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UNITED STATES  
REPORTS

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**512**

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OCT. TERM 1993

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UNITED STATES REPORTS

VOLUME 512

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1993

JUNE 13 THROUGH SEPTEMBER 30, 1994

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

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FRANK D. WAGNER

REPORTER OF DECISIONS

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WASHINGTON : 1998

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Printed on Uncoated Permanent Printing Paper

For sale by the U. S. Government Printing Office  
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328

ERRATUM

237 U. S. 309, line 14: "April 12" should be "April 19".

**JUSTICES**  
OF THE  
**SUPREME COURT**

DURING THE TIME OF THESE REPORTS\*

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WILLIAM H. REHNQUIST, CHIEF JUSTICE.  
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.<sup>1</sup>  
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.  
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.  
ANTONIN SCALIA, ASSOCIATE JUSTICE.  
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.  
DAVID H. SOUTER, ASSOCIATE JUSTICE.  
CLARENCE THOMAS, ASSOCIATE JUSTICE.  
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.  
STEPHEN BREYER, ASSOCIATE JUSTICE.<sup>2</sup>

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.  
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.  
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.  
BYRON R. WHITE, ASSOCIATE JUSTICE.

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OFFICERS OF THE COURT

JANET RENO, ATTORNEY GENERAL.  
DREW S. DAYS III, SOLICITOR GENERAL.  
WILLIAM K. SUTER, CLERK.  
FRANK D. WAGNER, REPORTER OF DECISIONS.  
ALFRED WONG, MARSHAL.<sup>3</sup>  
DALE E. BOSLEY, MARSHAL.<sup>4</sup>  
SHELLEY L. DOWLING, LIBRARIAN.

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\*For notes, see p. iv.

#### NOTES

<sup>1</sup>Justice Blackmun retired effective August 3, 1994. See *post*, p. VII.

<sup>2</sup>The Honorable Stephen Breyer of Massachusetts, formerly a Judge of the United States Court of Appeals for the First Circuit, was nominated by President Clinton on May 13, 1994, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on July 29, 1994; he was commissioned on August 2, 1994, and he took the oaths and his seat on August 3, 1994. He was presented to the Court on September 30, 1994. See *post*, p. XI.

<sup>3</sup>Mr. Wong retired as Marshal effective June 30, 1994. See *post*, p. XV.

<sup>4</sup>Mr. Bosley was appointed Marshal on August 2, 1994, effective August 1, 1994. See *post*, pp. XV, 1266.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 1, 1993, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

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

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

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

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

For the Tenth Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 1, 1993.

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(For next previous allotment, and modifications, see 502 U. S., p. VI, and 509 U. S., p. v.)

(For next subsequent allotment, see *post*, p. VI.)

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\*For order of August 3, 1994, assigning JUSTICE THOMAS to the Eighth Circuit, see *post*, p. 1272.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

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

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

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

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

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

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(For next previous allotment, and modifications, see 502 U. S., p. vi, 509 U. S., p. v, and *ante*, p. v.)

RETIREMENT OF JUSTICE BLACKMUN

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 30, 1994

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Present: CHIEF JUSTICE REHNQUIST, JUSTICE BLACKMUN,  
JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY,  
JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG.

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THE CHIEF JUSTICE said:

And we must also note with sadness that this is the last session in which our friend and colleague Harry Blackmun will be with us, and on this occasion we have sent Justice Blackmun the following letter which I will now read:

SUPREME COURT OF THE UNITED STATES,  
CHAMBERS OF THE CHIEF JUSTICE,  
*Washington, D. C., June 21, 1994.*

Dear Harry,

Your colleagues are sad that you have chosen to retire from the Court. You came here twenty-four years ago—longer ago than any of us—and have served with no less than sixteen different members.

Your opinions have covered a wide range of the issues that come before the Court. You are undoubtedly best known for having authored the Court's opinion in *Roe v. Wade* in 1973, but that distinction should not obscure the many other important issues on which you have spoken for the Court. Your contributions have not been limited to signed opinions, but include as well your wise counsel in our Conference.



And, though it has nothing to do with our judicial work, you have made a major improvement in the cultural life of the Court with your sponsorship of our biennial musical performances.

We shall miss you—especially if you go through with your present plans to move to Florida. But whether in Washington or Jacksonville, we wish you the very best.

Sincerely,

WILLIAM H. REHNQUIST  
JOHN PAUL STEVENS  
SANDRA DAY O'CONNOR  
ANTONIN SCALIA  
ANTHONY M. KENNEDY  
DAVID H. SOUTER  
CLARENCE THOMAS  
RUTH BADER GINSBURG

---

JUSTICE BLACKMUN said:

I suppose I should read my response to the cordial letter that has just been written and here it is:

SUPREME COURT OF THE UNITED STATES,  
CHAMBERS OF JUSTICE HARRY A. BLACKMUN,  
*Washington, D. C., June 22, 1994.*

My Dear Colleagues:

Your cordial letter brightens my day.

It has been a privilege for me to have been on the Federal Bench for over three decades and on this Court for over two. I have sat now with 17 Justices of the Court, about 15% of all those who have served since 1790. And I have had the privilege of knowing eight others whose service was complete before I arrived here. You and the ones before you who have departed since 1970 have provided pleasant friendship, professional inspiration, imagination, instruction, and a sense of worthwhile service in a common devotion to our imperfect but beloved country. At times, our task has been

heavy, the hours long, and the stress substantial. Byron reminded us that ‘the Court is a very small organization for the weight it carries.’ But always there was an awareness that we were all in this together, and that the system seemed to be working. And there was the conviction that this was the way it was meant to be and that it would work out all right. What a comfort that has been, and what a comfort it has been to work with each of you and with others of our predecessors who have deliberated around our conference table.

As an old canoeist myself, I share Bill Douglas’ vivid and eloquent description of our work together, the occasional long and strenuous portages, and the last night’s and the last morning’s campfires, as he set it forth in his retirement letter of November 14, 1975. 423 U. S. IX. It is so true that the Justices of the Court are ‘strangers at the beginning but almost invariably are close friends at the end.’ So it was for him. So it was for me. And so it has been, I think, for each of us. We have been gathered from different places and through the influence of different forces. That is one of the remarkable aspects of this Court and of the experience of service upon it.

Let us hope that, in the years far down the line, when history eventually places us in such perspective as we deserve, it at least will be able to say: ‘They did their best and did acceptably well.’ If that comes to be said, it is because of your cooperation, your understanding, your patience, and your acknowledgment that ours is a common, not an individual, task, and that we strove, in our small ways and with our limited capabilities, for the righting of injustices of both ancient and current origins. For all this, I am grateful.

Sincerely,  
HARRY

APPOINTMENT OF JUSTICE BREYER

SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 30, 1994

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Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

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The Marshal said:

All Rise, the President of the United States.

THE CHIEF JUSTICE said:

On behalf of the Court, Mr. President, I extend to you a warm welcome. This special sitting of the Court is held today to receive the Commission of the newly appointed Associate Justice of the Supreme Court of the United States, Stephen Breyer. The Court now recognizes the Attorney General of the United States, Ms. Janet Reno.

The Attorney General said:

MR. CHIEF JUSTICE and may it please the Court, I have the Commission which has been issued to the Honorable Stephen Breyer as an Associate Justice of the Supreme Court of the United States. The Commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the Commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Ms. Reno, your motion is granted. Mr. Clerk, will you please read the Commission?

The Clerk read the Commission:

WILLIAM JEFFERSON CLINTON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

*To all Who Shall See These Presents, Greeting:*

KNOW YE; That reposing special trust and confidence in the wisdom, uprightness, and learning of Stephen G. Breyer, of Massachusetts, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Stephen G. Breyer, during his good behavior.

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

Done at the City of Washington, this Second Day of August, in the year of our Lord one thousand nine hundred and ninety-four, and of the Independence of the United States of America the two hundred and nineteenth.

[SEAL]

WILLIAM JEFFERSON CLINTON

By the President:

JANET RENO,  
*Attorney General*

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THE CHIEF JUSTICE said:

I now ask the Chief Deputy Clerk of the Court to escort Justice Breyer to the bench.

THE CHIEF JUSTICE said:

Justice Breyer, are you ready to take the oath?

Justice Breyer said:

I am.

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Breyer said:

I, Stephen Breyer, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States, so help me God.

STEPHEN BREYER

Subscribed and sworn to before me this thirtieth day of September, 1994.

WILLIAM H. REHNQUIST  
*Chief Justice*

THE CHIEF JUSTICE said:

JUSTICE BREYER, on behalf of all the members of the Court, it is a pleasure to extend to you a very warm welcome as the 108th Justice of the Court and to wish you a long and happy career in our common calling.

RETIREMENT OF MARSHAL AND APPOINTMENT  
OF SUCCESSOR

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 30, 1994

---

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BLACKMUN,  
JUSTICE STEVENS, JUSTICE SCALIA, JUSTICE KENNEDY,  
JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG.

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THE CHIEF JUSTICE said:

The Court today notes the retirement of the Marshal of the Court, Alfred Wong. Mr. Wong has called the Court to order and has recessed the Court since his appointment in July 1976. The Marshal of the Court is responsible for all those housekeeping functions that keep the building running smoothly such as paying the bills, preparing the payroll, maintaining security for the Court and for those of us who work here, and coordinating the numerous official and social functions that take place here daily. Mr. Wong has performed his duties with due diligence, and the Court thanks him. The entire Court family extends to Mr. Wong and his family best wishes for a healthy and happy retirement. The Court has appointed Dale E. Bosley as Marshal of the Court, effective August 1, 1994.

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**CASES ADJUDGED**  
IN THE  
**SUPREME COURT OF THE UNITED STATES**  
AT  
OCTOBER TERM, 1993

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ROMANO *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS  
OF OKLAHOMA

No. 92–9093. Argued March 22, 1994—Decided June 13, 1994

During the sentencing phase of petitioner’s first-degree murder trial in Oklahoma, the State introduced a copy of the judgment and death sentence he had received during an earlier trial for another murder. The jury ultimately found that the aggravating circumstances outweighed the mitigating circumstances, and imposed a second death sentence on petitioner. In affirming, the Oklahoma Court of Criminal Appeals acknowledged that the evidence of petitioner’s prior death sentence was irrelevant to determining the appropriateness of the second death sentence, but held that admission of the evidence did not violate the Eighth and Fourteenth Amendments under *Caldwell v. Mississippi*, 472 U. S. 320, or so infect the sentencing determination with unfairness as to amount to a denial of due process.

*Held:* The admission of evidence regarding petitioner’s prior death sentence did not amount to constitutional error. Pp. 6–14.

(a) Admission of the evidence at issue did not contravene the principle established in *Caldwell*, *supra*, at 342 (O’CONNOR, J., concurring in part and concurring in judgment), because the evidence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility for the capital sentencing decision. Such evidence was not false at the time it was admitted and did not even pertain to the jury’s sentencing role. The trial court’s instructions, moreover, emphasized the importance of that role and never con-

## Syllabus

veyed or intimated that the jury could shift its responsibility in sentencing. Pp. 6–10.

(b) Although the evidence in question may have been irrelevant, the jury's consideration of it did not render the sentencing proceeding so unreliable that it violated the Eighth Amendment under *Lockett v. Ohio*, 438 U. S. 586, 604 (plurality opinion), and *Woodson v. North Carolina*, 428 U. S. 280, 305. That the evidence may have been irrelevant as a matter of state law does not render its admission federal constitutional error. See *Estelle v. McGuire*, 502 U. S. 62, 67. *Dawson v. Delaware*, 503 U. S. 159, 167, and *Zant v. Stephens*, 462 U. S. 862, 885, are plainly inapposite, since petitioner does not argue that admission of the evidence allowed the jury to consider, in aggravation, constitutionally protected conduct. *Johnson v. Mississippi*, 486 U. S. 578, 586, 590, n. 8, is also inapposite, since it is perfectly consistent with the Court of Criminal Appeals' approach and does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence. This Court declines petitioner's request to fashion a federal code of general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would supersede state rules in capital sentencing proceedings. Pp. 10–12.

(c) Introduction of the evidence in question did not so infect the trial with unfairness as to render the jury's imposition of the death penalty a denial of due process under the analytical framework set forth in *Donnelly v. DeChristoforo*, 416 U. S. 637, 643. Presuming that the trial court's instructions were followed, they did not offer the jurors any means by which to give effect to the irrelevant evidence of petitioner's prior sentence, and the relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case. Even assuming that the jury disregarded its instructions and allowed the irrelevant evidence to influence its decision, a finding of fundamental unfairness on the basis of this record would be an exercise in speculation, rather than reasoned judgment, since it seems equally plausible that the evidence in question could have influenced the jurors either to impose, or not to impose, the death sentence. Pp. 12–14.

847 P. 2d 368, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 14. BLACKMUN, J., filed a dissenting opinion, *post*, p. 15. GINSBURG, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 15.

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*Lee Ann Jones Peters* argued the cause for petitioner. With her on the briefs was *Robert A. Ravitz*.

*A. Diane Blalock*, Assistant Attorney General of Oklahoma, argued the cause for respondent. With her on the brief was *Sandra D. Howard*, Assistant Attorney General.\*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner murdered and robbed Roger Sarfaty in 1985. In 1986, he murdered and robbed Lloyd Thompson. Petitioner was tried separately for each murder. The Thompson trial occurred first, and an Oklahoma jury found petitioner guilty and sentenced him to death. Petitioner was then tried for the Sarfaty murder. A different Oklahoma jury found him guilty and sentenced him to death. During the sentencing phase of the Sarfaty trial, the State introduced a copy of the judgment and sentence petitioner received for the Thompson murder. Petitioner contends that the admission of evidence regarding his prior death sentence undermined the Sarfaty jury's sense of responsibility for determining the appropriateness of the death penalty, in violation of the Eighth and Fourteenth Amendments. We disagree and hold that the admission of this evidence did not amount to constitutional error.

In Oklahoma, capital trials are bifurcated into guilt and sentencing phases. Okla. Stat., Tit. 21, § 701.10 (1981). The

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\*A brief of *amici curiae* urging affirmance was filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *Richard A. Cordray*, State Solicitor, *Simon B. Karas*, Deputy Chief Counsel, and *Cordelia A. Glenn* and *Mary L. Hollern*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Pamela Carter* of Indiana, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, and *Stephen D. Rosenthal* of Virginia.

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sentencing jury may not impose a death sentence unless it unanimously finds the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, and that any aggravating circumstances outweigh any mitigating circumstances. §701.12. At the sentencing phase of the Sarfaty trial, the State sought to prove four aggravating circumstances, two of which are relevant to our decision: (1) that petitioner had been previously convicted of a violent felony; and (2) that petitioner would constitute a continuing threat to society.<sup>1</sup>

In attempting to establish these two aggravating circumstances, the State introduced evidence relating to the Thompson murder. The State presented testimony by Thompson's neighbor concerning her observations the day of the murder, Thompson's autopsy report, and photographs and fingerprints showing that the defendant in the Thompson case was in fact petitioner. The State also introduced a copy of the judgment and sentence from the Thompson murder conviction. That document revealed that petitioner had been convicted of first-degree murder and had been sentenced to death. App. 5–6. It also showed, and the trial court told the jury, that petitioner planned on appealing from the judgment and sentence. *Id.*, at 7. Petitioner's counsel objected to the admission of the document. He argued that, regardless of the admissibility of the evidence of petitioner's conviction, the death sentence petitioner received was not proper for the jury to consider. The trial court overruled the objection and admitted the evidence. Petitioner later presented evidence in mitigation.

Before closing arguments, the trial court instructed the jury. It identified the four aggravating circumstances the State sought to establish and told the jury that “[i]n determining which sentence you may impose in this case, you may

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<sup>1</sup>The other two aggravating circumstances were that the murder was especially heinous, atrocious, and cruel, and that it was committed to avoid lawful arrest or prosecution.

## Opinion of the Court

consider only those [four] circumstances.” *Id.*, at 9. The court then identified the 17 mitigating circumstances offered by petitioner. The jury was instructed that it could not impose the death penalty unless it unanimously found that one or more aggravating circumstances existed beyond a reasonable doubt and that any such circumstances outweighed any mitigating circumstances. *Id.*, at 8–12. In closing, the court admonished the jury:

“You are the determiner of the facts. The importance and worth of the evidence is for you to decide.

“I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimidated [sic] in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances or mitigating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

“You must not use any kind of chance in reaching a verdict, but you must rest it on the belief of each of you who agrees with it.” *Id.*, at 13.

The jury found that all four aggravating circumstances existed and that they outweighed the mitigating circumstances. It accordingly imposed a death sentence. Petitioner appealed. While his appeal in this case was pending, the Oklahoma Court of Criminal Appeals overturned petitioner’s conviction for the Thompson murder. See *Romano v. Oklahoma*, 827 P. 2d 1335 (1992) (*Romano I*). The Oklahoma Court of Criminal Appeals held that petitioner’s trial should have been severed from that of his codefendant; it therefore reversed and remanded for a new trial.<sup>2</sup>

In his appeal in this case, petitioner argued, *inter alia*, that the trial court erred by admitting evidence of his conviction and sentence for the Thompson murder. He asserted

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<sup>2</sup>On retrial for the Thompson murder, petitioner was again convicted and again sentenced to death. Brief for Petitioner 31, n. 11.

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that it was improper to admit the conviction because it was not final at the time of admission, and it had since been overturned. He also contended that the evidence of his death sentence in the Thompson case impermissibly reduced the Sarfaty sentencing jury's sense of responsibility for its decision, in violation of *Caldwell v. Mississippi*, 472 U. S. 320 (1985).

The Oklahoma Court of Criminal Appeals affirmed. 847 P. 2d 368, 390 (1993) (*Romano II*). The Oklahoma court concluded that the evidence regarding petitioner's prior death sentence was irrelevant. Because the jury was properly instructed in this case, however, it could not be said "that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise." *Ibid.* The Court of Criminal Appeals further held that the admission of the evidence "did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." *Id.*, at 391.

Petitioner sought our review, and we granted certiorari, limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" 510 U. S. 943 (1993). We now affirm.

It is helpful to begin by placing petitioner's challenge within the larger context of our Eighth Amendment death penalty jurisprudence. We have held that the Eighth Amendment's concern that the death penalty be both appropriate and not randomly imposed requires the States to perform two somewhat contradictory tasks in order to impose the death penalty.

First, States must properly establish a threshold below which the penalty cannot be imposed. *McCleskey v. Kemp*,

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481 U. S. 279, 305 (1987). To ensure that this threshold is met, the “State must establish rational criteria that narrow the decisionmaker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold.” *Ibid.* As we stated in *Lowenfield v. Phelps*, 484 U. S. 231 (1988), “[t]o pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’” *Id.*, at 244 (quoting *Zant v. Stephens*, 462 U. S. 862, 877 (1983)). In this respect, a State’s sentencing procedure must suitably direct and limit the decisionmaker’s discretion “‘so as to minimize the risk of wholly arbitrary and capricious action.’” *Id.*, at 874 (quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976)). Petitioner does not allege that Oklahoma’s sentencing scheme fails to adequately perform the requisite narrowing.

Second, States must ensure that “capital sentencing decisions rest on [an] individualized inquiry,” under which the “character and record of the individual offender and the circumstances of the particular offense” are considered. *McCleskey*, *supra*, at 303 (internal quotation marks omitted); see also *Clemons v. Mississippi*, 494 U. S. 738, 748 (1990). To this end, “States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer’s discretion, but must allow it to consider any relevant information offered by the defendant.” *McCleskey*, *supra*, at 306.

Within these constitutional limits, “the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.” *Blystone v. Pennsylvania*, 494 U. S. 299, 309 (1990). This latitude extends to evidentiary rules at sentencing proceedings. See, *e. g.*, *Gregg*, *supra*, at 203–204 (approving “the wide scope of evidence and argument allowed at presentence hearings”

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in Georgia). As we observed in *California v. Ramos*, 463 U. S. 992, 999 (1983):

“In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court’s principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.”

See also *id.*, at 1008 (“Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment”).

We have also held, in *Caldwell v. Mississippi*, that the jury must not be misled regarding the role it plays in the sentencing decision. See 472 U. S., at 336 (plurality opinion); *id.*, at 341–342 (O’CONNOR, J., concurring in part and concurring in judgment). The prosecutor in *Caldwell*, in remarks which “were quite focused, unambiguous, and strong,” misled the jury to believe that the responsibility for sentencing the defendant lay elsewhere. *Id.*, at 340. The trial judge “not only failed to correct the prosecutor’s remarks, but in fact openly agreed with them.” *Id.*, at 339.

The plurality concluded that the prosecutor’s remarks, along with the trial judge’s affirmation, impermissibly “minimize[d] the jury’s sense of responsibility for determining the appropriateness of death.” *Id.*, at 341. Such a diminution, the plurality felt, precluded the jury from properly performing its responsibility to make an individualized determination of the appropriateness of the death penalty. *Id.*, at 330–331. JUSTICE O’CONNOR, in her opinion concurring in part and concurring in the judgment, identified more narrowly the infirmity in the prosecutor’s remarks: “In my view, the



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prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.*, at 342.

As JUSTICE O'CONNOR supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling. See *Marks v. United States*, 430 U. S. 188, 193 (1977); *Gregg, supra*, at 169, n. 15. Accordingly, we have since read *Caldwell* as "relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U. S. 168, 184, n. 15 (1986). Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U. S. 401, 407 (1989); see also *Sawyer v. Smith*, 497 U. S. 227, 233 (1990).

Petitioner argues that *Caldwell* controls this case. He contends that the evidence of his prior death sentence impermissibly undermined the sentencing jury's sense of responsibility, in violation of the principle established in *Caldwell*. We disagree. The infirmity identified in *Caldwell* is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process. The trial court's instructions, moreover, emphasized the importance of the jury's role. As the Court of Criminal Appeals observed:

"The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. . . . It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized." *Romano II*, 847 P. 2d, at 390.

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We do not believe that the admission of evidence regarding petitioner’s prior death sentence affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility. The admission of this evidence, therefore, did not contravene the principle established in *Caldwell*.

That this case is different from *Caldwell* only resolves part of petitioner’s challenge. In addition to raising a “*Caldwell*” claim, petitioner presents a more general contention: He argues that because the evidence of his prior death sentence was inaccurate and irrelevant, the jury’s consideration of it rendered his sentencing proceeding so unreliable that the proceeding violated the Eighth Amendment. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Oklahoma court agreed that the “evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense.” *Romano II*, *supra*, at 391. That the evidence may have been irrelevant as a matter of state law, however, does not render its admission federal constitutional error. See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

Some of the cases upon which petitioner relies for support, to be sure, do hold that the Constitution bars the introduction of certain evidence at sentencing proceedings. But these cases are plainly inapposite. Petitioner cites, for example, *Dawson v. Delaware*, 503 U.S. 159 (1992). There we held that the trial court erred by admitting evidence, at Dawson’s capital sentencing proceeding, regarding Dawson’s membership in a white racist prison gang known as the Aryan Brotherhood. See *id.*, at 162–163. It was *constitutional* error, however, only because the admission violated “Dawson’s First Amendment rights.” *Id.*, at 167. *Dawson* thus involved application of the principle first enunciated in *Zant*: An aggravating circumstance is invalid if “it authorizes a jury to draw adverse inferences from conduct that is

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constitutionally protected.” 462 U. S., at 885. Petitioner does not argue that the admission of evidence regarding his prior death sentence allowed the jury to consider, in aggravation, constitutionally protected conduct. Accordingly, our decisions in *Dawson* and *Zant* do not support petitioner’s contention.

Petitioner also cites *Johnson v. Mississippi*, 486 U. S. 578 (1988), but it, too, is inapposite. There we reversed the imposition of Johnson’s death sentence because the only evidence supporting an aggravating factor turned out to be invalid, and because the Mississippi Supreme Court refused to reweigh the remaining, untainted aggravating circumstances against the mitigating circumstances. *Id.*, at 586, 590, n. 8. Similarly, in this case the only evidence supporting the “prior violent felony” aggravating circumstance was the judgment from petitioner’s conviction for the Thompson murder. That evidence, like the evidence in *Johnson*, was rendered invalid by the reversal of petitioner’s conviction on appeal.

Here, however, the Oklahoma Court of Criminal Appeals struck the “prior violent felony” aggravator, reweighed the three untainted aggravating circumstances against the mitigating circumstances, and still concluded that the death penalty was warranted. See *Romano II, supra*, at 389, 393–394. The Court of Criminal Appeals’ approach is perfectly consistent with our precedents, including *Johnson*, where we remanded without limiting the Mississippi Supreme Court’s authority to reweigh the remaining aggravating circumstances against the mitigating circumstances. See 486 U. S., at 590; *id.*, at 591 (White, J., concurring); see also *Clemons*, 494 U. S., at 744–750. Contrary to petitioner’s assertion, *Johnson* does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence.

Petitioner’s argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern

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the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. Cf. *Payne v. Tennessee*, 501 U. S. 808, 824–825 (1991); *Blystone*, 494 U. S., at 309.

Petitioner finally argues that the introduction of the evidence in question violated the Due Process Clause of the Fourteenth Amendment. It is settled that this Clause applies to the sentencing phase of capital trials. See, e. g., *Payne*, *supra*, at 825; *Clemons*, *supra*, at 746 (“[C]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause”).

We believe the proper analytical framework in which to consider this claim is found in *Donnelly v. DeChristoforo*, 416 U. S. 637, 643 (1974). There we addressed a claim that remarks made by the prosecutor during his closing argument were so prejudicial as to violate the defendant’s due process rights. We noted that the case was not one in which the State had denied a defendant the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right. *Id.*, at 643. Accordingly, we sought to determine whether the prosecutor’s remark “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Ibid.* We concluded, after an “examination of the entire proceedings,” that the remarks did not amount to a denial of constitutional due process. *Ibid.*

The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner’s prior death sentence so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process. See *Sawyer*, 497 U. S., at 244 (observing that “[t]he *Caldwell* rule was . . . added to [*Donnelly*’s] existing guarantee of due process protection against

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fundamental unfairness”); see also *Darden*, 477 U. S., at 178–181 (in analyzing allegedly improper comments made by prosecutor during closing argument of guilt-innocence stage of capital trial, “[t]he relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process’” (quoting *Donnelly*, *supra*, at 643)). Under this standard of review, we agree with the Oklahoma Court of Criminal Appeals that the admission of this evidence did not deprive petitioner of a fair sentencing proceeding.

The evidence that petitioner received a death sentence for murdering Thompson was deemed irrelevant by the Oklahoma Court of Criminal Appeals. See *Romano II*, 847 P. 2d, at 391. However, if the jurors followed the trial court’s instructions, which we presume they did, see *Richardson v. Marsh*, 481 U.S. 200, 206–207, 211 (1987), this evidence should have had little—if any—effect on their deliberations. Those instructions clearly and properly described the jurors’ paramount role in determining petitioner’s sentence, and they also explicitly limited the jurors’ consideration of aggravating factors to the four which the State sought to prove. Regardless of the evidence as to petitioner’s death sentence in the Thompson case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. Although one of the aggravating circumstances proved invalid when petitioner’s conviction for the Thompson murder was overturned on appeal, the other three remained untainted and still outweighed the mitigating circumstances. See *Romano II*, *supra*, at 389, 393–394. In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner’s sentence in the Thompson murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case.

Even assuming that the jury disregarded the trial court’s instructions and allowed the evidence of petitioner’s prior

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death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's sentencing proceeding for the Sarfaty murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment.

The judgment of the Oklahoma Court of Criminal Appeals is

*Affirmed.*

JUSTICE O'CONNOR, concurring.

The Court today, relying in part on my opinion in *Caldwell* v. *Mississippi*, 472 U. S. 320, 341 (1985), rejects petitioner's claim that the introduction of evidence of a prior death sentence impermissibly undermined the jury's sense of responsibility. I write separately to explain why in my view petitioner's *Caldwell* claim fails. The inaccuracy of the prosecutor's argument in *Caldwell* was essential to my conclusion that the argument was unconstitutional. See *id.*, at 342 (“[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility”). An accurate description of the jury's role—even one that lessened the jury's sense of responsibility—would have been constitutional. *Ibid.* (“[A] misleading picture of the jury's role is not sanctioned by [*California* v. *Ramos*, 463 U. S. 992 (1983),] [b]ut neither does *Ramos* suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures”).

Accordingly, I believe that petitioner's *Caldwell* claim fails because the evidence here was *accurate* at the time it was

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admitted. Petitioner's sentencing jury was told that he had been sentenced to death—and indeed he had been. Introducing that evidence is no different than providing the jury with an accurate description of a State's appellate review process. Both may (though we can never know for sure) lessen the jury's sense of responsibility, but neither is unconstitutional. Though evidence like that involved in this case can rise to the level of a *Caldwell* violation, to do so the evidence must be *both* inaccurate *and* tend to undermine the jury's sense of responsibility. *Ibid.*

It may well have been better practice for the State to agree to accept petitioner's stipulation offer, or to excise the sentencing information before submitting the Judgment and Sentence form to the jury. But under our precedents, because this evidence was accurate, I do not believe its introduction violated the Constitution.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE GINSBURG's dissent, which persuasively demonstrates why the admission of Romano's prior death sentence, like the prosecutor's arguments in *Caldwell v. Mississippi*, 472 U. S. 320 (1985), created an unacceptable risk of leading the jurors to minimize the importance of their roles. Even if this particular constitutional error were not present in this case, I would vacate Romano's death sentence and remand for resentencing in adherence to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution. See *Callins v. Collins*, 510 U. S. 1141, 1143 (1994).

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, dissenting.

In *Caldwell v. Mississippi*, 472 U. S. 320 (1985), this Court overturned a capital sentence as inadequately reliable because of a statement made by the prosecutor, in closing argument at the penalty phase of the trial. The *Caldwell* prose-

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cutor told the jury: “[Y]our [sentencing] decision is not the final decision’”; “the decision you render is automatically reviewable by the [State] Supreme Court.” *Id.*, at 325–326. Responding to the issue presented in *Caldwell*, this Court observed that capital sentencing jurors, required to determine “whether a specific human being should die at the hands of the State,” *id.*, at 329, are “placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice,” *id.*, at 333. Such jurors, the Court noted, might find “highly attractive” the prosecutor’s suggestion that persons other than themselves would bear “responsibility for any ultimate determination of death.” *Id.*, at 332–333.

The possibility the jury might have embraced the prosecutor’s suggestion, the Court concluded, rendered the imposition of the death penalty inconsistent with the Constitution’s requirement of individualized and reliable capital sentencing procedures. See *id.*, at 323, 329–330, 340–341. Emphasizing the “‘truly awesome responsibility’” imposed upon capital sentencing juries, *id.*, at 329, quoting *McGautha v. California*, 402 U. S. 183, 208 (1971), the Court held:

“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” 472 U. S., at 328–329.

In my view, this principle, reiterated throughout the Court’s *Caldwell* opinion,<sup>1</sup> covers the present case: The jury’s

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<sup>1</sup> See 472 U. S., at 323 (sentence constitutionally invalid, because unreliable, if “the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case”); *id.*, at 333 (“[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.”); *id.*, at 341 (because the State’s effort “to minimize the jury’s sense



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consideration of evidence, at the capital sentencing phase of petitioner Romano's trial, that a prior jury had already sentenced Romano to death, infected the jury's life-or-death deliberations as did the prosecutorial comments condemned in *Caldwell*. Accordingly, I would vacate the death sentence imposed upon Romano and remand for a new sentencing hearing.

## I

At the penalty phase of Romano's trial for the murder of Roger Sarfaty, the prosecution sought to put before the jury a copy of the "Judgment and Sentence" from an earlier and unrelated prosecution. That document revealed that Romano had been convicted of the first-degree murder of Lloyd Thompson and that he was to be executed for that crime. Defense counsel offered to stipulate to Romano's conviction for the Thompson murder, but objected to the jury's consideration of the death sentence. The trial court overruled defense counsel's objection and admitted the "Judgment and Sentence" document. That document stated that Romano had given "no good reason why [the] Judgment and Sentence [for the murder of Thompson] should not be pronounced," and commanded the State's Department of Corrections "to put the said JOHN JOSEPH ROMANO to death." App. 6. The jury in the instant, Sarfaty murder case also sentenced Romano to death.

During the pendency of Romano's appeal from his conviction and sentence for the Sarfaty murder, the Oklahoma Court of Criminal Appeals vacated his conviction for the Thompson murder. *Romano v. State*, 827 P. 2d 1335 (1992). Romano urged on appeal in the Sarfaty case that, under *Caldwell v. Mississippi*, it was impermissible to place before the jury, as relevant to its deliberations whether Romano

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of responsibility for determining the appropriateness of death" might have affected the sentencing decision, the death sentence must be vacated).

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should live or die, evidence that he was already under sentence of death.

The Oklahoma court rejected that contention and affirmed Romano’s conviction and death sentence for the Sarfaty murder. 847 P. 2d 368, 390 (Okla. Crim. App. 1993). In so ruling, the court acknowledged that “[l]earning that the defendant had previously received a death sentence for another murder could diminish the jury’s sense of importance of its role and mitigate the consequences of [its] decision.” *Ibid.* The court further recognized that “evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense.” *Id.*, at 391. Nevertheless, the court concluded, “when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jur[ors] in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise.” *Id.*, at 390.<sup>2</sup> That judgment is now before the Court.<sup>3</sup>

## II

In *Caldwell*, this Court found constitutionally impermissible a prosecutor’s statement, at the penalty phase of a capital trial, that the jury’s decision was “not the final decision” because it was “automatically reviewable.” The prosecutor’s assurances were impermissible, the Court ruled, because they created an unacceptable risk that the jury would “minimize the importance of its role,” “believ[ing] that the responsibility for determining the appropriateness of the defend-

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<sup>2</sup>The court also observed that, although death sentences attract “heightened” appellate scrutiny, “a presumption of correctness” attends the jury’s determination. 847 P. 2d, at 391.

<sup>3</sup>Romano was subsequently reconvicted at his second trial for the Thompson murder and again sentenced to death. See Brief for Petitioner 31, n. 11. The State does not suggest that these events affect the question we consider.

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ant's death rest[ed] elsewhere." *Caldwell*, 472 U. S., at 333, 329. This belief, the Court explained, is inconsistent with the "heightened 'need for reliability'" in capital sentencing. *Id.*, at 323, quoting *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

The risk of diminished jury responsibility was also grave in Romano's case. Revealing to the jury that Romano was condemned to die for the Thompson murder signaled to the jurors in the Sarfaty murder case that Romano faced execution regardless of their life-or-death decision in the case before them. Jurors so informed might well believe that Romano's fate had been sealed by the previous jury, and thus was not fully their responsibility. See *People v. Hope*, 116 Ill. 2d 265, 274, 508 N. E. 2d 202, 206 (1986) ("[T]he jury's awareness of defendant's prior death sentence would diminish its sense of responsibility . . . . Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would."), quoting *People v. Davis*, 97 Ill. 2d 1, 26, 452 N. E. 2d 525, 537 (1983); *West v. State*, 463 So. 2d 1048, 1052-1053 (Miss. 1985) ("[I]f the jury knows that the [defendant] is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination.").

A juror uncertain whether to vote for death or for life might be swayed by the knowledge that "another jury had previously resolved the identical issue adversely to defendant." *Hope*, 116 Ill. 2d, at 274, 508 N. E. 2d, at 206, quoting *Davis*, 97 Ill. 2d, at 26, 452 N. E. 2d, at 537. Such a juror, although "unconvinced that death is the appropriate punishment, . . . might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts," *Caldwell*, 472 U. S., at 331, reasoning that the defendant was already to be executed in any event. Furthermore, jurors otherwise inclined to hold out for a life sentence might acquiesce in a death penalty they did not truly believe warranted. Cf. *id.*,

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at 333 (“[O]ne can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.”).

Respondent State of Oklahoma correctly observes, however, that evidence of a prior death sentence may not produce a unidirectional bias toward death. Brief for Respondent 23. Some jurors, otherwise inclined to believe the defendant deserved the death penalty for the crime in the case before them, might nonetheless be anxious to avoid any feeling of responsibility for the defendant’s execution. Jurors so minded might vote for a life sentence, relying on the prior jury’s determination to secure defendant’s death. See *ante*, at 14. The offending prosecutorial comments in *Caldwell*, by contrast, created an apparently unidirectional “bias toward a death sentence,” for the appellate review that the *Caldwell* jurors were encouraged to consider could occur only if the jury sentenced the defendant to death, not if it voted for life. 472 U. S., at 331–332. Oklahoma maintains that Romano remains outside the *Caldwell* principle, because he is unable to demonstrate that the evidence of his prior death sentence tilted the jurors toward death.

Romano’s prosecutor, at least, seems to have believed that informing the jurors of the prior death sentence would incline them toward death, for otherwise, he probably would not have insisted upon introducing the “Judgment and Sentence” itself, over Romano’s objection, and despite Romano’s offer to stipulate to the underlying conviction. Most critically, *Caldwell*, as I comprehend that decision, does not require Romano to prove that the prosecutor’s hunch was correct, either in Romano’s case in particular or in death penalty cases generally.

*Caldwell* dominantly concerns the capital sentencing jury’s awareness and acceptance of its “‘awesome responsibility.’” *Id.*, at 341. To assure that acceptance, this Court’s Eighth

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Amendment jurisprudence instructs, capital sentencing procedures must be especially reliable. See *id.*, at 323 (prosecutor’s comments were “inconsistent with the Eighth Amendment’s heightened ‘need for reliability in the determination that death is the appropriate punishment in a specific case’”), quoting *Woodson v. North Carolina*, 428 U. S., at 305; 472 U. S., at 341 (death sentence “does not meet the standard of reliability that the Eighth Amendment requires,” when it may have been affected by the State’s attempt “to minimize the jury’s sense of responsibility for determining the appropriateness of death”). Under *Caldwell*’s reasoning, diminution of jurors’ sense of responsibility violates the Eighth Amendment’s reliability requirement, whether or not a defendant can demonstrate empirically that the effect of this diminution was to bias the jurors’ judgment toward death. According to *Caldwell*, if a reviewing court “cannot say” that an effort “to minimize the jury’s sense of responsibility for determining the appropriateness of death . . . had no effect on the sentencing decision, . . . [t]he sentence of death must . . . be vacated” as unreliable. *Ibid.*

## III

The Court today reads *Caldwell* to apply only if the jury has been “affirmatively misled regarding its role in the sentencing process.” *Ante*, at 9. According to the Court, because no information, incorrect when conveyed, was given to the jury responsible for sentencing Romano for Sarfaty’s murder, “[t]he infirmity identified in *Caldwell* is simply absent in this case.” *Ibid.*

The Court rests its rendition of *Caldwell* on the premise that only a plurality of the Court’s Members endorsed the principle I regard as pivotal: Diminution of the jury’s sense of responsibility “preclude[s] the jury from properly performing its [charge] to make an individualized determination of the appropriateness of the death penalty.” See *ante*, at 8, citing *Caldwell*, 472 U. S., at 330–331, 341. In fact, however,

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key portions of *Caldwell* that the Court attributes to a plurality of four were joined by five of the eight Justices who participated in that case. JUSTICE O'CONNOR parted company with the other Members of the majority only as to a discrete, three-paragraph section, Part IV-A (*id.*, at 335–336), in which “[t]he Court,” in her view, “seem[ed] generally to characterize information regarding appellate review as ‘wholly irrelevant to the determination of the appropriate sentence.’” *Id.*, at 342 (opinion concurring in part and concurring in judgment), quoting *id.*, at 336. JUSTICE O'CONNOR explained that she did not read *California v. Ramos*, 463 U. S. 992 (1983), “to imply that the giving of nonmisleading and accurate information regarding the jury’s role in the sentencing scheme is irrelevant to the sentencing decision.” 472 U. S., at 341 (emphasis deleted). It was in that context that JUSTICE O'CONNOR stated her view, quoted *ante*, at 8–9, that “‘the prosecutor’s remarks were impermissible,’” not because they referred to the existence of post-sentence review, but “because they were inaccurate and misleading in a manner that diminished the jury’s sense of responsibility.” 472 U. S., at 342.

JUSTICE O'CONNOR’s opinion thus appears to rest on “grounds narrower” than those relied upon by the other Members of the Court’s *Caldwell* majority, see *ante*, at 9, only insofar as her concurrence disavowed any implication that the “giving of accurate instructions regarding postsentencing procedures,” 472 U. S., at 342, is irrelevant or unconstitutional. The evidence of Romano’s death sentence for the murder of Thompson, however, was not information regarding postsentencing procedures Romano might pursue. Nor, as the Oklahoma Court of Criminal Appeals found, was the “Judgment and Sentence” for Thompson’s murder relevant to the Sarfaty jury’s sentencing decision. 847 P. 2d, at 391 (“evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness

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of the death sentence for the instant offense”).<sup>4</sup> Accordingly, I do not read JUSTICE O’CONNOR’s concurring opinion as narrowing the Court’s *Caldwell* holding with respect to the issue this case presents. Nor, for reasons set out in the margin, do I agree with the Court that several post-*Caldwell* cases, beginning with *Darden v. Wainwright*, 477 U. S. 168 (1986), confirm the narrow interpretation of *Caldwell* the Court announces today. See *ante*, at 9.<sup>5</sup>

Finally, the Court relies, as did the Oklahoma Court of Criminal Appeals, on the trial court’s instruction to the jurors that “[t]he importance and worth of the evidence is for you to decide,” together with the court’s disavowal of any

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<sup>4</sup> In its merits brief before this Court, but not in its state-court brief or in its brief in opposition to the petition for certiorari, the State of Oklahoma has argued that the evidence of Romano’s prior sentence may have been relevant. This belated argument does not persuade. The only authority the State cites holding that a prior death sentence may be relevant evidence at sentencing is *Commonwealth v. Beasley*, 505 Pa. 279, 288, 479 A. 2d 460, 465 (1984); that case decided, purely as a matter of state statutory construction, that the term “conviction” could be taken to include the sentence imposed for an earlier conviction.

<sup>5</sup> In *Darden*, the Court rejected a *Caldwell* challenge to a prosecutor’s comments at the guilt phase of a capital trial. The Court observed that the fact that the prosecutor did not make these comments at the penalty phase “greatly reduc[ed] the chance that they had any effect at all on sentencing.” 477 U. S., at 183–184, n. 15. Further, unlike the “Judgment and Sentence” form in Romano’s case, the comments made in *Darden* were not evidence, and the trial court told the jury so “several times.” Finally, the Court concluded that the prosecutor’s comments would have had, “[i]f anything, . . . the tendency to *increase* the jury’s perception of its role,” not diminish it. *Ibid.*

The Court also relies upon *Dugger v. Adams*, 489 U. S. 401, 407 (1989), and *Sawyer v. Smith*, 497 U. S. 227, 233 (1990). In *Adams*, the Court stated that “the merit of respondent’s *Caldwell* claim is irrelevant to our disposition of the case.” 489 U. S., at 408, n. 4. In *Sawyer*, the question the Court considered was not whether a *Caldwell* violation had occurred, but whether “*Caldwell* announced a new rule as defined by *Teague v. Lane*, 489 U. S. 288 (1989),” *i. e.*, whether *Caldwell* “was . . . dictated by prior precedent existing at the time the [habeas petitioner’s] conviction became final.” 497 U. S., at 229, 235.

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view as to the appropriate punishment. *Ante*, at 5. The Court quotes the Oklahoma court's conclusion that "[i]t was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized.'" *Ante*, at 9, quoting 847 P. 2d, at 390.

Plainly, the trial court's instruction to consider the evidence cannot resolve the *Caldwell* problem in this case: The "Judgment and Sentence" form, bearing Romano's prior death sentence, was part of the evidence the jury was told to consider. Further, once it is acknowledged that evidence of the prior death sentence "could diminish the jury's sense of importance of its role and mitigate the consequences of [its] decision," 847 P. 2d, at 390, it cannot be said that the court or attorneys did not "conve[y] or intimat[e]" that the jury's role was diminished. The prosecution proffered the death-commanding "Judgment and Sentence" as evidence, and the trial court admitted it—over Romano's objection, and despite his offer to stipulate to the conviction. As discussed *supra*, at 18–21, admission of that evidence risked leading jurors to "minimize the importance of [their] role," "believ[ing] that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." *Caldwell*, 472 U. S., at 333, 329. This risk was "unacceptable in light of the ease with which [it] could have been minimized." *Turner v. Murray*, 476 U. S. 28, 36 (1986) (opinion of White, J.).<sup>6</sup>

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<sup>6</sup>The State argues that any *Caldwell* problems were resolved, because the "Judgment and Sentence" form stated that Romano "gave notice of his intention to appeal from the Judgment and Sentence herein pronounced," App. 7, and because the trial judge told the jury, when the form was admitted, that "[Romano] has been convicted but it is on appeal and has not become final," Tr. 45 (May 26, 1987). See Brief for Respondent 19–22. I do not find these general references to appellate review sufficient to salvage the instant death sentence, given the irrelevance of Romano's prior sentence to legitimate sentencing considerations, see 847 P. 2d, at 391, and the ease with which all *Caldwell* difficulty could have been avoided.



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## IV

Permitting the jury to consider evidence that Romano was already under sentence of death, while that jury determined whether Romano should live or die, threatened to “minimize the jury’s sense of responsibility for determining the appropriateness of death.” Unable to say that the jury’s consideration of Romano’s prior death sentence “had no effect on the [instant] sentencing decision,” *Caldwell*, 472 U. S., at 341, I would vacate that decision and remand the case for a new sentencing hearing.

## Syllabus

UNITED STATES *v.* CARLTONCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 92–1941. Argued February 28, 1994—Decided June 13, 1994

As adopted in October 1986, 26 U. S. C. § 2057 granted an estate tax deduction for half the proceeds of “any sale of employer securities by the executor of an estate” to “an employee stock ownership plan” (ESOP). In December 1986, respondent Carlton, acting as an executor, purchased shares in a corporation, sold them to that company’s ESOP at a loss, and claimed a large § 2057 deduction on his estate tax return. In December 1987, § 2057 was amended to provide that, to qualify for the deduction, the securities sold to an ESOP must have been “directly owned” by the decedent “immediately before death.” Because the amendment applied retroactively, as if it were incorporated in the original 1986 provision, the Internal Revenue Service (IRS) disallowed Carlton’s § 2057 deduction. The District Court entered summary judgment against him in his ensuing refund action, rejecting his contention that the amendment’s retroactive application to his transactions violated the Due Process Clause of the Fifth Amendment. The Court of Appeals reversed, holding that such application was rendered unduly harsh and oppressive, and therefore unconstitutional, by Carlton’s lack of notice that § 2057 would be retroactively amended and by his reasonable reliance to his detriment on preamendment law.

*Held:* The 1987 amendment’s retroactive application to Carlton’s 1986 transactions does not violate due process. Under the applicable standard, a tax statute’s retroactive application must be supported by a legitimate legislative purpose furthered by rational means. See, *e. g.*, *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U. S. 717, 729–730. Here, Congress’ purpose in enacting the 1987 amendment was neither illegitimate nor arbitrary. Section 2057 was originally intended to create an incentive for stockholders to sell their companies to their employees, but the absence of a decedent-stock-ownership requirement resulted in the deduction’s broad availability to virtually any estate, at an estimated loss to the Government of up to \$7 billion in anticipated revenues. Thus, Congress undoubtedly intended the amendment to correct what it reasonably viewed as a mistake in the original provision. There is no plausible contention that it acted with an improper motive, and its decision to prevent the unanticipated revenue loss by denying

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the deduction to those who made purely tax-motivated stock transfers was not unreasonable. Moreover, the amendment's retroactive application is rationally related to its legitimate purpose, since Congress acted promptly in proposing the amendment within a few months of §2057's original enactment and established a modest retroactivity period that extended only slightly longer than one year. The Court of Appeals' exclusive focus on the taxpayer's notice and reliance held §2057 to an unduly strict standard. Pp. 30–35.

972 F. 2d 1051, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 35. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 39.

*Kent L. Jones* argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Paup, Deputy Solicitor General Wallace, Gilbert S. Rothenberg, and Teresa E. McLaughlin.*

*Russell G. Allen* argued the cause and filed a brief for respondent. With him on the brief was *Phillip R. Kaplan.*\*

JUSTICE BLACKMUN delivered the opinion of the Court.

In 1987, Congress amended a provision of the federal estate tax statute by limiting the availability of a recently added deduction for the proceeds of sales of stock to employee stock-ownership plans (ESOP's). Congress provided that the amendment would apply retroactively, as if incorporated in the original deduction provision, which had been adopted in October 1986. The question presented by this case is whether the retroactive application of the amendment violates the Due Process Clause of the Fifth Amendment.

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\*Briefs of *amici curiae* urging affirmance were filed for the Washington Legal Foundation et al. by *Joseph E. Schmitz, Charles A. Shanor, Daniel J. Popeo, and Paul D. Kamenar*; and for Anthony C. Morici, Jr., Executor and Trustee of the estate of McNamee, by *Charles C. Marson.*

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## I

Congress effected major revisions of the Internal Revenue Code in the Tax Reform Act of 1986, 100 Stat. 2085. One of those revisions was the addition of a new estate tax provision applicable to any estate that filed a timely return after the date of the Act, October 22, 1986. The new provision, codified as 26 U. S. C. §2057 (1982 ed., Supp. IV),<sup>1</sup> granted a deduction for half the proceeds of “any sale of employer securities by the executor of an estate” to “an employee stock ownership plan.” §2057(b).<sup>2</sup> In order to qualify for the deduction, the sale of securities had to be made “before the date on which the [estate tax] return . . . [was] required to be filed (including any extensions).” §2057(c)(1).

Respondent Jerry W. Carlton, the executor of the will of Willametta K. Day, deceased, sought to utilize the §2057 deduction. Day died on September 29, 1985. Her estate tax return was due December 29, 1986 (after Carlton had obtained a 6-month filing extension). On December 10, 1986, Carlton used estate funds to purchase 1.5 million shares of MCI Communications Corporation for \$11,206,000, at an average price of \$7.47 per share. Two days later, Carlton sold the MCI stock to the MCI ESOP for \$10,575,000, at an average price of \$7.05 per share. The total sale price thus was \$631,000 less than the purchase price. When Carlton filed the estate tax return on December 29, 1986, he claimed a deduction under §2057 of \$5,287,000, for half the proceeds of the sale of the stock to the MCI ESOP. The deduction reduced the estate tax by \$2,501,161. The parties have stipu-

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<sup>1</sup>Section 2057 was repealed for estates of decedents who died after December 19, 1989. See Omnibus Budget Reconciliation Act of 1989, §7304(a), 103 Stat. 2352.

<sup>2</sup>Section 2057(e) defined “employer securities” by reference to §409(l) of the Code, which in turn defined the term generally as “common stock issued by the employer (or by a corporation which is a member of the same controlled group) which is readily tradable on an established securities market.” 26 U. S. C. §409(l)(1) (1982 ed., Supp. IV).

## Opinion of the Court

lated that Carlton engaged in the MCI stock transactions specifically to take advantage of the §2057 deduction.

On January 5, 1987, the Internal Revenue Service (IRS) announced that, “[p]ending the enactment of clarifying legislation,” it would treat the §2057 deduction as available only to estates of decedents who owned the securities in question immediately before death. See IRS Notice 87-13, 1987-1 Cum. Bull. 432, 442. A bill to enact such an amendment to §2057 was introduced in each Chamber of Congress on February 26, 1987. See 133 Cong. Rec. 4145 and 4293 (1987).

On December 22, 1987, the amendment to §2057 was enacted. As amended, the statute provided that, to qualify for the estate tax deduction, the securities sold to an ESOP must have been “directly owned” by the decedent “immediately before death.” Omnibus Budget Reconciliation Act of 1987, §10411(a), 101 Stat. 1330-432.<sup>3</sup> The 1987 amendment was made effective as if it had been contained in the statute as originally enacted in October 1986. §10411(b).

The IRS disallowed the deduction claimed by Carlton under §2057 on the ground that the MCI stock had not been owned by his decedent “immediately before death.” Carlton paid the asserted estate tax deficiency, plus interest, filed a claim for refund, and instituted a refund action in the United States District Court for the Central District of California. He conceded that the estate did not qualify for the deduction under the 1987 amendment to §2057. He argued, however, that retroactive application of the 1987 amendment to the estate’s 1986 transactions violated the Due Process Clause of the Fifth Amendment. The District Court rejected his argument and entered summary judgment in favor of the United States.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 972 F. 2d 1051 (1992). The majority consid-

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<sup>3</sup>The amendment also required that employer securities qualifying for the deduction must, after the sale, be allocated to participants or held for future allocation in accordance with certain rules.

## Opinion of the Court

ered two factors paramount in determining whether retroactive application of a tax violates due process: whether the taxpayer had actual or constructive notice that the tax statute would be retroactively amended, and whether the taxpayer reasonably relied to his detriment on preamendment law. The court concluded that both factors rendered retroactive application of the amendment in this case unduly harsh and oppressive and therefore unconstitutional. Judge Norris dissented. In his view, the 1987 amendment was within the wide latitude of congressional authority to legislate retroactively in regulating economic activity. We granted certiorari, 510 U. S. 810 (1993).

## II

This Court repeatedly has upheld retroactive tax legislation against a due process challenge. See, *e. g.*, *United States v. Hemme*, 476 U. S. 558 (1986); *United States v. Darusmont*, 449 U. S. 292 (1981); *Welch v. Henry*, 305 U. S. 134 (1938); *United States v. Hudson*, 299 U. S. 498 (1937); *Milliken v. United States*, 283 U. S. 15 (1931); *Cooper v. United States*, 280 U. S. 409 (1930). Some of its decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether “retroactive application is so harsh and oppressive as to transgress the constitutional limitation.” *Welch v. Henry*, 305 U. S., at 147, quoted in *United States v. Hemme*, 476 U. S., at 568–569. The “harsh and oppressive” formulation, however, “does not differ from the prohibition against arbitrary and irrational legislation” that applies generally to enactments in the sphere of economic policy. *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U. S. 717, 733 (1984). The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation:

“Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered

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by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . .

“To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . “The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former’ . . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Id.*, at 729–730, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976).

There is little doubt that the 1987 amendment to §2057 was adopted as a curative measure. As enacted in October 1986, §2057 contained no requirement that the decedent have owned the stock in question to qualify for the ESOP proceeds deduction. As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an ESOP, thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation.

It seems clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted §2057. That provision was intended to create an “incentive for stockholders to sell their companies to their employees who helped them build the company rather than liquidate, sell to outsiders or have the corporation redeem their shares on behalf of existing shareholders.” Joint Committee on Taxation, *Tax Reform Proposals: Tax Treatment of Employee Stock Ownership Plans (ESOPs)*, 99th Cong., 2d Sess., 37 (Joint Comm. Print 1985); see also 132 Cong. Rec. 14507 (1986) (statement of Sen. Long) (§2057 “allow[s] . . . an executor to reduce taxes on an estate by one-half by selling the decedent’s company to an ESOP”). When Congress initially enacted §2057, it estimated a revenue loss from the

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deduction of approximately \$300 million over a 5-year period. See 133 Cong. Rec. 4145 (1987) (statement of Rep. Rostenkowski); *id.*, at 4293 (statement of Sen. Bentsen). It became evident shortly after passage of the 1986 Act, however, that the expected revenue loss under § 2057 could be as much as \$7 billion—over 20 times greater than anticipated—because the deduction was not limited to situations in which the decedent owned the securities immediately before death. *Ibid.* In introducing the amendment in February 1987, Senator Bentsen observed: “Congress did not intend for estates to be able to claim the deduction by virtue of purchasing stock in the market and simply reselling the stock to an ESOP . . . and Congress certainly did not anticipate a \$7 billion revenue loss.” *Id.*, at 4294. Without the amendment, Senator Bentsen stated, “taxpayers could qualify for the deductions by engaging in essentially sham transactions.” *Ibid.*

We conclude that the 1987 amendment’s retroactive application meets the requirements of due process. First, Congress’ purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally “innocent” taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable.

Second, Congress acted promptly and established only a modest period of retroactivity. This Court noted in *United States v. Darusmont*, 449 U. S., at 296, that Congress “almost without exception” has given general revenue statutes effec-



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tive dates prior to the dates of actual enactment. This “customary congressional practice” generally has been “confined to short and limited periods required by the practicalities of producing national legislation.” *Id.*, at 296–297. In *Welch v. Henry*, 305 U. S. 134 (1938), the Court upheld a Wisconsin income tax adopted in 1935 on dividends received in 1933. The Court stated that the “recent transactions” to which a tax law may be retroactively applied “must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.” *Id.*, at 150. Here, the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year. Moreover, the amendment was proposed by the IRS in January 1987 and by Congress in February 1987, within a few months of § 2057’s original enactment.

Respondent Carlton argues that the 1987 amendment violates due process because he specifically and detrimentally relied on the preamendment version of § 2057 in engaging in the MCI stock transactions in December 1986. Although Carlton’s reliance is uncontested—and the reading of the original statute on which he relied appears to have been correct—his reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code. Justice Stone explained in *Welch v. Henry*, 305 U. S., at 146–147:

“Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . . .”

Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in

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the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.

Similarly, we do not consider respondent Carlton's lack of notice regarding the 1987 amendment to be dispositive. In *Welch v. Henry*, the Court upheld the retroactive imposition of a tax despite the absence of advance notice of the legislation. And in *Milliken v. United States*, the Court rejected a similar notice argument, declaring that a taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation." 283 U. S., at 23.

In holding the 1987 amendment unconstitutional, the Court of Appeals relied on this Court's decisions in *Nichols v. Coolidge*, 274 U. S. 531 (1927), *Blodgett v. Holden*, 275 U. S. 142 (1927), and *Untermeyer v. Anderson*, 276 U. S. 440 (1928). Those cases were decided during an era characterized by exacting review of economic legislation under an approach that "has long since been discarded." *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963). To the extent that their authority survives, they do not control here. *Blodgett* and *Untermeyer*, which involved the Nation's first gift tax, essentially have been limited to situations involving "the creation of a wholly new tax," and their "authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws." *United States v. Hemme*, 476 U. S., at 568. *Nichols* involved a novel development in the estate tax which embraced a transfer that occurred 12 years earlier. The amendment at issue here certainly is not properly characterized as a "wholly new tax," and its period of retroactive effect is limited. Nor do the above cases stand for the proposition that retroactivity is permitted with respect to income taxes, but prohibited with respect to gift and estate taxes. In *Hemme* and *Milliken*, this Court upheld retroactive features of gift and estate taxes.

O'CONNOR, J., concurring in judgment

### III

In focusing exclusively on the taxpayer's notice and reliance, the Court of Appeals held the congressional enactment to an unduly strict standard. Because we conclude that retroactive application of the 1987 amendment to §2057 is rationally related to a legitimate legislative purpose, we conclude that the amendment as applied to Carlton's 1986 transactions is consistent with the Due Process Clause.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE O'CONNOR, concurring in the judgment.

The unamended 26 U. S. C. §2057, which allowed taxpayers to reduce the taxable estate by buying securities and reselling them to employee stock ownership plans (ESOP's), made it possible to avoid estate taxes by structuring transactions in a certain way. But the tax laws contain many such provisions. See, *e. g.*, 26 U. S. C. §2055 (allowing deductions from taxable estate for transfers to the government, charities, and religious organizations). And §2057 was only the latest in a series of congressional efforts to promote ESOP's by providing tax incentives. See, *e. g.*, 26 U. S. C. §133 (partial income tax exclusion for interest paid to banks on ESOP loans); 26 U. S. C. §1042 (allowing certain taxpayers to defer capital gains taxes on sale of securities to ESOP's).

Thus, although respondent Carlton may have made a "purely tax-motivated stock transfe[r]," *ante*, at 32, I do not understand the Court to express any normative disapproval of this course of action. As executor of Willametta Day's estate, it was entirely appropriate for Carlton to seek to reduce the estate taxes. And like all taxpayers, Carlton was entitled to structure the estate's affairs to comply with the tax laws while minimizing tax liability. As Learned Hand observed with characteristic acerbity:

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“[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes. Therefore, if what was done here, was what was intended by [the statute], it is of no consequence that it was all an elaborate scheme to get rid of [estate] taxes, as it certainly was.” *Helvering v. Gregory*, 69 F. 2d 809, 810 (CA2 1934) (citations omitted), *aff’d*, 293 U. S. 465 (1935).

To say that Carlton did nothing wrong in claiming the deduction does not, of course, answer the question whether Congress deprived him of due process by amending § 2057. As we have noted, “the retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means.” *General Motors Corp. v. Romein*, 503 U. S. 181, 191 (1992) (internal quotation marks omitted).

The Court finds it relevant that, according to prominent members of the tax-writing committees of each House, the statute as originally enacted would have cost the Government too much money and would have allowed taxpayers to avoid tax by engaging in sham transactions. See *ante*, at 31–32. Thus, the Court reasons that the amendment to § 2057 served the legislative purpose of “correct[ing]” a “mistake” Congress made the first time. *Ante*, at 32. But this mode of analysis proves too much. Every law touching on an area in which Congress has previously legislated can be said to serve the legislative purpose of fixing a perceived problem with the prior state of affairs—there is no reason to pass a new law, after all, if the legislators are satisfied with the old one. Moreover, the subjective motivation of Members of Congress in passing a statute—to the extent it can

O'CONNOR, J., concurring in judgment

even be known—is irrelevant in this context: It is sufficient for due process analysis if there exists *some* legitimate purpose underlying the retroactivity provision. Cf. *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313–315 (1993).

Retroactive application of revenue measures is rationally related to the legitimate governmental purpose of raising revenue. In enacting revenue measures, retroactivity allows “the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision.” *Welch v. Henry*, 305 U. S. 134, 149 (1938). For this reason,

“[i]n enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment. . . . Usually the ‘retroactive’ feature has application only to that portion of the current calendar year preceding the date of enactment, but [some statutes have been] applicable to an entire calendar year that had expired preceding enactment. This ‘retroactive’ application apparently has been confined to short and limited periods required by the practicalities of producing national legislation. We may safely say that it is a customary congressional practice.” *United States v. Darusmont*, 449 U. S. 292, 296–297 (1981) (*per curiam*).

But “the Court has never intimated that Congress possesses unlimited power to ‘readjust rights and burdens . . . and upset otherwise settled expectations.’” *Connolly v. Pension Benefit Guaranty Corporation*, 475 U. S. 211, 229 (1986) (O'CONNOR, J., concurring) (brackets omitted), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 16 (1976). The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and

O'CONNOR, J., concurring in judgment

repose. For example, a “wholly new tax” cannot be imposed retroactively, *United States v. Hemme*, 476 U. S. 558, 568 (1986), even though such a tax would surely serve to raise money. Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer’s decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them. See *Welch v. Henry*, *supra*, at 147.

Although there is also an element of arbitrariness in retroactively changing the rate of tax to which the transaction is subject, or the availability of a deduction for engaging in that transaction, our cases have recognized that Congress must be able to make such adjustments in an attempt to equalize actual revenue and projected budgetary requirements. In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. See *United States v. Hemme*, *supra*, at 562 (1 month); *United States v. Darusmont*, *supra*, at 294–295 (10 months); *United States v. Hudson*, 299 U. S. 498, 501 (1937) (1 month). In *Welch v. Henry*, *supra*, the tax was enacted in 1935 to reach transactions completed in 1933; but we emphasized that the state legislature met only biannually and it made the revision “at the first opportunity after the tax year in which the income was received.” 305 U. S., at 151. A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions. But in keeping with Congress’ practice of limiting the retroactive effect of revenue measures (a practice that may reflect Congress’ sensitivity to the due process problems that would be raised by overreaching), the December 1987 amendment to §2057 was made retroactive only to October 1986. Given our precedents and the limited period of retroactivity, I con-

SCALIA, J., concurring in judgment

cur in the judgment of the Court that applying the amended statute to respondent Carlton did not violate due process.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

If I thought that “substantive due process” were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation. Although there is not much precision in the concept “‘harsh and oppressive,’” which is what the Court has adopted as its test of substantive due process unconstitutionality in the field of retroactive tax legislation, see, *e. g.*, *United States v. Hemme*, 476 U. S. 558, 568–569 (1986), quoting *Welch v. Henry*, 305 U. S. 134, 147 (1938), surely it would cover a retroactive amendment that cost a taxpayer who relied on the original statute’s clear meaning over \$600,000. Unlike the tax at issue in *Hemme*, here the amendment “without notice, . . . gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.” 476 U. S., at 569.

The Court attempts to minimize the amendment’s harshness by characterizing it as “a curative measure,” quoting some post-legislation legislative history (another oxymoron) to show that, despite the uncontested plain meaning of the statute, Congress never meant it to apply to stock that was not owned by the decedent at the time of death. See *ante*, at 31–32. I am not sure that whether Congress has treated a citizen oppressively should turn upon whether the oppression was, after all, only Congress’ “curing” of its own mistake. Even if it should, however, what was done to respondent here went beyond a “cure.” The retroactivity not only hit him with the tax that Congress “meant” to impose originally, but it caused his expenditures incurred in invited reliance upon the earlier law to become worthless. That could have been avoided, of course, by providing a tax credit for such expenditures. Retroactively disallowing the tax bene-

SCALIA, J., concurring in judgment

fit that the earlier law offered, without compensating those who incurred expenses in accepting that offer, seems to me harsh and oppressive by any normal measure.

The Court seeks to distinguish our precedents invalidating retroactive taxes by pointing out that they involved the imposition of new taxes rather than a change in tax rates. See *ante*, at 34. But eliminating the specifically promised reward for costly action *after* the action has been taken, and refusing to reimburse the cost, is even more harsh and oppressive, it seems to me, than merely imposing a new tax on past actions. The Court also attempts to soften the impact of the amendment by noting that it involved only “a modest period of retroactivity.” *Ante*, at 32. But in the case of a tax-incentive provision, as opposed to a tax on a continuous activity (like the earning of income), the critical event is the taxpayer’s reliance on the incentive, and the key timing issue is whether the change occurs after the reliance; that it occurs immediately after rather than long after renders it no less harsh.

The reasoning the Court applies to uphold the statute in this case guarantees that *all* retroactive tax laws will henceforth be valid. To pass constitutional muster the retroactive aspects of the statute need only be “rationally related to a legitimate legislative purpose.” *Ante*, at 35. Revenue raising is certainly a legitimate legislative purpose, see U. S. Const., Art. I, §8, cl. 1, and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal. I welcome this recognition that the Due Process Clause does not prevent retroactive taxes, since I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process, see *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443, 470–471 (1993) (SCALIA, J., concurring in judgment).

I cannot avoid observing, however, two stark discrepancies between today’s due process reasoning and the due process reasoning the Court applies to its identification of new so-



SCALIA, J., concurring in judgment

called fundamental rights, such as the right to structure family living arrangements, see *Moore v. East Cleveland*, 431 U. S. 494 (1977) (plurality opinion), and the right to an abortion, see *Roe v. Wade*, 410 U. S. 113 (1973). First and most obviously, where respondent's claimed right to hold onto his property is at issue, the Court upholds the tax amendment because it rationally furthers a legitimate interest; whereas when other claimed rights that the Court deems fundamental are at issue, the Court strikes down laws that concededly promote legitimate interests, *id.*, at 150, 162. Secondly, when it is pointed out that the Court's retroactive-tax ruling today is inconsistent with earlier decisions, see, *e. g.*, *Nichols v. Coolidge*, 274 U. S. 531 (1927); *Blodgett v. Holden*, 275 U. S. 142 (1927); *Untermeyer v. Anderson*, 276 U. S. 440 (1928), the Court dismisses those cases as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" *Ante*, at 34, quoting *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963). But *economic* legislation was not the *only* legislation subjected to "exacting review" in those bad old days, and one wonders what principled reason justifies "discarding" that bad old approach *only as to that category*. For the Court continues to rely upon "exacting review" cases of the *Nichols-Blodgett-Untermeyer* vintage for its due process "fundamental rights" jurisprudence. See, *e. g.*, *Roe, supra*, at 152–153, 159 (citing *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923), and *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925)); see also *Griswold v. Connecticut*, 381 U. S. 479, 483 (1965) ("[W]e reaffirm the principle of the *Pierce* and the *Meyer* cases").

The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analy-

SCALIA, J., concurring in judgment

sis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.

## Syllabus

CITY OF LADUE ET AL. *v.* GILLEOCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

No. 92–1856. Argued February 23, 1994—Decided June 13, 1994

An ordinance of petitioner City of Ladue bans all residential signs but those falling within 1 of 10 exemptions, for the principal purpose of minimizing the visual clutter associated with such signs. Respondent Gilleo filed this action, alleging that the ordinance violated her right to free speech by prohibiting her from displaying a sign stating, “For Peace in the Gulf,” from her home. The District Court found the ordinance unconstitutional, and the Court of Appeals affirmed, holding that the ordinance was a “content based” regulation, and that Ladue’s substantial interests in enacting it were not sufficiently compelling to support such a restriction.

*Held:* The ordinance violates a Ladue resident’s right to free speech. Pp. 48–59.

(a) While signs pose distinctive problems and thus are subject to municipalities’ police powers, measures regulating them inevitably affect communication itself. Such a regulation may be challenged on the ground that it restricts too little speech because its exemptions discriminate on the basis of signs’ messages, or on the ground that it prohibits too much protected speech. For purposes of this case, the validity of Ladue’s submission that its ordinance’s various exemptions are free of impermissible content or viewpoint discrimination is assumed. Pp. 48–53.

(b) Although Ladue has a concededly valid interest in minimizing visual clutter, it has almost completely foreclosed an important and distinct medium of expression to political, religious, or personal messages. Prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, but such measures can suppress too much speech by eliminating a common means of speaking. Pp. 54–55.

(c) Ladue’s attempt to justify the ordinance as a “time, place, or manner” restriction fails because alternatives such as handbills and newspaper advertisements are inadequate substitutes for the important medium that Ladue has closed off. Displaying a sign from one’s own residence carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, for it provides information about the speaker’s identity, an important component of many attempts to persuade. Residential signs are also

## Syllabus

an unusually cheap and convenient form of communication. Furthermore, the audience intended to be reached by a residential sign—neighbors—could not be reached nearly as well by other means. Pp. 56–57.

(d) A special respect for individual liberty in the home has long been part of this Nation’s culture and law and has a special resonance when the government seeks to constrain a person’s ability to speak there. The decision reached here does not leave Ladue powerless to address the ills that may be associated with residential signs. In addition, residents’ self-interest in maintaining their own property values and preventing “visual clutter” in their yards and neighborhoods diminishes the danger of an “unlimited” proliferation of signs. Pp. 58–59.

986 F. 2d 1180, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. O’CONNOR, J., filed a concurring opinion, *post*, p. 59.

*Jordan B. Cherrick* argued the cause for petitioners. With him on the briefs were *Robert F. Schlafly* and *Jay A. Summerville*.

*Gerald P. Greiman* argued the cause for respondent. With him on the brief were *Martin M. Green*, *Mitchell A. Margo*, and *Steven R. Shapiro*.

*Deputy Solicitor General Bender* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, and *Amy L. Wax*.\*

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\*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Jack Schwartz* and *Diane Krejsa*, Assistant Attorneys General, *Robert A. Marks*, Attorney General of Hawaii, *Pamela Carter*, Attorney General of Indiana, *Jeffrey R. Howard*, Attorney General of New Hampshire, *Fred DeVesa*, Acting Attorney General of New Jersey, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, and *Jeffrey L. Amestoy*, Attorney General of Vermont; and for the National Institute of Municipal Law Officers et al. by *Richard Ruda* and *Lee Fennell*.

Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation et al. by *Richard E. Wiley*, *Lawrence W. Secrest III*, *Howard H. Bell*, *John F. Kamp*, *David S. Versfelt*, *Kenneth M. Vittor*, and *Slade Metcalf*; for the Association of National Advertisers, Inc., by *Burt Neuborne* and *Gilbert H. Weil*; for People for the American Way

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JUSTICE STEVENS delivered the opinion of the Court.

An ordinance of the City of Ladue prohibits homeowners from displaying any signs on their property except “residence identification” signs, “for sale” signs, and signs warning of safety hazards. The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences. The question presented is whether the ordinance violates a Ladue resident’s right to free speech.<sup>1</sup>

## I

Respondent Margaret P. Gilleo owns one of the 57 single-family homes in the Willow Hill subdivision of Ladue.<sup>2</sup> On December 8, 1990, she placed on her front lawn a 24- by 36-inch sign printed with the words, “Say No to War in the Persian Gulf, Call Congress Now.” After that sign disappeared, Gilleo put up another but it was knocked to the ground. When Gilleo reported these incidents to the police, they advised her that such signs were prohibited in Ladue. The city council denied her petition for a variance.<sup>3</sup> Gilleo then filed this action under 42 U. S. C. § 1983 against the City, the mayor, and members of the city council, alleging that

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et al. by *Timothy B. Dyk*, *Elliot M. Minberg*, and *Marc D. Stern*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

<sup>1</sup>The First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” The Fourteenth Amendment makes this limitation applicable to the States, see *Gitlow v. New York*, 268 U. S. 652 (1925), and to their political subdivisions, see *Lovell v. City of Griffin*, 303 U. S. 444 (1938).

<sup>2</sup>Ladue is a suburb of St. Louis, Missouri. It has a population of almost 9,000, and an area of about 8.5 square miles, of which only 3% is zoned for commercial or industrial use.

<sup>3</sup>The ordinance then in effect gave the city council the authority to “permit a variation in the strict application of the provisions and requirements of this chapter . . . where the public interest will be best served by permitting such variation.” App. 72.

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Ladue's sign ordinance violated her First Amendment right of free speech.

The District Court issued a preliminary injunction against enforcement of the ordinance. 774 F. Supp. 1559 (ED Mo. 1991). Gilileo then placed an 8.5- by 11-inch sign in the second story window of her home stating, "For Peace in the Gulf." The Ladue City Council responded to the injunction by repealing its ordinance and enacting a replacement.<sup>4</sup> Like its predecessor, the new ordinance contains a general prohibition of "signs" and defines that term broadly.<sup>5</sup> The ordinance prohibits all signs except those that fall within 1 of 10 exemptions. Thus, "residential identification signs" no larger than one square foot are allowed, as are signs advertising "that the property is for sale, lease or exchange" and identifying the owner or agent. §35-10, App. to Pet. for Cert. 45a. Also exempted are signs "for churches, religious institutions, and schools," §35-5, *id.*, at 41a, "[c]ommercial signs in commercially zoned or industrial zoned districts," §35-4, *ibid.*, and on-site signs advertising "gasoline filling

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<sup>4</sup>The new ordinance eliminates the provision allowing for variances and contains a grandfather clause exempting signs already lawfully in place.

<sup>5</sup>Section 35-2 of the ordinance declares that "No sign shall be erected [or] maintained" in the City except in conformity with the ordinance; §35-3 authorizes the City to remove nonconforming signs. App. to Pet. for Cert. 40a. Section 35-1 defines "sign" as:

"A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word 'sign' shall also include 'banners', 'pennants', 'insignia', 'bulletin boards', 'ground signs', 'billboard', 'poster billboards', 'illuminated signs', 'projecting signs', 'temporary signs', 'marquees', 'roof signs', 'yard signs', 'electric signs', 'wall signs', and 'window signs', wherever placed out of doors in view of the general public or wherever placed indoors as a window sign." *Id.*, at 39a.

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stations,”<sup>6</sup> §35–6, *id.*, at 42a. Unlike its predecessor, the new ordinance contains a lengthy “Declaration of Findings, Policies, Interests, and Purposes,” part of which recites that the

“proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children.” *Id.*, at 36a.

Gilleo amended her complaint to challenge the new ordinance, which explicitly prohibits window signs like hers. The District Court held the ordinance unconstitutional, 774 F. Supp. 1559 (ED Mo. 1991), and the Court of Appeals affirmed, 986 F. 2d 1180 (CA8 1993). Relying on the plurality opinion in *Metromedia, Inc. v. San Diego*, 453 U. S. 490 (1981), the Court of Appeals held the ordinance invalid as a “content based” regulation because the City treated commercial speech more favorably than noncommercial speech and favored some kinds of noncommercial speech over others.

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<sup>6</sup>The full catalog of exceptions, each subject to special size limitations, is as follows: “[M]unicipal signs”; “[s]ubdivision and residence identification” signs; “[r]oad signs and driveway signs for danger, direction, or identification”; “[h]ealth inspection signs”; “[s]igns for churches, religious institutions, and schools” (subject to regulations set forth in §35–5); “identification signs” for other not-for-profit organizations; signs “identifying the location of public transportation stops”; “[g]round signs advertising the sale or rental of real property,” subject to the conditions, set forth in §35–10, that such signs may “not be attached to any tree, fence or utility pole” and may contain only the fact of proposed sale or rental and the seller or agent’s name and address or telephone number; “[c]ommercial signs in commercially zoned or industrial zoned districts,” subject to restrictions set out elsewhere in the ordinance; and signs that “identif[y] safety hazards.” §35–4, *id.*, at 41a, 45a.

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986 F. 2d, at 1182. Acknowledging that “Ladue’s interests in enacting its ordinance are substantial,” the Court of Appeals nevertheless concluded that those interests were “not sufficiently ‘compelling’ to support a content-based restriction.” *Id.*, at 1183–1184 (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991)).

We granted the City of Ladue’s petition for certiorari, 510 U. S. 809 (1993), and now affirm.

## II

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. See, e. g., *Ward v. Rock Against Racism*, 491 U. S. 781 (1989); *Kovacs v. Cooper*, 336 U. S. 77 (1949). However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

In *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977), we addressed an ordinance that sought to maintain stable, integrated neighborhoods by prohibiting homeowners from placing “For Sale” or “Sold” signs on their property. Although we recognized the importance of Willingboro’s objective, we held that the First Amendment prevented the township from “achieving its goal by restricting the free flow of truthful information.” *Id.*, at 95. In some respects *Linmark* is the mirror image of this case. For instead of prohibiting “For Sale” signs without banning any other



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signs, Ladue has exempted such signs from an otherwise virtually complete ban. Moreover, whereas in *Linmark* we noted that the ordinance was not concerned with the promotion of esthetic values unrelated to the content of the prohibited speech, *id.*, at 93–94, here Ladue relies squarely on that content-neutral justification for its ordinance.

In *Metromedia*, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising “on-site” activities.<sup>7</sup> The Court concluded that the city’s interest in traffic safety and its esthetic interest in preventing “visual clutter” could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed. 453 U. S., at 511–512.<sup>8</sup> Nevertheless, the Court’s judgment in *Metromedia*, supported by two different lines of reasoning, invalidated the San Diego ordinance in its entirety. According to Justice White’s plurality opinion, the ordinance impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. *Id.*, at 514–515. On

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<sup>7</sup>The San Diego ordinance defined “on-site signs” as “those ‘designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed.’” *Metromedia, Inc. v. San Diego*, 453 U. S., at 494. The plurality read the “on-site” exemption of the San Diego ordinance as inapplicable to noncommercial messages. See *id.*, at 513. Cf. *id.*, at 535–536 (Brennan, J., concurring in judgment). The ordinance also exempted 12 categories of displays, including religious signs; for sale signs; signs on public and commercial vehicles; and “[t]emporary political campaign signs.” *Id.*, at 495, n. 3.

<sup>8</sup>Five Members of the Court joined Part IV of Justice White’s opinion, which approved of the city’s decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. See *id.*, at 541 (STEVENS, J., dissenting in part) (joining Part IV); *id.*, at 564–565 (Burger, C. J., dissenting); *id.*, at 570 (REHNQUIST, J., dissenting).

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the other hand, Justice Brennan, joined by JUSTICE BLACKMUN, concluded that “the *practical* effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication” for noncommercial messages, and that the city had failed to make the strong showing needed to justify such “content-neutral prohibitions of particular media of communication.” *Id.*, at 525–527. The three dissenters also viewed San Diego’s ordinance as tantamount to a blanket prohibition of billboards, but would have upheld it because they did not perceive “even a hint of bias or censorship in the city’s actions” nor “any reason to believe that the overall communications market in San Diego is inadequate.” *Id.*, at 552–553 (STEVENS, J., dissenting in part). See also *id.*, at 563, 566 (Burger, C. J., dissenting); *id.*, at 569–570 (REHNQUIST, J., dissenting).

In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789 (1984), we upheld a Los Angeles ordinance that prohibited the posting of signs on public property. Noting the conclusion shared by seven Justices in *Metromedia* that San Diego’s “interest in avoiding visual clutter” was sufficient to justify a prohibition of commercial billboards, 466 U. S., at 806–807, in *Vincent* we upheld the Los Angeles ordinance, which was justified on the same grounds. We rejected the argument that the validity of the city’s esthetic interest had been compromised by failing to extend the ban to private property, reasoning that the “private citizen’s interest in controlling the use of his own property justifies the disparate treatment.” *Id.*, at 811. We also rejected as “misplaced” respondents’ reliance on public forum principles, for they had “fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for public streets and parks.” *Id.*, at 814.

These decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in

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effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. See *Metro-media*, 453 U. S., at 512–517 (opinion of White, J.). Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. See *id.*, at 525–534 (Brennan, J., concurring in judgment). The City of Ladue contends, first, that the Court of Appeals' reliance on the former rationale was misplaced because the City's regulatory purposes are content neutral, and, second, that those purposes justify the comprehensiveness of the sign prohibition. A comment on the former contention will help explain why we ultimately base our decision on a rejection of the latter.

## III

While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.<sup>9</sup> Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental “attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 785–786 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the “permissible subjects for public debate” and thereby to “control . . . the search for political truth.” *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 538 (1980).<sup>10</sup>

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<sup>9</sup> Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause. See, e. g., *Carey v. Brown*, 447 U. S. 455, 459–471 (1980) (ordinance that forbade certain kinds of picketing but exempted labor picketing violated Clause); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 98–102 (1972) (same).

<sup>10</sup> Of course, not every law that turns on the content of speech is invalid. See generally Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev.

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The City argues that its sign ordinance implicates neither of these concerns, and that the Court of Appeals therefore erred in demanding a “compelling” justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among the side effects of various kinds of signs. These differences are only adventitiously connected with content, and supply a sufficient justification, unrelated to the City’s approval or disapproval of specific messages, for carving out the specified categories from the general ban. See Brief for Petitioners 18–23. Thus, according to the Declaration of Findings, Policies, Interests, and Purposes supporting the ordinance, the permitted signs, unlike the prohibited signs, are unlikely to contribute to the dangers of “unlimited proliferation” associated with categories of signs that are not inherently limited in number. App. to Pet. for Cert. 37a. Because only a few residents will need to display “for sale” or “for rent” signs at any given time, permitting one such sign per marketed house does not threaten visual clutter. *Ibid.* Because the City has only a few businesses, churches, and schools, the same rationale explains the exemption for on-site commercial and organizational signs. *Ibid.* Moreover, some of the exempted categories (*e. g.*, danger signs) respond to unique public needs to permit certain kinds of speech. *Ibid.* Even if we assume the validity of these arguments, the exemptions in Ladue’s ordinance nevertheless shed light on the separate question whether the ordinance prohibits too much speech.

Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government’s rationale for restricting speech in the first place. See, *e. g.*,

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79 (1978). See also *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S., at 545, and n. 2 (STEVENS, J., concurring in judgment).

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*Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 424–426 (1993). In this case, at the very least, the exemptions from Ladue’s ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City’s esthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.

Under the Court of Appeals’ content discrimination rationale, the City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue’s ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property; she asserts a constitutional right to display an antiwar sign at her own home. Therefore, we first ask whether Ladue may properly *prohibit* Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to *permit* certain other signs. In examining the propriety of Ladue’s near-total prohibition of residential signs, we will assume, *arguendo*, the validity of the City’s submission that the various exemptions are free of impermissible content or viewpoint discrimination.<sup>11</sup>

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<sup>11</sup> Because we set to one side the content discrimination question, we need not address the City’s argument that the ordinance, although speaking in subject-matter terms, merely targets the “undesirable secondary effects” associated with certain kinds of signs. See *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 49 (1986). The inquiry we undertake below into the adequacy of alternative channels of communication would also apply to a provision justified on those grounds. See *id.*, at 50.

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## IV

In *Linmark* we held that the city's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." 431 U. S., at 93. Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in *Linmark*. Moreover, whereas the ordinance in *Linmark* applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in *Linmark*. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly. A prohibition is not always invalid merely because it applies to a sizeable category of speech; the sign ban we upheld in *Vincent*, for example, was quite broad. But in *Vincent* we specifically noted that the category of speech in question—signs placed on public property—was not a "uniquely valuable or important mode of communication," and that there was no evidence that "appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression." 466 U. S., at 812.

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community.

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Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes.<sup>12</sup> They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. City of Griffin*, 303 U. S. 444, 451–452 (1938); handbills on the public streets, *Jamison v. Texas*, 318 U. S. 413, 416 (1943); the door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U. S. 141, 145–149 (1943); *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 164–165 (1939), and live entertainment, *Schad v. Mount Ephraim*, 452 U. S. 61, 75–76 (1981). See also *Frisby v. Schultz*, 487 U. S. 474, 486 (1988) (picketing focused upon individual residence is “fundamentally different from more generally directed means of communication that may not be completely banned in residential areas”). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.<sup>13</sup>

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<sup>12</sup> “[S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can’t buy.” D. Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (rev. ed. 1981).

<sup>13</sup> See Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 57–58 (1987):

“[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others. . . . To ensure ‘the widest possible dissemination of information[,]’ [*Associated*

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Ladue contends, however, that its ordinance is a mere regulation of the “time, place, or manner” of speech because residents remain free to convey their desired messages by other means, such as *hand-held* signs, “letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.” Brief for Petitioners 41. However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must “leave open ample alternative channels for communication.” *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the “speaker.” As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.<sup>14</sup> A sign advocating “Peace in the Gulf” in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed

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*Press v. United States*, 326 U. S. 1, 20 (1945),] and the ‘unfettered interchange of ideas,’ [*Roth v. United States*, 354 U. S. 476, 484 (1957),] the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.”

<sup>14</sup> See Aristotle 2, *Rhetoric*, Book 1, ch. 2, in 8 Great Books of the Western World, Encyclopedia Britannica 595 (M. Adler ed., 2d ed. 1990) (“We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided”).



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on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Cf. *Vincent*, 466 U. S., at 812–813, n. 30; *Anderson v. Celebrezze*, 460 U. S. 780, 793–794 (1983); *Martin v. City of Struthers*, 319 U. S., at 146; *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293 (1941). Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one’s house with a hand-held sign may make the difference between participating and not participating in some public debate.<sup>15</sup> Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.<sup>16</sup>

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<sup>15</sup> The precise location of many other kinds of signs (aside from “on-site” signs) is of lesser communicative importance. For example, assuming the audience is similar, a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another. The elimination of a cheap and handy medium of expression is especially apt to deter *individuals* from communicating their views to the public, for unlike businesses (and even political organizations) individuals generally realize few tangible benefits from such communication. Cf. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976) (“Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely”).

<sup>16</sup> Counsel for Ladue has also cited flags as a viable alternative to signs. Counsel observed that the ordinance does not restrict flags of any stripe, including flags bearing written messages. See Tr. of Oral Arg. 16, 21 (noting that rectangular flags, unlike “pennants” and “banners,” are not prohibited by the ordinance). Even assuming that flags are nearly as affordable and legible as signs, we do not think the mere possibility that another medium could be used in an unconventional manner to carry the same messages alters the fact that Ladue has banned a distinct and traditionally important medium of expression. See, e. g., *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 163 (1939).

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A special respect for individual liberty in the home has long been part of our culture and our law, see, *e. g.*, *Payton v. New York*, 445 U. S. 573, 596–597, and nn. 44–45 (1980); that principle has special resonance when the government seeks to constrain a person’s ability to *speak* there. See *Spence v. Washington*, 418 U. S. 405, 406, 409, 411 (1974) (*per curiam*). Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, see *Cox v. New Hampshire*, 312 U. S. 569, 574, 576 (1941); see also *Widmar v. Vincent*, 454 U. S. 263, 278 (1981) (STEVENS, J., concurring in judgment), its need to regulate temperate speech from the home is surely much less pressing, see *Spence*, 418 U. S., at 409.

Our decision that Ladue’s ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs.<sup>17</sup> It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent “visual clutter” in their own yards and neighborhoods—incentives markedly different from those of persons who erect signs on others’ land, in others’ neighborhoods, or on public property. Residents’ self-interest diminishes the danger of the “unlimited” proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue’s stated regulatory needs

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<sup>17</sup> Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban.

O'CONNOR, J., concurring

without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE O'CONNOR, concurring.

It is unusual for us, when faced with a regulation that on its face draws content distinctions, to “assume, *arguendo*, the validity of the City’s submission that the various exemptions are free of impermissible content or viewpoint discrimination.” *Ante*, at 53. With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115–116 (1991). The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny. See, *e. g.*, *Burson v. Freeman*, 504 U. S. 191, 197–198 (1992) (plurality opinion); *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 133–135 (1992); *Simon & Schuster, supra*, at 115–116; *Boos v. Barry*, 485 U. S. 312, 318–321 (1988) (plurality opinion); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 229–231 (1987); *Carey v. Brown*, 447 U. S. 455, 461–463 (1980); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95, 98–99 (1972).

Over the years, some cogent criticisms have been leveled at our approach. See, *e. g.*, *R. A. V. v. St. Paul*, 505 U. S. 377, 420–422 (1992) (STEVENS, J., concurring in judgment); *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 530, 544–548 (1980) (STEVENS, J., concurring in judgment); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 *Geo. L. J.* 727 (1980);

O'CONNOR, J., concurring

Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982). And it is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. The content distinctions present in this ordinance may, to some, be a good example of this.

But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. See *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 52–53 (1988). On a theoretical level, it reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. See, *e. g.*, *ante*, at 51–53; *Mosley, supra*, at 95; Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983). On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.

I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations. Perhaps this would have forced us to confront some of the difficulties with the existing doctrine; perhaps it would have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.

Nonetheless, I join the Court's opinion, because I agree with its conclusion in Part IV that even if the restriction were content neutral, it would still be invalid, and because I do not think Part III casts any doubt on the propriety of our normal content discrimination inquiry.

## Syllabus

DEPARTMENT OF TAXATION AND FINANCE OF  
NEW YORK ET AL. *v.* MILHELM ATTEA  
& BROS., INC., ET AL.

## CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 93-377. Argued March 23, 1994—Decided June 13, 1994

Enrolled tribal members purchasing cigarettes on Indian reservations are exempt from a New York cigarette tax, but non-Indians making such purchases are not. Licensed agents precollect the tax by purchasing stamps and affixing them to cigarette packs in advance of their first sale. Determining that a large volume of unstamped cigarettes was being purchased by non-Indians on reservations, petitioner tax department enacted regulations imposing recordkeeping requirements and quantity limitations on cigarette wholesalers selling untaxed cigarettes to reservation Indians. As relevant here, the regulations set quotas on the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers, and petitioner tax department must approve each such sale. Wholesalers must also ensure that a buyer holds a valid state tax exemption certificate, and must keep records of their tax-exempt sales, make monthly reports to petitioners, and, as licensed agents, precollect taxes on nonexempt sales. Respondent wholesalers are licensed by the Bureau of Indian Affairs to sell cigarettes to reservation Indians. They filed separate suits in state court alleging that the regulations were pre-empted by the federal Indian Trader Statutes. The trial court issued an injunction. Ultimately, the Appellate Division upheld the regulations, but the Court of Appeals reversed, distinguishing this Court's decisions upholding taxes imposed on non-Indian purchasers of cigarettes, see *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463; *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, on the ground that they involved regulating sales to non-Indian consumers whereas New York's regulations applied to sales by non-Indian wholesalers to reservation Indians. The court concluded that the Indian Trader Statutes, as construed in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U. S. 685, deprived the States of all power to impose regulatory burdens on licensed Indian traders, and, alternatively, that if States could impose minimal burdens on the traders, New York's regulations were invalid because the burdens were significant.

*Held:* New York's regulations do not, on their face, violate the Indian Trader Statutes. Pp. 69-78.

Syllabus

(a) Because respondents have made essentially a facial challenge, this case is confined to those alleged defects that inhere in the regulations as written, and the Court need not assess for all purposes each feature of the tax scheme that might affect tribal self-government or federal authority over Indian affairs. Pp. 69–70.

(b) Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes. Although broad language in *Warren Trading Post* suggests such immunity, that proposition has been undermined by subsequent decisions in *Moe* (upholding a state law requiring Indian retailers on tribal land to collect a state cigarette tax imposed on sales to non-Indians), *Colville* (upholding in relevant part a state law requiring tribal retailers on reservations to collect cigarette taxes on sales to nonmembers and to keep extensive records), and *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505. These cases have made clear that the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere. Thus, there is more room for state regulation in this area. In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians. It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are enrolled tribal members but not on wholesalers, who often are not. Pp. 70–75.

(c) New York's scheme does not impose excessive burdens on Indian traders. Respondents' objections to the regulations setting quotas and requiring that petitioners preapprove deliveries provide no basis for a facial challenge, although the possibility of inadequate quotas may provide a basis for a future challenge to the regulations' *application*. The requirements that wholesalers sell untaxed cigarettes only to persons with valid exemption certificates and keep detailed records are no more demanding than comparable measures approved in *Colville*. Moreover, the precollection obligation placed on wholesalers is the same as the obligation that, under *Moe* and *Colville*, may be imposed on reservation retailers. The United States' arguments supporting its position that the scheme improperly burdens Indian trading are also rejected. Pp. 75–78.

81 N. Y. 2d 417, 615 N. E. 2d 994, reversed.

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

## Counsel

*G. Oliver Koppell*, Attorney General of New York, argued the cause for petitioners. With him on the briefs were *Robert Abrams*, former Attorney General, *Jerry Boone*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Lew A. Millenbach*, Assistant Attorney General.

*Joseph E. Zdarsky* argued the cause for respondents. With him on the brief were *Hans Walker, Jr.*, *Michael Roy*, *Guy J. Agostinelli*, and *Gerald T. Walsh*.

*Beth S. Brinkmann* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Days*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Edward J. Shawaker*, and *Vicki L. Plaut*.\*

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\*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut by *Richard Blumenthal*, Attorney General, and *David H. Wrinn*, Assistant Attorney General; for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Robert A. Butterworth* of Florida, *Bonnie J. Campbell* of Iowa, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Heidi Heitkamp* of North Dakota, *Susan B. Loving* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Jeffrey B. Pine* of Rhode Island, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, and *James E. Doyle* of Wisconsin; for the Empire State Petroleum Association, Inc., et al. by *Emilio A. F. Petroccione* and *Usher Fogel*; for the National Association of Convenience Stores et al. by *Mark L. Austrian*; for the National Governors' Association et al. by *Richard Ruda*; and for the New York State Association of Tobacco and Candy Distributors, Inc., by *Thomas G. Jackson*.

Briefs of *amici curiae* urging affirmance were filed for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Melody L. McCoy*, *Yvonne Teresa Knight*, *Kim Jerome Gottschalk*, *Bertram E. Hirsch*, *Patrick L. Smith*, *Michael E. Taylor*, *Jeanne S. Whiteing*, and *Robert S. Thompson III*; for the Muscogee (Creek) Nation by *Michael Minnis*, *F. Browning Pipestem*, and *Leah Harjo Ware*; for the Oneida Indian Nation of New York by *William W. Taylor III* and *Michael R. Smith*; for the Saint Regis Mohawk Tribe et al. by *Bradley S. Waterman* and *Samuel M. Maruca*; and for the Seneca Nation of Indians by *Timothy B. Dyk* and *Beth Heifetz*.

JUSTICE STEVENS delivered the opinion of the Court.

Cigarette consumers in New York are subject to a state tax of 56 cents per pack. Enrolled tribal members who purchase cigarettes on Indian reservations are exempt from this tax, but non-Indians making purchases on reservations must pay it. To prevent non-Indians from escaping the tax, New York has enacted a regulatory scheme that imposes record-keeping requirements and quantity limitations on cigarette wholesalers who sell untaxed cigarettes to reservation Indians. The question presented is whether New York's program is pre-empted by federal statutes governing trade with Indians.

## I

Article 20 of the New York Tax Law imposes a tax on all cigarettes possessed in the State except those that New York is "without power" to tax. N. Y. Tax Law § 471(1) (McKinney 1987 and Supp. 1994). The State collects the cigarette tax through licensed agents who purchase tax stamps and affix them to cigarette packs in advance of the first sale within the State. The full amount of the tax is part of the price of stamped cigarettes at all subsequent steps in the distribution stream. Accordingly, the "ultimate incidence of and liability for the tax [is] upon the consumer." § 471(2). Any person who "willfully attempts in any manner to evade or defeat" the cigarette tax commits a misdemeanor. N. Y. Tax Law § 1814(a) (McKinney 1987).

Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, see *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 475–481 (1976), cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped. On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation. See *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, 160–161 (1980). In 1988, New York's Department of Taxa-



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tion and Finance<sup>1</sup> determined that a large volume of unstamped cigarettes was being purchased by non-Indians from reservation retailers. According to an affidavit submitted by an official in the Department's Audit Division, the volume of tax-exempt cigarettes sold on New York reservations in 1987–1988 would, if consumed exclusively by tax-immune Indians, correspond to a consumption rate 20 times higher than that of the average New York resident; in 1988–1989, putative reservation consumption was 32 times the statewide average. See Record 244–246 (Affidavit of Jamie Woodward). Because unlawful purchases of unstamped cigarettes deprived New York of substantial tax revenues—now estimated at more than \$65 million per year—the Department adopted the regulations at issue in this case.<sup>2</sup>

The regulations recognize the right of “exempt Indian nations or tribes, qualified Indian consumers and registered dealers” to “purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.” 20 N. Y. C. R. R. §336.6(a) (1992). To ensure that nonexempt purchasers do not likewise escape taxation, the regulations limit the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers. The limitations may be established and enforced in alternative ways. A tribe may enter into an agreement with the Department “to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of [un-

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<sup>1</sup>The petitioners in this case are the Department of Taxation and Finance of the State of New York, its Commissioner James W. Wetzler, and the Tax Appeals Tribunal of the State of New York. For convenience we refer to petitioners collectively as the Department.

<sup>2</sup>The cigarette regulations are similar to regulations New York adopted in an effort to prevent sales of untaxed gasoline to non-Indians on reservations. See *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N. Y. 2d 536, 508 N. E. 2d 914 (1987) (finding regulations pre-empted by federal law), vacated and remanded, 487 U. S. 1212 (1988), on remand 72 N. Y. 2d 720, 533 N. E. 2d 255 (1988).

taxed] cigarettes,” in which case wholesalers must obtain the tribe’s approval for each delivery of untaxed cigarettes to a reservation retailer. § 336.7(c)(1). In the absence of such an agreement—and apparently there have been none to date—the Department itself limits the permitted quantity of untaxed cigarettes based on the “probable demand” of tax-exempt Indian consumers. § 336.7(d)(1).

The Department calculates “probable demand” in either of two ways. If a tribe “regulates, licenses or controls the sale and distribution of cigarettes within its reservation,” the Department will rely upon evidence submitted by that tribe concerning local demand for cigarettes. § 336.7(d)(2)(i).<sup>3</sup> Otherwise, the Department fixes the untaxed cigarette limit for a tribe by multiplying the “New York average [cigarette] consumption per capita” by the number of enrolled members of the affected tribe. §§ 336.7(d)(1), (d)(2)(ii). Each sale of untaxed cigarettes by a wholesaler to a tribe or reservation retailer must be approved by the Department; approval is “based upon evidence of valid purchase orders received by the agent [*i. e.*, wholesaler] of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory” of the tribe. *Ibid.*<sup>4</sup> Retailers are sent “Tax Exemption Coupons” entitling them to their monthly allotment of tax-exempt cigarettes. The retailer gives copies of its coupons to the wholesaler upon delivery, and the wholesaler forwards one to the Department. See Brief for Petitioners 12–13; App. 44–45. The Department may withhold approval of deliveries to tribes or re-

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<sup>3</sup>The regulation cites as examples of such evidence “records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.” 20 N. Y. C. R. R. § 336.7(d)(2)(i) (1992).

<sup>4</sup>The Department determines the “trade territory” in consultation with the tribe if the tribe has undertaken to regulate the sale and distribution of cigarettes; otherwise, the Department determines the trade territory “based upon the information at its disposal.” § 336.7(d)(3)(ii).

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tailers who “are or have been” violating the regulations, § 336.7(d)(6), and may cancel the exemption certificates of noncomplying tribes or retailers. See §§ 336.6(d)(3), (e)(5).

Wholesalers who wish to sell tax-free cigarettes to Indian tribes or reservation retailers must ensure that the buyer intends to distribute the cigarettes to tax-exempt consumers, takes delivery on the reservation, and holds a valid state tax exemption certificate.<sup>5</sup> Reservation retailers may sell unstamped cigarettes only to “qualified Indian consumers,” who at the time of first purchase must provide the retailer with a “certificate of individual Indian exemption” and provide written evidence of their identity for subsequent purchases. §§ 336.6(e)(2), (g)(1).<sup>6</sup>

Wholesale distributors of tax-exempt cigarettes must hold state licenses authorizing them to purchase and affix New York cigarette tax stamps, and must collect taxes on nonexempt sales. §§ 336.7(b)(2), (e). They must also keep records reflecting the identity of the buyer in each tax-exempt sale and make monthly reports to the Department on all such sales. §§ 336.6(g)(3)–(4). New York’s regulatory scheme, unsurprisingly, imposes no restrictions on the sale of stamped cigarettes—*i. e.*, those on which taxes have been precollected by wholesalers.

## II

Respondents are wholesalers licensed by the Bureau of Indian Affairs of the United States Department of the Interior (BIA) to sell cigarettes to reservation Indians. Before New

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<sup>5</sup> See §§ 336.6(d)(1), (f)(1); § 336.7(b)(1). The purchasing tribe or retailer must display its exemption certificate at the time of first purchase, and must sign an invoice for subsequent purchases. § 336.6(g)(1).

<sup>6</sup> A “qualified Indian consumer” is an enrolled member of one of New York’s exempt Indian nations or tribes “who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian’s own use or consumption (*i. e.*, other than for resale) within such reservation.” § 336.6(b)(1)(ii).

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York's cigarette tax enforcement scheme went into effect, they filed separate suits in the Supreme Court in Albany County alleging that the regulations were pre-empted by the federal Indian Trader Statutes, 25 U. S. C. §261 *et seq.* The trial court agreed and issued an injunction. After the Appellate Division affirmed, *Milhelm Attea & Bros., Inc. v. Dept. of Taxation and Finance of New York*, 164 App. Div. 2d 300, 564 N. Y. S. 2d 491 (1990), and the New York Court of Appeals denied review, we granted certiorari, vacated the judgment of the Appellate Division, and remanded for further consideration in the light of our decision in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991). 502 U. S. 1053 (1992). On remand, the Appellate Division upheld the regulations, 181 App. Div. 2d 210, 585 N. Y. S. 2d 847 (1992), but the Court of Appeals reversed, 81 N. Y. 2d 417, 615 N. E. 2d 994 (1993).

The Court of Appeals distinguished our decisions holding that a State may require Indian retailers to collect a tax imposed on non-Indian purchasers of cigarettes, see *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980), on the ground that those cases involved the regulation of sales to non-Indian consumers. 81 N. Y. 2d, at 425, 615 N. E. 2d, at 997. In the Court of Appeals' view, this case was significantly different because New York's regulations apply to sales by non-Indian wholesalers to reservation Indians. *Ibid.* The court concluded that the Indian Trader Statutes, as construed in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U. S. 685 (1965), deprived the States of all power to impose regulatory burdens on licensed Indian traders. 81 N. Y. 2d, at 426–427, 615 N. E. 2d, at 997–998. Even if States could impose minimal burdens on Indian traders, the Court of Appeals alternatively held, New York's regulations are nevertheless invalid because they “impose *significant* burdens on the wholesaler.” *Id.*, at 427, 615 N. E. 2d,

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at 998. In particular, the regulations “dictate to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade.” *Ibid.* Moreover, New York’s scheme “requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, imposes a sales tax on Indian retailers.” *Ibid.*

We granted certiorari, 510 U. S. 943 (1993), and now reverse.

## III

Respondents’ challenge to New York’s regulatory scheme is essentially a facial one. In reviewing a challenge of this kind, we do not rest our decision on consequences that, while possible, are by no means predictable. For example, respondents do not contest the factual accuracy of the Department’s initial calculations of “probable demand” for tax-exempt cigarettes at particular reservations, see Record 244–248; rather, they challenge the Department’s authority to impose such limits at all. Therefore, for present purposes we must assume that the allocations for each reservation will be sufficiently generous to satisfy the legitimate demands of those reservation Indians who smoke cigarettes. In other respects as well, we confine ourselves to those alleged defects that inhere in the regulations as written.

A second limitation on our review flows from the nature of respondents’ challenge. Their claim is that the New York scheme interferes with their federally protected activities as Indian traders who sell goods at wholesale to reservation Indians. While the effect of the New York scheme on Indian retailers and consumers may be relevant to that inquiry, see *Warren Trading Post*, 380 U. S., at 691, this case does not require us to assess for all purposes each feature of New York’s tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs. Here

we confront the narrower question whether the New York scheme is inconsistent with the Indian Trader Statutes.

#### IV

Throughout this Nation's history, Congress has authorized "sweeping" and "comprehensive federal regulation" over persons who wish to trade with Indians and Indian tribes. *Warren Trading Post*, 380 U. S., at 687–689. An exercise of Congress' power to "regulate Commerce . . . with the Indian Tribes," see U. S. Const., Art. I, §8, cl. 3, the Indian Trader Statutes were enacted to prevent fraud and other abuses by persons trading with Indians. See *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U. S. 160, 163–164 (1980). The provision principally relied upon by respondents and by the Court of Appeals, enacted in 1876 and captioned "Power to appoint traders with Indians," states:

"The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 19 Stat. 200, 25 U. S. C. §261.<sup>7</sup>

In *Warren Trading Post*, we held that this provision prevented Arizona from imposing a tax on the income or gross sales proceeds of licensed Indian traders dealing with reservation Indians. The Indian Trader Statutes and the "apparently all-inclusive regulations" under them, we stated, "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so

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<sup>7</sup>The other Indian trader provisions state that persons who establish their fitness to trade with Indians to the BIA's satisfaction shall be permitted to do so, 25 U. S. C. §262, authorize the President to prohibit the introduction of goods into Indian country and to revoke licenses, §263, and impose penalties for unauthorized trading, §264. BIA regulations under the statutes are codified at 25 CFR §§ 140.1–140.26 (1993).

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fully in hand that no room remains for state laws imposing additional burdens upon traders.” 380 U. S., at 690. Therefore, Arizona’s tax “would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.” *Id.*, at 691. See also *Central Machinery Co.*, 448 U. S., at 163–166 (tax on proceeds of sale of farm machinery to tribe pre-empted by § 261).

Although language in *Warren Trading Post* suggests that no state regulation of Indian traders can be valid, our subsequent decisions have “undermine[d]” that proposition. See *Central Machinery*, 448 U. S., at 172 (Powell, J., dissenting). Thus, in *Moe*, we upheld a Montana law that required Indian retailers on tribal land to collect a state cigarette tax imposed on sales to non-Indian consumers. We noted that the Indian smokeshop proprietor’s competitive advantage over other retailers depended “on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.” 425 U. S., at 482. In contrast to the tax in *Warren Trading Post*, which fell directly upon an Indian trader, the cigarette tax in *Moe* fell upon a class—non-Indians—whom the State had power to tax. 425 U. S., at 483. We approved Montana’s “requirement that the Indian tribal seller collect a tax validly imposed on non-Indians” as a “minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.” *Ibid.*

In *Colville*, we upheld in relevant part a more comprehensive Washington State cigarette tax enforcement scheme that required tribal retailers selling goods on the reservation

to collect taxes on sales to nonmembers and to keep extensive records concerning these transactions. We rejected the proposition that “principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.” 447 U. S., at 155. Moreover, the Tribes had failed to meet their burden of showing that the recordkeeping requirements imposed on tribal retailers were “not reasonably necessary as a means of preventing fraudulent transactions.” *Id.*, at 160.<sup>8</sup> See also *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U. S. 9, 11–12 (1985) (*per curiam*).

In *Potawatomi*, we held that sovereign immunity barred the State of Oklahoma’s suit against a Tribe to recover cigarette taxes owed for sales to non-Indians at a convenience store owned by the Tribe. In response to the State’s protest that the Tribe’s immunity from suit made the State’s recognized authority to tax cigarette sales to non-Indians a “right without any remedy,” 498 U. S., at 514, we explained that alternative remedies existed for state tax collectors, such as damages actions against individual tribal officers or agreements with the tribes. *Ibid.* We added that “States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, [447 U. S.,] at 161–162, or by assessing wholesalers

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<sup>8</sup>We described the recordkeeping requirements as follows:

“The state sales tax scheme requires smokeshop operators to keep detailed records of both taxable and nontaxable transactions. The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.” *Colville*, 447 U. S., at 159.



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who supplied unstamped cigarettes to the tribal stores.”  
*Ibid.*

## V

This is another case in which we must “reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.” *McClanahan v. Arizona Tax Comm’n*, 411 U. S. 164, 165 (1973). Resolution of conflicts of this kind does not depend on “rigid rule[s]” or on “mechanical or absolute conceptions of state or tribal sovereignty,” but instead on “a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 142, 145 (1980). See also *Cotton Petroleum Corp. v. New Mexico*, 490 U. S. 163, 176 (1989).

The specific kind of state tax obligation that New York’s regulations are designed to enforce—which falls on non-Indian purchasers of goods that are merely retailed on a reservation—stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on “value generated on the reservation by activities involving the Tribes,” *Colville*, 447 U. S., at 156–157. *Moe*, *Colville*, and *Potawatomi* make clear that the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes’ modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere. The “balance of state, federal, and tribal interests,” *Rice v. Rehner*, 463 U. S. 713, 720 (1983), in this area thus leaves more room for state regulation than in others. In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.

Although *Moe* and *Colville* dealt most directly with claims of interference with tribal sovereignty,<sup>9</sup> the reasoning of those decisions requires rejection of the submission that 25 U. S. C. § 261 bars any and all state-imposed burdens on Indian traders. It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers, who often (as in this case) are not.<sup>10</sup> Such a ruling might well have the perverse consequence of casting greater state tax enforcement burdens on the very reservation Indians whom the Indian Trader Statutes were enacted to protect. Just as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose. A regulation designed to prevent non-Indians from evading taxes may well burden Indian traders in the sense that it reduces the competitive advantage offered by trading unlimited quantities of tax-free goods; but that consideration is no more weighty in the case of Indian traders engaged in wholesale transactions than it was in the case of reservation retailers.

The state law we found pre-empted in *Warren Trading Post* was a tax directly “imposed upon Indian traders for trading with Indians.” 380 U. S., at 691. See also *Central Machinery*, 448 U. S., at 164. That characterization does

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<sup>9</sup> In fact, in *Colville*, the tribal retailers obligated to collect state taxes on cigarette sales to non-Indians and keep detailed sales records were licensed Indian traders. See *Confederated Tribes of Colville v. State of Wash.*, 446 F. Supp. 1339, 1347 (ED Wash. 1978).

<sup>10</sup> According to the Federal Government, there are approximately 125 federally licensed Indian traders in New York, of whom the 64 wholesalers are all non-Indians and the 61 retailers are all Indians. See Brief for United States as *Amicus Curiae* 2, n. 1.

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not apply to regulations designed to prevent circumvention of “concededly lawful” taxes owed by non-Indians. See *Moe*, 425 U. S., at 482–483. Although broad language in our opinion in *Warren Trading Post* lends support to a contrary conclusion, we now hold that Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes. That conclusion does not, of course, answer the Court of Appeals’ alternative basis for striking down the New York scheme—namely, that it imposes *excessive* burdens on Indian traders.

## VI

Respondents vigorously object to the limitation of wholesaler’s tax-exempt cigarette sales through the “probable demand” mechanism. We are persuaded, however, that New York’s decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream is a “reasonably necessary” method of “preventing fraudulent transactions,” one that “polices against wholesale evasion of [New York’s] own valid taxes without unnecessarily intruding on core tribal interests.” *Colville*, 447 U. S., at 160, 162. The sole purpose and justification for the quotas on untaxed cigarettes is the State’s legitimate interest in avoiding tax evasion by non-Indian consumers. By imposing a quota on *tax-free* cigarettes, New York has not sought to dictate “the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.” 25 U. S. C. §261. Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price. If the Department’s “probable demand” calculations are adequate, tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption. While the possibility of an inadequate quota may provide the basis for a future challenge to the *application* of the regulations, we are unwilling to assume, in the absence

of any such showing by respondents, that New York will underestimate the legitimate demand for tax-free cigarettes. The associated requirement that the Department preapprove deliveries of tax-exempt cigarettes in order to ensure compliance with the quotas does not render the scheme facially invalid. This procedure should not prove unduly burdensome absent wrongful withholding or delay of approval—problems that can be addressed if and when they arise. See *Colville*, 447 U. S., at 160 (burden of showing that tax enforcement scheme imposes excessive regulatory burdens is on challenger).

New York's requirements that wholesalers sell untaxed cigarettes only to persons who can produce valid exemption certificates and that wholesalers maintain detailed records on tax-exempt transactions likewise do not unduly interfere with Indian trading. The recordkeeping requirements and eligible buyer restrictions in the New York scheme are no more demanding than the comparable measures we approved in *Colville*. See n. 8, *supra*. Indeed, because wholesale trade typically involves a comparatively small number of large-volume sales, the transactional recordkeeping requirements imposed on Indian traders in this case are probably less onerous than those imposed on retailers in *Moe* and *Colville*. By requiring wholesalers to precollect taxes on, and affix stamps to, cigarettes destined for nonexempt consumers, New York has simply imposed on the wholesaler the same precollection obligation that, under *Moe* and *Colville*, may be imposed on reservation retailers. We therefore disagree with the Court of Appeals' conclusion that New York has in this way "impose[d] a sales tax *on Indian retailers*." 81 N. Y. 2d, at 427, 615 N. E. 2d, at 998 (emphasis added). Again assuming that the "probable demand" calculations leave ample room for legitimately tax-exempt sales, the precollection regime will not require prepayment of any tax to which New York is not entitled.

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The United States, as *amicus* supporting affirmance, agrees with the Court of Appeals' alternative holding that the New York scheme improperly burdens Indian trading. In addition to the provisions disapproved by the Court of Appeals, the United States attacks the requirement that reservation *retailers* obtain state tax exemption certificates on the ground that it invades the BIA's "sole power and authority" to appoint Indian traders. We do not, however, understand the regulations to do anything more than establish a method of identifying those retailers who are already engaged in the business of selling cigarettes. At this stage, we will not assume that the Department would refuse certification to any federally authorized trader or stultify tribal economies by refusing certification to new reservation retailers. Indeed, the Department assures us that certification is "virtually automatic" upon submission of an application. Reply Brief for Petitioners 5 (citing 20 N. Y. C. R. R. § 336.6(f)(1) (1992)).

The United States also objects to the provisions for establishing "trade territories" and allocating each reservation's overall quota among its retail outlets. Depending upon how they are applied in particular circumstances, these provisions may present significant problems to be addressed in some future proceeding. However, the record before us furnishes no basis for identifying or evaluating any such problem. Agreements between the Department and individual tribes might avoid or resolve problems that are now purely hypothetical.<sup>11</sup> Possible problems involving the allocation of

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<sup>11</sup> *Amicus* the Seneca Nation argues that New York's cigarette tax regulations violate treaties between it and the United States insofar as the regulations allow New York to tax any transactions occurring on Seneca tribal lands. See Brief for Seneca Nation of Indians as *Amicus Curiae* 18–26; but see Brief for United States as *Amicus Curiae* 21–24. We do not address this contention, which differs markedly from respondents' position and which was not addressed by the Court of Appeals. See *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56, 60, n. 2 (1981).

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cigarettes among reservation retailers would not necessarily threaten any harm to respondent wholesalers, whose main interest lies in selling the maximum number of cigarettes, however ultimately allocated.

Because we conclude that New York's cigarette tax enforcement regulations do not, on their face, violate the Indian Trader Statutes, the judgment of the New York Court of Appeals is reversed.

*It is so ordered.*

## Syllabus

O'MELVENY & MYERS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR AMERICAN DIVERSIFIED SAVINGS BANK, ET AL.

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

No. 93–489. Argued March 21, 1994—Decided June 13, 1994

Respondent Federal Deposit Insurance Corporation (FDIC), receiver for an insolvent California savings and loan (S&L), caused the S&L to make refunds to investors in certain fraudulent real estate syndications in which the S&L had been represented by petitioner law firm. The FDIC filed suit against petitioner in the Federal District Court and alleged state causes of action for professional negligence and breach of fiduciary duty. Petitioner moved for summary judgment, alleging, *inter alia*, that knowledge of the fraudulent conduct of the S&L's officers must be imputed to the S&L, and hence to the FDIC, which, as receiver, stood in the S&L's shoes; and thus the FDIC was estopped from pursuing its tort claims. The court granted the motion, but the Court of Appeals reversed, indicating that a federal common-law rule of decision controlled.

*Held:* The California rule of decision, rather than a federal rule, governs petitioner's tort liability. Pp. 83–89.

(a) State law governs the imputation of corporate officers' knowledge to a corporation that is asserting causes of action created by state law. There is no federal general common law, *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, and the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation. Pp. 83–85.

(b) California law also governs the narrower question whether corporate officers' knowledge can be imputed to the FDIC suing as receiver. This Court will not adopt a judge-made federal rule to supplement comprehensive and detailed federal statutory regulation; matters left unaddressed in such a scheme are presumably left to state law. Title 12 U. S. C. § 1821(d)(2)(A)(i)—which states that “the [FDIC] shall, . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution”—places the FDIC in the insolvent S&L's shoes to pursue its claims under state law, except where some provision in the extensive framework of the Financial Institutions Re-

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form, Recovery, and Enforcement Act of 1989 (FIRREA) specifically creates a special federal rule of decision. Pp. 85–87.

(c) Judicial creation of a special federal rule would not be justified even if FIRREA is inapplicable to the instant receivership, which began in 1986. Instances where a special federal rule is warranted are few and restricted, limited to situations where there is a significant conflict between some federal policy or interest and the use of state law. The FDIC has identified no significant conflict here, not even one implicating the most lightly invoked federal interest: uniformity. Pp. 87–89.

969 F. 2d 744, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which BLACKMUN, O'CONNOR, and SOUTER, JJ., joined, *post*, p. 90.

*Rex E. Lee* argued the cause for petitioner. With him on the briefs were *Robert D. McLean, Carter G. Phillips, Joseph R. Guerra, Peter D. Keisler, Richard D. Bernstein, Gregory R. Smith, Joseph M. Lipner, and Elliot Brown.*

*Deputy Solicitor General Bender* argued the cause for respondents. With him on the brief were *Solicitor General Days, James A. Feldman, Ann S. DuRoss, Richard J. Osterman, and Jerome A. Madden.\**

JUSTICE SCALIA delivered the opinion of the Court.

The issue in this case is whether, in a suit by the Federal Deposit Insurance Corporation (FDIC) as receiver of a feder-

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\*Briefs of *amici curiae* urging reversal were filed for Arthur Andersen & Co. et al. by *Carl D. Liggio, Kathryn A. Oberly, Jon N. Ekdahl, Harris J. Amhowitz, Howard J. Krongard, Edwin D. Scott, and Eldon Olson*; for Banking and Business Lawyers by *Keith R. Fisher, John C. Deal, David S. Willenzik, Neal L. Petersen, Henry H. Fox, and Michael J. Halloran*; and for Lee H. Henkel III by *Keith A. Jones.*

*C. Edward Simpson, Theodore H. Focht, and Michael E. Don* filed a brief for the Securities Investor Protection Corporation et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *R. William Ide III, John J. Curtin, Jr., and Arthur W. Leibold, Jr.*; and for Shradler & York et al. by *Eugene B. Wilshire, Jr., and Patrick J. Dyer.*



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ally insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank.

## I

American Diversified Savings Bank (ADSB or S&L) is a California-chartered and federally insured savings and loan. The following facts have been stipulated to, or are uncontroverted, by the parties to the case, and we assume them to be true for purposes of our decision. ADSB was acquired in 1983 by Ranbir Sahni and Lester Day, who respectively obtained 96% and 4% of its stock, and who respectively served as its chairman/CEO and president. Under their leadership, ADSB engaged in many risky real estate transactions, principally through limited partnerships sponsored by ADSB and its subsidiaries. Together, Sahni and Day also fraudulently overvalued ADSB's assets, engaged in sham sales of assets to create inflated "profits," and generally "cooked the books" to disguise the S&L's dwindling (and eventually negative) net worth.

In September 1985, petitioner O'Melveny & Myers, a Los Angeles-based law firm, represented ADSB in connection with two real estate syndications. At that time, ADSB was under investigation by state and federal regulators, but that fact had not been made public. In completing its work for the S&L, petitioner did not contact the accounting firms that had previously done work for ADSB, nor state and federal regulatory authorities, to inquire about ADSB's financial status. The two real estate offerings on which petitioner worked closed on December 31, 1985. On February 14, 1986, federal regulators concluded that ADSB was insolvent and that it had incurred substantial losses because of violations of law and unsound business practices. Respondent stepped

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in as receiver for ADSB,<sup>1</sup> and on February 19, 1986, filed suit against Messrs. Sahni and Day in Federal District Court, alleging breach of fiduciary duty and, as to Sahni, Racketeer Influenced and Corrupt Organizations Act violations. Soon after taking over as receiver, respondent began receiving demands for refunds from investors who claimed that they had been deceived in connection with the two real estate syndications. Respondent caused ADSB to rescind the syndications and to return all of the investors' money plus interest.

On May 12, 1989, respondent sued petitioner in the United States District Court for the Central District of California, alleging professional negligence and breach of fiduciary duty. The parties stipulated to certain facts and petitioner moved for summary judgment, arguing that (1) it owed no duty to ADSB or its affiliates to uncover the S&L's own fraud; (2) that knowledge of the conduct of ADSB's controlling officers must be imputed to the S&L, and hence to respondent, which, as receiver, stood in the shoes of the S&L; and (3) that respondent was estopped from pursuing its tort claims against petitioner because of the imputed knowledge. On May 15, 1990, the District Court granted summary judgment, explaining only that petitioner was "entitled to judgment in its favor . . . as a matter of law." The Court of Appeals for the Ninth Circuit reversed, on grounds that we shall discuss below. 969 F. 2d 744 (1992). Petitioner filed a petition for writ of certiorari, which we granted. 510 U. S. 989 (1993).

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<sup>1</sup>For simplicity's sake, we refer to a "receiver" throughout, which we identify as the FDIC. The reality was more complicated. The first federal entity involved was the Federal Savings and Loan Insurance Corporation (FSLIC), which was appointed conservator of ADSB in 1986 and receiver in June 1988. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183, abolished FSLIC, and caused FDIC, the manager of the FSLIC resolution fund, to be substituted as receiver and party to this case. See *id.*, §§215, 401(a)(1), 401(f)(2).

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## II

It is common ground that the FDIC was asserting in this case causes of action created by California law. Respondent contends that in the adjudication of those causes of action (1) a federal common-law rule and not California law determines whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation; and (2) even if California law determines the former question, federal common law determines the more narrow question whether knowledge by officers so acting will be imputed to the FDIC when it sues as receiver of the corporation.<sup>2</sup>

The first of these contentions need not detain us long, as it is so plainly wrong. "There is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78 (1938), and (to anticipate somewhat a point we will elaborate more fully in connection with respondent's second contention) the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation. See *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U. S. 29, 33–34 (1956). The Ninth Circuit believed that its conclusion on this point was in harmony with *Schacht v. Brown*, 711 F. 2d 1343 (CA7 1983), *Cenco Inc. v. Seidman & Seidman*, 686 F. 2d 449 (CA7 1982), and *In re Investors Funding Corp. of N. Y. Securities Litigation*, 523 F. Supp. 533 (SDNY 1980), 969 F. 2d, at 750, but even a cursory examination of those cases shows the contrary. In *Cenco*, where the cause of action similarly arose under state common law, the Seventh Circuit's analysis of

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<sup>2</sup>The Court of Appeals appears to have agreed with the first of these contentions. Instead of the second, however, it embraced the proposition that federal common law prevents the attributed knowledge of corporate officers acting against the corporation's interest from being used as the basis for an estoppel defense against the FDIC as receiver. Since there is nothing but a formalistic distinction between this argument and the second one described in text, we do not treat it separately.

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the “circumstances under which the knowledge of fraud on the part of the plaintiff’s directors [would] be imputed to the plaintiff corporation [was] merely an attempt to divine how Illinois courts would decide that issue.” *Schacht, supra*, at 1347 (citing *Cenco, supra*, at 455). Likewise, in *Investors Funding*, the District Court analyzed the potential affirmative defenses to the state-law claims by applying “[t]he controlling legal principles [of] New York law.” 523 F. Supp., at 540. In *Schacht*, the Seventh Circuit expressly noted that “the cause of action [at issue] arises under RICO, a federal statute; we therefore write on a clean slate and may bring to bear federal policies in deciding the estoppel question.” 711 F. 2d, at 1347.

In seeking to defend the Ninth Circuit’s holding, respondent contends (to quote the caption of its argument) that “The Wrongdoing Of ADSB’s Insiders Would Not Be Imputed To ADSB Under Generally Accepted Common Law Principles,” Brief for Respondent 12—in support of which it attempts to show that nonattribution to the corporation of dishonest officers’ knowledge is the rule applied in the vast bulk of decisions from 43 jurisdictions, ranging from Rhode Island to Wyoming. See, *e. g.*, *id.*, at 21–22, n. 9 (distinguishing, *inter alia*, *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 65 A. 641 (1905), and *American Nat. Bank of Powell v. Foodbasket*, 497 P. 2d 546 (Wyo. 1972)). The supposed relevance of this is set forth in a footnote: “It is our position that federal common law does govern this issue, but that the content of the federal common law rule corresponds to the rule that would independently be adopted by most jurisdictions.” Brief for Respondent 15, n. 3. If there were a federal common law on such a generalized issue (which there is not), we see no reason why it would necessarily conform to that “independently . . . adopted by most jurisdictions.” But the short of the matter is that California law, not federal law, governs the imputation of knowledge to corporate victims of

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alleged negligence, and that is so whether or not California chooses to follow “the majority rule.”

We turn, then, to the more substantial basis for the decision below, which asserts federal pre-emption not over the law of imputation generally, but only over its application to the FDIC suing as receiver. Respondent begins its defense of this principle by quoting *United States v. Kimbell Foods, Inc.*, 440 U. S. 715, 726 (1979), to the effect that “federal law governs questions involving the rights of the United States arising under nationwide federal programs.” But the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of ADSB. In any event, knowing whether “federal law governs” in the *Kimbell Foods* sense—a sense which includes federal adoption of state-law rules, see *id.*, at 727–729—does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied to the issue of imputation or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California’s own sovereign power or federal adoption of California’s disposition. See *Boyle v. United Technologies Corp.*, 487 U. S. 500, 507, n. 3 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 97 (1981); *Milwaukee v. Illinois*, 451 U. S. 304, 319 (1981). Petitioner asserts that both these principles apply in the present case, by reason of 12 U. S. C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV), and the comprehensive legislation of which it is a part, the Financial Institutions

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Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183.

Section 1821(d)(2)(A)(i), which is part of a title captioned “Powers and duties of [the FDIC] as . . . receiver,” states that “the [FDIC] shall, . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . .” 12 U. S. C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver “steps into the shoes” of the failed S&L, cf. *Coit Independence Joint Venture v. FSLIC*, 489 U. S. 561, 585 (1989), obtaining the rights “of the insured depository institution” that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims of the S&L—in this case California tort claims potentially defeasible by a showing that the S&L’s officers had knowledge—“any defense good against the original party is good against the receiver.” 969 F. 2d, at 751 (quoting *Allen v. Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts’ authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See 12 U. S. C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limitations beyond period that might exist under state law); §§ 1821(e)(1), (3) (precluding state-law claims against the FDIC under certain contracts it is authorized to repudiate); § 1821(k) (permitting claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability); § 1821(d)(9) (excluding certain state-law claims against FDIC based on oral agreements by the S&L). *Inclusio unius, exclusio alterius*. It is hard to

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avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional “federal common-law” exceptions is not to “supplement” this scheme, but to alter it.

We have thought it necessary to resolve the effect of FIRREA because respondent argued that the statute not only did not prevent but positively authorized federal common law. We are reluctant to rest our judgment on FIRREA alone, however, since that statute was enacted into law in 1989, while respondent took over as receiver for ADSB in 1986. The FDIC is willing to “assume . . . that FIRREA would have taken effect in time to be relevant to this case,” Brief for Respondent 35, n. 21, but it is not self-evident that that assumption is correct. See *Landgraf v. USI Film Products*, 511 U. S. 244, 268–270, 274 (1994); cf. *id.*, at 290–291 (SCALIA, J., concurring in judgment). It seems to us imprudent to resolve the retroactivity question without briefing, and inefficient to pretermitt the retroactivity issue on the basis of the FDIC’s concession, since that would make our decision of limited value in other cases. As we proceed to explain, even assuming the inapplicability of FIRREA this is not one of those cases in which judicial creation of a special federal rule would be justified.

Such cases are, as we have said in the past, “few and restricted,” *Wheeldin v. Wheeler*, 373 U. S. 647, 651 (1963), limited to situations where there is a “significant conflict between some federal policy or interest and the use of state law.” *Wallis v. Pan American Petroleum Corp.*, 384 U. S. 63, 68 (1966). Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision. See, e. g., *Kamen v. Kemper Financial Services, Inc.*, 500 U. S. 90, 98 (1991); *Boyle, supra*, at 508; *Kimbell Foods*, 440 U. S., at 728. Not only the permissibility but also the scope of judicial displacement of state rules

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turns upon such a conflict. See, *e. g.*, *Kamen, supra*, at 98; *Boyle, supra*, at 508. What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in “federal common-law” rules. See *United States v. Yazell*, 382 U. S. 341, 347, n. 13 (1966).

The closest respondent comes to identifying a specific, concrete federal policy or interest that is compromised by California law is its contention that state rules regarding the imputation of knowledge might “deplet[e] the deposit insurance fund,” Brief for Respondent 32. But neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent must mean by “depletion” is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, “federal-common-law” causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected “more money” arguments remarkably similar to the one made here. See *Kimbell Foods, supra*, at 737–738; *Yazell, supra*, at 348; cf. *Robertson v. Wegmann*, 436 U. S. 584, 593 (1978).



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Even less persuasive—indeed, positively probative of the dangers of respondent’s facile approach to federal-common-law-making—is respondent’s contention that it would “deserve the federal program” to permit California to insulate “the attorney’s or accountant’s malpractice,” thereby imposing costs “on the nation’s taxpayers, rather than on the negligent wrongdoer.” Brief for Respondent 32. By presuming to judge what constitutes malpractice, this argument demonstrates the runaway tendencies of “federal common law” untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy. What sort of tort liability to impose on lawyers and accountants in general, and on lawyers and accountants who provide services to federally insured financial institutions in particular, “involves a host of considerations that must be weighed and appraised,” *Northwest Airlines, Inc.*, 451 U. S., at 98, n. 41 (quoting *United States v. Gilman*, 347 U. S. 507, 512–513 (1954))—including, for example, the creation of incentives for careful work, provision of fair treatment to third parties, assurance of adequate recovery by the federal deposit insurance fund, and enablement of reasonably priced services. Within the federal system, at least, we have decided that that function of weighing and appraising “is more appropriately for those who write the laws, rather than for those who interpret them.” *Northwest Airlines, supra*, at 98, n. 41 (quoting *Gilman, supra*, at 513).

We conclude that this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted. As noted earlier, the parties are in agreement that if state law governs it is the law of California; but they vigorously disagree as to what that law provides. We leave it to the Ninth Circuit to resolve that point. The judgment is reversed and the case remanded for proceedings consistent with this opinion.

*So ordered.*

STEVENS, J., concurring

JUSTICE STEVENS, with whom JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SOUTER join, concurring.

While I join the Court's opinion, I add this comment to emphasize an important difference between federal courts and state courts. It would be entirely proper for a state court of general jurisdiction to fashion a rule of agency law that would protect creditors of an insolvent corporation from the consequences of wrongdoing by corporate officers even if the corporation itself, or its shareholders, would be bound by the acts of its agents. Indeed, a state court might well attach special significance to the fact that the interests of taxpayers as well as ordinary creditors will be affected by the rule at issue in this case. Federal courts, however, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 95 (1981). Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.

Cases like this one, however, present a special problem. They raise issues, such as the imputation question here, that may not have been definitively settled in the state jurisdiction in which the case is brought, but that nevertheless must be resolved by federal courts. The task of the federal judges who confront such issues would surely be simplified if Congress had provided them with a uniform federal rule to apply. As matters stand, however, federal judges must do their best to estimate how the relevant state courts would perform their lawmaking task, and then emulate that sometimes purely hypothetical model. The Court correctly avoids any suggestion about how the merits of the imputation issue should be resolved on remand or in similar cases that may arise elsewhere. "The federal judges who deal

STEVENS, J., concurring

regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.” *Butner v. United States*, 440 U. S. 48, 58 (1979).

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HOWLETT *v.* BIRKDALE SHIPPING CO., S. A.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 93–670. Argued April 20, 1994—Decided June 13, 1994

Petitioner Howlett, a longshoreman employed by stevedore Northern Shipping Co., was injured when he slipped and fell on a sheet of clear plastic that had been placed under bags he was discharging from a cargo hold on a ship owned and operated by respondent Birkdale Shipping Co. He filed suit against Birkdale under § 5(b) of the Longshore and Harbor Workers' Compensation Act, which requires shipowners to exercise ordinary care to maintain a ship and its equipment in a condition so that an expert and experienced stevedore can load and unload cargo with reasonable safety. As a corollary to this "turnover duty," a shipowner must warn the stevedore of latent hazards that are known or should be known to the shipowner. Here, the evidence showed that the vessel had supplied the plastic to the loading stevedore in Guayaquil, Ecuador, and that that stevedore had placed it under the bags, even though this was improper. Howlett charged that Birkdale was negligent in failing to warn Northern and its employees of this dangerous condition. The District Court granted Birkdale summary judgment, finding that Howlett had not demonstrated that Birkdale had actual knowledge of the hazardous condition, and that the condition was not open and obvious. It declined to infer such knowledge from the fact that the vessel had supplied the Guayaquil stevedore with the plastic or that the vessel's crew was present during the loading operation. Even if the plastic's improper use was apparent to the crew in Guayaquil, the court added, then it was also an open and obvious condition for which Howlett could not recover. The Court of Appeals affirmed.

*Held:*

1. A vessel's turnover duty to warn of latent defects in the cargo stow is narrow. As a general rule, the duty to warn attaches only to hazards that are not known to the stevedore and that would be neither obvious to, nor anticipated by, a skilled stevedore in the competent performance of its work. *Scindia Steam Nav. Co. v. De los Santos*, 451 U. S. 156, 167. Subjecting vessels to suit for injuries that could be so anticipated would upset the balance Congress was careful to strike when it amended the Act in 1972 to shift more of the responsibility for compensating injured longshoremen to stevedores, who are best able to avoid acci-

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dents during cargo operations. In addition, absent a vessel's actual knowledge of a hazard, the turnover duty attaches only if the exercise of reasonable care would place upon the vessel an obligation to inspect for or discover the hazard's existence. Contrary to Howlett's submission, however, the exercise of reasonable care does not require a vessel to supervise the ongoing operations of the loading stevedore or other stevedores handling the cargo before it arrives in port, or to inspect the completed stow, to discover hazards in the cargo stow. Pp. 96–105.

2. The District Court erred in resting summary judgment on the ground that the vessel had no actual knowledge of the hazard leading to Howlett's injury. Some crew members, who might have held positions such that their knowledge should be attributed to the vessel, might have observed the plastic being placed under the bags during the loading process. The court's additional theory that the condition would have been open and obvious to the stevedore during unloading had it been obvious to the crew may also prove faulty, being premised on the vessel's state of affairs during loading, not discharge. Of course, the vessel may be entitled to summary judgment, since there is evidence that the plastic was visible during unloading, and since Howlett must demonstrate that the alleged hazard would not have been obvious to, or anticipated by, a skilled and competent stevedore at the discharge port. Pp. 105–106.

998 F. 2d 1003, vacated and remanded.

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

*Charles Sovel* argued the cause for petitioner. With him on the briefs was *Stanley B. Gruber*.

*Carl D. Buchholz III* argued the cause for respondent. With him on the brief was *Michael P. Zipfel*.\*

JUSTICE KENNEDY delivered the opinion of the Court.

Under § 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b), a shipowner must exercise ordinary care to maintain the ship and its equipment in a

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\**Thomas D. Wilcox* and *Charles T. Carroll, Jr.*, filed a brief for the National Association of Waterfront Employers as *amicus curiae* urging reversal.

*Graydon S. Staring* and *John A. Flynn* filed a brief for the American Institute of Merchant Shipping as *amicus curiae* urging affirmance.

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condition so that an expert and experienced stevedore can load and unload cargo with reasonable safety. As a corollary to this duty, the shipowner must warn the stevedore of latent hazards, as the term is defined in maritime law, that are known or should be known to the shipowner. This case requires us to define the circumstances under which a shipowner must warn of latent hazards in the cargo stow or cargo area.

## I

The case arrives after a grant of summary judgment to respondent Birkdale Shipping Co., S. A., so we consider the facts in the light most favorable to petitioner Albert Howlett. Howlett, a longshoreman employed in the Port of Philadelphia by stevedore Northern Shipping Co., was injured while discharging bags of cocoa beans from a cargo hold on the MV *Presidente Ibanez*, a ship owned and operated by Birkdale. During the unloading operation, Howlett and three other longshoremen hooked up a draft, or load, of bags stowed on the tween deck of the hold. When the ship's boom lifted the draft out of the hold, an 8-square-foot area of the tween deck was exposed. Howlett, who was standing on surrounding bags, jumped down about three feet to the deck, where he slipped and fell on a sheet of clear plastic that had been placed under the cargo. As a result of his fall, Howlett sustained serious injuries that have disabled him from returning to work as a longshoreman.

Howlett brought suit against Birkdale under § 5(b) of the Act. Both parties agreed that it is customary to lay paper and plywood on a steel deck to protect a stow of cocoa beans against condensation damage. They also agreed that, for purposes of protecting the beans, it was improper to use plastic, which tends to aggravate condensation damage rather than prevent it. Evidence adduced during pretrial proceedings suggested that the independent stevedore engaged by Birkdale to load the beans in Guayaquil, Ecuador, had placed the plastic on the tween deck. Further evidence

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showed that the vessel had supplied the Guayaquil stevedore with the plastic, along with other material used in stowing cargo, including paper, plywood, and dunnage. Howlett claimed that before jumping to the deck he did not see the plastic, which was covered by dirt and debris. He charged that Birkdale was negligent in failing to warn Northern and its longshoremen-employees of this dangerous condition.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Birkdale. Relying upon *Derr v. Kawasaki Kisen K. K.*, 835 F. 2d 490 (CA3 1987), cert. denied, 486 U. S. 1007 (1988), the court held that Howlett, to prevail on his failure-to-warn claim, had to demonstrate that Birkdale had actual knowledge of the hazardous condition and that the condition was not open and obvious. After reviewing the record, the court concluded that Howlett had failed to present evidence sufficient to sustain his claim. The court declined to infer that Birkdale had actual knowledge of the condition from the fact that it had supplied the Guayaquil stevedore with the plastic, reasoning that “being the supplier of equipment does not necessarily imply knowledge of its intended purpose.” App. to Pet. for Cert. 4a. The court further declined to infer actual knowledge from the fact that the members of the vessel’s crew were present on the top deck during the loading operation. And even if the Guayaquil stevedore’s improper use of plastic had been apparent to the crew, the court continued, “then it readily transpires that this was an open and obvious condition” for which Howlett could not recover. *Ibid.* The Court of Appeals affirmed without opinion, judgment order reported at 998 F. 2d 1003 (CA3 1993).

We granted certiorari, 510 U. S. 1039 (1994), to resolve a conflict among the Circuits regarding the scope of the shipowners’ duty to warn of latent hazards in the cargo stow, an inquiry that depends in large part upon the nature of the shipowners’ duty to inspect for such defects. Compare *Derr v. Kawasaki Kisen K. K.*, *supra* (vessel need not inspect or

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supervise the loading stevedore's cargo operations for the benefit of longshoremen in later ports), with *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (CA9 1981) (vessel must supervise a foreign stevedore's loading operations), cert. denied, 459 U.S. 967 (1982).

## II

The Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death. See generally T. Schoenbaum, *Admiralty and Maritime Law* § 6-6 (1987); M. Norris, *Law of Maritime Personal Injuries* §§ 4:11, 4:22-4:29 (4th ed. 1990). The injured longshoreman's employer—in most instances, an independent stevedore, see *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263-264 (1979)—must pay the statutory benefits regardless of fault, but is shielded from any further liability to the longshoreman. See 33 U.S.C. §§ 904, 905(a); Norris, *supra*, §§ 4:7-4:10.

The longshoreman also may seek damages in a third-party negligence action against the owner of the vessel on which he was injured, and may do so without forgoing statutory compensation if he follows certain procedures. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). Section 5(b) provides in relevant part:

“In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . , and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness



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or a breach thereof at the time the injury occurred.” 33 U. S. C. § 905(b).

This provision, enacted as part of the extensive 1972 amendments to the Act, effected fundamental changes in the nature of the third-party action. First, it abolished the longshoreman’s pre-existing right to sue a shipowner based upon the warranty of seaworthiness, a right that had been established in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). Section 5(b) also eliminated the stevedore’s obligation, imposed by *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), to indemnify a shipowner, if held liable to a longshoreman, for breach of the stevedore’s express or implied warranty to conduct cargo operations with reasonable safety. See generally *Scindia Steam Nav. Co. v. De los Santos*, 451 U. S. 156, 165 (1981); G. Gilmore & C. Black, *Law of Admiralty* § 6–57, pp. 449–455 (2d ed. 1975) (hereinafter Gilmore & Black). Other sections of the 1972 amendments provided for a substantial increase in the statutory benefits injured longshoremen are entitled to receive from their stevedore-employers. See *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, 261–262 (1977); Gilmore & Black § 6–46, at 411; Note, 13 *Tulane Mar. L. J.* 163, 163–164 (1988). The design of these changes was to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer. See *Scindia Steam*, 451 U. S., at 171. Subjecting vessels to suit for injuries that could be anticipated and prevented by a competent stevedore would threaten to upset the balance Congress was careful to strike in enacting the 1972 amendments.

The question whether Howlett produced evidence sufficient to hold Birkdale liable for his injuries turns on the meaning of the term “negligence” in § 5(b). Because Congress did not “specify the acts or omissions of the vessel that would constitute negligence,” the contours of a vessel’s duty to longshoremen are “left to be resolved through the ‘appli-

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cation of accepted principles of tort law and the ordinary process of litigation.’” *Id.*, at 165–166.

The starting point in this regard must be our decision in *Scindia Steam*, which outlined the three general duties shipowners owe to longshoremen. The first, which courts have come to call the “turnover duty,” relates to the condition of the ship upon the commencement of stevedoring operations. See *id.*, at 167. The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the “active control of the vessel.” *Ibid.* The third duty, called the “duty to intervene,” concerns the vessel’s obligations with regard to cargo operations in areas under the principal control of the independent stevedore. See *id.*, at 167–178.

The allegations of Howlett’s complaint, and the facts adduced during pretrial proceedings, implicate only the vessel’s turnover duty. We provided a brief statement of the turnover duty in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U. S. 404 (1969): A vessel must “exercise ordinary care under the circumstances” to turn over the ship and its equipment and appliances “in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship’s service or otherwise, will be able by the exercise of ordinary care” to carry on cargo operations “with reasonable safety to persons and property.” *Id.*, at 416–417, n. 18 (internal quotation marks omitted); see also *Scindia Steam*, 451 U. S., at 167. A corollary to the turnover duty requires the vessel to warn the stevedore “of any hazards on the ship or with respect to its equipment,” so long as the hazards “are known to the vessel or should be known to it in the exercise of reasonable care,” and “would likely be encountered by the stevedore in the course of his cargo operations[,] are not known by the stevedore[,] and would not be obvious to or anticipated by him if reasonably

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competent in the performance of his work.” *Ibid.*, citing *Marine Terminals, supra*, at 416, n. 18. Although both components of the turnover duty are related in various respects, Howlett confines his case to an allegation that Birkdale failed to warn that the tween deck was covered with plastic rather than (as is ordinarily the case) paper and plywood.

Most turnover cases brought under §5(b) concern the condition of the ship itself or of equipment on the ship used in stevedoring operations. See, e. g., *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F. 2d 1204 (CA9 1989) (no handhold on coaming ladder); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (CA3 1979) (defective hatch covers), remanded, 451 U. S. 965, reinstated, 657 F. 2d 25 (CA3 1981), cert. denied, 456 U. S. 914 (1982); *Scalafani v. Moore McCormack Lines, Inc.*, 388 F. Supp. 897 (EDNY) (no handrail on platform linking gangway and deck), aff’d without opinion, 535 F. 2d 1243 (CA2 1975). The turnover duty to warn, however, may extend to certain latent hazards in the cargo stow. This is so because an improper stow can cause injuries to longshoremen, see, e. g., *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355 (1962); *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956); *Clay v. Lykes Bros. S. S. Co.*, 525 F. Supp. 306 (ED La. 1981); *The Etna*, 43 F. Supp. 303 (ED Pa. 1942), and thus is among the “hazards on the ship” to which the duty to warn attaches. *Scindia Steam*, 451 U. S., at 167.

The precise contours of the duty to warn of latent hazards in the cargo stow must be defined with due regard to the concurrent duties of the stevedore and to the statutory scheme as a whole. It bears repeating that the duty attaches only to latent hazards, defined in this context as hazards that would be neither obvious to nor anticipated by a competent stevedore in the ordinary course of cargo operations. In addition, the vessel’s duty to warn is confined to latent hazards that “are known to the vessel or should be

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known to it in the exercise of reasonable care.” *Ibid.* Absent actual knowledge of a hazard, then, the duty to warn may attach only if the exercise of reasonable care would place upon the shipowner an obligation to inspect for, or discover, the hazard’s existence. See *Kirsch v. Plovindba*, 971 F. 2d 1026, 1029 (CA3 1992) (“[T]he shipowner’s duty to warn the stevedore of hidden dangers necessarily implies a duty to inspect to discover those dangers”).

Howlett, relying upon the Restatement (Second) of Torts § 412 (1965), maintains that a vessel’s obligations in this regard are broad. Section 412 provides that an owner of land or chattels who hires an independent contractor must take reasonable steps to “ascertain whether the land or chattel is in reasonably safe condition after the contractor’s work is completed.” In light of this provision, Howlett argues that “a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make ‘reasonable’ (not continuous) inspections” during and after cargo operations to discover dangerous conditions in the stow. Brief for Petitioner 27.

We decline to adopt Howlett’s proposal. As an initial matter, we repeat our caveat that the Restatement’s land-based principles, “while not irrelevant, do not furnish sure guidance” in maritime cases brought under § 5(b). *Scindia Steam*, 451 U. S., at 168, n. 14. On a more fundamental level, Howlett’s contention that a vessel must make reasonable inspections, both during and after stevedoring operations, to discover defects in the stow contradicts the principles underlying our decision in *Scindia Steam*. The plaintiff longshoreman in *Scindia Steam*, injured by cargo that fell from a defective winch, alleged that the shipowner should have intervened in the stevedoring operations and repaired the winch before permitting operations to continue. The case thus turned not upon the turnover duty but upon the scope of the vessel’s duty to intervene once cargo operations have begun. We held that the duty to intervene, in the event the

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vessel has no knowledge of the hazardous condition, is limited: “[A]bsent contract provision, positive law, or custom to the contrary,” a vessel “has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.” *Id.*, at 172.

The rule relieving vessels from this general duty rests upon “the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.” *Ibid.*; see also *Hugev v. Dampskisaktieselskabet Int’l*, 170 F. Supp. 601, 609–610 (SD Cal. 1959), *aff’d sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int’l*, 274 F. 2d 875 (CA9), cert. denied, 363 U. S. 803 (1960). These expectations derive in part from §41 of the Act, 33 U. S. C. §941, which requires the stevedore, as the longshoreman’s employer, to provide a “reasonably safe” place to work and to take safeguards necessary to avoid injuries. *Scindia Steam*, 451 U. S., at 170. The expectations also derive from indemnity cases decided prior to the 1972 Act, which teach that “the stevedore [is] in the best position to avoid accidents during cargo operations” and that “the shipowner [can] rely on the stevedore’s warranty to perform competently.” *Id.*, at 171, citing *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U. S. 315 (1964); see also 451 U. S., at 175 (safety is “a matter of judgment committed to the stevedore in the first instance”). The stevedore’s obligations in this regard may not be diminished by transferring them to the vessel.

Given the legal and practical realities of the maritime trade, we concluded in *Scindia Steam* that imposing a duty upon vessels to supervise and inspect cargo operations for the benefit of longshoremen then on board would undermine Congress’ intent in §5(b) to terminate the vessel’s “automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore,” *id.*, at 168,

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and to foreclose liability “based on a theory of unseaworthiness or nondelegable duty,” *id.*, at 172. Agreeing with the Court, Justice Powell further observed that imposing such a duty—in light of the stevedore-employer’s right to receive reimbursement for its payment of statutory compensation if a longshoreman prevails in a §5(b) action against a vessel, see *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S., at 269–270—would “decrease significantly the incentives toward safety of the party in the best position to prevent injuries.” *Scindia Steam, supra*, at 181 (concurring opinion); see also *Edmonds, supra*, at 274 (BLACKMUN, J., dissenting). It is also worth noting that an injured longshoreman’s acceptance of statutory compensation operates as an assignment to the stevedore-employer of the longshoreman’s right to bring suit against the vessel, so long as the longshoreman does not sue within six months of accepting compensation. 33 U. S. C. §933(b). Were we to have accepted the longshoreman’s contentions in *Scindia Steam*, we would have run the risk of promoting the kind of collateral litigation between stevedores and vessels (albeit in a different guise) that had consumed an intolerable amount of litigation costs prior to the 1972 Amendments. See Gilmore & Black §6–46, at 411.

The foregoing principles, while taken from *Scindia Steam*’s examination of the vessel’s duty to intervene, bear as well on the nature of the vessel’s turnover duty, and hence on the case before us. We consider first Howlett’s view that a vessel must make reasonable inspections during stevedoring operations to ensure a proper stow and to detect any hazards or defects before they become hidden. The beneficiaries of this proposed duty would be longshoremen who unload or otherwise deal with the cargo at later ports. But if, as we held in *Scindia Steam*, a vessel need not supervise or inspect ongoing cargo operations for the benefit of longshoremen then on board, it would make little sense to impose the same obligation for the benefit of longshoremen at subse-

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quent ports. In practical effect, then, adopting Howlett's proposal would impose inconsistent standards upon shipowners as to different sets of longshoremen, and would render much of our holding in *Scindia Steam* an empty gesture.

These concerns are mitigated somewhat when a longshoreman, such as Howlett, works on cargo stowed in a foreign port and undisturbed by longshoremen in a prior American port of call. Foreign longshoremen are not covered by the Act, so requiring vessels to supervise and inspect a foreign stevedore's ongoing operations would not be inconsistent with the precise rule laid down in *Scindia Steam*. This consideration, however, does not support imposing broader duties upon vessels to inspect cargo loading operations in foreign ports. It is settled maritime custom and practice that the stevedore exercises primary control over the details of a cargo operation, see *Oregon Stevedoring, supra*, at 322–323, and we are given no reason to believe that this is any less true in foreign ports than in domestic ports.

That is not to say, of course, that the vessel and its crew remain detached from cargo operations altogether. Most vessels take responsibility, for instance, for preparing a stowage plan, which governs where each cargo will be stowed on the ship. See generally C. Sauerbier & R. Meurn, *Marine Cargo Operations* 217–239 (2d ed. 1985). But it is the stevedore, an independent contractor hired for its expertise in the stowage and handling of cargo, that is charged with actual implementation of the plan. To impose a duty upon vessels to exercise scrutiny over a cargo loading operation to discover defects that may become hidden when the stow is complete would require vessels to inject themselves into matters beyond their ordinary province. See Williams, *Shipowner Liability for Improperly Stowed Cargo: Federal Courts at Sea on the Standard of Care Owed to Off-Loading Longshoremen*, 17 *Tulane Mar. L. J.* 185, 198–199 (1993); contra *Turner v. Japan Lines, Ltd.*, 651 F. 2d, at 1304 (vessel “can ensure safety by choosing a reliable foreign stevedore

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[and] supervising its work when necessary”). The proposed rule would undermine Congress’ intent in § 5(b) to eliminate the vessel’s nondelegable duty to protect longshoremen from the negligence of others. See *Scindia Steam*, 451 U. S., at 168–169.

We next consider Howlett’s view that a vessel must make reasonable inspections after the completion of stevedoring operations to discover hazards in the stow. There is good reason to doubt that adopting this rule would have much practical import. Any hazard uncovered by a shipowner who inspects a completed stow would, as a matter of course, be discovered in a subsequent port by a stevedore “reasonably competent in the performance of his work.” *Id.*, at 167. As discussed above, shipowners engage a stevedore for its expertise in cargo operations and are entitled to assume that a competent stevedore will be able to identify and cope with defects in the stow. See *id.*, at 171; *Hugev v. Dampskisaktieselskabet Int’l*, 170 F. Supp., at 609–610. Once loading operations are complete, it follows that any dangers arising from an improper stow would be “at least as apparent to the [stevedore] as to the [shipowner].” *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S., at 366 (Stewart, J., dissenting). Because there can be no recovery under § 5(b) for a vessel’s failure to warn of dangers that would be apparent to a longshoreman of reasonable competence, *Scindia Steam, supra*, at 167, nothing would be accomplished by imposing a duty upon vessels to inspect the stow upon completion of cargo operations. That is reason enough to reject it.

For the purposes of delineating the scope of a shipowner’s turnover duty, then, the cargo stow is separate and distinct from other aspects of the ship. When between ports, the vessel and its crew have direct access to (and control over) the ship itself and its gear, equipment, and tools. The vessel’s responsibilities to inspect these areas of the ship are commensurate with its access and control, bearing in mind,



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of course, that negligence, rather than unseaworthiness, is the controlling standard where longshoremen are concerned. Because the vessel does not exercise the same degree of operational control over, and does not have the same access to, the cargo stow, its duties with respect to the stow are limited by comparison. See *Robertson v. Tokai Shosen K. K.*, 655 F. Supp. 152, 154 (ED Pa.), *aff'd*, 835 F. 2d 490 (CA3 1987), *cert. denied*, 486 U. S. 1007 (1988).

In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one. The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work. *Scindia Steam*, 451 U. S., at 167. Furthermore, the duty encompasses only those hazards that "are known to the vessel or should be known to it in the exercise of reasonable care." *Ibid.* Contrary to Howlett's submission, however, the exercise of reasonable care does not require the shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow.

## III

We turn to the proper disposition of this case. As the Court of Appeals did not issue an opinion, we have before us only the District Court's statement of its reasons for granting summary judgment in favor of Birkdale. The vessel having been under no obligation to supervise and inspect the cargo loading operations, and no other theory for charging the vessel with constructive knowledge having been advanced, the District Court was correct to inquire whether the vessel had actual knowledge of the tween deck's condition. The District Court found it undisputed that there was no actual knowledge. At this stage of the proceedings, however, we cannot conclude that summary judgment can rest on this ground. There is sufficient evidence in the record

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to support a permissible inference that, during the loading process, some crew members, who might have held positions such that their knowledge should be attributed to the vessel, did in fact observe the plastic on the tween deck. And the District Court's alternative theory that even if some crew members were aware of the condition during loading operations, then the condition also would have been open and obvious to a stevedore during unloading operations, may prove faulty as well, being premised on the state of affairs when the vessel took on cargo, not during discharge at the port where Howlett was injured.

All this does not mean that the vessel is not entitled to summary judgment. Howlett's own witnesses stated that the plastic was visible, even from the top deck, during unloading operations. Howlett must overcome these submissions, for even assuming the vessel had knowledge of the tween deck's condition, he must further demonstrate that the alleged hazard would have been neither obvious to nor anticipated by a skilled and competent stevedore at the discharge port. This contention, however, was not addressed by the District Court and was not explored in detail here. We think it the better course to remand the case to the Court of Appeals so that it, or the District Court, can address in the first instance these and other relevant points upon a review of the entire record made in support of the vessel's motion for summary judgment.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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LIVADAS *v.* BRADSHAW, CALIFORNIA LABOR  
COMMISSIONERCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 92–1920. Argued April 26, 1994—Decided June 13, 1994

California law requires employers to pay all wages due immediately upon an employee's discharge, Labor Code § 201; imposes a penalty for refusal to pay promptly, § 203; and places responsibility for enforcing these provisions on the Commissioner of Labor. After petitioner Livadas's employer refused to pay her the wages owed upon her discharge, but paid them a few days later, she filed a penalty claim. The Commissioner replied with a form letter construing Labor Code § 229 as barring him from enforcing such claims on behalf of individuals like Livadas, whose employment terms and conditions are governed by a collective-bargaining agreement containing an arbitration clause. Livadas brought this action under 42 U. S. C. § 1983, alleging that the nonenforcement policy was pre-empted by federal law because it abridged her rights under the National Labor Relations Act (NLRA). The District Court granted her summary judgment, rejecting the Commissioner's defense that the claim was pre-empted by § 301 of the Labor-Management Relations Act, 1947 (LMRA). Although acknowledging that the NLRA gives Livadas a right to bargain collectively and that § 1983 would supply a remedy for official deprivation of that right, the Court of Appeals reversed, concluding that no federal right had been infringed because Livadas's case reduced to an assertion that the Commissioner had misinterpreted state law, namely § 229.

*Held:*

1. The Commissioner's policy is pre-empted by federal law. Pp. 116–132.

(a) This case is fundamentally no different from *Nash v. Florida Industrial Comm'n*, 389 U. S. 235, 239, in which the Court held that a state rule predicated benefits on refraining from conduct protected by federal labor law was pre-empted because it interfered with congressional purpose. The Commissioner's policy, which requires Livadas to choose between Labor Code and NLRA rights, cannot be reconciled with a federal statutory scheme premised on the centrality of collective bargaining and the desirability of arbitration. Pp. 116–118.

(b) The Commissioner's answers to the foregoing conclusion flow from two significant misunderstandings of law. First, the assertion that the nonenforcement policy must be valid because § 229 is consistent

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with federal law is premised on irrelevant relationships and leads to the wrong question: Pre-emption analysis turns on the policy's actual content and its real effect on federal rights, not on whether § 229 is valid under the Federal Constitution or whether the policy is, as a matter of state law, a proper interpretation of § 229. Second, the argument that a "rational basis" supports the distinction the policy draws between employees represented by unions and those who are not mistakes a validity standard under the Equal Protection and Due Process Clauses for what the Supremacy Clause requires: a determination whether the state rule conflicts with the federal law. Pp. 118–121.

(c) This Court's decisions according pre-emptive effect to LMRA § 301 foreclose even a colorable argument that a claim under Labor Code § 203 was pre-empted here, since they establish that the section does not broadly pre-empt nonnegotiable employee rights conferred by state law; that it is a claim's legal character, as independent of rights under the collective-bargaining agreement, that decides whether a state cause of action may go forward; and that when liability is governed by independent state law and the meaning of contract terms is not in dispute, the bare fact that a collective-bargaining agreement is consulted for damage computation is no reason to extinguish the state-law claim. See, *e. g.*, *Allis-Chalmers Corp. v. Lueck*, 471 U. S. 202, and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399. Here, the primary text for deciding whether Livadas was entitled to a penalty was not the collective-bargaining agreement, but a calendar. The only issue raised by her claim, whether her employer willfully failed to pay her wages promptly upon severance, was a question of state law entirely independent of the agreement. Absent any indication that there was a dispute over the penalty amount, the simple need to refer to bargained-for wage rates in computing the penalty is irrelevant. Pp. 121–125.

(d) The Commissioner's attempt before this Court to recast the nonenforcement policy as expressing a "conscious decision" to keep the State's "hands off" the claims of employees protected by collective-bargaining agreements, either because the Commissioner's efforts and resources are more urgently needed by others or because official restraint will actually encourage the collective-bargaining and arbitral processes favored by federal law, is rejected. If the policy were in fact animated by the first of these late-blooming rationales, the Commissioner's emphasis on the need to avoid "interpret[ing]" or "apply[ing]" collective-bargaining agreements would be entirely misplaced. Nor is the second asserted rationale convincing, since enforcement under the policy does not turn on the bargain struck by the contracting parties or on whether the contractual wage rate is even arbitrable, but simply on the fact that the parties have consented to arbitration. The suggestion that the policy is meant to stimulate freewheeling bargaining over

## Syllabus

wage payments to discharged workers contradicts Labor Code §219, which expressly and categorically prohibits the modification of rules under the Code by “private agreement.” Even at face value, however, the “hands off” label poses special dangers that advantages conferred by federal law will be canceled out and its objectives undermined, and those dangers are not laid to rest by professions of the need for governmental neutrality in labor disputes. Similarly, the vague assertions that the policy advances federal interests are not persuasive, since this Court has never suggested that the federal bias toward bargaining is to be served by forcing employees and employers to bargain for what they would otherwise be entitled to under state law. *Fort Halifax Packing Co. v. Coyne*, 482 U. S. 1, and the federal and state “opt-out” laws cited by the Commissioner, distinguished. Pp. 126–132.

2. Livadas is entitled to seek relief under §1983 for the Commissioner’s abridgment of her NLRA right to complete the collective-bargaining process and agree to an arbitration clause. That right is at least immanent in the NLRA’s structure, if it is not provided in so many words by the statutory text, and the obligation to respect it on the part of those acting under color of law is not vague or amorphous. Moreover, Congress has given no indication of any intent to foreclose actions like Livadas’s, and there is no cause for special caution here. See *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 108–112. Pp. 132–135.

987 F. 2d 552, reversed.

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

*Richard G. McCracken* argued the cause for petitioner. With him on the briefs was *Michael T. Anderson*.

*Malcolm L. Stewart* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Deputy Solicitor General Wallace*, *Amy L. Wax*, *Linda Sher*, and *Norton J. Come*.

*H. Thomas Cadell, Jr.*, argued the cause and filed a brief for respondent.\*

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\*Briefs of *amici curiae* urging reversal were filed for the Allied Educational Foundation by *Bertram R. Gelfand* and *Jeffrey C. Dannenberg*; and for the American Federation of Labor and Congress of Industrial Organizations by *Mark Schneider*, *Marsha S. Berzon*, *Laurence Gold*, and *Walter Kamiat*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States et al. by *Marshall B. Babson*, *Stanley*

## Opinion of the Court

JUSTICE SOUTER delivered the opinion of the Court.

California law requires employers to pay all wages due immediately upon an employee's discharge, imposes a penalty for refusal to pay promptly, precludes any private contractual waiver of these minimum labor standards, and places responsibility for enforcing these provisions on the State Commissioner of Labor (Commissioner or Labor Commissioner), ostensibly for the benefit of all employees. Respondent, the Labor Commissioner,<sup>1</sup> has construed a further provision of state law as barring enforcement of these wage and penalty claims on behalf of individuals like petitioner, whose terms and conditions of employment are governed by a collective-bargaining agreement containing an arbitration clause. We hold that federal law pre-empts this policy, as abridging the exercise of such employees' rights under the National Labor Relations Act (NLRA or Act), 29 U. S. C. § 151 *et seq.*, and that redress for this unlawful refusal to enforce may be had under 42 U. S. C. § 1983.

## I

Until her discharge on January 2, 1990, petitioner Karen Livadas worked as a grocery clerk in a Vallejo, California, Safeway supermarket. The terms and conditions of her employment were subject to a collective-bargaining agreement between Safeway and Livadas's union, Local 373 of the United Food and Commercial Workers, AFL-CIO. Unexceptionally, the agreement provided that "[d]isputes as to the interpretation or application of the agreement," including grievances arising from allegedly unjust discharge or suspension, would be subject to binding arbitration. See Food

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*R. Strauss, Stephen A. Bokat, Mona C. Zeiberg, Jan Amundson, and Quentin Riegel*; and for the Employers Group et al. by *Steven G. Drapkin*.

<sup>1</sup> Respondent Bradshaw has succeeded Lloyd Aubry, the original named defendant in this action, as Labor Commissioner and has been substituted as a party before this Court. See this Court's Rule 35.3.

## Opinion of the Court

Store Contract, United Food & Commercial Workers Union, Local 373, AFL–CIO, Solano and Napa Counties §§ 18.2, 18.3 (Mar. 1, 1989–Feb. 29, 1992) (Food Store Contract).<sup>2</sup> When notified of her discharge, Livadas demanded immediate payment of wages owed her, as guaranteed to all California workers by state law, see Cal. Lab. Code Ann. § 201 (West 1989),<sup>3</sup> but her store manager refused, referring to the company practice of making such payments by check mailed from a central corporate payroll office. On January 5, 1990, Livadas received a check from Safeway, in the full amount owed for her work through January 2.

On January 9, 1990, Livadas filed a claim against Safeway with the California Division of Labor Standards Enforcement (DLSE or Division), asserting that under § 203 of the Labor Code the company was liable to her for a sum equal to three days' wages, as a penalty for the delay between discharge and the date when payment was in fact re-

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<sup>2</sup>Section 18.1 of the collective-bargaining agreement defines a “grievance” as a “dispute . . . involving or arising out of the meaning, interpretation, application or alleged violation” of the agreement.

Section 18.8 provides that “[i]n the case of a direct wage claim . . . which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.”

<sup>3</sup>California Labor Code § 201 provides in pertinent part: “If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” It draws no distinction between union-represented employees and others.

Under another provision of California law, Labor Code § 219, the protections of § 201 (and of other rules governing the frequency and form of wage payments) “can [not] in any way be contravened or set aside by private agreement, whether written, oral, or implied,” although employers are free to pay wages more frequently, in greater amounts, or at an earlier date than ordained by these state rules; cf. § 204.2 (executive, administrative, and professional employees may negotiate through collective bargaining for pay periods different from those required by state law).

## Opinion of the Court

ceived.<sup>4</sup> Livadas requested the Commissioner to enforce the claim.<sup>5</sup>

By an apparently standard form letter dated February 7, 1990, the Division notified Livadas that it would take no action on her complaint:

“It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.

“Labor Code Section 203 requires that the wages continue at the ‘same rate’ until paid. In order to establish what the ‘same rate’ was, it is necessary to look to the

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<sup>4</sup>That section provides that when an employer “willfully fails” to comply with the strictures of § 201 and fails to pay “any wages” owed discharged employees, “the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.” Cal. Lab. Code Ann. § 203 (West 1989).

In her DLSE claim form, Livadas made plain that she did not dispute Safeway’s calculation of the wages owed, but sought only the penalty for the employer’s late tender. App. 18.

<sup>5</sup>Under state law, the Commissioner of Labor is the Division Chief of the DLSE, see Cal. Lab. Code Ann. §§ 79, 82(b) (West 1989), and is authorized either directly to prosecute a wage or penalty claim on an employee’s behalf in state court, § 98.3(a), or, in the alternative, to initiate informal hearings under DLSE auspices, see § 98(a), in which full relief may be awarded, § 98.1. The Commissioner’s policy with respect to claims by employees covered by collective-bargaining agreements appears not to distinguish between these two modes of proceeding, and, accordingly, we will refer, as the parties largely do, to her policy as a categorical refusal to “enforce” such claims. Although Labor Code § 218 states that “[n]othing in this article shall limit the right of any wage claimant to sue . . . for any wages or penalty due him,” another provision, § 218.5, authorizes attorney’s fee awards to prevailing parties in wage and penalty disputes, making individual litigation a somewhat risky prospect, and DLSE enforcement remains in any event the more realistic avenue for modest claims.



## Opinion of the Court

collective bargaining agreement and ‘apply’ that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code § 229 prohibit.”<sup>6</sup> App. 16.

The letter made no reference to any particular aspect of Livadas’s claim making it unfit for enforcement, and the Commissioner’s position is fairly taken to be that DLSE enforcement of § 203 claims, as well as other claims for which relief is pegged to an employee’s wage rate, is generally unavailable to employees covered by collective-bargaining agreements.<sup>7</sup>

Livadas brought this action in the United States District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the nonenforcement policy, reflecting the Commissioner’s reading of Labor Code § 229, was pre-empted as conflicting with Livadas’s rights under § 7 of the NLRA, 49 Stat. 452, as amended, 29 U. S. C. § 157, because the policy placed a

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<sup>6</sup> Labor Code § 229 provides: “Actions to enforce the provisions of this article [Labor Code §§ 200–243] for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.” Cf. *Perry v. Thomas*, 482 U. S. 483 (1987) (§ 229 bar to waiver defeated by Federal Arbitration Act policy).

All concerned identify the allusion to what “courts” have said to be a reference to a 1975 decision of the California Court of Appeal, *Plumbing, Heating and Piping Employers Council v. Howard*, 53 Cal. App. 3d 828, 126 Cal. Rptr. 406, where the Commissioner was held barred by the statute from enforcing an “unpaid” wage claim arising from an employee’s assertion that he was entitled, under collective-bargaining agreements then in force, to receive a foreman’s rate of pay and not a journeyman’s.

<sup>7</sup> The Commissioner notes that a small minority of collective-bargaining agreements lack provisions either setting wage rates or mandating arbitration (and therefore might potentially be enforced under the challenged policy). But see n. 13, *infra*; *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399, 411, n. 11 (1988) (noting that 99% of sampled collective-bargaining agreements include arbitration clauses).

## Opinion of the Court

penalty on the exercise of her statutory right to bargain collectively with her employer. She stressed that there was no dispute about the amount owed and that neither she nor Safeway had begun any grievance proceeding over the penalty.<sup>8</sup> Livadas sought a declaration that the Commissioner's interpretation of § 229 was pre-empted, an injunction against adherence to the allegedly impermissible policy, and an order requiring the Commissioner either to process her penalty claim or (if it would be time barred under state law) pay her damages in the amount the Commissioner would have obtained if the Commissioner had moved against the employer in time.

The District Court granted summary judgment for Livadas, holding the labor pre-emption claim cognizable under § 1983, see *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103 (1989) (*Golden State II*), and the Commissioner's policy pre-empted as interfering with her § 7 right, see, e. g., *Golden State Transit Corp. v. Los Angeles*, 475 U. S. 608 (1986) (*Golden State I*), by denying her the benefit of a minimum labor standard, namely, the right to timely payment of final wages secured by Labor Code §§ 201 and 203. 749 F. Supp. 1526 (ND Cal. 1990). The District Court treated as irrelevant the Commissioner's assertion that the policy was consistent with state law (e. g., Labor Code § 229) and rejected the defense that it was required by federal law, namely, § 301 of the Labor-Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), which has been read to pre-empt state-court resolution of disputes turning on the rights of parties under collective-bargaining agree-

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<sup>8</sup> Livadas did file a grievance claiming that the discharge had been improper under the collective-bargaining agreement, ultimately obtaining reinstatement with backpay. While the parties dispute what effect, as a matter of state law, that recovery would have on Livadas's right under § 203, neither the pertinent California statutes nor the Commissioner's policy at issue here depend on whether a claimant's termination was for just cause.

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ments. The District Court explained that resolution of the claim under §203 “requires reference only to a calendar, not to the [collective-bargaining agreement],” 749 F. Supp., at 1536, and granted petitioner all requested relief. *Id.*, at 1540.<sup>9</sup>

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 987 F. 2d 552 (1993). The court acknowledged that federal law gives Livadas a right to engage in collective bargaining and that §1983 would supply a remedy for official deprivation of that right, but the panel majority concluded that no federal right had been infringed. The court reasoned that the policy was based on the Commissioner’s reading of Labor Code §229, whose function of keeping state tribunals from adjudicating claims in a way that would interfere with the operation of federal labor policy is, by definition, consistent with the dictates of federal law. Noting that Livadas did not assert pre-emption of §229 itself or object to the California courts’ interpretation of it, the majority concluded that her case reduced to an assertion that the Commissioner had misinterpreted state law, an error for which relief could be obtained in California courts.

Livadas could not claim to be “penalized,” the Appeals panel then observed, for she stood “in the same position as every other employee in the state when it comes to seeking the Commissioner’s enforcement. Every employee . . . is subject to an eligibility determination, and every employee . . . is subject to the risk that the Commissioner will get it wrong.” 987 F. 2d, at 559. The Ninth Circuit majority concluded by invoking the “general policies of federal labor law” strongly favoring the arbitration of disputes and reasoning that, “Congress would not want state officials erring

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<sup>9</sup> In the Court of Appeals, Livadas acknowledged that the portion of the District Court’s order awarding monetary relief against the Commissioner in her official capacity was likely barred by the Eleventh Amendment, see Brief for Petitioner 43, n. 20. This and other issues arising from the scope of the remedy are better left for the courts below on remand.

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on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted.” *Id.*, at 560.<sup>10</sup> We granted certiorari, 510 U.S. 1083 (1994), to address the important questions of federal labor law implicated by the Commissioner’s policy, and we now reverse.

## II

## A

A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose. In *Nash v. Florida Industrial Comm’n*, 389 U.S. 235 (1967), a unanimous Court held that a state policy of withholding unemployment benefits solely because an employee had filed an unfair labor practice charge with the National Labor Relations Board had a “direct tendency to frustrate the purpose of Congress” and, if not pre-empted, would “defeat or handicap a valid national objective by . . . withdraw[ing] state benefits . . . simply because” an employee engages in conduct protected

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<sup>10</sup>In dissent, Judge Kozinski countered that by focusing on whether Livadas was entitled to a correct application of state law, the majority had explored the wrong question. The proper enquiry, the dissent maintained, was not whether the Commissioner has discretion under state law not to enforce wage and penalty claims (which she plainly does) or whether she need enforce claims if doing so would actually be pre-empted by federal law (she plainly need not), but whether she may draw the line for enforcement purposes between individuals covered by collective-bargaining agreements containing arbitration clauses (whose claims will sometimes but not always be pre-empted under §301) and those not so covered. Underscoring that Livadas’s claim would not, in fact, have been pre-empted had the federal rule been given its proper scope, the dissent found wanting the majority’s “quasi-pre-emption” rationale, 987 F. 2d, at 562. Judge Kozinski concluded that the Commissioner’s policy, based on an “honest (though flagrant) mistake of law,” *id.*, at 563, could not be squared with the requirements of federal labor law, because the burdened class was defined by the exercise of federal rights and because the burden on collective-bargaining rights, justified only by a mistaken understanding of what §301 requires, served no “legitimate state purpose” at all. *Ibid.*

## Opinion of the Court

and encouraged by the NLRA. *Id.*, at 239; see also *Golden State I, supra*, at 618 (city may not condition franchise renewal on settlement of labor dispute). This case is fundamentally no different from *Nash*.<sup>11</sup> Just as the respondent state commission in that case offered an employee the choice of pursuing her unfair labor practice claim or receiving unemployment compensation, the Commissioner has presented Livadas and others like her with the choice of having state-law rights under §§ 201 and 203 enforced or exercising the right to enter into a collective-bargaining agreement with an arbitration clause. This unappetizing choice, we conclude, was not intended by Congress, see *infra*, at 130, and cannot ultimately be reconciled with a statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitra-

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<sup>11</sup> While the NLRA does not expressly recognize a right to be covered by a collective-bargaining agreement, in that no duty is imposed on an employer actually to reach agreement with represented employees, see 29 U. S. C. § 158(d), a State's penalty on those who complete the collective-bargaining process works an interference with the operation of the Act, much as does a penalty on those who participate in the process. Cf. *Hill v. Florida ex rel. Watson*, 325 U. S. 538 (1945) (State may not enforce licensing requirement on collective-bargaining agents).

We understand the difference between the position of petitioner (who would place this case within our “*Machinists*” line of labor pre-emption cases, see *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976)) and that of her *amicus*, the Solicitor General (who describes it as a case of “conflict” pre-emption, see Brief for United States as *Amicus Curiae* 14–15, and n. 4) to be entirely semantic, depending on whether Livadas's right is characterized as implicit in the structure of the Act (as was the right to self-help upheld in *Machinists*) or as rooted in the text of § 7. See generally *Golden State II*, 493 U. S. 103, 110–112 (1989) (emphasizing fundamental similarity between enumerated NLRA rights and “*Machinists*” rights). Neither party here argues for application of the rule of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), which safeguards the primary jurisdiction of the National Labor Relations Board to pass judgment on certain conduct, such as labor picketing, which might be held protected by § 7 of the Act but which might also be prohibited by § 8 of the Act.

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tion. Cf. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U. S. 724, 755 (1985) (state law held not pre-empted because it “neither encourage[s] nor discourage[s] the collective-bargaining processes”).<sup>12</sup>

## B

## 1

The Commissioner’s answers to this pre-emption conclusion flow from two significant misunderstandings of law. First, the Commissioner conflates the policy that Livadas challenges with the state law on which it purports to rest, Labor Code § 229, assuming that if the statutory provision is consistent with federal law, her policy must be also. But

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<sup>12</sup>Despite certain similarities, the question whether federal labor law permits a State to grant or withhold unemployment insurance benefits from striking workers requires consideration of the policies underlying a distinct federal statute, Title IX of the Social Security Act, see 26 U. S. C. § 3301 (1988 ed. and Supp. IV); 42 U. S. C. § 501 *et seq.*; 42 U. S. C. § 1101 *et seq.* Thus, straightforward NLRA pre-emption analysis has been held inappropriate. See *New York Telephone Co. v. New York State Dept. of Labor*, 440 U. S. 519, 536–540 (1979) (plurality opinion); see also *id.*, at 549 (BLACKMUN, J., concurring in judgment).

Noting that *Nash v. Florida Industrial Comm’n*, 389 U. S. 235 (1967), held state action pre-empted that was “like the coercive actions which employers and unions are forbidden to engage in,” see *id.*, at 239, it is argued here, see Brief for Employers Group as *Amicus Curiae* 7–12, that the NLRA prohibits only state action closely analogous to conduct that would support an unfair labor practice charge if engaged in by a private employer. Our cases, however, teach that parallelism is not dispositive and that the Act sometimes demands a more scrupulous evenhandedness from the States. See generally *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U. S. 282, 290 (1986) (State may not debar employers with multiple NLRA violations from government contracting); compare *Golden State I*, 475 U. S. 608 (1986), with *NLRB v. Servette, Inc.*, 377 U. S. 46, 49–54 (1964) (private actor may refuse to deal with employer based on impending strike); but cf. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 227–228 (1993) (the Act does not always preclude a State, functioning as an employer or a purchaser of labor services, from behaving as a private employer would be entitled to do).

## Opinion of the Court

on this logic, a policy of issuing general search warrants would be justified if it were adopted to implement a state statute codifying word-for-word the “good-faith” exception to the valid warrant requirement recognized in *United States v. Leon*, 468 U. S. 897 (1984). The relationship between policy and state statute and between the statute and federal law is, in any event, irrelevant. The question presented by this case is not whether Labor Code § 229 is valid under the Federal Constitution or whether the Commissioner’s policy is, as a matter of state law, a proper interpretation of § 229. Pre-emption analysis, rather, turns on the actual content of respondent’s policy and its real effect on federal rights. See *Nash v. Florida Industrial Comm’n*, 389 U. S. 235 (1967) (holding pre-empted an administrative policy interpreting presumably valid state unemployment insurance law exception for “labor disputes” to include proceedings under NLRB complaints); see also 987 F. 2d, at 561 (Kozinski, J., dissenting).<sup>13</sup>

Having sought to lead us to the wrong question, the Commissioner proposes the wrong approach for answering it, defending the distinction drawn in the challenged statutory interpretation, between employees represented by unions and those who are not, as supported by a “rational basis,” see,

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<sup>13</sup>See also *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F. 2d 1148, 1154 (CA4 1992) (State may not, consistently with the NLRA, withhold protections of state antitrespass law from employer involved in labor dispute, in an effort to apply a facially valid “neutrality statute”). Thus, while the “misinterpretation of a perfectly valid state statute . . . does not [in itself] provide grounds for federal relief,” 987 F. 2d, at 559, it does not follow that no federal relief may be had when such misinterpretation results in conflict with federal law. Nor does the opportunity to seek redress in a nonfederal forum determine the existence of a federal right, see *ibid.* See, e. g., *Monroe v. Pape*, 365 U. S. 167, 183 (1961). Of course, the extent to which a course of conduct has deviated from “clearly established” federal law remains crucial to deciding whether an official will be entitled to immunity from individual damage liability, see, e. g., *Davis v. Scherer*, 468 U. S. 183, 197 (1984).

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*e. g.*, Brief for Respondent 17. But such reasoning mistakes a standard for validity under the Equal Protection and Due Process Clauses for what the Supremacy Clause requires. The power to tax is no less the power to destroy, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), merely because a state legislature has an undoubtedly rational and “legitimate” interest in raising revenue. In labor pre-emption cases, as in others under the Supremacy Clause, our office is not to pass judgment on the reasonableness of state policy, see, *e. g.*, *Golden State I*, 475 U. S. 608 (1986) (city’s desire to remain “neutral” in labor dispute does not determine pre-emption). It is instead to decide if a state rule conflicts with or otherwise “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of the federal law. *Brown v. Hotel Employees*, 468 U. S. 491, 501 (1984) (internal quotation marks and citation omitted).<sup>14</sup>

That is not to say, of course, that the several rationales for the policy urged on the Court by the Commissioner and *amici* are beside the point here. If, most obviously, the Commissioner’s policy were actually compelled by federal law, as she argues it is, we could hardly say that it was, simultaneously, pre-empted; at the least, our task would then be one of harmonizing statutory law. But we entertain this and other justifications claimed, not because constitutional analysis under the Supremacy Clause is an open-ended balancing act, simply weighing the federal interest against the intensity of local feeling, see *id.*, at 503, but because claims of justification can sometimes help us to discern congressional purpose, the “ultimate touchstone” of our enquiry. *Malone*

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<sup>14</sup> Similarly, because our analysis here turns not on the “rationality” of the governmental classification, but rather on its effect on federal objectives, the Commissioner’s policy is not saved merely because it happens, at the margins, to be “under-” and “over-inclusive,” *i. e.*, burdening certain employees who are not protected by the NLRA and allowing employees covered by highly unusual collective-bargaining agreements the benefit of enforcement of §§ 201 and 203 claims.



## Opinion of the Court

v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (internal quotation marks and citation omitted); see also *New York Telephone Co. v. New York State Dept. of Labor*, 440 U. S. 519, 533 (1979) (plurality opinion).

## 2

We begin with the most complete of the defenses mounted by the Commissioner, one that seems (or seemed until recently, at least) to be at the heart of her position: that the challenged policy, far from being pre-empted by federal law, is positively compelled by it, and that even if the Commissioner had been so inclined, the LMRA § 301 would have precluded enforcement of Livadas’s penalty claim. The non-enforcement policy, she suggests, is a necessary emanation from this Court’s § 301 pre-emption jurisprudence, marked as it has been by repeated admonitions that courts should steer clear of collective-bargaining disputes between parties who have provided for arbitration. See, *e. g.*, *Allis-Chalmers Corp. v. Lueck*, 471 U. S. 202 (1985). Because, this argument runs (and Livadas was told in the DLSE no-action letter), disposition of a union-represented employee’s penalty claim entails the “interpretation or application” of a collective-bargaining agreement (since determining the amount owed turns on the contractual rate of pay agreed) resort to a state tribunal would lead it into territory that Congress, in enacting § 301, meant to be covered exclusively by arbitrators.

This reasoning, however, mistakes both the functions § 301 serves in our national labor law and our prior decisions according that provision pre-emptive effect. To be sure, we have read the text of § 301<sup>15</sup> not only to grant federal courts jurisdiction over claims asserting breach of collective-

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<sup>15</sup>Section 301 states that “[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .” 29 U. S. C. § 185(a).

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bargaining agreements but also to authorize the development of federal common-law rules of decision, in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution, see *Textile Workers v. Lincoln Mills of Ala.*, 353 U. S. 448, 455–456 (1957); see also *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); *Avco Corp. v. Machinists*, 390 U. S. 557, 559 (1968) (“§ 301 . . . was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes”). And in *Teamsters v. Lucas Flour Co.*, 369 U. S. 95 (1962), we recognized an important corollary to the *Lincoln Mills* rule: while § 301 does not preclude state courts from taking jurisdiction over cases arising from disputes over the interpretation of collective-bargaining agreements, state contract law must yield to the developing federal common law, lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions. See 369 U. S., at 103–104.<sup>16</sup>

And while this sensible “acorn” of § 301 pre-emption recognized in *Lucas Flour* has sprouted modestly in more recent decisions of this Court, see, *e. g.*, *Lueck, supra*, at 210 (“[I]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations”), it has not yet become, nor may it, a sufficiently “mighty oak,” see *Golden State I*, 475 U. S., at 622 (REHNQUIST, J., dissenting), to supply the cover the Commissioner seeks here. To the contrary, the pre-emption rule has been applied only to assure that the

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<sup>16</sup> Within its proper sphere, § 301 has been accorded unusual pre-emptive power. In *Avco Corp. v. Machinists*, 390 U. S. 557 (1968), for example, we recognized that an action for breach of a collective-bargaining agreement “ar[ose] under” § 301 (and therefore was subject to federal removal, see 28 U. S. C. § 1441 (1988 ed. and Supp. IV)), despite the fact that the petitioner’s complaint did not mention the federal provision and appeared to plead an adequate claim for relief under state contract law.

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purposes animating § 301 will be frustrated neither by state laws purporting to determine “questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement,” *Lueck*, 471 U. S., at 211, nor by parties’ efforts to renege on their arbitration promises by “relabeling” as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements, *id.*, at 219; see *Republic Steel Corp. v. Maddox*, 379 U. S. 650, 652 (1965) (“[F]ederal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress”) (emphasis deleted).

In *Lueck* and in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399 (1988), we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law,<sup>17</sup> and we stressed that it is the legal character of a claim, as “independent” of rights under the collective-bargaining agreement, *Lueck, supra*, at 213 (and not whether a grievance arising from “precisely the same set of facts” could be pursued, *Lingle, supra*, at 410) that decides whether a state

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<sup>17</sup>That is so, we explained, both because Congress is understood to have legislated against a backdrop of generally applicable labor standards, see, *e. g.*, *Lingle*, 486 U. S., at 411–412, and because the scope of the arbitral promise is not itself unlimited, see *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”). And while contract-interpretation disputes must be resolved in the bargained-for arbitral realm, see *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965), § 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-pre-empted claims, see *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962) (state courts have jurisdiction over § 301 suits but must apply federal common law); *NLRB v. C & C Plywood Corp.*, 385 U. S. 421 (1967).

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cause of action may go forward.<sup>18</sup> Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see *Lingle, supra*, at 413, n. 12 (“A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled”).

These principles foreclose even a colorable argument that a claim under Labor Code §203 was pre-empted here. As the District Court aptly observed, the primary text for deciding whether Livadas was entitled to a penalty was not the Food Store Contract, but a calendar. The only issue raised by Livadas’s claim, whether Safeway “willfully fail[ed] to pay” her wages promptly upon severance, Cal. Lab. Code

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<sup>18</sup> We are aware, as an *amicus* brief makes clear, see Brief for AFL–CIO as *Amicus Curiae*, that the Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and *Lueck*. But this case, in which non-pre-emption under §301 is clear beyond peradventure, see *infra* this page and 125, is not a fit occasion for us to resolve disagreements that have arisen over the proper scope of our earlier decisions. We do note in this regard that while our cases tend to speak broadly in terms of §301 “pre-emption,” defendants invoke that provision in diverse situations and for different reasons: sometimes their assertion is that a plaintiff’s cause of action itself derives from the collective-bargaining agreement (and, by that agreement, belongs before an arbitrator); in other instances, the argument is different, that a plaintiff’s claim cannot be “resolved” absent collective-bargaining agreement interpretation, *i. e.*, that a term of the agreement may or does confer a defense on the employer (perhaps because the employee or his union has negotiated away the state-law right), cf. *Caterpillar Inc. v. Williams*, 482 U. S. 386, 398–399 (1987); and in other cases still, concededly “independent” state-law litigation may nonetheless entail some collective-bargaining agreement application. Holding the plaintiff’s cause of action substantively extinguished may not, as *amicus* AFL–CIO observes, always be the only means of vindicating the arbitrator’s primacy as the bargained-for contract interpreter. Cf. *Collyer Insulated Wire, Gulf & Western Systems Co.*, 192 N. L. R. B. 837 (1971).

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Ann. §203 (West 1989), was a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer. There is no indication that there was a “dispute” in this case over the amount of the penalty to which Livadas would be entitled, and *Lingle* makes plain in so many words that when liability is governed by independent state law, the mere need to “look to” the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by §301. See 486 U. S., at 413, n. 12.<sup>19</sup>

Beyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective-bargaining agreement is irrelevant to the dispute (if any) between Livadas and Safeway. There is no suggestion here that Livadas’s union sought or purported to bargain away her protections under §201 or §203, a waiver that we have said would (especially in view of Labor Code §219) have to be “‘clear and unmistakable,’” see *Lingle, supra*, at 409–410, n. 9 (quoting *Metropolitan Edison Co. v. NLRB*, 460 U. S. 693, 708 (1983)), for a court even to consider whether it could be given effect, nor is there any indication that the parties to the collective-bargaining agreement understood their arbitration pledge to cover these state-law claims. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 35 (1991); cf. Food Store Contract §18.8. But even if such suggestions or indications were to be found, the Commissioner could not invoke them to defend her policy, which makes no effort to take such factors into account before denying enforcement.<sup>20</sup>

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<sup>19</sup>This is not to say, of course, that a §203 penalty claim could never be pre-empted by §301.

<sup>20</sup>In holding the challenged policy pre-empted, we note that there is no equally obvious conflict between what §301 requires and the text of Labor Code §229 (as against what respondent has read it to mean). The California provision, which concerns whether a promise to arbitrate a claim will be enforced to defeat a direct action under the Labor Code, does not purport generally to deny union-represented employees their rights under §§201 and 203. Rather, it confines its preclusive focus only to “dispute[s]

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Before this Court, however, the Commissioner does not confine herself to the assertion that Livadas's claim would have been pre-empted by LMRA § 301. Indeed, largely putting aside that position, she has sought here to cast the policy in different terms, as expressing a "conscious decision," see Brief for Respondent 14, to keep the State's "hands off" the claims of employees protected by collective-bargaining agreements, either because the Division's efforts and resources are more urgently needed by others or because official restraint will actually encourage the collective-bargaining and arbitral processes favored by federal law. The latter, more ambitious defense has been vigorously taken up by the Commissioner's *amici*, who warn that invalidation of the disputed policy would sound the death knell for other, more common governmental measures that take account of collective-bargaining processes or treat workers represented by unions differently from others in any respect.

Although there surely is no bar to our considering these alternative explanations, cf. *Dandridge v. Williams*, 397 U. S. 471, 475, n. 6 (1970) (party may defend judgment on basis not relied upon below), we note, as is often the case with such late-blooming rationales, that the overlap between what the Commissioner now claims to be state policy and what the state legislature has enacted into law is awkwardly inexact. First, if the Commissioner's policy (or California

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concerning the interpretation or application of any collective-bargaining agreement," in which event an "agreement to arbitrate" such disputes is to be given effect. Nor does the *Howard* decision, the apparent font of the Commissioner's policy, appear untrue to § 301 teachings: there, an employee sought to have an "unpaid wage" claim do the office of a claim that a collective-bargaining agreement entitled him to a higher wage; that sort of claim, however, derives its existence from the collective-bargaining agreement and, accordingly, falls within any customary understanding of arbitral jurisdiction. See 53 Cal. App. 3d, at 836, 126 Cal. Rptr., at 411.

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law) were animated simply by the frugal desire to conserve the State's money for the protection of employees not covered by collective-bargaining agreements, the Commissioner's emphasis, in the letter to Livadas and in this litigation, on the need to "interpret" or "apply" terms of a collective-bargaining agreement would be entirely misplaced.

Nor is the nonenforcement policy convincingly defended as giving parties to a collective-bargaining agreement the "benefit of their bargain," see Brief for Respondent 18, n. 13, by assuring them that their promise to arbitrate is kept and not circumvented. Under the Commissioner's policy, enforcement does not turn on what disputes the parties agreed would be resolved by arbitration (the bargain struck), see *Gilmer*, 500 U. S., at 26, or on whether the contractual wage rate is even subject to (arbitrable) dispute. Rather, enforcement turns exclusively on the fact that the contracting parties consented to any arbitration at all. Even if the Commissioner could permissibly presume that state-law claims are generally intended to be arbitrated, but cf. *id.*, at 35 (employees in prior cases "had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims"),<sup>21</sup> her policy goes still further. Even in cases when it could be said with "positive assurance,"

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<sup>21</sup> In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 (1974), permitting a discharged employee to bring a Title VII claim, notwithstanding his having already grieved the dismissal under a collective-bargaining agreement. *Gilmer* distinguished *Gardner-Denver* as relying, *inter alia*, on: the "distinctly separate nature of . . . contractual and statutory rights" (even when both were "violated as a result of the same factual occurrence"), 415 U. S., at 50; the fact that a labor "arbitrator has authority to resolve only questions of contractual rights," *id.*, at 53-54; and the concern that in collective-bargaining arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," *id.*, at 58, n. 19.

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*Warrior & Gulf*, 363 U. S., at 582, that the parties did not intend that state-law claims be subject to arbitration, cf. Food Store Contract § 18.8 (direct wage claim not involving interpretation of agreement may be submitted “to any other tribunal or agency which is authorized and empowered” to enforce it), the Commissioner would still deny enforcement, on the stated basis that the collective-bargaining agreement nonetheless contained “an arbitration clause” and because the claim would, on her view, entail “interpretation,” of the agreement’s terms. Such an irrebuttable presumption is not easily described as the benefit of the parties’ “bargain.”

The Commissioner and *amici* finally suggest that denying enforcement to union-represented employees’ claims under §§ 201 and 203 (and other Labor Code provisions) is meant to encourage parties to bargain collectively for their own rules about the payment of wages to discharged workers. But with this suggestion, the State’s position simply slips any tether to California law. If California’s goal really were to stimulate such freewheeling bargaining on these subjects, the enactment of Labor Code § 219, expressly and categorically prohibiting the modification of these Labor Code rules by “private agreement,” would be a very odd way to pursue it.<sup>22</sup> Cf. Cal. Lab. Code Ann. § 227.3 (West 1989) (allowing parties to collective-bargaining agreement to arrive at different rule for vacation pay). In short, the policy, the rationales, and the state law are not coherent.

## 2

Even at face value, however, neither the “hands off” labels nor the vague assertions that general labor law policies are thereby advanced much support the Commissioner’s defense here. The former merely takes the position discussed and rejected earlier, that a distinction between claimants represented by unions and those who are not is “rational,” the

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<sup>22</sup>The Commissioner avoids such complications simply by omitting any reference to Labor Code § 219.



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former being less “in need” than the latter. While we hardly suggest here that every distinction between union-represented employees and others is invalid under the NLRA, see *infra*, at 131–132, the assertion that represented employees are less “in need” precisely because they have exercised federal rights poses special dangers that advantages conferred by federal law will be canceled out and its objectives undermined. Cf. *Metropolitan Life*, 471 U. S., at 756 (“It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers”). Accordingly, as we observed in *Metropolitan Life*, the widespread practice in Congress and in state legislatures has assumed the contrary, bestowing basic employment guarantees and protections on individual employees without singling out members of labor unions (or those represented by them) for disability; see *id.*, at 755;<sup>23</sup> accord, *Lingle*, 486 U. S., at 411–412.

Nor do professions of “neutrality” lay the dangers to rest. The pre-empted action in *Golden State I* could easily have been redescribed as following a “hands-off” policy, in that the city sought to avoid endorsing either side in the course of a labor dispute, see 475 U. S., at 622 (REHNQUIST, J., dissenting) (city did not seek “to place its weight on one side or the other of the scales of economic warfare”), and the respondent commission in *Nash* may have understood its policy as expressing neutrality between the parties in a yet-to-be-

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<sup>23</sup>We noted that “Congress [has never] seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently . . . . Minimum state labor standards affect union and nonunion employees equally and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.” *Metropolitan Life*, 471 U. S., at 755.

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decided unfair labor practice dispute. See also *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F. 2d 1148, 1154 (CA4 1992) (NLRA forbids state policy, under state law barring “aid or assistance” to either party to a labor dispute, of not arresting picketers who violated state trespass laws). Nor need we pause long over the assertion that nonenforcement of valid state-law claims is consistent with federal labor law by “encouraging” the operation of collective bargaining and arbitration process. Denying represented employees basic safety protections might “encourage” collective bargaining over that subject, and denying union employers the protection of generally applicable state trespass law might lead to increased bargaining over the rights of labor pickets, cf. *Rum Creek, supra*, but we have never suggested that labor law’s bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course. See generally *Metropolitan Life, supra*, at 757 (Congress did not intend to “remove the backdrop of state law . . . and thereby artificially create a no-law area”) (emphasis deleted and internal quotation marks omitted).<sup>24</sup>

The precedent cited by the Commissioner and *amici* as supporting the broadest “hands off” view, *Fort Halifax Packing Co. v. Coyne*, 482 U. S. 1 (1987), is not in point. In that case we held that there was no federal pre-emption of a Maine statute that allowed employees and employers to contract for plant-closing severance payments different from those otherwise mandated by state law. That decision, however, does not even purport to address the question supposedly presented here: while there was mention of state lati-

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<sup>24</sup> Were it enough simply to point to a general labor policy advanced by particular state action, the city in *Golden State* could have claimed to be encouraging the “friendly adjustment of industrial disputes,” 29 U. S. C. § 151, and the State in *Gould*, the entirely “laudable,” 475 U. S., at 291, purpose of “deter[ring] labor law violations and . . . reward[ing] ‘fidelity to the law,’” *id.*, at 287.

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tude to “balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment,” see *id.*, at 22, the policy challenged here differs in two crucial respects from the “unexceptional exercise of the [State’s] police power,” *ibid.* (internal quotation marks and citation omitted), defended in those terms in our earlier case. Most fundamentally, the Maine law treated all employees equally, whether or not represented by a labor organization. All were entitled to the statutory severance payment, and all were allowed to negotiate agreements providing for different benefits. See *id.*, at 4, n. 1. Second, the minimum protections of Maine’s plant-closing law were relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement), but only by the parties’ express agreement on different terms, see *id.*, at 21.<sup>25</sup>

While the Commissioner and her *amici* call our attention to a number of state and federal laws that draw distinctions between union and nonunion represented employees, see, e. g., D. C. Code Ann. §36–103 (1993) (“Unless otherwise specified in a collective agreement . . . [w]henver an employer discharges an employee, the employer shall pay the employee’s wages earned not later than the working day following such discharge”); 29 U. S. C. §203(o) (“Hours [w]orked” for Fair Labor Standards Act measured according to “express terms of . . . or practice under bona fide collective-bargaining agreement”), virtually all share the important second feature observed in *Coyne*, that union-represented employees have the full protection of the minimum standard, absent any agreement for something different. These “opt out” statutes are thus manifestly different in their operation (and their effect on federal rights)

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<sup>25</sup> It bears mention that the law in *Fort Halifax* pegged the benefit payment to an employee’s wages, meaning that the State Labor Commissioner would “look to” the collective-bargaining agreement in enforcing claims in precisely the same manner that respondent would here.

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from the Commissioner's rule that an employee forfeits his state-law rights the moment a collective-bargaining agreement with an arbitration clause is entered into. But cf. *Metropolitan Edison*, 460 U. S., at 708. Hence, our holding that the Commissioner's unusual policy is irreconcilable with the structure and purposes of the Act should cast no shadow on the validity of these familiar and narrowly drawn opt-out provisions.<sup>26</sup>

## III

Having determined that the Commissioner's policy is in fact pre-empted by federal law, we find strong support in our precedents for the position taken by both courts below that Livadas is entitled to seek relief under 42 U. S. C. § 1983 for the Commissioner's abridgment of her NLRA rights. Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's "rights, privileges, or immunities secured by the Constitution and laws" of the United States, and we have given that provision the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms. *Maine v. Thiboutot*, 448 U. S. 1, 4 (1980). We have, it is true, recognized that even the broad statutory text does not authorize a suit for every alleged violation of federal law. A particular statutory provision, for example, may be so manifestly precatory that it could not fairly be read to impose a "binding obligatio[n]" on a governmental unit, *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 27 (1981), or its terms may be so "vague and amorphous" that determining whether a "deprivation" might have occurred would strain judicial competence. See *Wright v. Roanoke Redevelop-*

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<sup>26</sup> Nor does it seem plausible to suggest that Congress meant to pre-empt such opt-out laws, as "burdening" the statutory right of employees not to join unions by denying nonrepresented employees the "benefit" of being able to "contract out" of such standards. Cf. Addendum B to Brief for Employers Group as *Amicus Curiae* (collecting state statutes containing similar provisions).

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*ment and Housing Authority*, 479 U. S. 418, 431–432 (1987). And Congress itself might make it clear that violation of a statute will not give rise to liability under § 1983, either by express words or by providing a comprehensive alternative enforcement scheme. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1 (1981). But apart from these exceptional cases, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law. See also *Dennis v. Higgins*, 498 U. S. 439, 443 (1991).

Our conclusion that Livadas is entitled to seek redress under § 1983 is, if not controlled outright, at least heavily foreshadowed by our decision in *Golden State II*. We began there with the recognition that not every instance of federal pre-emption gives rise to a § 1983 cause of action, see 493 U. S., at 108, and we explained that to decide the availability of § 1983 relief a court must look to the nature of the federal law accorded pre-emptive effect and the character of the interest claimed under it, *ibid.*<sup>27</sup> We had no difficulty concluding, however, as we had often before, see, *e. g.*, *Hill v. Florida ex rel. Watson*, 325 U. S. 538 (1945), that the NLRA protects interests of employees and employers against abridgment by a State, as well as by private actors; that the obligations it imposes on governmental actors are not so “vague and amorphous” as to exceed judicial competence to decide; and that Congress had not meant to foreclose relief under § 1983. In so concluding, we contrasted the intricate scheme provided to remedy violations by private actors to the complete absence of provision for relief from governmen-

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<sup>27</sup> Thus, *Golden State II* observed that an NLRA pre-emption claim grounded in the need to vindicate the primary jurisdiction of the National Labor Relations Board, see *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), see n. 10, *supra*, is “fundamentally different” from one stemming from state abridgment of a protected individual interest, see 493 U. S., at 110, a difference that might prove relevant to cognizability under § 1983.

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tal interference, see 493 U. S., at 108–109. Indeed, the only issue seriously in dispute in *Golden State II* was whether the freedom to resort to “peaceful methods of . . . economic pressure,” *id.*, at 112 (internal quotation marks omitted), which we had recognized as implicit in the structure of the Act, could support § 1983 liability in the same manner as official abridgment of those rights enumerated in the text would do. *Ibid.* The Court majority said yes, explaining that “[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute.” *Ibid.*

The right Livadas asserts, to complete the collective-bargaining process and agree to an arbitration clause, is, if not provided in so many words in the NLRA, see n. 10, *supra*, at least as immanent in its structure as the right of the cab company in *Golden State II*. And the obligation to respect it on the part of the Commissioner and others acting under color of law is no more “vague and amorphous” than the obligation in *Golden State*. Congress, of course, has given no more indication of any intent to foreclose actions like Livadas’s than the sort brought by the cab company. Finding no cause for special caution here, we hold that Livadas’s claim is properly brought under § 1983.

## IV

In an effort to give wide berth to federal labor law and policy, the Commissioner declines to enforce union-represented employees’ claims rooted in nonwaivable rights ostensibly secured by state law to all employees, without regard to whether the claims are valid under state law or preempted by LMRA § 301. Federal labor law does not require such a heavy-handed policy, and, indeed, cannot permit it. We do not suggest here that the NLRA automatically defeats all state action taking any account of the collective-bargaining process or every state law distinguishing union-

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represented employees from others. It is enough that we find the Commissioner's policy to have such direct and detrimental effects on the federal statutory rights of employees that it must be pre-empted. The judgment of the Court of Appeals for the Ninth Circuit is accordingly

*Reversed.*

## Syllabus

IBANEZ *v.* FLORIDA DEPARTMENT OF BUSINESS  
AND PROFESSIONAL REGULATION, BOARD OF  
ACCOUNTANCYCERTIORARI TO THE DISTRICT COURT OF APPEAL OF  
FLORIDA, FIRST DISTRICT

No. 93–639. Argued April 19, 1994—Decided June 13, 1994

Petitioner Ibanez is a member of the Florida Bar; she is also a Certified Public Accountant (CPA) licensed by respondent Florida Board of Accountancy (Board), and is authorized by the Certified Financial Planner Board of Standards, a private organization, to use the designation “Certified Financial Planner” (CFP). She referred to these credentials in her advertising and other communication with the public concerning her law practice, placing CPA and CFP next to her name in her yellow pages listing and on her business cards and law offices stationery. Notwithstanding the apparent truthfulness of the communication—it is undisputed that neither her CPA license nor her CFP authorization has been revoked—the Board reprimanded her for engaging in “false, deceptive, and misleading” advertising. The District Court of Appeal of Florida, First District, affirmed.

*Held:* The Board’s decision censuring Ibanez is incompatible with First Amendment restraints on official action. Pp. 142–149.

(a) Ibanez’ use of the CPA and CFP designations qualifies as “commercial speech.” The State may ban such speech only if it is false, deceptive, or misleading. See, *e. g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638. If it is not, the State can restrict it, but only upon a showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. See, *e. g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557, 564, 566. The State’s burden is not slight: It must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. See, *e. g.*, *Edenfield v. Fane*, 507 U. S. 761, 771. Measured against these standards, the order reprimanding Ibanez cannot stand. Pp. 142–143.

(b) The Board asserts that Ibanez’ use of the CPA designation on her commercial communications is misleading in that it tells the public she is subject to the Florida Accountancy Act and to the Board’s jurisdiction “when she believes and acts as though she is not.” This position is insubstantial. Ibanez no longer contests the Board’s assertion of juris-



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diction over her, and in any event, what she “believes” regarding the reach of the Board’s authority is not sanctionable. See *Baird v. State Bar of Ariz.*, 401 U. S. 1, 6. Nor can the Board rest on the bare assertion that Ibanez is unwilling to comply with its regulation; it must build its case on specific evidence of noncompliance. It has never even charged Ibanez with an action out of compliance with the governing statutory or regulatory standards. And as long as she holds a currently active CPA license from the Board, it is difficult to see how consumers could be misled by her truthful representation to that effect. Pp. 143–144.

(c) The Board’s justifications for disciplining Ibanez based on her use of the CFP designation are not more persuasive. The Board presents no evidence that Ibanez’ use of the term “certified” “inherently mislead[s]” by causing the public to infer state approval and recognition. See *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U. S. 91 (attorney’s use of designation “Certified Civil Trial Specialist By the National Board of Trial Advocacy” neither actually nor inherently misleading). Nor did the Board advert to key aspects of the designation here at issue—the nature of the authorizing organization and the state of knowledge of the public to whom Ibanez’ communications are directed—in reaching its alternative conclusion that the CFP designation is “potentially misleading.” On the bare record made in this case, the Board has not shown that the restrictions burden no more of Ibanez’ constitutionally protected speech than necessary. Pp. 144–149.

621 So. 2d 435, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court with respect to Part II–B, and the opinion of the Court with respect to Parts I, II–A, and II–C, in which BLACKMUN, STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. O’CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 149.

*Silvia Safille Ibanez, pro se*, argued the cause for petitioner. With her on the briefs were *J. Lofton Westmoreland* and *Robert J. Shapiro*.

*Lisa S. Nelson* argued the cause and filed a brief for respondent.\*

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\*Briefs of *amici curiae* urging reversal were filed for the Alliance of Practicing Certified Public Accountants et al. by *Donald B. Verrilli, Jr.*, *David W. DeBruin*, and *Maureen F. Del Duca*; for the American Association of Attorney-Certified Public Accountants, Inc., by *David Ostrove*,

JUSTICE GINSBURG delivered the opinion of the Court.

Petitioner Silvia Safille Ibanez, a member of the Florida Bar since 1983, practices law in Winter Haven, Florida. She is also a Certified Public Accountant (CPA), licensed by respondent Florida Board of Accountancy (Board)<sup>1</sup> to “practice public accounting.” In addition, she is authorized by the Certified Financial Planner Board of Standards, a private organization, to use the trademarked designation “Certified Financial Planner” (CFP).

Ibanez referred to these credentials in her advertising and other communication with the public. She placed CPA and CFP next to her name in her yellow pages listing (under “Attorneys”) and on her business card. She also used those designations at the left side of her “Law Offices” stationery. Notwithstanding the apparently truthful nature of her communication—it is undisputed that neither her CPA license nor her CFP certification has been revoked—the Board reprimanded her for engaging in “false, deceptive, and misleading” advertising. Final Order of the Board of Accountancy (May 12, 1992) (hereinafter Final Order), App. 178, 194.

The record reveals that the Board has not shouldered the burden it must carry in matters of this order. It has not

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*Sydney S. Traum*, and *Philip D. Brent*; for the Certified Financial Planner Board of Standards et al. by *Peter E. Zwanzig*; and for the Florida Bar by *Steven E. Stark* and *Scott D. Makar*.

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Certified Public Accountants by *Louis A. Craco*, *Richard I. Miller*, *Michael R. Young*, and *Kelly M. Hnatt*; and for the Florida Institute of Certified Public Accountants by *Kenneth R. Hart* and *Steven P. Seymoe*.

<sup>1</sup>The Board of Accountancy, created by the Florida Legislature, Fla. Stat. § 473.303 (1991), is authorized to “adopt all rules necessary to administer” the Public Accountancy Act (chapter 473 of the Florida Statutes). Fla. Stat. § 473.304 (Supp. 1992). The Board is responsible for licensing CPA’s, see Fla. Stat. § 473.308 (1991), and every licensee is subject to the governance of the Act and the rules adopted by the Board. Fla. Stat. § 473.304 (Supp. 1992).

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demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes. We therefore hold that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action.

## I

Under Florida's Public Accountancy Act, only licensed CPA's may "[a]ttest as an expert in accountancy to the reliability or fairness of presentation of financial information," Fla. Stat. § 473.322(1)(c) (1991),<sup>2</sup> or use the title "CPA" or other title "tending to indicate that such person holds an active license" under Florida law. § 473.322(1)(b). Furthermore, only licensed CPA's may "[p]ractice public accounting." § 473.322(1)(a). "Practicing public accounting" is defined as an "offe[r] to perform . . . one or more types of services involving the use of accounting skills, or . . . management advisory or consulting services," Fla. Stat. § 473.302(5) (Supp. 1992), made by one who either *is*, § 473.302(5)(a), or "*hold[s] himself . . . out as*," § 473.302(5)(b) (emphasis added), a certified public accountant.<sup>3</sup>

The Board learned of Ibanez' use of the designations CPA and CFP when a copy of Ibanez' yellow pages listing was mailed, anonymously, to the Board's offices; it thereupon commenced an investigation and, subsequently, issued a complaint against her. The Board charged Ibanez with (1)

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<sup>2</sup>This "attest" function is more commonly referred to as "auditing."

<sup>3</sup>Florida's Public Accountancy Act is known as a "Title Act" because, with the exception of the "attest" function, activities performed by CPA's can lawfully be performed by non-CPA's. See Brief for Respondent 11-12. The Act contains additional restrictions on the conduct of licensed CPA's. For example, a partnership or corporation cannot "practice public accounting" unless all partners or shareholders are CPA's, Fla. Stat. § 473.309 (1991), nor may licensees "engaged in the practice of public accounting" pay or accept referral fees, § 473.3205, or accept contingency fees, § 473.319.

“practicing public accounting” in an unlicensed firm, in violation of § 473.3101 of the Public Accountancy Act;<sup>4</sup> (2) using a “specialty designation”—CFP—that had not been approved by the Board, in violation of Board Rule 24.001(1)(g), Fla. Admin. Code § 61H1-24.001(1)(g) (1994);<sup>5</sup> and (3) appending the CPA designation after her name, thereby “impl[ying] that she abides by the provisions of [the Public Accountancy Act],” in violation of Rule 24.001(1)’s ban on “fraudulent, false, deceptive, or misleading” advertising. Amended Administrative Complaint (filed June 30, 1991), 1 Record 32–35.

At the ensuing disciplinary hearing, Ibanez argued that she was practicing law, not “public accounting,” and was therefore not subject to the Board’s regulatory jurisdiction. Response to Amended Administrative Complaint (filed Aug. 26, 1991), ¶ 25, *id.*, at 108.<sup>6</sup> Her use of the CPA and CFP designations, she argued further, constituted “nonmisleading, truthful, commercial speech” for which she could not be sanctioned. ¶ 24, *ibid.* Prior to the close of proceedings before the hearing officer, the Board dropped the charge that Ibanez was practicing public accounting in an unlicensed firm. Order on Reconsideration (filed Aug. 22, 1991), ¶ 2, *id.*, at 103–104. The hearing officer subsequently found in Ibanez’ favor on all counts, and recommended to the Board that,

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<sup>4</sup> Florida Stat. § 473.3101 (Supp. 1994) requires that “[e]ach partnership, corporation, or limited liability company seeking to engage in the practice of public accounting” apply for a license from the Board, and § 473.309 requires that each such partnership or corporation hold a current license.

<sup>5</sup> Rule 24.001(1) states, in pertinent part, that “[n]o licensee shall disseminate . . . any . . . advertising which is in any way fraudulent, false, deceptive, or misleading, if it . . . (g) [s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless . . . [the] recognizing agency is approved by the Board.” Fla. Admin. Code § 61H1-24.001(1) (1994). The CFP Board of Standards, the “recognizing agency” in regard to Ibanez’ CFP designation, has not been approved by the Board.

<sup>6</sup> Ibanez pointed out that she does not perform the “attest” function in her law practice, and that no service she performs requires a CPA license. See *supra*, at 139, n. 3.

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for want of the requisite proof, all charges against Ibanez be dismissed. Recommended Order (filed Jan. 15, 1992), App. 147.

The Board rejected the hearing officer's recommendation, and declared Ibanez guilty of "false, deceptive and misleading" advertising. Final Order, *id.*, at 194. The Board reasoned, first, that Ibanez was "practicing public accounting" by virtue of her use of the CPA designation and was thus subject to the Board's disciplinary jurisdiction. *Id.*, at 183. Because Ibanez had insisted that her law practice was outside the Board's regulatory jurisdiction, she had, in the Board's judgment, rendered her use of the CPA designation misleading:

"[Ibanez] advertises the fact that she is a CPA, while performing the same 'accounting' activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors [of which] she may be guilty when delivering her services to her clients.

"[Ibanez] is unwilling to acquiesce in the requirements of [the Public Accountancy Act] and [the Board's rules] by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. . . . [She] has, in effect, told the public that she is subject to the provisions of [the Public Accountancy Act] and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not." *Id.*, at 184–185.

Next, the Board addressed Ibanez' use of the CFP designation. On that matter, the Board stated that any designation using the term "certified" to refer to a certifying orga-

nization other than the Board itself (or an organization approved by the Board) “inherently mislead[s] the public into believing that state approval and recognition exists.” *Id.*, at 193–194. Ibanez appealed to the District Court of Appeal, First District, which affirmed the Board’s final order *per curiam* without opinion. *Id.*, at 196, *judgt. order reported at 621 So. 2d 435 (1993)*. As a result, Ibanez had no right of review in the Florida Supreme Court. We granted certiorari, 510 U. S. 1067 (1994), and now reverse.

## II

### A

The Board correctly acknowledged that Ibanez’ use of the CPA and CFP designations was “commercial speech.” Final Order, App. 186. Because “disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,” *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U. S. 91, 108 (1990), only false, deceptive, or misleading commercial speech may be banned. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638 (1985), citing *Friedman v. Rogers*, 440 U. S. 1 (1979); see also *In re R. M. J.*, 455 U. S. 191, 203 (1982) (“Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.”).

Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.<sup>7</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557, 566 (1980);

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<sup>7</sup>“It is well established that ‘[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.’” *Edenfield v. Fane*, 507 U. S. 761, 770 (1993), quoting *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 71, n. 20 (1983).

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see also *id.*, at 564 (regulation will not be sustained if it “provides only ineffective or remote support for the government’s purpose”); *Edenfield v. Fane*, 507 U. S. 761, 767 (1993) (regulation must advance substantial state interest in a “direct and material way” and be in “reasonable proportion to the interests served”); *In re R. M. J.*, 455 U. S., at 203 (State can regulate commercial speech if it shows that it has “a substantial interest” and that the interference with speech is “in proportion to the interest served”).

The State’s burden is not slight; the “free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.” *Zauderer*, 471 U. S., at 646. “[M]ere speculation or conjecture” will not suffice; rather the State “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U. S., at 770, 771; see also *Zauderer*, 471 U. S., at 648–649 (State’s “unsupported assertions” insufficient to justify prohibition on attorney advertising; “broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force”). Measured against these standards, the order reprimanding Ibanez cannot stand.

## B

We turn first to Ibanez’ use of the CPA designation in her commercial communications. On that matter, the Board’s position is entirely insubstantial. To reiterate, Ibanez holds a currently active CPA license which the Board has never sought to revoke. The Board asserts that her truthful communication is nonetheless misleading because it “[tells] the public that she is subject to the provisions of [the Accountancy Act] and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not.” Final Order, App. 185; see also Brief for Respondent 20 (“[T]he use

of the CPA designation . . . where the licensee is unwilling to comply with the provisions of the [statute] under which the license was granted, is inherently misleading and may be prohibited.”).

Ibanez no longer contests the Board’s assertion of jurisdiction, see Brief for Petitioner 28 (Ibanez “is, in fact, a licensee subject to the rules of the Board”), and in any event, what she “believes” regarding the reach of the Board’s authority is not sanctionable. See *Baird v. State Bar of Ariz.*, 401 U. S. 1, 6 (1971) (First Amendment “prohibits a State from excluding a person from a profession or punishing him solely because . . . he holds certain beliefs”). Nor can the Board rest on a bare assertion that Ibanez is “unwilling to comply” with its regulation. To survive constitutional review, the Board must build its case on specific evidence of noncompliance. Ibanez has neither been charged with, nor found guilty of, any professional activity or practice out of compliance with the governing statutory or regulatory standards.<sup>8</sup> And as long as Ibanez holds an active CPA license from the Board we cannot imagine how consumers can be misled by her truthful representation to that effect.

### C

The Board’s justifications for disciplining Ibanez for using the CFP designation are scarcely more persuasive. The Board concluded that the words used in the designation—particularly, the word “certified”—so closely resemble “the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists.” Final Order, App. 193–194. This conclusion is difficult to maintain in light of *Peel*. We held in *Peel* that an attorney’s use of the designation “Certified Civil Trial Specialist By the

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<sup>8</sup>Notably, the Board itself withdrew the only charge against Ibanez of this kind, viz., the allegation that she practiced public accounting in an unlicensed firm. See *supra*, at 140.



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National Board of Trial Advocacy” was neither actually nor inherently misleading. See 496 U. S., at 106 (rejecting contention that use of National Board of Trial Advocacy certification on attorney’s letterhead was “actually misleading”); *id.*, at 110 (“State may not . . . completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA”); *id.*, at 111 (Marshall, J., joined by Brennan, J., concurring in judgment) (agreeing that attorney’s letterhead was “neither actually nor inherently misleading”). The Board offers nothing to support a different conclusion with respect to the CFP designation.<sup>9</sup> Given “the complete absence of any evidence of deception,” *id.*, at 106, the Board’s “concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment,” *id.*, at 111.<sup>10</sup>

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<sup>9</sup>JUSTICE O’CONNOR writes that “[t]he average consumer has no way to verify the accuracy or value of [Ibanez’] use of the CFP designation” because her advertising, “[u]nlike the advertisement in *Peel*, . . . did not identify the organization that had conferred the certification.” *Post*, at 150. We do not agree that the consumer of financial planning services is thus disarmed.

To verify Ibanez’ CFP credential, a consumer could call the CFP Board of Standards. The Board that reprimanded Ibanez never suggested that such a call would be significantly more difficult to make than one to the certifying organization in *Peel*, the National Board of Trial Advocacy. We note in this regard that the attorney’s letterhead in *Peel* supplied no address or telephone number for the certifying agency. Most instructive on this matter, we think, is the requirement of the Rules of Professional Conduct of the Florida Bar, to which attorney Ibanez is subject, that she provide “written information setting forth the factual details of [her] experience, expertise, background, and training” to anyone who so inquires. See Florida Bar, Rule of Professional Conduct 4–7.3(a)(2).

<sup>10</sup>The Board called only three witnesses at the proceeding against Ibanez, all of whom were employees or former employees of the Department of Professional Regulation. Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled by the use of the CFP designation. See *Peel*, 496 U. S., at 100–101 (noting that there was “no contention that any potential client

The Board alternatively contends that Ibanez' use of the CFP designation is "potentially misleading," entitling the Board to "enact measures short of a total ban to prevent deception or confusion." Brief for Respondent 33, citing *Peel*, 496 U. S., at 116 (Marshall, J., joined by Brennan, J., concurring in judgment). If the "protections afforded commercial speech are to retain their force," *Zauderer*, 471 U. S., at 648–649, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U. S., at 771.

The Board points to Rule 24.001(1)(j), Fla. Admin. Code § 61H1–24.001(1)(j) (1994), which prohibits use of any "specialist" designation unless accompanied by a disclaimer, made "in the immediate proximity of the statement that implies formal recognition as a specialist"; the disclaimer must "stat[e] that the recognizing agency is not affiliated with or sanctioned by the state or federal government," and it must set out the recognizing agency's "requirements for recognition, including, but not limited to, educatio[n], experience[,], and testing." See Brief for Respondent 33–35. Given the state of this record—the failure of the Board to point to any harm that is potentially real, not purely hypothetical—we are satisfied that the Board's action is unjustified. We express no opinion whether, in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing "unduly burdensome disclosure requirements [that] offend the First Amendment." *Zauderer*, 471 U. S., at 651. This much is plain, however: The detail required in the disclaimer currently described by the Board effectively rules out notation of the "specialist"

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or person was actually misled or deceived," nor "any factual finding of actual deception or misunderstanding").

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designation on a business card or letterhead, or in a yellow pages listing.<sup>11</sup>

The concurring Justices, on whom the Board relies, did indeed find the “[NBTA] Certified Civil Trial Specialist” statement on a lawyer’s letterhead “potentially misleading,” but they stated no categorical rule applicable to all specialty designations. Thus, they recognized that “[t]he potential for misunderstanding might be less if the NBTA were a commonly recognized organization and the public had a general understanding of its requirements.” *Peel*, 496 U. S., at 115. In this regard, we stress again the failure of the Board to back up its alleged concern that the designation CFP would mislead rather than inform.

The Board never adverted to the prospect that the public potentially in need of a civil trial specialist, see *Peel, supra*, is wider, and perhaps less sophisticated, than the public with financial resources warranting the services of a planner. Noteworthy in this connection, “Certified Financial Planner” and “CFP” are well-established, protected federal trademarks that have been described as “the most recognized designation[s] in the planning field.” *Financial Planners: Report of Staff of United States Securities and Exchange Commission to the House Committee on Energy and Commerce’s Subcommittee on Telecommunications and Finance 53 (1988)*, reprinted in *Financial Planners and Investment Advisors, Hearing before the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 100th Cong., 2d Sess., 78 (1988)*. Approxi-

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<sup>11</sup> Under the Board’s regulations, moreover, it appears that even a disclaimer of the kind described would not have saved Ibanez from censure. Rule 24.001(i) flatly bans “[s]tat[ing] a form of recognition by any entity other than the Board that uses the ter[m] ‘certified.’” Separate and distinct from that absolute prohibition, the regulations further proscribe “[s]tat[ing] or impl[y]ing that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains” a copiously detailed disclaimer. Rule 24.001(j).

mately 27,000 persons have qualified for the designation nationwide. Brief for Certified Financial Planner Board of Standards, Inc., et al. as *Amici Curiae* 3. Over 50 accredited universities and colleges have established courses of study in financial planning approved by the CFP Board of Standards, and standards for licensure include satisfaction of certain core educational requirements, a passing score on a certification examination “similar in concept to the Bar or CPA examinations,” completion of a planning-related work experience requirement, agreement to abide by the CFP Code of Ethics and Professional Responsibility, and an annual continuing education requirement. *Id.*, at 10–15.

Ibanez, it bears emphasis, is engaged in the practice of law and so represents her offices to the public. Indeed, she performs work reserved for lawyers but nothing that *only* CPA’s may do. See *supra*, at 139, n. 3. It is therefore significant that her use of the designation CFP is considered in all respects appropriate by the Florida Bar. See Brief for Florida Bar as *Amicus Curiae* 9–10 (noting that Florida Bar, Rules of Professional Conduct, and particularly Rule 4–7.3, “specifically allo[w] Ibanez to disclose her CPA and CFP credentials [and] contemplate that Ibanez must provide this information to prospective clients (if relevant)”).

Beyond question, this case does not fall within the caveat noted in *Peel* covering certifications issued by organizations that “had made no inquiry into petitioner’s fitness,” or had “issued certificates indiscriminately for a price”; statements made in such certifications, “even if true, could be misleading.” 496 U. S., at 102. We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here. See *Edenfield*, 507 U. S., at 771 (striking down Florida ban on CPA solicitation where Board “presents no studies that suggest personal solicitation . . . creates the dangers . . . the Board claims to fear” nor even “anecdotal evidence . . . that validates the Board’s suppositions”); *Zauderer*, 471 U. S., at

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648–649 (striking down restrictions on attorney advertising where “State’s arguments amount to little more than unsupported assertions” without “evidence or authority of any kind”). To approve the Board’s reprimand of Ibanez would be to risk toleration of commercial speech restraints “in the service of . . . objectives that could not themselves justify a burden on commercial expression.” *Edenfield*, 507 U. S., at 171.

Accordingly, the judgment of the Florida District Court of Appeal is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

Once again, we are confronted with a First Amendment challenge to a state restriction on professional advertising. Petitioner, who has been licensed as an attorney and as a certified public accountant (CPA) by the State of Florida, and who also has been recognized as a “Certified Financial Planner” (CFP) by a private organization, identified herself in telephone listings under the “attorneys” heading as “IBANEZ SILVIA S CPA CFP.” App. 4. Respondent, the Florida Board of Accountancy, determined that petitioner’s use of both the CPA and the CFP designations was inherently misleading, and sanctioned her for false advertising. Fla. Stat. § 473.323(1)(f) (1991) (accountants subject to disciplinary action if they “[a]dvertis[e] goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content”).

## I

Because petitioner’s use of the CFP designation is both inherently and potentially misleading, I would uphold the Board’s sanction of petitioner. I therefore respectfully dissent from Parts II–A and II–C of the opinion of the Court.

A

States may prohibit inherently misleading speech entirely. *In re R. M. J.*, 455 U. S. 191, 203 (1982). In *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990), we considered an attorney advertisement that proclaimed the lawyer to be a “‘Certified Civil Trial Specialist By the National Board of Trial Advocacy.’” See *id.*, at 96. A majority of the Court concluded that this statement was not inherently misleading, although the discussion of this issue was joined by only four Justices. See *id.*, at 100–106 (plurality opinion); *id.*, at 111 (Marshall, J., concurring in judgment). The plurality reasoned that the certification was a statement of verifiable fact; that the certification had been conferred by a reputable organization that had applied objectively clear standards to determining the attorney’s qualifications; and that consumers would not confuse the attorney’s claim of certification as a specialist with formal state recognition.

Although the Certified Financial Planner Board of Standards, Inc., appears to be a reputable organization that applies objectively clear standards before conferring the CFP designation on accountants, the other factors relied on by the *Peel* plurality are not present in this case. First, it was important in *Peel* that “[t]he facts stated on [the attorney’s] letterhead are true *and verifiable*.” *Id.*, at 100 (emphasis added); see also *id.*, at 101 (“A lawyer’s certification by [the recognizing organization] is a verifiable fact, as are the predicate requirements for that certification”). Of course, petitioner’s recognition as a CFP can be verified—but only if the consumer knows where to call or write. Unlike the advertisement in *Peel*, petitioner’s advertisements did not identify the organization that had conferred the certification. The average consumer has no way to verify the accuracy or value of petitioner’s use of the CFP designation.

Related to this point is the fact that, in the absence of an identified conferring organization, the consumer is likely to

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conclude that the CFP designation is conferred by the State. The *Peel* plurality stressed that “it seems unlikely that [the attorney’s] statement about his certification as a ‘specialist’ *by an identified national organization* necessarily would be confused with formal state recognition.” *Id.*, at 104–105 (emphasis added). Because here there is no such identification, the converse is true. It is common knowledge that “many States prescribe requirements for, and ‘certify’ public accountants as, ‘Certified Public Accountants.’” *Id.*, at 113 (Marshall, J., concurring in judgment). Petitioner has of course been licensed as a CPA by the State of Florida. But her use of the CFP designation in close connection with the identification of herself as a CPA (“IBANEZ SILVIA S CPA CFP”) would lead a reasonable consumer to conclude that the two “certifications” were conferred by the same entity—the State of Florida.

The Board of Accountancy has recognized this likelihood of consumer confusion: “[The term ‘certified’] in conjunction with the term ‘CPA’ and the practice of public accounting, [is] so close to the terms protected by state licensure itself, that [its] use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists.” App. 193–194. For this reason, the Board’s regulations provide that an advertisement will be deemed misleading if it “[s]tates a form of recognition by any entity other than the Board that uses the ter[m] ‘certified.’” Fla. Admin. Code 61H1–24.001(1)(i) (1994). Petitioner’s advertising is in clear violation of this prohibition. Because the First Amendment does not prevent a State from protecting consumers from such inherently misleading advertising, in my view the Board’s blanket prohibition on the use of the term “certified” in CPA advertising is constitutional as applied to petitioner.

## B

But even if petitioner’s use of “certified” was not inherently misleading, it seems clear beyond cavil that *some* con-

sumers would conclude that the State conferred the CFP designation, just as it does the CPA license, and thus that the advertisement is *potentially* misleading. Indeed, this conclusion follows *a fortiori* from *Peel*, where five Justices concluded that the attorney's specialty designation was at least potentially misleading. See 496 U. S., at 118 (White, J., dissenting). The advertisement in *Peel*, which identified the certifying organization, provided substantially more information to consumers than does petitioner's advertisement; if the one was potentially misleading (and we said that it was), so too is the other.

States may not completely ban potentially misleading commercial speech if narrower limitations can ensure that the information is presented in a nonmisleading manner. *In re R. M. J.*, *supra*, at 203. But if a professional's certification claim has the potential to mislead, the State may "requir[e] a disclaimer about the certifying organization or the standards of a specialty." *Peel*, 496 U. S., at 110 (plurality opinion); see also *id.*, at 116–117 (Marshall, J., concurring in judgment); *In re R. M. J.*, *supra*, at 203. The Board has done just that: An advertisement that "[s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting" will be deemed false or misleading, "unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government." Fla. Admin. Code 61H1–24.001(1)(j) (1994). "The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educatio[n], experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist." *Ibid.* There is no question but that the CFP designation "implies that [petitioner] has received formal recognition as a specialist" in financial planning, an "aspect of the practice of public accounting," and her advertisements do not contain the required disclaimer. If the ab-



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solute prohibition on the use of the term “certified” cannot be applied to petitioner (as the Court today holds), then the disclaimer requirement applies to petitioner’s advertising that she is a specialist in financial planning. Because petitioner failed to comply with it, the Board properly disciplined her.

## II

Petitioner *is* a certified public accountant, and her use of the CPA designation in advertising conveyed this truthful information to the public. I agree with the Court that the State of Florida may not prohibit petitioner’s use of the CPA designation under the circumstances in which this case is presented to us, and I therefore join Part II–B of the Court’s opinion. I would only point out that it is open to the Board to proceed against petitioner for practicing public accounting in violation of statutory or regulatory standards applicable to Florida accountants. See Brief for Petitioner 28 (“Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy”). And if petitioner’s public accounting license is revoked, the State may constitutionally prohibit her from advertising herself as a CPA.

## Syllabus

SIMMONS *v.* SOUTH CAROLINA

## CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 92-9059. Argued January 18, 1994—Decided June 17, 1994

During the penalty phase of petitioner's South Carolina trial, the State argued that his future dangerousness was a factor for the jury to consider when deciding whether to sentence him to death or life imprisonment for the murder of an elderly woman. In rebuttal, petitioner presented evidence that his future dangerousness was limited to elderly women and thus there was no reason to expect violent acts from him in prison. However, the court refused to give the jury his proposed instruction that under state law he was ineligible for parole. When asked by the jury whether life imprisonment carried with it the possibility of parole, the court instructed the jury not to consider parole in reaching its verdict and that the terms life imprisonment and death sentence were to be understood to have their plain and ordinary meaning. The jury returned a death sentence. On appeal, the State Supreme Court concluded that regardless of whether a trial court's refusal to inform a sentencing jury about a defendant's parole ineligibility might ever be error, the instruction given to petitioner's jury satisfied in substance his request for a charge on such ineligibility.

*Held:* The judgment is reversed, and the case is remanded.

310 S. C. 439, 427 S. E. 2d 175, reversed and remanded.

JUSTICE BLACKMUN, joined by JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG, concluded:

1. Where a defendant's future dangerousness is at issue, and state law prohibits his release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. An individual cannot be executed on the basis of information which he had no opportunity to deny or explain. *Gardner v. Florida*, 430 U. S. 349, 362. Petitioner's jury reasonably may have believed that he could be released on parole if he were not executed. To the extent that this misunderstanding pervaded its deliberations, it had the effect of creating a false choice between sentencing him to death and sentencing him to a limited period of incarceration. The trial court's refusal to apprise the jury of information so crucial to its determination, particularly when the State alluded to the defendant's future dangerousness in its argument, cannot be reconciled with this Court's well-established precedents interpreting the Due Process Clause. See, *e. g.*, *Skipper v. South Carolina*, 476 U. S. 1. Pp. 161-169.

## Syllabus

2. The trial court's instruction that life imprisonment was to be understood in its plain and ordinary meaning did not satisfy petitioner's request for a parole ineligibility charge, since it did nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines "life imprisonment." Pp. 169–171.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that where the State puts a defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the sentencing jury—either by argument or instruction—that he is parole ineligible. If the prosecution does not argue future dangerousness, a State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without the possibility of parole. Here, the trial court's instruction did not satisfy petitioner's request for a parole ineligibility charge, since the rejection of parole is a recent development displacing the longstanding practice of parole availability, and since common sense dictates that many jurors might not know whether a life sentence carries with it the possibility of parole. Pp. 175–178.

BLACKMUN, J., announced the judgment of the Court and delivered an opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. SOUTER, J., filed a concurring opinion, in which STEVENS, J., joined, *post*, p. 172. GINSBURG, J., filed a concurring opinion, *post*, p. 174. O'CONNOR, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 175. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 178.

*David I. Bruck*, by appointment of the Court, 510 U. S. 942, argued the cause for petitioner. With him on the briefs was *M. Anne Pearce*.

*Richard A. Harpootlian* argued the cause for respondent. With him on the brief were *T. Travis Medlock*, Attorney General of South Carolina, and *Donald J. Zelenka*, Chief Deputy Attorney General.\*

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\*A brief of *amici curiae* urging affirmance was filed for the State of Idaho et al. by *Larry EchoHawk*, Attorney General of Idaho, and *Lynn E. Thomas*, Solicitor General, *Grant Woods*, Attorney General of Arizona, *Daniel E. Lungren*, Attorney General of California, *John M. Bailey*, Chief State's Attorney of Connecticut, *Roland Burris*, Attorney General of Illi-

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JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join.

This case presents the question whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of a state trial court to instruct the jury in the penalty phase of a capital trial that under state law the defendant was ineligible for parole. We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

I

A

In July 1990, petitioner beat to death an elderly woman, Josie Lamb, in her home in Columbia, South Carolina. The week before petitioner's capital murder trial was scheduled to begin, he pleaded guilty to first-degree burglary and two counts of criminal sexual conduct in connection with two prior assaults on elderly women. Petitioner's guilty pleas resulted in convictions for violent offenses, and those convictions rendered petitioner ineligible for parole if convicted of any subsequent violent-crime offense. S. C. Code Ann. § 24-21-640 (Supp. 1993).

Prior to jury selection, the prosecution advised the trial judge that the State "[o]bviously [was] going to ask you to exclude any mention of parole throughout this trial." App. 2. Over defense counsel's objection, the trial court granted the prosecution's motion for an order barring the

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nois, *Chris Gorman*, Attorney General of Kentucky, *Richard P. Ieyoub*, Attorney General of Louisiana, *Joseph P. Mazurek*, Attorney General of Montana, *Fred DeVesa*, Attorney General of New Jersey, *Michael E. Easley*, Attorney General of North Carolina, *Mark Barnett*, Attorney General of South Dakota, and *Dan Morales*, Attorney General of Texas.

*William C. Pelster* filed a brief for Donna L. Markle et al. as *amici curiae*.

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defense from asking any question during *voir dire* regarding parole. Under the court's order, defense counsel was forbidden even to mention the subject of parole, and expressly was prohibited from questioning prospective jurors as to whether they understood the meaning of a "life" sentence under South Carolina law.<sup>1</sup> After a 3-day trial, petitioner was convicted of the murder of Ms. Lamb.

During the penalty phase, the defense brought forward mitigating evidence tending to show that petitioner's violent behavior reflected serious mental disorders that stemmed from years of neglect and extreme sexual and physical abuse petitioner endured as an adolescent. While there was some disagreement among witnesses regarding the extent to which petitioner's mental condition properly could be deemed a "disorder," witnesses for both the defense and the prosecution agreed that petitioner posed a continuing danger to elderly women.

In its closing argument the prosecution argued that petitioner's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The question for the jury, said the prosecution, was "what to do with [petitioner] now that he is in our midst." *Id.*, at 110. The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Ibid.*

Petitioner sought to rebut the prosecution's generalized argument of future dangerousness by presenting evidence that, due to his unique psychological problems, his dangerousness was limited to elderly women, and that there was no reason to expect further acts of violence once he was isolated in a prison setting. In support of his argument, petitioner introduced testimony from a female medical assistant and

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<sup>1</sup>The venire was informed, however, of the meaning of the term "death" under South Carolina law. The trial judge specifically advised the prospective jurors that "[b]y the death penalty, we mean death by electrocution." The sentencing jury was also so informed. App. 129.

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from two supervising officers at the Richland County jail where petitioner had been held prior to trial. All three testified that petitioner had adapted well to prison life during his pretrial confinement and had not behaved in a violent manner toward any of the other inmates or staff. Petitioner also offered expert opinion testimony from Richard L. Boyle, a clinical social worker and former correctional employee, who had reviewed and observed petitioner's institutional adjustment. Mr. Boyle expressed the view that, based on petitioner's background and his current functioning, petitioner would successfully adapt to prison if he was sentenced to life imprisonment.

Concerned that the jury might not understand that "life imprisonment" did not carry with it the possibility of parole in petitioner's case, defense counsel asked the trial judge to clarify this point by defining the term "life imprisonment" for the jury in accordance with S. C. Code Ann. § 24-21-640 (Supp. 1993).<sup>2</sup> To buttress his request, petitioner proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility. On petitioner's behalf, attorneys for the South Carolina Department of Corrections and the Department of Probation, Parole and Pardons testified that any offender in petitioner's position was in fact ineligible for parole under South Carolina law. The prosecution did not challenge or question petitioner's parole ineligibility. Instead, it sought to elicit admissions from the witnesses that, notwithstanding petitioner's parole ineligibility, petitioner might receive holiday furloughs or other forms of early release. Even this effort was unsuccessful, however,

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<sup>2</sup>Section 24-21-640 states: "The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing from a prior conviction, for violent crimes as defined in Section 16-1-60." Petitioner's earlier convictions for burglary in the first degree and criminal sexual assault in the first degree are violent offenses under § 16-1-60.

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as the cross-examination revealed that Department of Corrections regulations prohibit petitioner's release under early release programs such as work-release or supervised furloughs, and that no convicted murderer serving life without parole ever had been furloughed or otherwise released for any reason.

Petitioner then offered into evidence, without objection, the results of a statewide public-opinion survey conducted by the University of South Carolina's Institute for Public Affairs. The survey had been conducted a few days before petitioner's trial, and showed that only 7.1 percent of all jury-eligible adults who were questioned firmly believed that an inmate sentenced to life imprisonment in South Carolina actually would be required to spend the rest of his life in prison. See App. 152–154. Almost half of those surveyed believed that a convicted murderer might be paroled within 20 years; nearly three-quarters thought that release certainly would occur in less than 30 years. *Ibid.* More than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an “extremely important” or a “very important” factor in choosing between life and death. *Id.*, at 155.

Petitioner argued that, in view of the public's apparent misunderstanding about the meaning of “life imprisonment” in South Carolina, there was a reasonable likelihood that the jurors would vote for death simply because they believed, mistakenly, that petitioner eventually would be released on parole.

The prosecution opposed the proposed instruction, urging the court “not to allow . . . any argument by state or defense about parole and not charge the jury on anything concerning parole.” *Id.*, at 37. Citing the South Carolina Supreme Court's opinion in *State v. Torrence*, 305 S. C. 45, 406 S. E.

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2d 315 (1991), the trial court refused petitioner's requested instruction. Petitioner then asked alternatively for the following instruction:

"I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

"In your deliberations, you are not to speculate that these sentences mean anything other than what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is." App. 162.

The trial judge also refused to give this instruction, but indicated that he might give a similar instruction if the jury inquired about parole eligibility.

After deliberating on petitioner's sentence for 90 minutes, the jury sent a note to the judge asking a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.*, at 145. Over petitioner's objection, the trial judge gave the following instruction:

"You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain [sic] and ordinary meaning." *Id.*, at 146.

Twenty-five minutes after receiving this response from the court, the jury returned to the courtroom with a sentence of death.

On appeal to the South Carolina Supreme Court, petitioner argued that the trial judge's refusal to provide the jury accurate information regarding his parole ineligibil-



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ity violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>3</sup> The South Carolina Supreme Court declined to reach the merits of petitioner's challenges. With one justice dissenting, it concluded that, regardless of whether a trial court's refusal to inform a sentencing jury about a defendant's parole ineligibility might be error under some circumstances, the instruction given to petitioner's jury "satisfie[d] in substance [petitioner's] request for a charge on parole ineligibility," and thus there was no reason to consider whether denial of such an instruction would be constitutional error in this case. 310 S. C. 439, 444, 427 S. E. 2d 175, 179 (1993). We granted certiorari, 510 U. S. 811 (1993).

## II

The Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U. S. 349, 362 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This

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<sup>3</sup>Specifically, petitioner argued that under the Eighth Amendment his parole ineligibility was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,'" *Skipper v. South Carolina*, 476 U. S. 1, 4-5 (1986), quoting *Lockett v. Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion), and that therefore he was entitled to inform the jury of his parole ineligibility. He also asserted that by withholding from the jury the fact that it had a life-without-parole sentencing alternative, the trial court impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment. Cf. *Beck v. Alabama*, 447 U. S. 625 (1980). Finally, relying on the authority of *Gardner v. Florida*, 430 U. S. 349 (1977), petitioner argued that his due process right to rebut the State's argument that petitioner posed a future danger to society had been violated by the trial court's refusal to permit him to show that a noncapital sentence adequately could protect the public from any future acts of violence by him.

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grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. Three times petitioner asked to inform the jury that in fact he was ineligible for parole under state law; three times his request was denied. The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.<sup>4</sup>

A

This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system. See *Jurek v. Texas*, 428 U. S. 262, 275 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *California v. Ramos*, 463 U. S. 992, 1003, n. 17 (1983) (explaining that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society").

Although South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances.

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<sup>4</sup>We express no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment.

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See *Barclay v. Florida*, 463 U. S. 939, 948–951 (1983) (plurality opinion); *California v. Ramos*, 463 U. S., at 1008 (“Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment”). Thus, prosecutors in South Carolina, like those in other States that impose the death penalty, frequently emphasize a defendant’s future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *Cornell L. Rev.* 1, 4 (1993).

Arguments relating to a defendant’s future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant’s future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt. But where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase. The defendant’s character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment. See *Lockett v. Ohio*, 438 U. S. 586 (1978); *Eddings v. Oklahoma*, 455 U. S. 104, 110 (1982); *Barclay v. Florida*, 463 U. S., at 948–951.

In assessing future dangerousness, the actual duration of the defendant’s prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defend-

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ant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

## B

In *Skipper v. South Carolina*, 476 U. S. 1 (1986), this Court held that a defendant was denied due process by the refusal of the state trial court to admit evidence of the defendant's good behavior in prison in the penalty phase of his capital trial. Although the majority opinion stressed that the defendant's good behavior in prison was "relevant evidence in mitigation of punishment," and thus admissible under the Eighth Amendment, *id.*, at 4, citing *Lockett v. Ohio*, 438 U. S., at 604 (plurality opinion), the *Skipper* opinion expressly noted that the Court's conclusion also was compelled by the Due Process Clause. The Court explained that where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal. 476 U. S., at 5, n. 1. See also *id.*, at 9 (Powell, J., opinion concurring in judgment) ("[B]ecause petitioner was not allowed to rebut evidence and argument used against him," the defendant clearly was denied due process).

The Court reached a similar conclusion in *Gardner v. Florida*, 430 U. S. 349 (1977). In that case, a defendant was sentenced to death on the basis of a presentence report which was not made available to him and which he therefore could not rebut. A plurality of the Court explained that sending a man to his death "on the basis of information which he had no opportunity to deny or explain" violated fundamental notions of due process. *Id.*, at 362. The principle an-

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nounced in *Gardner* was reaffirmed in *Skipper*, and it compels our decision today. See also *Crane v. Kentucky*, 476 U. S. 683, 690 (1986) (due process entitles a defendant to “‘a meaningful opportunity to present a complete defense’”) (citation omitted); *Ake v. Oklahoma*, 470 U. S. 68, 83–87 (1985) (where the State presents psychiatric evidence of a defendant’s future dangerousness at a capital sentencing proceeding, due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense).

Like the defendants in *Skipper* and *Gardner*, petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner’s future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor’s intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society.<sup>5</sup> The logic and effectiveness of petitioner’s argument naturally depended on the fact that he was legally ineligible for parole and thus would remain in prison if afforded a life sentence. Petitioner’s efforts to focus the jury’s attention on the question whether, in prison, he would be a future danger were futile, as he repeatedly was denied any opportunity to inform the jury that he never would be released on parole. The jury was left to speculate about petitioner’s parole eligibility when evaluating petitioner’s future dangerousness, and was denied a straight an-

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<sup>5</sup> Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. But the State may not mislead the jury by concealing accurate information about the defendant’s parole ineligibility. The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution’s arguments of future dangerousness with the fact that he is ineligible for parole under state law.

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swer about petitioner's parole eligibility even when it was requested.

## C

The State and its *amici* contend that petitioner was not entitled to an instruction informing the jury that petitioner is ineligible for parole because such information is inherently misleading.<sup>6</sup> Essentially, they argue that because future exigencies such as legislative reform, commutation, clemency, and escape might allow petitioner to be released into society, petitioner was not entitled to inform the jury that he is parole ineligible. Insofar as this argument is targeted at the specific wording of the instruction petitioner requested, the argument is misplaced. Petitioner's requested instruction ("If . . . you recommend that [the defendant] be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life," App. 162) was proposed only after the trial court ruled that South Carolina law prohibited a plain-language instruction that petitioner was ineligible for parole under state law. To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments, the argument has little force. Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate. Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether "life imprisonment" means life without parole or something else.

The State's asserted accuracy concerns are further undermined by the fact that a large majority of States which pro-

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<sup>6</sup> In this regard, the State emphasizes that no statute prohibits petitioner's eventual release into society. While this technically may be true, state regulations unambiguously prohibit work-release and virtually all other furloughs for inmates who are ineligible for parole. See App. 16. As for pardons, the statute itself provides that they are available only in "the most extraordinary circumstances." S. C. Code Ann. §24-21-950D (1989).

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vide for life imprisonment without parole as an alternative to capital punishment inform the sentencing authority of the defendant's parole ineligibility.<sup>7</sup> The few States that do not provide capital sentencing juries with any information regarding parole ineligibility seem to rely, as South Carolina

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<sup>7</sup> At present, there are 26 States that both employ juries in capital sentencing and provide for life imprisonment without parole as an alternative to capital punishment. In 17 of these, the jury expressly is informed of the defendant's ineligibility for parole. Nine States simply identify the jury's sentencing alternatives as death and life without parole. See Ala. Code § 13A-5-46(e) (1982); Ark. Code Ann. § 5-4-603(b) (1993); Cal. Penal Code Ann. § 190.3 (West 1988); Conn. Gen. Stat. § 53a-46a(f) (1985); Del. Code Ann., Tit. 11, § 4209(a) (1987); La. Code Crim. Proc. Ann., Art. 905.6 (West Supp. 1994); Mo. Rev. Stat. § 565.030.4 (Supp. 1993); N. H. Rev. Stat. Ann. § 630:5 (Supp. 1992); Wash. Rev. Code § 10.95.030 (1994). Eight States allow the jury to specify whether the defendant should or should not be eligible for parole. See Ga. Code Ann. § 17-10-31.1(a) (Supp. 1993); Ind. Code § 35-50-2-9 (Supp. 1993); Md. Ann. Code, Art. 27, § 413(c)(3) (Supp. 1993); Nev. Rev. Stat. § 175.554(2)(c)(2) (1993); Okla. Stat. Ann. Tit. 21, § 701.10(A) (Supp. 1993-1994); Ore. Rev. Stat. § 163.105 (1991); Tenn. Code Ann. §§ 39-13-204(a)-(f)(2) (Supp. 1993); Utah Code Ann. § 76-3-207(4) (Supp. 1993).

In three States, statutory or decisional law requires that the sentencing jury be instructed, where accurate, that the defendant will be ineligible for parole. See Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993); *People v. Gacho*, 122 Ill. 2d 221, 262, 522 N. E. 2d 1146, 1166 (1988); *Turner v. State*, 573 So. 2d 657, 675 (Miss. 1990), cert. denied, 500 U. S. 910 (1991).

Three States have not considered the question whether jurors should be instructed that the defendant is ineligible for parole under state law. See Fla. Stat. Ann. § 775.0823(1) (Supp. 1994); S. D. Codified Laws § 24-15-4 (1988); Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (1993). The Florida Supreme Court, however, has approved for publication pattern jury instructions that inform capital sentencing juries of the no-parole feature of Fla. Stat. Ann. § 775.0823(1). See Standard Jury Instructions—Criminal Cases No. 92-1, 603 So. 2d 1175, 1205 (Fla. 1992).

Finally, there are four States in which the capital sentencing decision is made by the trial judge alone or by a sentencing panel of judges. Thus, in these States, as well, the sentencing authority is fully aware of the precise parole status of life-sentenced murderers. Ariz. Rev. Stat. Ann. § 13-703(B) (Supp. 1993); Idaho Code § 19-2515(d) (1987); Mont. Code Ann. § 46-18-301 (1993); Neb. Rev. Stat. § 29-2520 (1989).

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does here, on the proposition that *California v. Ramos*, 463 U. S. 992 (1983), held that such determinations are purely matters of state law.<sup>8</sup>

It is true that *Ramos* stands for the broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing. In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." *Id.*, at 1014. Concomitantly, nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release.

But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will

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<sup>8</sup> Only two States other than South Carolina have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact. See *Commonwealth v. Henry*, 524 Pa. 135, 160, 569 A. 2d 929, 941 (1990), cert. denied, 499 U. S. 931 (1991); *Commonwealth v. Strong*, 522 Pa. 445, 458–460, 563 A. 2d 479, 485–486 (1989); *Eaton v. Commonwealth*, 240 Va. 236, 248–249, 397 S. E. 2d 385, 392–393 (1990), cert. denied, 502 U. S. 824 (1991); *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S. E. 2d 491, 507, cert. denied, 488 U. S. 871 (1988).

JUSTICE SCALIA points out that two additional States, Texas and North Carolina, traditionally have kept information about a capital defendant's parole ineligibility from the sentencing jury. See *post*, at 179. Neither of these States, however, has a life-without-parole sentencing alternative to capital punishment. It is also worthy of note that, pursuant to recently enacted legislation, North Carolina now requires trial courts to instruct capital sentencing juries concerning parole eligibility. See 1993 N. C. Sess. Laws, ch. 538, § 29.



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be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court. See *Gardner*, 430 U. S., at 362.

### III

There remains to be considered whether the South Carolina Supreme Court was correct in concluding that the trial court "satisfie[d] in substance [petitioner's] request for a charge on parole ineligibility," 310 S. C., at 444, 427 S. E. 2d, at 179, when it responded to the jury's query by stating that life imprisonment was to be understood in its "plain and ordinary meaning," *ibid.* In the court's view, petitioner basically received the parole-ineligibility instruction he requested. We disagree.

It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the States. For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term of years) in practice was understood to be shorter than the stated term. See generally Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61 (1993) (describing the development of mandatory sentencing laws). Increasingly, legislatures have enacted mandatory sentencing laws with severe penalty provisions, yet the precise contours of these penal laws vary from State to State. See Cheatwood, *The Life-Without-Parole Sanction: Its Current Status and a Research Agenda*, 34 Crime & Delinq. 43, 45, 48 (1988). Justice Chandler of the South Carolina Supreme

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Court observed that it is impossible to ignore “the reality, known to the ‘reasonable juror,’ that, historically, life-term defendants have been eligible for parole.” *State v. Smith*, 298 S. C. 482, 489–490, 381 S. E. 2d 724, 728 (1989) (opinion concurring and dissenting), cert. denied, 494 U. S. 1060 (1990).<sup>9</sup>

An instruction directing juries that life imprisonment should be understood in its “plain and ordinary” meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines “life imprisonment.”<sup>10</sup> See *Boyde v. California*, 494 U. S. 370, 380 (1990) (where there is a “reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence,” the defendant is denied due process).

It is true, as the State points out, that the trial court admonished the jury that “you are instructed not to consider parole” and that parole “is not a proper issue for your consideration.” App. 146. Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole *was* available but that the jury, for some unstated reason, should be blind to this fact. Undoubtedly, the instruction was confusing and frustrating to the jury, given

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<sup>9</sup>Public opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term “life imprisonment.” See Paduano & Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Human Rights L. Rev. 211, 222–225 (1987); Note, *The Meaning of “Life” for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 (1989); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993); Bowers, *Capital Punishment and Contemporary Values: People’s Misgivings and the Court’s Misperceptions*, 27 Law & Society 157, 169–170 (1993).

<sup>10</sup>It almost goes without saying that if the jury in this case understood that the “plain meaning” of “life imprisonment” was life without parole in South Carolina, there would have been no reason for the jury to inquire about petitioner’s parole eligibility.

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the arguments by both the prosecution and the defense relating to petitioner's future dangerousness, and the obvious relevance of petitioner's parole ineligibility to the jury's formidable sentencing task. While juries ordinarily are presumed to follow the court's instructions, see *Greer v. Miller*, 483 U. S. 756, 766, n. 8 (1987), we have recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U. S. 123, 135 (1968). See also *Beck v. Alabama*, 447 U. S. 625, 642 (1980); *Barclay v. Florida*, 463 U. S., at 950 ("Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences").

But even if the trial court's instruction successfully prevented the jury from considering parole, petitioner's due process rights still were not honored. Because petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility. An instruction directing the jury not to consider the defendant's likely conduct in prison would not have satisfied due process in *Skipper v. South Carolina*, 476 U. S. 1 (1986), and, for the same reasons, the instruction issued by the trial court in this case does not satisfy due process.

## IV

The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole. The judgment of the South Carolina Supreme Court accordingly is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

SOUTER, J., concurring

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, concurring.

I join in JUSTICE BLACKMUN's opinion that, at least when future dangerousness is an issue in a capital sentencing determination, the defendant has a due process right to require that his sentencing jury be informed of his ineligibility for parole. I write separately because I believe an additional, related principle also compels today's decision, regardless of whether future dangerousness is an issue at sentencing.

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.); see also, e. g., *Godfrey v. Georgia*, 446 U. S. 420, 427–428 (1980); *Mills v. Maryland*, 486 U. S. 367, 383–384 (1988). Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U. S. 153, 190 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination," *Beck v. Alabama*, 447 U. S. 625, 638 (1980).

That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request

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should be vacated as having been “arbitrarily or discriminatorily” and “wantonly and . . . freakishly imposed.” *Furman v. Georgia*, 408 U. S. 238, 249 (1972) (Douglas, J., concurring) (internal quotation marks omitted); *id.*, at 310 (Stewart, J., concurring).

While I join the other Members of the Court’s majority in holding that, at least, counsel ought to be permitted to inform the jury of the law that it must apply, see *ante*, at 169 (plurality opinion); *post*, at 174 (GINSBURG, J., concurring); *post*, at 178 (O’CONNOR, J., concurring in judgment), I also accept the general rule that, on matters of law, arguments of counsel do not effectively substitute for statements by the court.

“[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.” *Boyde v. California*, 494 U. S. 370, 384 (1990) (citation omitted).

I would thus impose that straightforward duty on the court.

Because JUSTICE BLACKMUN persuasively demonstrates that juries in general are likely to misunderstand the meaning of the term “life imprisonment” in a given context, see *ante*, at 159, 169–170, and n. 9, the judge must tell the jury what the term means, when the defendant so requests. It is, moreover, clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking, “Does the imposition of a life sentence carry with it the possibility of parole?” *Ante*, at 160, 170, n. 10. The answer here was easy and controlled by state statute. The judge should have said no. JUSTICE BLACKMUN shows that the instruction actually given was at

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best a confusing, “equivocal direction to the jury on a basic issue,” *Bollenbach v. United States*, 326 U. S. 607, 613 (1946), and that “there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violated petitioner’s rights. *Boyd*, *supra*, at 380. By effectively withholding from the jury the life-without-parole alternative, the trial court diminished the reliability of the jury’s decision that death, rather than that alternative, was the appropriate penalty in this case.

While States are, of course, free to provide more protection for the accused than the Constitution requires, see *California v. Ramos*, 463 U. S. 992, 1014 (1983), they may not provide less. South Carolina did so here. For these reasons, as well as those set forth by JUSTICE BLACKMUN, whose opinion I join, the judgment of the Supreme Court of South Carolina must be reversed.

JUSTICE GINSBURG, concurring.

This case is most readily resolved under a core requirement of due process, the right to be heard. *Crane v. Kentucky*, 476 U. S. 683, 690 (1986). When the prosecution urges a defendant’s future dangerousness as cause for the death sentence, the defendant’s right to be heard means that he must be afforded an opportunity to rebut the argument. See *Skipper v. South Carolina*, 476 U. S. 1, 5, n. 1 (1986). To be full and fair, that opportunity must include the right to inform the jury, if it is indeed the case, that the defendant is ineligible for parole. JUSTICE BLACKMUN’s opinion is in accord with JUSTICE O’CONNOR’s on this essential point. See *ante*, at 164, 165–166, 168–169; *post*, at 176–178.

As a subsidiary matter, JUSTICE O’CONNOR’s opinion clarifies that the due process requirement is met if the relevant information is intelligently conveyed to the jury; due process does not dictate that the judge herself, rather than defense counsel, provide the instruction. See *post*, at 177–178. I do

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not read JUSTICE BLACKMUN's opinion to say otherwise.\* And I note that the trial court here not only refused to instruct the jury that in this case life means "life without parole"; the court also ordered petitioner's counsel to refrain from saying anything to the jury about parole ineligibility. App. 55–57.

On these understandings, I concur in JUSTICE BLACKMUN's opinion.

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

"Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause," *Clemons v. Mississippi*, 494 U. S. 738, 746 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. Cf. *Crane v. Kentucky*, 476 U. S. 683, 690 (1986). In capital cases, we have held that the defendant's future dangerousness is a consideration on which the State may rely in seeking the death penalty. See *California v. Ramos*, 463 U. S. 992, 1002–1003 (1983). But "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain' [requires that the defendant be afforded an opportunity to introduce evidence on this point]." *Skipper v. South Carolina*, 476 U. S. 1, 5, n. 1 (1986), quoting *Gardner v. Florida*, 430 U. S. 349, 362 (1977) (plurality opinion); see also 476 U. S., at 9–10 (Powell, J., concurring in judgment).

In this case, petitioner physically and sexually assaulted three elderly women—one of them his own grandmother—before killing a fourth. At the capital sentencing proceed-

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\*Compare *ante*, at 162, n. 4 (refraining from addressing Simmons' Eighth Amendment claim), with *ante*, at 173–174 (SOUTER, J., concurring) (Eighth Amendment requires judge to instruct jury about parole ineligibility).

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ing, the State sought to show that petitioner is a vicious predator who would pose a continuing threat to the community. The prosecutor argued that the jury's role was to decide "what to do with [petitioner] now that he is in our midst," App. 110, and told the jury: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense," *ibid.*; see also *id.*, at 102, 112. Petitioner's response was that he only preyed on elderly women, a class of victims he would not encounter behind bars. See *id.*, at 121; *ante*, at 157 (plurality opinion). This argument stood a chance of succeeding, if at all, only if the jury were convinced that petitioner would *stay* in prison. Although the only available alternative sentence to death in petitioner's case was life imprisonment without possibility of parole, S. C. Code Ann. §§ 16-3-20(A) and 24-21-640 (Supp. 1993), the trial court precluded the jury from learning that petitioner would never be released from prison.

Unlike in *Skipper*, where the defendant sought to introduce factual evidence tending to disprove the State's showing of future dangerousness, see 476 U. S., at 3; *id.*, at 10-11 (Powell, J., concurring in judgment), petitioner sought to rely on the operation of South Carolina's sentencing law in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment. We have previously noted with approval, however, that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole." *California v. Ramos*, 463 U. S., at 1013, n. 30. The decision whether or not to inform the jury of the possibility of early release is generally left to the States. See *id.*, at 1014. In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative



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sentence to death is life imprisonment without possibility of parole.

When the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future. Of course, in such cases the prosecution is free to argue that the defendant would be dangerous in prison; the State may also (though it need not) inform the jury of any truthful information regarding the availability of commutation, pardon, and the like. See *id.*, at 1001–1009.

The prosecutor in this case put petitioner's future dangerousness in issue, but petitioner was not permitted to argue parole ineligibility to the capital sentencing jury. Although the trial judge instructed the jurors that “[t]he terms life imprisonment and death sentence are to be understood in their pla[i]n and ordinary meaning,” App. 146, I cannot agree with the court below that this instruction “satisfie[d] in substance [petitioner's] request for a charge on parole ineligibility.” 310 S. C. 439, 444, 427 S. E. 2d 175, 179 (1993). The rejection of parole by many States (and the Federal Government) is a recent development that displaces the longstanding practice of parole availability, see *ante*, at 169–170 (plurality opinion), and common sense tells us that many jurors might not know whether a life sentence carries with it the

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possibility of parole. While it may come to pass that the “plain and ordinary meaning” of a life sentence is life without parole, that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison. Moreover, the prosecutor, by referring to a verdict of death as an act of “self-defense,” strongly implied that petitioner *would* be let out eventually if the jury did not recommend a death sentence.

Where the State puts the defendant’s future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible. In this case, the prosecution argued at the capital sentencing proceeding that petitioner would be dangerous in the future. Although the only alternative sentence to death under state law was life imprisonment without possibility of parole, petitioner was not allowed to argue to the jury that he would never be released from prison, and the trial judge’s instruction did not communicate this information to the jury. I therefore concur in the Court’s judgment that petitioner was denied the due process of law to which he is constitutionally entitled.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today’s judgment certainly seems reasonable enough as a determination of what a capital sentencing jury should be permitted to consider. That is not, however, what it purports to be. It purports to be a determination that any capital sentencing scheme that does *not* permit jury consideration of such material is so incompatible with our national traditions of criminal procedure that it violates the Due Process Clause of the Constitution of the United States. There is really no basis for such a pronouncement, neither in

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any near uniform practice of our people, nor in the jurisprudence of this Court.

With respect to the former I shall discuss only current practice, since the parties and *amici* have addressed only that, and since traditional practice may be relatively uninformative with regard to the new schemes of capital sentencing imposed upon the States by this Court's recent jurisprudence. The overwhelming majority of the 32 States that permit juries to impose or recommend capital sentences do not allow specific information regarding parole to be given to the jury. To be sure, in many of these States the sentencing choices specifically include "life without parole," so that the jury charge itself conveys the information whether parole is available. In at least eight of those States, however, the jury's choice is not merely between "life without parole" and "death," but among some variation of (parole eligible) "life," "life without parole," and "death"<sup>1</sup>—so that the precise date of availability of parole is relevant to the jury's choice. Moreover, even among those States that permit the jury to choose only between "life" (unspecified) and "death," South Carolina is not alone in keeping parole information from the jury. Four other States in widely separated parts of the country follow that same course,<sup>2</sup> and there are other States that lack

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<sup>1</sup>The eight States are Georgia, see Ga. Code Ann. § 17-10-31.1 (Supp. 1993), Indiana, see Ind. Code § 35-50-2-9 (1993), Maryland, see Md. Ann. Code, Art. 27, § 413(c)(3) (Supp. 1993), Nevada, see Nev. Rev. Stat. § 175.554(2)(c)(2) (1993), Oklahoma, see Okla. Stat., Tit. 21, § 701.10(A) (Supp. 1993), Oregon, see Ore. Rev. Stat. § 163.150 (Supp. 1991), Tennessee, see Tenn. Code Ann. § 39-13-204(a) (Supp. 1993), and Utah, see Utah Code Ann. § 76-3-207(4) (Supp. 1993).

<sup>2</sup>The four States are Pennsylvania, see *Commonwealth v. Henry*, 524 Pa. 135, 159-161, 569 A. 2d 929, 941 (1990), Texas, see *Jones v. State*, 843 S. W. 2d 487, 495 (Tex. Crim. App. 1992), Virginia, see *Eaton v. Commonwealth*, 240 Va. 236, 247-250, 397 S. E. 2d 385, 392-393 (1990), and North Carolina, see *State v. Brown*, 306 N. C. 151, 182-184, 293 S. E. 2d 569, 589 (1982), which will alter its practice effective January 1, 1995, see 1993 N. C. Sess. Laws, ch. 538, § 29.

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any clear practice.<sup>3</sup> By contrast, the parties and their *amici* point to only 10 States that arguably employ the procedure which, according to today's opinions, the Constitution requires.<sup>4</sup> This picture of national practice falls far short of demonstrating a principle so widely shared that it is part of even a current and temporary American consensus.

As for our prior jurisprudence: The opinions of JUSTICE BLACKMUN and JUSTICE O'CONNOR rely on the Fourteenth Amendment's guarantee of due process, rather than on the Eighth Amendment's "cruel and unusual punishments" prohibition, as applied to the States by the Fourteenth Amendment. But cf. *ante*, at 172 (SOUTER, J., concurring). The prior law applicable to that subject indicates that petitioner's due process rights would be violated if he was "sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper v. South Carolina*, 476 U. S. 1, 5, n. 1 (1986), quoting *Gardner v. Florida*, 430 U. S. 349, 362 (1977). Both opinions try to bring this case within that description, but it does not fit.

The opinions paint a picture of a prosecutor who repeatedly stressed that petitioner would pose a threat to society *upon his release*. The record tells a different story.

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<sup>3</sup>The States that allow the jury to choose between "life without parole" and "death" and have not squarely decided whether the jury should receive information about parole include South Dakota, see S. D. Codified Laws § 24-15-4 (1988), and Wyoming, see Wyo. Stat. § 7-13-402(a) (Supp. 1993).

<sup>4</sup>The 10 States identified by the parties and their *amici* are Colorado, see Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993), Florida, see Standard Jury Instructions—Criminal Cases, Report No. 92-1, 603 So. 2d 1175 (1992), Illinois, see *People v. Gacho*, 122 Ill. 2d 221, 262-264, 522 N. E. 2d 1146, 1166 (1988), Maryland, see *Doering v. State*, 313 Md. 384, 545 A. 2d 1281 (1988), Mississippi, see *Turner v. State*, 573 So. 2d 657 (Miss. 1990), New Jersey, see *State v. Martini*, 131 N. J. 176, 312-314, 619 A. 2d 1208, 1280 (1993), New Mexico, see *State v. Henderson*, 109 N. M. 655, 789 P. 2d 603 (1990), Nevada, see *Petrocelli v. State*, 101 Nev. 46, 692 P. 2d 503 (1985), Oklahoma, see *Humphrey v. State*, 864 P. 2d 343 (Okla. Crim. App. 1993), and Oregon, see Brief for State of Idaho et al. as *Amici Curiae* 8.

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Rather than emphasizing future dangerousness as a crucial factor, the prosecutor stressed the nature of petitioner's crimes: the crime that was the subject of the prosecution, the brutal murder of a 79-year-old woman in her home, and three prior crimes confessed to by petitioner, all rapes and beatings of elderly women, one of them his grandmother. I am sure it was the sheer depravity of those crimes, rather than any specific fear for the future, which induced the South Carolina jury to conclude that the death penalty was justice.

Not only, moreover, was future dangerousness not emphasized, but future dangerousness *outside of prison* was not even mentioned. The trial judge undertook specifically to prevent that, in response to the broader request of petitioner's counsel that the prosecutor be prevented from arguing future dangerousness *at all*:

“Obviously, I will listen carefully to the argument of the solicitor to see if it contravenes the actual factual circumstance. Certainly, I recognize the right of the State to argue concerning the defendant's dangerous propensity. I will not allow the solicitor, for example, to say to the jury anything that would indicate that the defendant is not going to be jailed for the period of time that is encompassed within the actual law. The fact that we do not submit the parole eligibility to the jury does not negate the fact that the solicitor must stay within the trial record.” App. 56–57.

As I read the record, the prosecutor followed this admonition—and the Due Process Clause requires nothing more.

Both JUSTICE BLACKMUN and JUSTICE O'CONNOR focus on two portions of the prosecutor's final argument to the jury in the sentencing phase. First, they stress that the prosecutor asked the jury to answer the question of “what to do with [petitioner] now that he is in our midst.” That statement, however, was not made (as they imply) in the course of an argument about future dangerousness, but was a response to

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petitioner's mitigating evidence. Read in context, the statement is not even relevant to the issue in this case:

“The defense in this case as to sentence . . . [is] a diversion. It's putting the blame on society, on his father, on his grandmother, on whoever else he can, spreading it out to avoid that personal responsibility. That he came from a deprived background. That he didn't have all of the breaks in life and certainly that helps shape someone. But we are not concerned about how he got shaped. We are concerned about what to do with him now that he is in our midst.” *Id.*, at 110.

Both opinions also seize upon the prosecutor's comment that the jury's verdict would be “an act of self-defense.” That statement came at the end of admonition of the jury to avoid emotional responses and enter a rational verdict:

“Your verdict shouldn't be returned in anger. Your verdict shouldn't be an emotional catharsis. Your verdict shouldn't be . . . a response to that eight-year-old kid [testifying in mitigation] and really shouldn't be a response to the gruesome grotesque handiwork of [petitioner]. Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense.” *Id.*, at 109–110.

This reference to “self-defense” obviously alluded, neither to defense of the jurors' own persons, nor specifically to defense of persons outside the prison walls, but to defense of all members of society against this individual, wherever he or they might be. Thus, as I read the record (and bear in mind that the trial judge was on the lookout with respect to this point), the prosecutor did not *invite* the jury to believe that petitioner would be eligible for parole—he did not *mislead* the jury.

The rule the majority adopts in order to overturn this sentence therefore goes well beyond what would be necessary to counteract prosecutorial misconduct (a disposition with

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which I might agree). It is a rule at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness. JUSTICE BLACKMUN appears to go even further, requiring the admission of parole ineligibility even when the prosecutor does *not* argue future dangerousness. See *ante*, at 163–164; but see *ante*, at 174 (GINSBURG, J., concurring). I do not understand the basis for this broad prescription. As a general matter, the Court leaves it to the States to strike what *they* consider the appropriate balance among the many factors—probative value, prejudice, reliability, potential for confusion, among others—that determine whether evidence ought to be admissible. Even in the capital punishment context, the Court has noted that “the wisdom of the decision to permit juror consideration of [postsentencing contingencies] is best left to the States.” *California v. Ramos*, 463 U. S. 992, 1014 (1983). “[T]he States, and not this Court, retain ‘the traditional authority’ to determine what particular evidence . . . is relevant.” *Skipper v. South Carolina*, 476 U. S., at 11 (Powell, J., concurring in judgment). One reason for leaving it that way is that a sensible code of evidence cannot be invented piecemeal. Each item cannot be considered in isolation, but must be given its place within the whole. Preventing the *defense* from introducing evidence regarding paroleability is only half of the rule that prevents the *prosecution* from introducing it as well. If the rule is changed for defendants, many will think that evenhandedness demands a change for prosecutors as well. State’s attorneys ought to be able to say that if, ladies and gentlemen of the jury, you do not impose capital punishment upon this defendant (or if you impose anything less than life without parole) he may be walking the streets again in eight years! Many would not favor the admission of such an argument—but would prefer it to a state scheme in which defendants can call attention to the unavailability of parole, but prosecutors cannot note

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its availability. This Court should not force state legislators into such a difficult choice unless the isolated state evidentiary rule that the Court has before it is not merely less than ideal, but beyond a high threshold of unconstitutionality.

The low threshold the Court constructs today is difficult to reconcile with our almost simultaneous decision in *Romano v. Oklahoma*, ante, p. 1. There, the Court holds that the proper inquiry when evidence is admitted in contravention of a state law is “whether the admission of evidence . . . so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” Ante, at 12. I do not see why the unconstitutionality criterion for *excluding* evidence in accordance with state law should be any less demanding than the unconstitutionality criterion *Romano* recites for *admitting* evidence in violation of state law: “fundamental unfairness.” And “fundamentally unfair” the South Carolina rule is assuredly not. The notion that the South Carolina jury imposed the death penalty “just in case” Simmons might be released on parole seems to me quite farfetched. And the notion that the decision taken on such grounds would have been altered by information on the *current state of the law* concerning parole (which could of course be amended) is even more farfetched. And the scenario achieves the ultimate in farfetchedness when there is added the fact that, according to uncontroverted testimony of prison officials in this case, even *current* South Carolina law (as opposed to discretionary prison regulations) does not prohibit furloughs and work-release programs for life-without-parole inmates. See App. 16–17.

When the prosecution has not specifically suggested parolability, I see no more reason why the United States Constitution should compel the admission of evidence showing that, under the State’s current law, the defendant would be nonparolable, than that it should compel the admission of evidence showing that parolable life-sentence murderers are in fact



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almost never paroled, or are paroled only after age 70; or evidence to the effect that escapes of life-without-parole inmates are rare; or evidence showing that, though under current law the defendant *will* be parolable in 20 years, the recidivism rate for elderly prisoners released after long incarceration is negligible. All of this evidence may be thought relevant to whether the death penalty should be imposed, and a petition raising the last of these claims has already arrived. See Pet. for Cert. in *Rudd v. Texas*, O. T. 1993, No. 93–7955.

As I said at the outset, the regime imposed by today's judgment is undoubtedly reasonable as a matter of policy, but I see nothing to indicate that the Constitution requires it to be followed coast to coast. I fear we have read today the first page of a whole new chapter in the "death-is-different" jurisprudence which this Court is in the apparently continuous process of composing. It adds to our insistence that state courts admit "all relevant mitigating evidence," see, *e. g.*, *Eddings v. Oklahoma*, 455 U. S. 104 (1982); *Lockett v. Ohio*, 438 U. S. 586 (1978), a requirement that they adhere to distinctive rules, more demanding than what the Due Process Clause normally requires, for admitting evidence of other sorts—Federal Rules of Death Penalty Evidence, so to speak, which this Court will presumably craft (at great expense to the swiftness and predictability of justice) year by year. The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility.

I dissent.

## Syllabus

WEST LYNN CREAMERY, INC., ET AL. *v.* HEALY,  
COMMISSIONER OF MASSACHUSETTS DEPART-  
MENT OF FOOD AND AGRICULTURECERTIORARI TO THE SUPREME JUDICIAL COURT OF  
MASSACHUSETTS

No. 93–141. Argued March 2, 1994—Decided June 17, 1994

A Massachusetts pricing order subjects all fluid milk sold by dealers to Massachusetts retailers to an assessment. Although most of that milk is produced out of State, the entire assessment is distributed to Massachusetts dairy farmers. Petitioners—licensed dealers who purchase milk produced by out-of-state farmers and sell it within Massachusetts—sued to enjoin enforcement of the order on the ground that it violated the Federal Commerce Clause, but the state court denied relief. The Supreme Judicial Court of Massachusetts affirmed, concluding that the order was not facially discriminatory, applied evenhandedly, and only incidentally burdened interstate commerce, and that such burden was outweighed by the “local benefits” to the dairy industry.

*Held:* The pricing order unconstitutionally discriminates against interstate commerce. Pp. 192–207.

(a) The order is clearly unconstitutional under this Court’s decisions invalidating state laws designed to benefit local producers of goods by creating tariff-like barriers that neutralized the competitive and economic advantages possessed by lower cost out-of-state producers. See, e. g., *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263. The “premium payments” are effectively a tax making milk produced out of State more expensive. Although that tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers, who are thereby empowered to sell at or below the price charged by lower cost out-of-state producers. Pp. 192–197.

(b) Respondent’s principal argument—that, because both the local-subsidy and nondiscriminatory-tax components of the order are valid, the combination of the two is equally valid—is rejected. Even granting respondent’s assertion that both components of the pricing order would be constitutional standing alone, the order must still fall because it is funded principally from taxes on the sale of milk produced in other States and therefore burdens interstate commerce. More fundamentally, the argument is logically flawed in its assumption that the lawfulness of each of two acts establishes the legality of their combination.

## Syllabus

Indeed, by conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone: The Commonwealth's political processes cannot be relied on to prevent legislative abuse where dairy farmers, one of the powerful in-state interests that would ordinarily be expected to lobby against the order premium as a tax raising milk prices, have been mollified by the subsidy. Pp. 198–202.

(c) Respondent's second argument—that the order is not discriminatory because the dealers who pay premiums are not competitors of the farmers who receive disbursements—cannot withstand scrutiny. The imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid because a burden placed at any point will result in a disadvantage to the out-of-state producer. Pp. 202–203.

(d) If accepted, respondent's third argument—that the order is not protectionist because the program's costs are borne only by Massachusetts dealers and consumers and its benefits are distributed exclusively to Massachusetts farmers—would undermine almost every discriminatory tax case. State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products they are unconstitutional. More fundamentally, the argument ignores the fact that Massachusetts dairy farmers are part of an integrated interstate market. The obvious impact of the order on out-of-state production demonstrates that it is simply wrong to assume that it burdens only in-state consumers and dealers. Pp. 203–204.

(e) Acceptance of respondent's final argument—that the order's incidental burden on commerce is justified by the local benefit of saving the financially distressed dairy industry—would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits. Pp. 204–207.

415 Mass. 8, 611 N. E. 2d 239, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 207. REHNQUIST, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 212.

*Steven J. Rosenbaum* argued the cause for petitioners. With him on the briefs were *Michael L. Altman* and *Robert A. Long, Jr.*

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*Douglas H. Wilkins*, Assistant Attorney General of Massachusetts, argued the cause for respondent. With him on the brief were *Scott Harshbarger*, Attorney General, and *Eric E. Smith*, Assistant Attorney General.\*

JUSTICE STEVENS delivered the opinion of the Court.

A Massachusetts pricing order imposes an assessment on all fluid milk sold by dealers to Massachusetts retailers. About two-thirds of that milk is produced out of State. The entire assessment, however, is distributed to Massachusetts dairy farmers. The question presented is whether the pricing order unconstitutionally discriminates against interstate commerce. We hold that it does.

## I

Petitioner West Lynn Creamery, Inc., is a milk dealer licensed to do business in Massachusetts. It purchases raw milk, which it processes, packages, and sells to wholesalers, retailers, and other milk dealers. About 97% of the raw milk it purchases is produced by out-of-state farmers. Petitioner LeComte's Dairy, Inc., is also a licensed Massachusetts milk dealer. It purchases all of its milk from West Lynn and distributes it to retail outlets in Massachusetts.

Since 1937, the Agricultural Marketing Agreement Act, 50 Stat. 246, as amended, 7 U. S. C. § 601 *et seq.*, has authorized the Secretary of Agriculture to regulate the minimum prices

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\*Briefs of *amici curiae* urging reversal were filed for Cumberland Farms, Inc., by *Allan Afrow*; and for the Milk Industry Foundation et al. by *Steven J. Rosenbaum* and *Robert A. Long, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey by *Fred DeVesa*, Acting Attorney General, *Mary Carol Jacobson*, Assistant Attorney General, and *Gregory Romano*, Deputy Attorney General; and for the Massachusetts Association of Dairy Farmers et al. by *Erwin N. Griswold*, *Gregory A. Castanias*, and *Allen Tupper Brown*.

*Jeffrey L. Amestoy*, Attorney General of Vermont, and *Eileen I. Elliott*, Assistant Attorney General, filed a brief of *amicus curiae* for the State of Vermont.

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paid to producers of raw milk by issuing marketing orders for particular geographic areas.<sup>1</sup> While the Federal Government sets minimum prices based on local conditions, those prices have not been so high as to prevent substantial competition among producers in different States. In the 1980's and early 1990's, Massachusetts dairy farmers began to lose market share to lower cost producers in neighboring States. In response, the Governor of Massachusetts appointed a Special Commission to study the dairy industry. The commission found that many producers had sold their dairy farms during the past decade and that if prices paid to farmers for their milk were not significantly increased, a majority of the remaining farmers in Massachusetts would be "forced out of business within the year." App. 13. On January 28, 1992, relying on the commission's report, the Commissioner of the Massachusetts Department of Food and Agriculture (respondent) declared a State of Emergency.

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<sup>1</sup>The minimum price is a "blend price" that is determined, in part, by the ultimate use of the raw milk. See 7 CFR § 1001.1 *et seq.* (1993). Raw milk used to produce fluid milk products has the highest price and is characterized in the federal order as "Class I" milk. Milk used for other products, such as eggnog, sour cream, and hard cheese, bears a lower price and is characterized as "Class II" and "Class III" milk. Each dealer is required to file a monthly report of its raw milk purchases and the use to which that milk is put. In computing the monthly blend price, the Federal Market Administrator calculates the weighted average price of the various classes of milk. If Class I milk predominates in the dealer reports, the blend price is high; if other classes predominate, the blend price is lower. Although all of the farmers are paid the same minimum blend price regardless of the use to which their milk is put, dealers who sell more than an average amount of Class I products pay a higher per unit price than those with relatively lower Class I sales. The federal marketing order thus provides a uniform blend price for sellers of raw milk while imposing nonuniform payment obligations on the dealers purchasing that milk. The federal order does not prohibit the payment of prices higher than the established minima. Like the federal order, the Massachusetts order requires dealers to make payments into a fund that is disbursed to farmers on a monthly basis. The assessments, however, are only on Class I sales and the distributions are only to Massachusetts farmers.

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In his declaration he noted that the average federal blend price<sup>2</sup> had declined from \$14.67 per hundred pounds (cwt) of raw milk in 1990 to \$12.64/cwt in 1991, while costs of production for Massachusetts farmers had risen to an estimated average of \$15.50/cwt. *Id.*, at 27. He concluded:

“Regionally, the industry is in serious trouble and ultimately, a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.” *Id.*, at 31.

Promptly after his declaration of emergency, respondent issued the pricing order that is challenged in this proceeding.<sup>3</sup>

The order requires every “dealer”<sup>4</sup> in Massachusetts to make a monthly “premium payment” into the “Massachusetts Dairy Equalization Fund.” The amount of those payments is computed in two steps. First, the monthly “order premium” is determined by subtracting the federal blend price for that month from \$15 and dividing the difference by three; thus if the federal price is \$12/cwt, the order premium is \$1/cwt.<sup>5</sup> Second, the premium is multiplied by the amount

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<sup>2</sup> For an explanation of the term “blend price,” see the previous footnote.

<sup>3</sup> The order was first issued on February 18, 1992, and amended on February 26, 1992. App. 32–40; Brief for Respondent 4–5. Only the amended order is at issue in this case.

<sup>4</sup> A “dealer” is defined as “any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.” App. 32–33.

<sup>5</sup> App. 35–36; *West Lynn Creamery, Inc. v. Commissioner of Dept. of Food and Agriculture*, 415 Mass. 8, 11, n. 10, 611 N. E. 2d 239, 241, n. 10 (1993). The commissioner appears to have set the order premium at only a third of the difference between the federal price and \$15 because Massachusetts farmers produce only about one-third of the milk sold as fluid milk in the State. App. 21. Since Massachusetts dairy farmers produce

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(in pounds) of the dealer's Class I<sup>6</sup> sales in Massachusetts. Each month the fund is distributed to Massachusetts producers.<sup>7</sup> Each Massachusetts producer receives a share of the total fund equal to his proportionate contribution to the State's total production of raw milk.<sup>8</sup>

Petitioners West Lynn and LeComte's complied with the pricing order for two months, paying almost \$200,000 into the Massachusetts Dairy Equalization Fund. *Id.*, at 100, 105. Starting in July 1992, however, petitioners refused to make the premium payments, and respondent commenced license revocation proceedings. Petitioners then filed an action in state court seeking an injunction against enforcement of the order on the ground that it violated the Commerce Clause of the Federal Constitution. The state court denied relief and respondent conditionally revoked their licenses.

The parties agreed to an expedited appellate procedure, and the Supreme Judicial Court of Massachusetts transferred the cases to its own docket. It affirmed, because it concluded that "the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally

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one-third of the milk, an assessment of one-third the difference between \$15 and the federal minimum price generates enough revenue to give Massachusetts dairy farmers the entire difference between \$15 and the federal minimum price without leaving any surplus. By paying Massachusetts dairy farmers the entire difference between \$15 and the federal minimum price, the order premium allows Massachusetts farmers whose cost of production is \$15/cwt to sell their milk without loss at the federal minimum price.

<sup>6</sup> For an explanation of the term "Class I," see n. 1, *supra*.

<sup>7</sup> A "producer" is defined as "any person producing milk from dairy cattle." App. 33.

<sup>8</sup> The disbursement is subject to two qualifications. First, any farmer who produced more than 200,000 pounds of milk is considered to have produced only 200,000 pounds. Second, no producer may receive payments that make its net price per cwt (including both the federal minimum price and payments from the Equalization Fund) higher than \$15/cwt. If these limitations lead to a surplus in the Dairy Equalization Fund, the surplus is returned to the dealers. *Id.*, at 36-38.

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burdens interstate commerce.” *West Lynn Creamery, Inc. v. Commissioner of Dept. of Food and Agriculture*, 415 Mass. 8, 15, 611 N. E. 2d 239, 243 (1993). The court noted that the “pricing order was designed to aid only Massachusetts producers.” *Id.*, at 16, 611 N. E. 2d, at 244. It conceded that “[c]ommon sense” indicated that the plan has an “adverse impact on interstate commerce” and that “[t]he fund distribution scheme does burden out-of-State producers.” *Id.*, at 17, 611 N. E. 2d, at 244. Nevertheless, the court asserted that “the burden is incidental given the purpose and design of the program.” *Id.*, at 18, 611 N. E. 2d, at 244. Because it found that the “local benefits” provided to the Commonwealth’s dairy industry “outweigh any incidental burden on interstate commerce,” it sustained the constitutionality of the pricing order. *Id.*, at 19, 611 N. E. 2d, at 245. We granted certiorari, 510 U.S. 811 (1993), and now reverse.

## II

The Commerce Clause vests Congress with ample power to enact legislation providing for the regulation of prices paid to farmers for their products. *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). An affirmative exercise of that power led to the promulgation of the federal order setting minimum milk prices. The Commerce Clause also limits the power of the Commonwealth of Massachusetts to adopt regulations that discriminate against interstate commerce. “This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protection-



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ism . . . .” *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269, 273–274 (1988).<sup>9</sup>

The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State. A tariff is an attractive measure because it simultaneously raises revenue and benefits local producers by burdening their out-of-state competitors. Nevertheless, it violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States.

Because of their distorting effects on the geography of production, tariffs have long been recognized as violative of the Commerce Clause. In fact, tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means. In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), the State of New York attempted to protect its dairy farmers from the adverse effects of Vermont competition by establishing a single minimum price for all milk, whether produced in New York or elsewhere. This Court did not hesitate, however, to strike it down. Writing for a unanimous Court, Justice Cardozo reasoned:

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<sup>9</sup>The “negative” aspect of the Commerce Clause was considered the more important by the “father of the Constitution,” James Madison. In one of his letters, Madison wrote that the Commerce Clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.” 3 M. Far-  
rand, *Records of the Federal Convention of 1787*, p. 478 (1911).

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“Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.” *Id.*, at 527.

Thus, because the minimum price regulation had the same effect as a tariff or customs duty—neutralizing the advantage possessed by lower cost out-of-state producers—it was held unconstitutional. Similarly, in *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984), this Court invalidated a law which advantaged local production by granting a tax exemption to certain liquors produced in Hawaii. Other cases of this kind are legion. *Welton v. Missouri*, 91 U. S. 275 (1876); *Guy v. Baltimore*, 100 U. S. 434 (1880); *Toomer v. Witsell*, 334 U. S. 385 (1948); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U. S. 361 (1964); *Chemical Waste Management, Inc. v. Hunt*, 504 U. S. 334 (1992); see also *Hunt v. Washington State Apple Advertising Comm’n*, 432 U. S. 333, 351 (1977) (invalidating statute, because it “has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned”).

Under these cases, Massachusetts’ pricing order is clearly unconstitutional. Its avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States. The “premium payments” are effectively a tax which makes milk produced out of State more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products. The pricing

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order thus allows Massachusetts dairy farmers who produce at higher cost to sell at or below the price charged by lower cost out-of-state producers.<sup>10</sup> If there were no federal minimum prices for milk, out-of-state producers might still be able to retain their market share by lowering their prices. Nevertheless, out-of-staters' ability to remain competitive by lowering their prices would not immunize a discriminatory measure. *New Energy Co. of Ind. v. Limbach*, 486 U. S., at 275.<sup>11</sup> In this case, because the Federal Government sets

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<sup>10</sup> A numerical example may make this effect clearer. Suppose the federal minimum price is \$12/cwt, that out-of-state producers can sell milk profitably at that price, but that in-state producers need a price of \$15/cwt in order to break even. Under the pricing order, the tax or "order premium" will be \$1/cwt (one-third the difference between the \$15/cwt target price and the \$12/cwt federal minimum price). Assuming the tax generates sufficient funds (which will be the case as long as two-thirds of the milk is produced out of State, which appears to be the case), the Massachusetts farmers will receive a subsidy of \$3/cwt. This subsidy will allow them to lower their prices from \$15/cwt to \$12/cwt while still breaking even. Selling at \$12/cwt, Massachusetts dairy farmers will now be able to compete with out-of-state producers. The net effect of the tax and subsidy, like that of a tariff, is to raise the after-tax price paid by the dealers. If exactly two-thirds of the milk sold in Massachusetts is produced out of State, net prices will rise by \$1/cwt. If out-of-state farmers produce more than two-thirds of the raw milk, the Dairy Equalization Fund will have a surplus, which will be refunded to the milk dealers. This refund will mitigate the price increase, although it will have no effect on the ability of the program to enable higher cost Massachusetts dairy farmers to compete with lower cost out-of-staters.

<sup>11</sup> In *New Energy*, 486 U. S., at 275, we noted: "It is true that in [*Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U. S. 366 (1976),] and *Sporhase v. Nebraska ex rel. Douglas*, 458 U. S. 941 (1982),] the effect of a State's refusal to accept the offered reciprocity was total elimination of all transport of the subject product into or out of the offering State; whereas in the present case the only effect of refusal is that the out-of-state product is placed at a substantial commercial disadvantage through discriminatory tax treatment. That makes no difference for purposes of Commerce Clause analysis. In the leading case of *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), the New York law excluding out-of-state milk did not impose an absolute ban, but rather allowed importation and sale so long

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minimum prices, out-of-state producers may not even have the option of reducing prices in order to retain market share. The Massachusetts pricing order thus will almost certainly “cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market.”<sup>12</sup> *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 126, n. 16 (1978). In fact, this effect was the motive behind the promulgation of the pricing order. This effect renders the program unconstitutional, because it, like a tariff, “neutraliz[es] advantages belonging to the place of origin.” *Baldwin*, 294 U. S., at 527.

In some ways, the Massachusetts pricing order is most similar to the law at issue in *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984). Both involve a broad-based tax on a single kind of good and special provisions for in-state produc-

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as the initial purchase from the dairy farmer was made at or above the New York State-mandated price. In other words, just as the appellant here, in order to sell its product in Ohio, only has to cut its profits by reducing its sales price below the market price sufficiently to compensate the Ohio purchaser-retailer for the forgone tax credit, so also the milk wholesaler-distributor in *Baldwin*, in order to sell its product in New York, only had to cut its profits by increasing its purchase price above the market price sufficiently to meet the New York-prescribed premium. We viewed the New York law as ‘an economic barrier against competition’ that was ‘equivalent to a rampart of customs duties.’ *Id.*, at 527.”

<sup>12</sup>That is not to say that the Massachusetts dairy industry may not continue to shrink and that the market share of Massachusetts dairy producers may not continue its fall. It may be the case that Massachusetts producers’ costs are so high that, even with the pricing order, many of them will be unable to compete. Nevertheless, the pricing order will certainly allow more Massachusetts dairy farmers to remain in business than would have had the pricing order not been imposed. For Commerce Clause purposes, it does not matter whether the challenged regulation actually increases the market share of local producers or whether it merely mitigates a projected decline. See *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263, 272 (1984) (“[W]e perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises . . .”); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S., at 523.

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ers. *Bacchus* involved a 20% excise tax on all liquor sales, coupled with an exemption for fruit wine manufactured in Hawaii and for okolehao, a brandy distilled from the root of a shrub indigenous to Hawaii. The Court held that Hawaii's law was unconstitutional because it "had both the purpose and effect of discriminating in favor of local products." *Id.*, at 273. See also *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113 (1908) (invalidating property tax exemption favoring local manufacturers). By granting a tax exemption for local products, Hawaii in effect created a protective tariff. Goods produced out of State were taxed, but those produced in State were subject to no net tax. It is obvious that the result in *Bacchus* would have been the same if instead of exempting certain Hawaiian liquors from tax, Hawaii had rebated the amount of tax collected from the sale of those liquors. See *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269 (1988) (discriminatory tax credit). And if a discriminatory tax rebate is unconstitutional, Massachusetts' pricing order is surely invalid; for Massachusetts not only rebates to domestic milk producers the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of milk produced elsewhere.<sup>13</sup> The additional rebate of the tax paid on the sale of milk produced elsewhere in no way reduces the danger to the national market posed by tariff-like barriers, but instead exacerbates the danger by giving domestic producers an additional tool with which to shore up their competitive position.<sup>14</sup>

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<sup>13</sup> Indeed, it is this aspect of the pricing order which allows it to give Massachusetts farmers a benefit three times as valuable per cwt as the tax (order premium) imposed. See n. 5, *supra*.

<sup>14</sup> One might attempt to distinguish *Bacchus* by noting that the rebate in this case goes not to the entity which pays the tax (milk dealers) but to the dairy farmers themselves. Rebating the taxes directly to producers rather than to the dealers, however, merely reinforces the conclusion that the pricing order will favor local producers. If the taxes were refunded only to the dealers, there might be no impact on interstate commerce,

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## III

Respondent advances four arguments against the conclusion that its pricing order imposes an unconstitutional burden on interstate commerce: (A) Because each component of the program—a local subsidy and a nondiscriminatory tax—is valid, the combination of the two is equally valid; (B) The dealers who pay the order premiums (the tax) are not competitors of the farmers who receive disbursements from the Dairy Equalization Fund, so the pricing order is not discriminatory; (C) The pricing order is not protectionist, because the costs of the program are borne only by Massachusetts dealers and consumers, and the benefits are distributed exclusively to Massachusetts farmers; and (D) The order’s incidental burden on commerce is justified by the local benefit of saving the dairy industry from collapse. We discuss each of these arguments in turn.

## A

Respondent’s principal argument is that, because “the milk order achieves its goals through lawful means,” the order as a whole is constitutional. Brief for Respondent 20. He argues that the payments to Massachusetts dairy farmers from the Dairy Equalization Fund are valid, because subsidies are constitutional exercises of state power, and that the order premium which provides money for the fund is valid, because it is a nondiscriminatory tax. Therefore the pricing order is constitutional, because it is merely the combination of two independently lawful regulations. In effect, respondent argues, if the State may impose a valid tax on dealers, it is free to use the proceeds of the tax as it chooses; and

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because the dealers might not use the funds to increase the price or quantity of milk purchased from Massachusetts dairy farmers. The refund to the dealers might, therefore, result in no advantage to in-state producers. On the other hand, by refunding moneys directly to the dairy farmers, the pricing order ensures that Massachusetts producers will benefit.

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if it may independently subsidize its farmers, it is free to finance the subsidy by means of any legitimate tax.

Even granting respondent's assertion that both components of the pricing order would be constitutional standing alone,<sup>15</sup> the pricing order nevertheless must fall. A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States.<sup>16</sup> By so funding the subsidy, respondent not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not "benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U. S., at 273–274; see also *Bacchus Imports, Ltd. v. Dias*, 468 U. S., at 272; *Guy v. Baltimore*, 100 U. S., at 443.

More fundamentally, respondent errs in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts. By conjoining

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<sup>15</sup>We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that "[d]irect subsidization of domestic industry does not ordinarily run afoul" of the negative Commerce Clause. *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269, 278 (1988); see also *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 815 (1976) (STEVENS, J., concurring). In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes. *Zobel v. Williams*, 457 U. S. 55, 67 (1982) (Brennan, J., concurring); *Bacchus Imports, Ltd. v. Dias*, 468 U. S., at 271; *Metropolitan Life Ins. Co. v. Ward*, 470 U. S. 869, 876–878 (1985).

<sup>16</sup>It is undisputed that an overwhelming majority of the milk sold in Massachusetts is produced elsewhere. Thus, even though the tax is applied evenhandedly to milk produced in State and out of State, most of the tax collected comes from taxes on milk from other States. In addition, the tax on in-state milk, unlike that imposed on out-of-state milk, does not impose any burden on in-state producers, because in-state dairy farmers can be confident that the taxes paid on their milk will be returned to them via the Dairy Equalization Fund.

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a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because “[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981); see also *Raymond Motor Transp., Inc. v. Rice*, 434 U. S. 429, 444, n. 18 (1978) (special deference to state highway regulations because “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”); *South Carolina Highway Dept. v. Barnwell Brothers, Inc.*, 303 U. S. 177, 187 (1938); *Goldberg v. Sweet*, 488 U. S. 252, 266 (1989).<sup>17</sup> However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State’s political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy. So, in this case, one would ordinarily have expected at least three groups to lobby against the order premium, which, as a tax, raises the price (and hence lowers demand) for milk: dairy farmers, milk dealers, and consumers. But because the tax was coupled with a subsidy, one of the most powerful of these groups, Massachusetts dairy

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<sup>17</sup>The same principle is recognized in the conceptually similar field of intergovernmental taxation, where nondiscrimination also plays a central role in setting the boundary between the permissible and the impermissible. *Washington v. United States*, 460 U. S. 536, 545 (1983) (“A ‘political check’ is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government”); *South Carolina v. Baker*, 485 U. S. 505, 525–526, n. 15 (1988); *United States v. County of Fresno*, 429 U. S. 452, 462–464 (1977).



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farmers, instead of exerting their influence against the tax, were in fact its primary supporters.<sup>18</sup>

Respondent's argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole. New York's minimum price order also used constitutional means—a State's power to regulate prices—but was held unconstitutional because of its deleterious effects. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). Similarly, the law held unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984), involved the exercise of Hawaii's undisputed power to tax and to grant tax exemptions.

Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects. As the Court declared over 50 years ago: “The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.” *Best & Co. v. Maxwell*, 311 U. S. 454, 455–456 (1940); *Maryland v. Louisiana*, 451 U. S. 725, 756 (1981);

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<sup>18</sup> As the Governor's Special Commission Relative to the Establishment of a Dairy Stabilization Fund realized, consumers would be unlikely to organize effectively to oppose the pricing order. The commission's report remarked, “the estimated two cent increase per quart of milk would not be noticed by the consuming public,” App. 18, because the price of milk varies so often and for so many reasons that consumers would be unlikely to feel the price increases or to attribute them to the pricing order.

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*Exxon Corp. v. Governor of Maryland*, 437 U.S., at 147; see also *Guy v. Baltimore*, 100 U.S., at 443 (invalidating discriminatory wharfage fees which were “mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States”); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S., at 527 (“What is ultimate is the principle that one state in its dealings with another may not put itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement”); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *New Energy Co. of Ind. v. Limbach*, 486 U.S., at 275, 276 (invalidating reciprocal tax credit because it, “in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers”).

## B

Respondent also argues that since the Massachusetts milk dealers who pay the order premiums are not competitors of the Massachusetts farmers, the pricing order imposes no discriminatory burden on commerce. Brief for Respondent 28–29. This argument cannot withstand scrutiny. Is it possible to doubt that if Massachusetts imposed a higher sales tax on milk produced in Maine than milk produced in Massachusetts that the tax would be struck down, in spite of the fact that the sales tax was imposed on consumers, and consumers do not compete with dairy farmers? For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer. *Brown v. Maryland*, 12 Wheat. 419, 444, 448 (1827) (“So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the

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importer himself, in like manner as a direct duty on the article itself would be made.” “The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce”); *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113 (1908) (differential burden on intermediate stage manufacturer); *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984) (differential burden on wholesaler); *Webber v. Virginia*, 103 U. S. 344, 350 (1881) (differential burden on sales agent); *New Energy Co. of Ind. v. Limbach*, 486 U. S., at 273–274 (differential burden on retailer).

## C

Respondent also argues that “the operation of the Order disproves any claim of protectionism,” because “*only* in-state consumers feel the effect of any retail price increase . . . [and] [t]he dealers themselves . . . have a substantial in-state presence.” Brief for Respondent 17 (emphasis in original). This argument, if accepted, would undermine almost every discriminatory tax case. State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional. The idea that a discriminatory tax does not interfere with interstate commerce “merely because the burden of the tax was borne by consumers” in the taxing State was thoroughly repudiated in *Bacchus Imports, Ltd. v. Dias*, 468 U. S., at 272. The cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation.

More fundamentally, respondent ignores the fact that Massachusetts dairy farmers are part of an integrated interstate market. As noted *supra*, at 194–196, the purpose and effect of the pricing order are to divert market share to Massachusetts dairy farmers. This diversion necessarily injures the dairy farmers in neighboring States. Further-

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more, the Massachusetts order regulates a portion of the same interstate market in milk that is more broadly regulated by a federal milk marketing order which covers most of New England. 7 CFR § 1001.2 (1993). The Massachusetts producers who deliver milk to dealers in that regulated market are participants in the same interstate milk market as the out-of-state producers who sell in the same market and are guaranteed the same minimum blend price by the federal order. The fact that the Massachusetts order imposes assessments only on Massachusetts sales and distributes them only to Massachusetts producers does not exclude either the assessments or the payments from the interstate market. To the extent that those assessments affect the relative volume of Class I milk products sold in the marketing area as compared to other classes of milk products, they necessarily affect the blend price payable even to out-of-state producers who sell only in non-Massachusetts markets.<sup>19</sup> The obvious impact of the order on out-of-state production demonstrates that it is simply wrong to assume that the pricing order burdens only Massachusetts consumers and dealers.

## D

Finally, respondent argues that any incidental burden on interstate commerce “is outweighed by the ‘local benefits’ of preserving the Massachusetts dairy industry.”<sup>20</sup> Brief for

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<sup>19</sup>On the way changing the demand for Class I milk products changes the blend price for producers in the entire area covered by the marketing order, see n. 1, *supra*.

<sup>20</sup>Among the “local benefits” that respondent identifies is “protecting unique open space and related benefits.” Brief for Respondent 40. As the Massachusetts Supreme Judicial Court recognized by relegating the “open space” point to a single footnote, *West Lynn Creamery, Inc. v. Commissioner of Dept. of Food and Agriculture*, 415 Mass. 8, 10, n. 6, 611 N. E. 2d 239, 240, n. 6 (1993), the argument that environmental benefits were central and the enhancement of the market share of Massachusetts dairy farmers merely “incidental” turns the pricing order on its head. In addition, even if environmental preservation were the central purpose of

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Respondent 42. In a closely related argument, respondent urges that “the purpose of the order, to save an industry from collapse, is not protectionist.” *Id.*, at 16. If we were to accept these arguments, we would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S., at 272, we explicitly rejected any distinction “between thriving and struggling enterprises.” Whether a State is attempting to “‘enhance thriving and substantial business enterprises’” or to “‘subsidize . . . financially troubled’” ones is irrelevant to Commerce Clause analysis. *Ibid.* With his characteristic eloquence, Justice Cardozo responded to an argument that respondent echoes today:

“The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when

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the pricing order, that would not be sufficient to uphold a discriminatory regulation. See *Philadelphia v. New Jersey*, 437 U.S. 617, 626–627 (1978). Finally, the suggestion that the collapse of the dairy industry endangers open space is not self-evident. Dairy farms are enclosed by fences, and the decline of farming may well lead to less, rather than more, intensive land use. As one scholar noted: “Many people assume that . . . land lost from agriculture is now in urban uses. It is true that some agricultural land has been urbanized, especially since World War II, but the major portion of the land moving out of agriculture over the years has been abandoned to natural forest growth.” J. Foster & W. MacConnell, *Agricultural Land Use Change in Massachusetts 1951–1971*, p. 5 (Research Bulletin No. 640, Jan. 1977); see also Department of Agriculture, A. Daugherty, *Major Uses of Land in the United States: 1987*, pp. 4, 13 (Agricultural Economic Rep. No. 643, 1991) (decline in grazing and pasture land offset by increased wilderness, wildlife, and park areas).

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the farmers of the state are unable to earn a living income. *Nebbia v. New York*, [291 U.S. 502 (1934)] . . . Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It 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., at 522–523.<sup>21</sup>

In a later case, also involving the welfare of Massachusetts dairy farmers,<sup>22</sup> Justice Jackson described the same overriding interest in the free flow of commerce across state lines:

“Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged

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<sup>21</sup> “This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.” *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949); see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S., at 272–273.

<sup>22</sup> A surprisingly large number of our Commerce Clause cases arose out of attempts to protect local dairy farmers. *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S., at 539; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). The reasons for the political effectiveness of milk producers are explored in G. Miller, *The Industrial Organization of Political Production: A Case Study*, 149 *J. Institutional & Theoretical Economics* 769 (1993).

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to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.” *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525, 539 (1949).

The judgment of the Supreme Judicial Court of Massachusetts is reversed.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

In my view the challenged Massachusetts pricing order is invalid under our negative-Commerce-Clause jurisprudence, for the reasons explained in Part II below. I do not agree with the reasons assigned by the Court, which seem to me, as explained in Part I, a broad expansion of current law. Accordingly, I concur only in the judgment of the Court.

## I

The purpose of the negative Commerce Clause, we have often said, is to create a national market. It does not follow from that, however, and we have never held, that every state law which obstructs a national market violates the Commerce Clause. Yet that is what the Court says today. It seems to have canvassed the entire corpus of negative-Commerce-Clause opinions, culled out every free-market snippet of reasoning, and melded them into the sweeping principle that the Constitution is violated by any state law or regulation that “artificially encourag[es] in-state production even when the same goods could be produced at lower cost in other States.” *Ante*, at 193. See also *ante*, at 194 (the

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law here is unconstitutional because it “neutraliz[es] the advantage possessed by lower cost out-of-state producers”); *ante*, at 195 (price order is unconstitutional because it allows in-state producers “who produce at higher cost to sell at or below the price charged by lower cost out-of-state producers”); *ante*, at 196 (a state program is unconstitutional where it “‘neutralizes advantages belonging to the place of origin’”) (quoting *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935)); *ante*, at 205 (“Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits”).

As the Court seems to appreciate by its eagerness expressly to reserve the question of the constitutionality of subsidies for in-state industry, *ante*, at 199, and n. 15, this expansive view of the Commerce Clause calls into question a wide variety of state laws that have hitherto been thought permissible. It seems to me that a state subsidy would *clearly* be invalid under any formulation of the Court’s guiding principle identified above. The Court guardedly asserts that a “pure subsidy funded out of general revenue *ordinarily* imposes no burden on interstate commerce, but merely assists local business,” *ante*, at 199 (emphasis added), but under its analysis that must be taken to be true only because most local businesses (*e. g.*, the local hardware store) are not competing with businesses out of State. The Court notes that, in funding this subsidy, Massachusetts has taxed milk produced in other States, and thus “not only assists local farmers, but burdens interstate commerce.” *Ibid.* But the same could be said of almost all subsidies funded from general state revenues, which almost invariably include moneys from use taxes on out-of-state products. And even where the funding does not come in any part from taxes on out-of-state goods, “merely assist[ing]” in-state businesses, *ibid.*, unquestionably neutralizes advantages possessed by out-of-state enterprises. Such subsidies, particularly where



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they are in the form of cash or (what comes to the same thing) tax forgiveness, are often admitted to have as their purpose—indeed, *are nationally advertised as having as their purpose*—making it more profitable to conduct business in State than elsewhere, *i. e.*, distorting normal market incentives.

The Court’s guiding principle also appears to call into question many garden-variety state laws heretofore permissible under the negative Commerce Clause. A state law, for example, which requires, contrary to the industry practice, the use of recyclable packaging materials, favors local non-exporting producers, who do not have to establish an additional, separate packaging operation for in-state sales. If the Court’s analysis is to be believed, such a law would be unconstitutional without regard to whether disruption of the “national market” is the real purpose of the restriction, and without the need to “balance” the importance of the state interests thereby pursued, see *Pike v. Bruce Church, Inc.*, 397 U. S. 137 (1970). These results would greatly extend the negative Commerce Clause beyond its current scope. If the Court does not intend these consequences, and does not want to foster needless litigation concerning them, it should not have adopted its expansive rationale. Another basis for deciding the case is available, which I proceed to discuss.

## II

“The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce.” *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U. S. 232, 263 (1987) (SCALIA, J., concurring in part and dissenting in part). Nonetheless, we formally adopted the doctrine of the negative Commerce Clause 121 years ago, see *Case of the State Freight Tax*, 15 Wall. 232 (1873), and since then have decided a vast number of negative-Commerce-Clause cases, engendering considerable reliance interests.

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As a result, I will, on *stare decisis* grounds, enforce a self-executing “negative” Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court. See *Itel Containers Int’l Corp. v. Huddleston*, 507 U. S. 60, 78–79, and nn. 1, 2 (1993) (SCALIA, J., concurring in judgment) (collecting cases). Applying this approach—or at least the second part of it—is not always easy, since once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a “quagmire.” *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 458 (1959). See generally D. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888*, pp. 168–181, 222–236, 330–342, 403–416 (1985). The object should be, however, to produce a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further. See *American Trucking Assns., Inc. v. Scheiner*, 483 U. S. 266, 305–306 (1987) (SCALIA, J., dissenting).

There are at least four possible devices that would enable a State to produce the economic effect that Massachusetts has produced here: (1) a discriminatory tax upon the industry, imposing a higher liability on out-of-state members than on their in-state competitors; (2) a tax upon the industry that is nondiscriminatory in its assessment, but that has an “exemption” or “credit” for in-state members; (3) a nondiscriminatory tax upon the industry, the revenues from which are placed into a segregated fund, which fund is disbursed as “rebates” or “subsidies” to in-state members of the industry (the situation at issue in this case); and (4) with or without nondiscriminatory taxation of the industry, a subsidy for the in-state members of the industry, funded from the State’s general revenues. It is long settled that the first of these methodologies is unconstitutional under the negative Com-

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merce Clause. See, e. g., *Guy v. Baltimore*, 100 U. S. 434, 443 (1880). The second of them, “exemption” from or “credit” against a “neutral” tax, is no different in principle from the first, and has likewise been held invalid. See *Maryland v. Louisiana*, 451 U. S. 725, 756 (1981); *Westinghouse Elec. Corp. v. Tully*, 466 U. S. 388, 399–400, and n. 9 (1984). The fourth methodology, application of a state subsidy from general revenues, is so far removed from what we have hitherto held to be unconstitutional, that prohibiting it must be regarded as an extension of our negative-Commerce-Clause jurisprudence and therefore, to me, unacceptable. See *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269, 278 (1988). Indeed, in my view our negative-Commerce-Clause cases have already approved the use of such subsidies. See *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 809–810 (1976).

The issue before us in the present case is whether the third of these methodologies must fall. Although the question is close, I conclude it would not be a principled point at which to disembark from the negative-Commerce-Clause train. The only difference between methodology (2) (discriminatory “exemption” from nondiscriminatory tax) and methodology (3) (discriminatory refund of nondiscriminatory tax) is that the money is taken and returned rather than simply left with the favored in-state taxpayer in the first place. The difference between (3) and (4), on the other hand, is the difference between assisting in-state industry through discriminatory taxation and assisting in-state industry by other means.

I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State’s general revenue fund. Perhaps, as some commentators contend, that line comports with an important economic reality: A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing,

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nonprotectionist, purposes. See Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395, 479 (1989); Collins, Economic Union as a Constitutional Value, 63 N. Y. U. L. Rev. 43, 103 (1988); Gergen, The Selfish State and the Market, 66 Texas L. Rev. 1097, 1138 (1988); see also *ante*, at 200, and n. 17. That is not, however, the basis for my position, for as THE CHIEF JUSTICE explains, “[a]nalysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.” *Post*, at 215 (dissenting opinion). Instead, I draw the line where I do because it is a clear, rational line at the limits of our extant negative-Commerce-Clause jurisprudence.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

The Court is less than just in its description of the reasons which lay behind the Massachusetts law which it strikes down. The law undoubtedly sought to aid struggling Massachusetts dairy farmers, beset by steady or declining prices and escalating costs. This situation is apparently not unique to Massachusetts; New Jersey has filed an *amicus* brief in support of respondent because New Jersey has enacted a similar law. Both States lie in the northeastern metropolitan corridor, which is the most urbanized area in the United States, and has every prospect of becoming more so. The value of agricultural land located near metropolitan areas is driven up by the demand for housing and similar urban uses; distressed farmers eventually sell out to developers. Not merely farm produce is lost, as is the milk production in this case, but, as the Massachusetts Special Commission whose report was the basis for the order in question here found:

“Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as

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wildlife refuges, for recreation, hunting, fishing, tourism, and education.” App. 13.

Massachusetts has dealt with this problem by providing a subsidy to aid its beleaguered dairy farmers. In case after case, we have approved the validity under the Commerce Clause of such enactments. “No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry.” *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263, 271 (1984). “Direct subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause]; discriminatory taxation of out-of-state manufacturers does.” *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269, 278 (1988). But today the Court relegates these well-established principles to a footnote and, at the same time, gratuitously casts doubt on the validity of state subsidies, observing that “[w]e have never squarely confronted” their constitutionality. *Ante*, at 199, n. 15.

But in *Milk Control Bd. v. Eisenberg Farm Products*, 306 U. S. 346 (1939), the Court upheld a Pennsylvania statute establishing minimum prices to be paid to Pennsylvania dairy farmers against a Commerce Clause challenge by a Pennsylvania milk dealer that shipped all of its milk purchased in Pennsylvania to New York to be sold there. The Court observed that “[t]he purpose of the statute . . . is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania.” *Id.*, at 352. It went on to say:

“One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state’s citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or

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indirectly involves or burdens interstate commerce. . . . These principles have guided judicial decision for more than a century.” *Id.*, at 351–352.

The Massachusetts subsidy under consideration is similar in many respects to the Pennsylvania statute described in *Eisenberg, supra*. Massachusetts taxes all dealers of milk within its borders. The tax is evenhanded on its face, *i. e.*, it affects all dealers regardless of the point of origin of the milk. *Ante*, at 194 (“the tax also applies to milk produced in Massachusetts”); *ante*, at 200 (“the evenhanded tax at issue here”). The State has not acted to strong-arm sister States as in *Limbach*; rather, its motives are purely local. As the Supreme Judicial Court of Massachusetts aptly described it: “[T]he premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay.” *West Lynn Creamery, Inc. v. Commissioner of Dept. of Food and Agriculture*, 415 Mass. 8, 19, 611 N. E. 2d 239, 245 (1993).

Consistent with precedent, the Court observes: “A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.” *Ante*, at 199. And the Court correctly recognizes that “[n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld” due to the deference normally accorded to a State’s political process in passing legislation in light of various competing interest groups. *Ante*, at 200, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981), and *Raymond Motor Transp., Inc. v. Rice*, 434 U. S. 429, 444, n. 18 (1978). But the Court strikes down this method of state subsidization because the nondiscriminatory tax levied against all milk *dealers* is coupled with a subsidy to milk *producers*. *Ante*, at 200–201. The Court does this because of its view that the method of imposing the tax and subsidy distorts the State’s political process: The dairy farmers, who would otherwise lobby against the tax, have been mollified by the subsidy. *Ibid.* But as the Court itself points out, there are still at least two

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strong interest groups opposed to the milk order—consumers and milk dealers. More importantly, nothing in the dormant Commerce Clause suggests that the fate of state regulation should turn upon the particular lawful manner in which the state subsidy is enacted or promulgated. Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.

The Court concludes that the combined effect of the milk order “simultaneously burdens interstate commerce and discriminates in favor of local producers.” *Ante*, at 201. In support of this conclusion, the Court cites *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), and *Bacchus Imports, Ltd. v. Dias, supra*, as two examples in which constitutional means were held to have unconstitutional effects on interstate commerce. But both *Baldwin* and *Bacchus* are a far cry from this case.

In *Baldwin, supra*, in order to sell bottled milk in New York, milk dealers were required to pay a minimum price for milk, even though they could have purchased milk from Vermont farmers at a lower price. This scheme was found to be an effort to prevent Vermont milk producers from selling to New York dealers at their lower market price. As Justice Cardozo explained, under the New York statute, “the importer . . . may keep his milk or drink it, but sell it he may not.” 294 U. S., at 521. Such a scheme clearly made it less attractive for New York dealers to purchase milk from Vermont farmers, for the disputed law negated any economic advantage in so doing. Under the Massachusetts milk order, there is no such adverse effect. Milk dealers have the same incentives to purchase lower priced milk from out-of-state farmers; dealers of all milk are taxed equally. To borrow Justice Cardozo’s description, milk dealers in Massachusetts are free to keep their milk, drink their milk, and sell it—on equal terms as local milk.

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In *Bacchus*, the State of Hawaii combined its undisputed power to tax and grant exemptions in a manner that the Court found violative of the Commerce Clause. There, the State exempted a local wine from the burdens of an excise tax levied on all other liquor sales. Despite the Court's strained attempt to compare the scheme in *Bacchus* to the milk order in this case, *ante*, at 196–197, it is clear that the milk order does not produce the same effect on interstate commerce as the tax exemption in *Bacchus*. I agree with the Court's statement that *Bacchus* can be distinguished “by noting that the rebate in this case goes not to the entity which pays the tax (milk dealers) but to the dairy farmers themselves.” *Ante*, at 197, n. 14. This is not only a distinction, but a significant difference. No decided case supports the Court's conclusion that the negative Commerce Clause prohibits the State from using money that it has lawfully obtained through a neutral tax on milk dealers and distributing it as a subsidy to dairy farmers. Indeed, the case which comes closest to supporting the result the Court reaches is the ill-starred opinion in *United States v. Butler*, 297 U. S. 1 (1936), in which the Court held unconstitutional what would have been an otherwise valid tax on the processing of agricultural products because of the use to which the revenue raised by the tax was put.

More than half a century ago, Justice Brandeis said in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932):

“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”



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Justice Brandeis' statement has been cited more than once in subsequent majority opinions of the Court. See, *e. g.*, *Reeves, Inc. v. Stake*, 447 U. S. 429, 441 (1980). His observation bears heeding today, as it did when he made it. The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence.

## Syllabus

MCI TELECOMMUNICATIONS CORP. *v.* AMERICAN  
TELEPHONE & TELEGRAPH CO.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 93–356. Argued March 21, 1994—Decided June 17, 1994\*

Title 47 U. S. C. § 203(a) requires communications common carriers to file tariffs with the Federal Communications Commission, and § 203(b)(2) authorizes the Commission to “modify any requirement made by or under . . . this section . . . .” Relying on the latter provision, the Commission issued an order determining that its earlier decision to make tariff filing optional for all nondominant long-distance carriers was within its authority to “modify.” American Telephone and Telegraph Co., the only dominant long-distance carrier, filed a motion with the Court of Appeals seeking summary reversal of the Commission’s order. The motion was granted on the basis of that court’s prior decision determining that the Commission’s authorization of permissive detariffing violated § 203(a).

*Held:* The Commission’s permissive detariffing policy is not a valid exercise of its § 203(b)(2) authority to “modify any requirement.” Because virtually every dictionary in use now and at the time the statute was enacted defines “to modify” as meaning to change moderately or in minor fashion, the word “modify” must be seen to have a connotation of increment or limitation. That § 203(b)(2) does not contemplate basic or fundamental changes is also demonstrated by the fact that the only exception to it deals with a very minor matter: The Commission may not require the period for giving notice of tariff changes to exceed 120 days. The Commission’s permissive detariffing policy cannot be justified as a nonfundamental “modification.” The tariff filing requirement is the heart of the common carrier subchapter of the Communications Act of 1934, and the policy eliminates that requirement entirely for all except one firm in the long-distance sector, and for 40% of all consumers in that sector. Moreover, it is hard to imagine that a condition shared by so many affected parties qualifies as “special” under § 203(b)(2)’s requirement that when the Commission proceeds “by general order” to make a modification, the order can only apply “to special circumstances or conditions.” The Commission’s interpretation of the statute is there-

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\*Together with No. 93–521, *United States et al. v. American Telephone & Telegraph Co. et al.*, also on certiorari to the same court.

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fore not entitled to deference, since it goes beyond the meaning that the statute can bear. That Congress seemed to manifest agreement with the parties' respective interpretations in later legislation is irrelevant; there has been no consistent history of legislation to which one or the other interpretation is essential. Finally, petitioners' argument that their interpretation better serves the Act's broad purpose of promoting efficient telephone service should be addressed to Congress. Pp. 224–234.

Affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and SOUTER, JJ., joined, *post*, p. 235. O'CONNOR, J., took no part in the consideration or decision of the cases.

*Christopher J. Wright* argued the cause for the federal petitioners. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Bingaman*, and *Deputy Solicitor General Wallace*. *Donald B. Verrilli, Jr.*, argued the cause for petitioner in No. 93–356. With him on the briefs were *Chester T. Kamin*, *Michael H. Salsbury*, *Anthony C. Epstein*, *John B. Morris, Jr.*, *Donald J. Elardo*, *Frank W. Krogh*, and *Richard G. Taranto*.

*David W. Carpenter* argued the cause for respondents in both cases. With him on the brief for respondent American Telephone & Telegraph Co. were *Thomas W. Merrill*, *Peter D. Keisler*, *Joseph D. Kearney*, *Mark C. Rosenblum*, and *John J. Langhauser*. *Leon M. Kestenbaum*, *Michael B. Fingerhut*, *Theodore Case Whitehouse*, and *W. Theodore Pierson, Jr.*, filed a brief for respondent Sprint Communications Co. L. P. et al.†

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†Briefs of *amici curiae* urging reversal were filed for International Business Machines Corporation by *T. Roger Wollenberg*, *William T. Lake*, *John H. Harwood II*, and *Sheila McCartney*; for the California Bankers Clearing House Association et al. by *Henry D. Levine*, *Ellen G. Block*, and *Francis E. Fletcher, Jr.*; and for Witel, Inc., by *David G. Leitch*.

JUSTICE SCALIA delivered the opinion of the Court.

Section 203(a) of Title 47 of the United States Code requires communications common carriers to file tariffs with the Federal Communications Commission, and §203(b) authorizes the Commission to “modify” any requirement of §203. These cases present the question whether the Commission’s decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority.

## I

Like most cases involving the role of the American Telephone and Telegraph Company (AT&T) in our national telecommunication system, these have a long history. An understanding of the cases requires a brief review of the Commission’s efforts to regulate and then deregulate the telecommunications industry. When Congress created the Commission in 1934, AT&T, through its vertically integrated Bell system, held a virtual monopoly over the Nation’s telephone service. The Communications Act of 1934, 48 Stat. 1064, as amended, authorized the Commission to regulate the rates charged for communication services to ensure that they were reasonable and nondiscriminatory. The requirements of §203 that common carriers file their rates with the Commission and charge only the filed rate were the centerpiece of the Act’s regulatory scheme.

In the 1970’s, technological advances reduced the entry costs for competitors of AT&T in the market for long-distance telephone service. The Commission, recognizing the feasibility of greater competition, passed regulations to facilitate competitive entry. By 1979, competition in the provision of long-distance service was well established, and some urged that the continuation of extensive tariff filing requirements served only to impose unnecessary costs on new entrants and to facilitate collusive pricing. The Commission held hearings on the matter, see *Competitive Carrier Notice of Inquiry and Proposed Rulemaking*, 77

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F. C. C. 2d 308 (1979), following which it issued a series of rules that have produced this litigation.

The *First Report and Order*, 85 F. C. C. 2d 1, 20–24 (1980), distinguished between dominant carriers (those with market power) and nondominant carriers—in the long-distance market, this amounted to a distinction between AT&T and everyone else—and relaxed some of the filing procedures for nondominant carriers, *id.*, at 30–49. In the *Second Report and Order*, 91 F. C. C. 2d 59 (1982), the Commission entirely eliminated the filing requirement for resellers of terrestrial common carrier services. This policy of optional filing, or permissive detariffing, was extended to all other resellers, and to specialized common carriers, including petitioner MCI Telecommunications Corp., by the *Fourth Report and Order*, 95 F. C. C. 2d 554 (1983),<sup>1</sup> and to virtually all remaining categories of nondominant carriers by the *Fifth Report and Order*, 98 F. C. C. 2d 1191 (1984). Then, in 1985, the Commission shifted to a mandatory detariffing policy, which prohibited nondominant carriers from filing tariffs. See *Sixth Report and Order*, 99 F. C. C. 2d 1020. The United States Court of Appeals for the District of Columbia Circuit, however, struck down the *Sixth Report's* mandatory detariffing policy in a challenge brought—somewhat ironically as it now appears—by MCI. See *MCI Telecommunications Corp. v. F. C. C.*, 765 F. 2d 1186 (1985) (Ginsburg, J.). The Court of Appeals reasoned that § 203(a)'s command that “[e]very common carrier . . . shall . . . file” tariffs was mandatory. And although § 203(b) authorizes the Commission to “modify any requirement” in the section, the Court of Appeals concluded that that phrase “suggest[ed] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement.” *Id.*, at 1192.

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<sup>1</sup>The *Third Report and Order*, 48 Fed. Reg. 46791 (1983), extended the Competitive Carrier Rulemakings to carriers providing service to domestic points outside the continental United States, such as Hawaii, Puerto Rico, and the United States Virgin Islands.

In the wake of the invalidation of mandatory detariffing by the Court of Appeals, MCI continued its practice of not filing tariffs for certain services, pursuant to the permissive detariffing policy of the *Fourth Report and Order*. On August 7, 1989, AT&T filed a complaint, pursuant to the third-party complaint provision of the Communications Act, 47 U. S. C. § 208(a), which alleged that MCI's collection of unfiled rates violated §§ 203(a) and (c). MCI responded that the *Fourth Report and Order* was a substantive rule, and so MCI had no legal obligation to file rates. AT&T rejoined that the *Fourth Report and Order* was simply a statement of the Commission's nonenforcement policy, which did not immunize MCI from private enforcement actions; and that if the *Fourth Report and Order* established a substantive rule, it was in excess of statutory authority. The Commission did not take final action on AT&T's complaint until almost 2½ years after its filing. See *AT&T Communications v. MCI Telecommunications Corp.*, 7 FCC Rcd 807 (1992). It characterized the *Fourth Report and Order* as a substantive rule and dismissed AT&T's complaint on the ground that MCI was in compliance with that rule. It refused to address, however, AT&T's contention that the rule was ultra vires, announcing instead a proposed rulemaking to consider that question. See *Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking*, 7 FCC Rcd 804 (1992).

AT&T petitioned for review, arguing, *inter alia*, that the Commission lacked authority to defer to a later rulemaking consideration of an issue which was dispositive of an adjudicatory complaint. The United States Court of Appeals for the District of Columbia Circuit granted the petition for review. See *American Telephone & Telegraph Co. v. F. C. C.*, 978 F. 2d 727 (1992) (Silberman, J.). The Court of Appeals characterized the Commission's failure to address its authority to promulgate the permissive detariffing policy as "a sort of administrative law shell game," *id.*, at 731-732. Address-

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ing that question itself, the Court of Appeals concluded that the permissive detariffing policy of the *Fourth Report and Order* was rendered indefensible by the 1985 *MCI* decision: “Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to ‘modify’ requirements of the Act.” *Id.*, at 736. The Court of Appeals then remanded the case so that the Commission could award appropriate relief. See *id.*, at 736–737. We denied certiorari. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 509 U. S. 913 (1993).

Moving now with admirable dispatch, less than two weeks after the decision by the Court of Appeals concerning the adjudicatory proceeding, the Commission released a Report and Order from the rulemaking proceeding commenced in response to AT&T’s complaint. See *In re Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992), stayed pending further notice, 7 FCC Rcd 7989 (1992). That is the Report and Order at issue in this case. The Commission, relying upon the §203(b) authority to “modify” that had by then been twice rejected by the District of Columbia Circuit, determined that its permissive detariffing policy was within its authority under the Communications Act. AT&T filed a motion with the District of Columbia Circuit seeking summary reversal of the Commission’s order. The motion was granted in an unpublished *per curiam* order stating: “The decision of this court in [*American Telephone & Telegraph Co. v. FCC*, 978 F. 2d 727 (1992),] conclusively determined that the FCC’s authorization of permissive detariffing violates Section 203(a) of the Communications Act.” App. to Pet. for Cert. 2a. Both *MCI* and the United States (together with the Commission) petitioned for certiorari. We granted the petitions and consolidated them. 510 U. S. 989 (1993).

## II

Section 203 of the Communications Act contains both the filed rate provisions of the Act and the Commission's disputed modification authority. It provides in relevant part:

“(a) Filing; public display.

“Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . , whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. . . .

“(b) Changes in schedule; discretion of Commission to modify requirements.

“(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

“(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

“(c) Overcharges and rebates.

“No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a



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greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.” 47 U. S. C. § 203 (1988 ed. and Supp. IV).

The dispute between the parties turns on the meaning of the phrase “modify any requirement” in § 203(b)(2). Petitioners argue that it gives the Commission authority to make even basic and fundamental changes in the scheme created by that section. We disagree. The word “modify”—like a number of other English words employing the root “mod-” (deriving from the Latin word for “measure”), such as “moderate,” “modulate,” “modest,” and “modicum”—has a connotation of increment or limitation. Virtually every dictionary we are aware of says that “to modify” means to change moderately or in minor fashion. See, *e. g.*, Random House Dictionary of the English Language 1236 (2d ed. 1987) (“to change somewhat the form or qualities of; alter partially; amend”); Webster’s Third New International Dictionary 1452 (1981) (“to make minor changes in the form or structure of: alter without transforming”); 9 Oxford English Dictionary 952 (2d ed. 1989) (“[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation”); Black’s Law Dictionary 1004 (6th ed. 1990) (“[t]o alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce”).

In support of their position, petitioners cite dictionary definitions contained in, or derived from, a single source, Webster’s Third New International Dictionary 1452 (1981) (Webster’s Third), which includes among the meanings of

“modify,” “to make a basic or important change in.”<sup>2</sup> Petitioners contend that this establishes sufficient ambiguity to entitle the Commission to deference in its acceptance of the broader meaning, which in turn requires approval of its permissive detariffing policy. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In short, they contend that the courts must defer to the agency’s choice among available dictionary definitions, citing *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992).

But *Boston & Maine* does not stand for that proposition. That case involved the question whether the statutory term “required” could only mean “demanded as essential” or could also mean “demanded as appropriate.” In holding that the latter was a permissible interpretation, to which *Chevron* deference was owed, the opinion did not rely exclusively upon dictionary definitions, but also upon contextual indications, see 503 U.S., at 417–419—which in the present cases, as we shall see, contradict petitioners’ position. Moreover, when the *Boston & Maine* opinion spoke of “alternative dictionary definitions,” *ibid.*, it did not refer to what we have here: one dictionary whose suggested meaning contradicts virtually all others. It referred to alternative definitions

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<sup>2</sup>Petitioners also cite Webster’s Ninth New Collegiate Dictionary 763 (1991), which includes among its definitions of “modify,” “to make basic or fundamental changes in often to give a new orientation to or to serve a new end.” They might also have cited the eighth version of Webster’s New Collegiate Dictionary 739 (1973), which contains that same definition; and Webster’s Seventh New Collegiate Dictionary 544 (1963), which contains the same definition as Webster’s Third New International Dictionary quoted in text. The Webster’s New Collegiate Dictionaries, published by G. & C. Merriam Company of Springfield, Massachusetts, are essentially abridgments of that company’s Webster’s New International Dictionaries, and recite that they are based upon those lengthier works. The last New Collegiate to be based upon Webster’s Second New International, rather than Webster’s Third, does not include “basic or fundamental change” among the accepted meanings of “modify.” See Webster’s New Collegiate Dictionary 541 (6th ed. 1949).

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*within the dictionary cited* (Webster's Third, as it happens), which was not represented to be the *only* dictionary giving those alternatives. To the contrary, the Court said "these alternative interpretations are as old as the jurisprudence of this Court," *id.*, at 419, citing *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See also Webster's New International Dictionary 2117 (2d ed. 1934); 2 New Shorter Oxford English Dictionary 2557 (1993) (giving both alternatives).

Most cases of verbal ambiguity in statutes involve, as *Boston & Maine* did, a selection between accepted alternative meanings shown as such by many dictionaries. One can envision (though a court case does not immediately come to mind) having to choose between accepted alternative meanings, one of which is so newly accepted that it has only been recorded by a single lexicographer. (Some dictionary must have been the very first to record the widespread use of "projection," for example, to mean "forecast.") But what petitioners demand that we accept as creating an ambiguity here is a rarity even rarer than that: a meaning set forth in a single dictionary (and, as we say, its progeny) which not only *supplements* the meaning contained in all other dictionaries, but *contradicts* one of the meanings contained in virtually all other dictionaries. Indeed, contradicts one of the alternative meanings contained in the out-of-step dictionary itself—for as we have observed, Webster's Third itself defines "modify" to connote *both* (specifically) major change *and* (specifically) minor change. It is hard to see how that can be. When the word "modify" has come to mean *both* "to change in some respects" *and* "to change fundamentally" it will in fact mean *neither* of those things. It will simply mean "to change," and some adverb will have to be called into service to indicate the great or small degree of the change.

If that is what the peculiar Webster's Third definition means to suggest has happened—and what petitioners suggest by appealing to Webster's Third—we simply disagree.

“Modify,” in our view, connotes moderate change. It might be good English to say that the French Revolution “modified” the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm. And it might be unsurprising to discover a 1972 White House press release saying that “the Administration is modifying its position with regard to prosecution of the war in Vietnam”—but only because press agents tend to impart what is nowadays called “spin.” Such intentional distortions, or simply careless or ignorant misuse, must have formed the basis for the usage that Webster’s Third, and Webster’s Third alone, reported.<sup>3</sup> It is perhaps gilding the lily to add this: In 1934, when the Communications Act became law—the most relevant time for determining a statutory term’s meaning, see *Perrin v. United States*, 444 U. S. 37, 42–45 (1979)—Webster’s Third was not yet even contemplated. To our knowledge *all* English dictionaries provided the narrow definition of “modify,” including those published by G. & C. Merriam Company. See Webster’s New International Dictionary 1577 (2d ed. 1934); Webster’s Collegiate Dictionary 628 (4th ed. 1934). We have not the slightest doubt that is the meaning the statute intended.

Beyond the word itself, a further indication that the § 203(b)(2) authority to “modify” does not contemplate fundamental changes is the sole exception to that authority which

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<sup>3</sup>That is not an unlikely hypothesis. Upon its long-awaited appearance in 1961, Webster’s Third was widely criticized for its portrayal of common error as proper usage. See, e. g., Follett, Sabotage in Springfield, 209 *Atlantic* 73 (Jan. 1962); Barzun, What is a Dictionary? 32 *The American Scholar* 176, 181 (spring 1963); Macdonald, The String Unwound, 38 *The New Yorker* 130, 156–157 (Mar. 1962). An example is its approval (without qualification) of the use of “infer” to mean “imply”: “infer” “5: to give reason to draw an inference concerning: HINT (did not take part in the debate except to ask a question *inferring* that the constitution must be changed—*Manchester Guardian Weekly*).” Webster’s Third New International Dictionary 1158 (1961).

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the section provides. One of the requirements of §203 is that changes to filed tariffs can be made only after 120 days' notice to the Commission and the public. §203(b)(1). The *only* exception to the Commission's §203(b)(2) modification authority is as follows: "except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." Is it conceivable that the statute is indifferent to the Commission's power to eliminate the tariff-filing requirement entirely for all except one firm in the long-distance sector, and yet strains out the gnat of extending the waiting period for tariff revision beyond 120 days? We think not. The exception is not as ridiculous as a Lilliputian in London only because it is to be found in Lilliput: in the small-scale world of "modifications," it is a big deal.

Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, see, *e. g.*, *Pittston Coal Group v. Sebben*, 488 U. S. 105, 113 (1988); *Chevron*, 467 U. S., at 842–843, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement. The Commission's attempt to establish that no more than that is involved greatly understates the extent to which its policy deviates from the filing requirement, and greatly undervalues the importance of the filing requirement itself.

To consider the latter point first: For the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of an entire toenail is insignificant; loss of an entire arm tragic. The tariff-filing requirement is, to pursue this analogy, the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, see, *e. g.*, *MCI Telecommunications Corp. v. FCC*, 917 F. 2d

30, 38 (CADC 1990), this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges: "[T]here is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440 (1907); see also *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506, 508–509 (1912). "The duty to file rates with the Commission, [the analog to §203(a)], and the obligation to charge only those rates, [the analog to §203(c)], have always been considered essential to preventing price discrimination and stabilizing rates." *Maislin Industries, U. S., Inc. v. Primary Steel, Inc.*, 497 U. S. 116, 126 (1990); see also *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932) (filing requirements "render rates definite and certain, and . . . prevent discrimination and other abuses"); *Armour Packing Co. v. United States*, 209 U. S. 56, 81 (1908) (elimination of filing requirement "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish"). As the *Maislin* Court concluded, compliance with these provisions "is 'utterly central' to the administration of the Act." 497 U. S., at 132, quoting *Regular Common Carrier Conference v. United States*, 793 F. 2d 376, 379 (CADC 1986).

Much of the rest of the Communications Act subchapter applicable to Common Carriers, see 47 U. S. C. §§201–228, and the Act's Procedural and Administrative Provisions, 47 U. S. C. §§401–416, are premised upon the tariff-filing requirement of §203. For example, §415 defines "overcharges" (which customers are entitled to recover) by reference to the filed rate. See §415(g). The provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory, see 47 U. S. C. §§204, 206–

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208, 406, would not be susceptible of effective enforcement if rates were not publicly filed.<sup>4</sup> See *Maislin*, *supra*, at 132. Rate filings are, in fact, the essential characteristic of a rate-regulated industry. It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to “modify” rate-filing requirements.

Bearing in mind, then, the enormous importance to the statutory scheme of the tariff-filing provision, we turn to whether what has occurred here can be considered a mere “modification.” The Commission stresses that its detariffing policy applies only to nondominant carriers, so that the rates charged to over half of all consumers in the long-distance market are on file with the Commission. It is not clear to us that the proportion of customers affected, rather than the proportion of carriers affected, is the proper measure of the extent of the exemption (of course *all* carriers in the long-distance market are exempted, except AT&T). But even assuming it is, we think an elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a “modification.” What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications

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<sup>4</sup>The dissent misrepresents what we say in this sentence, see *post*, at 242, and addresses two paragraphs to an argument we have not made, *post*, at 242–244. We simply say, as did the *Maislin* Court, that eliminating the tariff-filing requirement would frustrate complaint proceedings; not that eliminating those requirements, or indeed even eliminating the complaint proceedings, would frustrate the ultimate purposes of the Act. Perhaps, as the dissent asserts, it would not; perhaps even eliminating the FCC would not do so. But we (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.

to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.

Apart from its failure to qualify as a “modification,” there is an independent reason why the Commission’s detariffing policy cannot come within the § 203(b)(2) authority to modify. That provision requires that when the Commission proceeds “by general order” (as opposed to when it acts “in particular instances”) to make a modification, the order can only apply “to special circumstances or conditions.” Although that is a somewhat elastic phrase, it is not infinitely so. It is hard to imagine that a condition shared by 40% of all long-distance customers, and by all long-distance carriers except one, qualifies as “special” within the intent of this limitation.<sup>5</sup>

Both sides of this dispute contend that Congress has manifested in later legislation agreement with their respective interpretations of the Communications Act. Petitioners point to the 1990 amendment of the Act to require operator service providers (OSP’s) to file informational tariffs, which can be phased out after four years, see Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 104 Stat. 990, 47 U. S. C. § 226(h) (1988 ed., Supp. IV). Petitioners reason that this must envision a background of permissive filing, since otherwise the permitted phaseout of infor-

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<sup>5</sup>The dissent suggests that we ignore § 203(c) of the Act, which prohibits carriers from providing service in the absence of a filed rate “unless provided by or under the authority of this Act.” The dissent asserts that that phrase must refer to the modification authority of § 203(b)(2). See *post*, at 239–240. Perhaps it does so—though that would not at all contradict our interpretation of § 203(b)(2), which we have acknowledged, see *infra*, at 234, might in some limited circumstances permit the Commission to waive the filing requirement. But § 203(c) could just as (in fact, more) easily be read as referring to § 203(a)’s express exemption of connecting carriers, §§ 201(b) and 211’s authorization of services between carriers pursuant to contractual rates, § 332(c)(1)(A)’s exemptions for mobile carriers, and other express statutory exemptions from filing requirements.



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mational tariffs would be a phase-in of even more rigorous requirements. AT&T, on the other hand, claims that Congress has manifested agreement with *its* position in the recent amendment of 47 U. S. C. § 332(c)(1)(A) that gives the Commission authority to limit the tariff-filing requirement for commercial mobile carriers—authority that would be unnecessary if the Commission’s view of § 203 is correct. At most, these conflicting arguments indicate that Congress was aware of the decade-long tug of war between the Commission and the District of Columbia Circuit over the authority to relax filing requirements, and at different times proceeded on different assumptions as to who would win. We have here not a consistent history of legislation to which one or the other, interpretation of the Act is essential; but rather two pieces of legislation to which first one, and then the other, interpretation of the Act is more congenial. That is not enough to change anything.

Finally, petitioners earnestly urge that their interpretation of § 203(b) furthers the Communications Act’s broad purpose of promoting efficient telephone service. They claim that although the filing requirement prevented price discrimination and unfair practices while AT&T maintained a monopoly over long-distance service, it frustrates those same goals now that there is greater competition in that market. Specifically, they contend that filing costs raise artificial barriers to entry and that the publication of rates facilitates parallel pricing and stifles price competition. We have considerable sympathy with these arguments (though we doubt it makes sense, if one is concerned about the use of filed tariffs to communicate pricing information, to require filing by the dominant carrier, the firm most likely to be a price leader). The Court itself has policed trade associations and rate bureaus under the antitrust laws precisely because the sharing of pricing information can facilitate price fixing, see, *e. g.*, *Sugar Institute, Inc. v. United States*, 297 U. S. 553

(1936); *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921), and the Court has protected regulated firms from some types of antitrust suits brought on the basis of their filed rates, see, e. g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409 (1986). As we noted earlier this Term, there is considerable “debate in other forums about the wisdom of the filed rate doctrine,” *Security Services, Inc. v. Kmart Corp.*, 511 U. S. 431, 440 (1994), and, more broadly, about the value of continued regulation of the telecommunications industry. But our estimations, and the Commission’s estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission’s desire “to ‘increase competition’ cannot provide [it] authority to alter the well-established statutory filed rate requirements,” *Maislin*, 497 U. S., at 135. As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, “such considerations address themselves to Congress, not to the courts,” *Armour Packing*, 209 U. S., at 82.

We do not mean to suggest that the tariff-filing requirement is so inviolate that the Commission’s existing modification authority does not reach it at all. Certainly the Commission can modify the form, contents, and location of required filings, and can defer filing or perhaps even waive it altogether in limited circumstances. But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established.

The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE O’CONNOR took no part in the consideration or decision of these cases.

STEVENS, J., dissenting

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE SOUTER join, dissenting.

The communications industry has an unusually dynamic character. In 1934, Congress authorized the Federal Communications Commission (FCC or Commission) to regulate “a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.” *National Broadcasting Co. v. United States*, 319 U. S. 190, 219 (1943). The Communications Act of 1934 (Act) gives the FCC unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate “to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U. S. C. § 151. This Court’s consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities. See, e. g., *United States v. Southwestern Cable Co.*, 392 U. S. 157, 172–173 (1968); *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). The Court today abandons that approach in favor of a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions.

## I

At the time the Act was passed, the telephone industry was dominated by the American Telephone & Telegraph Company (AT&T) and its affiliates. Title II of the Act, which establishes the framework for FCC regulation of common carriers by wire, was clearly a response to that dominance. As the Senate Report explained, “[u]nder existing provisions of the Interstate Commerce Act the regulation of the telephone monopoly has been practically nil. This vast monopoly which so immediately serves the needs of the peo-

ple in their daily and social life must be effectively regulated.” S. Rep. No. 781, 73d Cong., 2d Sess., 2 (1934).<sup>1</sup>

The wire communications provisions of the Act address problems distinctly associated with monopoly. Section 201 requires telephone carriers to “furnish . . . communication service upon reasonable request therefor,” and mandates that their “charges, practices, classifications, and regulations” be “just and reasonable.” 47 U. S. C. §201. Section 202 forbids carriers to “make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality.” 47 U. S. C. §202(a). The Commission, upon complaint or its own motion, may hold hearings upon, and declare the lawfulness of, proposed rate increases, §204, and may prescribe just and reasonable charges upon a finding that a carrier’s actual or proposed charges are illegal, §205. Persons damaged by a carrier’s violation of the statute have a right to damages, §§206–207, and any person may file with the Commission a complaint of violation of the Act, §208.

Section 203, modeled upon the filed rate provisions of the Interstate Commerce Act, see 49 U. S. C. §§10761–10762; S. Rep. No. 781, *supra*, at 4, requires that common carriers other than connecting carriers “file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers.” 47 U. S. C. §203(a). A telephone carrier must allow a 120-day period of lead time before a tariff goes into effect, and, “unless other-

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<sup>1</sup>See Investigation of the Telephone Industry in the United States, H. R. Doc. No. 340, 76th Cong., 1st Sess., 145–146 (1939) (chronicling Bell System’s development of a “Nation-wide, unified system to monopolize the telephone part of the national communication field” through the “prevention and elimination of effective competition”). See also H. R. Rep. No. 1273, 73d Cong., 2d Sess., pt. 1, p. XXXI (1934) (“Telephone business is a monopoly—it is supposed to be regulated”).

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wise provided by or under authority of this chapter,” may not provide communication services except according to a filed schedule, §§203(c), (d). The tariff-filing section of the Act, however, contains a proviso that states:

“(b) Changes in schedule; discretion of Commission to modify requirements.

“(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.” 47 U. S. C. §203(b)(2) (1988 ed., Supp. IV).

Congress doubtless viewed the filed rate provisions as an important mechanism to guard against abusive practices by wire communications monopolies. But it is quite wrong to suggest that the mere process of filing rate schedules—rather than the substantive duty of reasonably priced and nondiscriminatory service—is “the heart of the common-carrier section of the Communications Act.” *Ante*, at 229.

## II

In response to new conditions in the communications industry, including stirrings of competition in the long-distance telephone market, the FCC in 1979 began re-examining its regulatory scheme. The Commission tentatively concluded that costly tariff-filing requirements were unnecessary and actually counterproductive as applied to nondominant carriers, *i. e.*, those whose lack of market power leaves them unable to extract supracompetitive or discriminatory rates from customers. See *Competitive Carrier Rulemaking*, 77 F. C. C. 2d 308 (1979). Relaxing the regulatory burdens upon new entrants would foster competition into the tele-

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communications markets; at the same time, the forces of competition would ensure that firms without monopoly power would comply with the Act's prohibitions on "unreasonable rates" and price discrimination. See *id.*, at 334–338. As the Commission explained in 1981, tariff-filing obligations for nondominant firms were simultaneously "superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies" and inimical to "price competition and service and marketing innovation." *Deregulation of Telecommunications Services*, 84 F. C. C. 2d 445, 478–479 (1981). Accordingly, in a series of rulings in the early 1980's, the Commission issued orders progressively exempting specified classes of nondominant carriers from the obligation to file tariff schedules. See, e. g., *Second Report and Order*, 91 F. C. C. 2d 59 (1982); *Third Report and Order*, 48 Fed. Reg. 46791 (1983). The Commission's *Fourth Report and Order*, 95 F. C. C. 2d 554 (1983), extended and reaffirmed its "permissive detariffing" policy, under which dominant long-distance carriers must file tariff schedules whereas nondominant carriers, although subject to the Act's prohibitions on unreasonable rates and price discrimination, may, but need not, file them.

In the instant *In re Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992), the FCC adhered to its policy of excusing nondominant providers of long-distance telephone service from the § 203 filing requirement, and codified that longstanding forbearance policy. The Commission reaffirmed its commitment to "adapt . . . regulation of telecommunications common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry," *id.*, at 8079, and explained once again why, in its view, permissive detariffing furthered these goals, *id.*, at 8079–8080. As it had since its initial

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stages of detariffing, see 84 F. C. C. 2d, at 479–480, the Commission found principal statutory authority for detariffing in the “modify any requirement” language of §203(b)(2). 7 FCC Rcd, at 8074–8075. “[A]ctual experience under permissive detariffing,” including an increase in the number of long-distance carriers from 12 in 1982 to 482 a decade later, “further confirm[ed] the success of [the FCC’s] approach in furthering the statutory goals of the Communications Act.” *Id.*, at 8079–8080.

## III

Although the majority observes that further relaxation of tariff-filing requirements might more effectively enhance competition, *ante*, at 233–234, it does not take issue with the Commission’s conclusions that mandatory filing of tariff schedules serves no useful purpose and is actually counterproductive in the case of carriers who lack market power. As the Commission had noted in its prior detariffing orders, see, *e. g.*, 84 F. C. C. 2d, at 479–480, if a nondominant carrier sought to charge inflated rates, “customers would simply move to other carriers.” 7 FCC Rcd, at 8079. Moreover, an absence of market power will ordinarily preclude firms of any kind from engaging in price discrimination. See, *e. g.*, L. Sullivan, *Law of Antitrust* 89 (1977) (“A firm will not discriminate unless it has market power”); 9 P. Areeda, *Anti-trust Law* ¶1711a, pp. 119–120 (1991). The Commission plausibly concluded that any slight enforcement benefits a tariff-filing requirement might offer were outweighed by the burdens it would put on new entrants and consumers. Thus, the sole question for us is whether the FCC’s policy, however sensible, is nonetheless inconsistent with the Act.

In my view, each of the Commission’s detariffing orders was squarely within its power to “modify any requirement” of §203. Section 203(b)(2) plainly confers at least some discretion to modify the general rule that carriers file tariffs,

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for it speaks of “*any* requirement.”<sup>2</sup> Section 203(c) of the Act, ignored by the Court, squarely supports the FCC’s position; it prohibits carriers from providing service without a tariff “*unless otherwise provided by or under authority of this Act.*” Section 203(b)(2) is plainly one provision that “otherwise provides,” and thereby authorizes, service without a filed schedule. The FCC’s authority to modify § 203’s requirements in “particular instances” or by “general order applicable to special circumstances or conditions” emphasizes the expansive character of the Commission’s authority: modifications may be narrow or broad, depending upon the Commission’s appraisal of current conditions. From the vantage of a Congress seeking to regulate an almost completely monopolized industry, the advent of competition is surely a “special circumstance or condition” that might legitimately call for different regulatory treatment.

The only statutory exception to the Commission’s modification authority provides that it may not extend the 120-day notice period set out in § 203(b)(1). See § 203(b)(2). The Act thus imposes a specific limit on the Commission’s authority to *stiffen* that regulatory imposition on carriers, but does not confine the Commission’s authority to *relax* it. It was no stretch for the FCC to draw from this single, unidirectional statutory limitation on its modification authority the inference that its authority is otherwise unlimited. See 7 FCC Rcd, at 8075.

According to the Court, the term “modify,” as explicated in all but the most unreliable dictionaries, *ante*, at 225–228, and n. 3, rules out the Commission’s claimed authority to relieve nondominant carriers of the basic obligation to file tariffs. Dictionaries can be useful aides in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context.

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<sup>2</sup>Section 203(b)(2) must do more than merely allow the Commission to dictate the form and contents of tariff filings, for § 203(b)(1) separately grants it that authority.



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Cf. *Cabell v. Markham*, 148 F. 2d 737, 739 (CA2 1945) (Hand, J.). Even if the sole possible meaning of “modify” were to make “minor” changes, *ante*, at 225,<sup>3</sup> further elaboration is needed to show why the detariffing policy should fail. The Commission came to its present policy through a series of rulings that gradually relaxed the filing requirements for nondominant carriers. Whether the current policy should count as a cataclysmic or merely an incremental departure from the §203(a) baseline depends on whether one focuses on particular carriers’ obligations to file (in which case the Commission’s policy arguably works a major shift)<sup>4</sup> or on the statutory policies behind the tariff-filing requirement (which remain satisfied because market constraints on nondominant carriers obviate the need for rate filing). When §203 is viewed as part of a statute whose aim is to constrain monopoly power, the Commission’s decision to exempt nondominant carriers is a rational and “measured” adjustment to novel circumstances—one that remains faithful to the core purpose of the tariff-filing section. See Black’s Law Dictionary 1198 (3d ed. 1933) (defining “modification” as “A change; an alteration which introduces new elements into the details, or cancels some of them, but leaves *the general purpose and effect of the subject-matter intact*”).

The Court seizes upon a particular sense of the word “modify” at the expense of another, long-established meaning

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<sup>3</sup> As petitioner MCI points out, the revolutionary consent decree providing for the breakup of the Bell System was, per AT&T’s own proposal, entitled “Modification of Final Judgment.” See *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D. C. 1982), *aff’d*, 460 U. S. 1001 (1983).

<sup>4</sup> Because the statute imposes no limit on the Commission’s authority to shorten the interval between filing a tariff and bringing it into effect, and because there is no sign that anyone actually pays attention to tariffs filed by nondominant carriers, the additional step of eliminating the filing requirement is less important than the Court would have it. Even the Court appears to recognize that the Commission could sometimes excuse carriers from filing tariffs. See *ante*, at 234.

that fully supports the Commission's position. That word is first defined in Webster's Collegiate Dictionary 628 (4th ed. 1934) as meaning "to limit or reduce in extent or degree."<sup>5</sup> The Commission's permissive detariffing policy fits comfortably within this common understanding of the term. The FCC has in effect adopted a general rule stating that "if you are dominant you must file, but if you are nondominant you need not." The Commission's partial detariffing policy—which excuses nondominant carriers from filing *on condition that* they remain nondominant—is simply a relaxation of a costly regulatory requirement that recent developments had rendered pointless and counterproductive in a certain class of cases.

A modification pursuant to § 203(b)(1), like any other order issued under the Act, must of course be consistent with the purposes of the statute. On this point, the Court asserts that the Act's prohibition against unreasonable and discriminatory rates "would not be susceptible of effective enforcement if rates were not publicly filed." *Ante*, at 231. That determination, of course, is for the Commission to make in the first instance. But the Commission has repeatedly ex-

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<sup>5</sup>See also 9 Oxford English Dictionary 952 (2d ed. 1989) ("2. To alter in the direction of moderation or lenity; to make less severe, rigorous, or decided; to qualify, tone down . . . . 1610 Donne *Pseudo-martyr* 184 'For so Mariana modefies his Doctrine, that the Prince should not execute any Clergy man, though hee deser[v]e it'"); Random House Dictionary of the English Language 1236 (2d ed. 1987) ("5. to reduce or lessen in degree or extent; moderate; soften; *to modify one's demands*"); Webster's Third New International Dictionary 1452 (1981) ("1: to make more temperate and less extreme: lessen the severity of; . . . 'traffic rules were *modified* to let him pass'"); Webster's New Collegiate Dictionary 739 (1973) ("1. to make less extreme; MODERATE"); Webster's Seventh New Collegiate Dictionary 544 (1963) (same); Webster's New International Dictionary 1577 (2d ed. 1934) ("2. To reduce in extent or degree; to moderate; qualify; lower; as, to *modify* heat, pain, punishment"); N. Webster, American Dictionary of the English Language (1828) ("To moderate; to qualify; to reduce in extent or degree. Of his grace/ He *modifies* his first severe decree. *Dryden*").

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plained that (1) a carrier that lacks market power is entirely unlikely to charge unreasonable or discriminatory rates, (2) the statutory bans on unreasonable charges and price discrimination apply with full force regardless of whether carriers have to file tariffs, (3) any suspected violations by non-dominant carriers can be addressed on the Commission's own motion or on a damages complaint filed pursuant to §206,<sup>6</sup> and (4) the FCC can reimpose a tariff requirement should violations occur. See, *e. g.*, 7 FCC Rcd, at 8078–8079. The Court does not adequately respond to the FCC's explanations, and gives no reason whatsoever to doubt the Commission's considered judgment that tariff filing is altogether unnecessary in the case of competitive carriers, see, *e. g.*, *id.*, at 8073, 8079; the majority's ineffective enforcement argument lacks any evidentiary or historical support.

The Court's argument is also demonstrably incorrect. A contemporary cousin of the Communications Act of 1934—the Robinson-Patman Price Discrimination Act, 15 U. S. C. §§ 13(a), 13a, 13b, enacted in 1936—contains a much broader prohibition against price discrimination than does the Communications Act. That statute has performed its mission for almost 60 years without any counterpart to the filed rate doctrine. Indeed, the substantive requirements of Title II of the Communications Act itself apply to “connecting carriers” even though §203(a) exempts such carriers from the §203 tariff-filing provisions. See 47 U. S. C. §152(b); *National Assn. of Regulatory Utility Commr's v. F. C. C.*, 737 F. 2d 1095, 1115, n. 23 (CADC 1984), cert. denied, 469 U. S. 1227 (1985). The small fraction of competitive carriers that

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<sup>6</sup>The Court suggests that the Commission's detariffing policy disrupts the statutory scheme because 47 U. S. C. §415(g) defines recoverable “overcharges” by reference to filed tariffs. See *ante*, at 230. Overcharge suits, by definition, depend on the presence of tariffs, but they are not the only means for aggrieved telephone customers to recover. Section 206 allows them to recover damages from carriers who have violated the Act and does not turn on the existence of a tariff. See also §§208, 415(b).

existed in 1979 now represents about 40% of the market; this growth has occurred while the detariffing policy has been in effect without any indication that the absence of filed schedules has produced discriminatory or unreasonable pricing by nondominant carriers. Extolling the “enormous importance” of filed rates, *ante*, at 231, and resorting to dictionary definitions and colorful metaphors are unsatisfactory substitutes for a reasoned explanation of why the statute requires rate filing even when the practice serves no useful purpose and actually harms consumers.

The filed tariff provisions of the Communications Act are not ends in themselves, but are merely one of several procedural *means* for the Commission to ensure that carriers do not charge unreasonable or discriminatory rates. See 84 F. C. C. 2d, at 483. The Commission has reasonably concluded that this particular means of enforcing the statute’s substantive mandates will prove counterproductive in the case of nondominant long-distance carriers. Even if the 1934 Congress did not define the scope of the Commission’s modification authority with perfect scholarly precision, this is surely a paradigm case for judicial deference to the agency’s interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility.<sup>7</sup> Whatever the best reading of §203(b)(2), the Commission’s reading cannot in my view be termed unreasonable. It is

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<sup>7</sup>The majority considers it unlikely that Congress would have conferred power on the Commission to exempt carriers from the supposedly pivotal rate-filing obligation. See *ante*, at 231–232. But surely such a delegation is not out of place in a statute that also empowers the FCC, for example, to decide what the “public convenience, interest, or necessity” requires, see, *e. g.*, 47 U. S. C. § 303, and to “prescribe such rules and regulations as may be necessary in the public interest,” § 201(b); see also § 154(i). The Court’s rigid reading of § 202(b)(2) is out of step with our prior recognition that the 1934 Act was meant to be 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).

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informed (as ours is not) by a practical understanding of the role (or lack thereof) that filed tariffs play in the modern regulatory climate and in the telecommunications industry. Since 1979, the FCC has sought to adapt measures originally designed to control monopoly power to new market conditions. It has carefully and consistently explained that mandatory tariff-filing rules frustrate the core statutory interest in rate reasonableness. The Commission's use of the "discretion" expressly conferred by §203(b)(2) reflects "a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (footnotes omitted). The FCC has permissibly interpreted its §203(b)(2) authority in service of the goals Congress set forth in the Act. We should sustain its eminently sound, experience-tested, and uncommonly well-explained judgment.

I respectfully dissent.

## Syllabus

HAWAIIAN AIRLINES, INC. *v.* NORRIS

## CERTIORARI TO THE SUPREME COURT OF HAWAII

No. 92–2058. Argued April 28, 1994—Decided June 20, 1994\*

Respondent Norris was terminated from his job as an aircraft mechanic by petitioner Hawaiian Airlines, Inc. (HAL), after refusing to sign a maintenance record, as required by his collective-bargaining agreement (CBA), for a plane he considered unsafe, and reporting his concerns to the Federal Aviation Administration. In separate state-court suits against HAL and its officers, also petitioners, he alleged, *inter alia*, that he had been wrongfully discharged in violation of the public policy expressed in the Federal Aviation Act and implementing regulations and in violation of Hawaii's Whistleblower Protection Act. The court dismissed these tort claims as pre-empted by the Railway Labor Act's (RLA's) mandatory arbitral mechanism for so-called "minor" disputes, which grow "out of grievances or out of the interpretation and application of agreements concerning [pay rates], rules, or working conditions," 45 U. S. C. § 153 First (i). The State Supreme Court reversed, concluding that § 153 First (i)'s plain language does not support pre-emption of disputes independent of a labor agreement, and interpreting the opinion in *Consolidated Rail Corporation v. Railway Labor Executives' Assn.*, 491 U. S. 299, to limit RLA pre-emption to disputes involving contractually defined rights. The court rejected petitioners' argument that the claims were pre-empted because resort to the CBA was necessary to determine whether Norris was discharged for insubordination, pointing to *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399, in which this Court held that the Labor-Management Relations Act, 1947 (LMRA), pre-empts state law only if a state-law claim is dependent on the interpretation of a CBA, and that purely factual questions about an employee's conduct and the employer's conduct and motives do not require interpreting such an agreement's terms.

*Held:* The RLA does not pre-empt Norris' state-law causes of action. Pp. 252–266.

(a) The minor disputes contemplated by the RLA are those that are grounded in a CBA. See, *e. g.*, *Consolidated Rail Corporation*, 491 U. S., at 305. The RLA pre-emption standard for resolving such disputes that has emerged from the relevant cases, see, *e. g.*, *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, is that a state-law cause of action

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\*Together with *Finazzo et al. v. Norris*, also on certiorari to the same court (see this Court's Rule 12.2).

## Syllabus

is not pre-empted if it involves rights and obligations that exist independent of the CBA. This standard is virtually identical to the pre-emption standard employed in cases involving §301 of the LMRA. Given the convergence of the two standards, *Lingle* provides an appropriate framework for addressing RLA pre-emption, and its standard—that the existence of a potential CBA-based remedy does not deprive an employee of independent remedies available under state law—is adopted to resolve such claims. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711; *Consolidated Rail Corporation*, 491 U. S., at 302, distinguished. Pp. 252–266.

(b) Under *Lingle*, Norris' state-law claims are independent of the CBA. Petitioners' argument that resort to the CBA is necessary to determine whether Norris was discharged for cause is foreclosed by *Lingle*'s teaching that the issue whether an employer's actions make out the element of discharge under state law is a purely factual question. Similarly, Norris' failure to sign the maintenance record is not relevant to the determination of his state-law tort claims. P. 266.

74 Haw. 648, 847 P. 2d 263 (first case), and 74 Haw. 235, 842 P. 2d 634 (second case), affirmed.

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

*Kenneth B. Hipp* argued the cause for petitioners. With him on the briefs were *David J. Dezzani* and *Margaret C. Jenkins*.

*Susan Oki Mollway* argued the cause for respondent. With her on the brief were *Edward DeLappe Boyle*, *Marsha S. Berzon*, *Mark Schneider*, and *Laurence Gold*.

*Richard H. Seamon* argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *John F. Manning*, and *William Kanter*.†

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†Briefs of *amici curiae* urging reversal were filed for the State of New Jersey by *Deborah T. Poritz*, Attorney General, *Andrea M. Silkowitz*, Assistant Attorney General, and *Eldad Philip Isaac*, Deputy Attorney General; for the Air Transport Association of America by *Charles A. Shanor*, *John J. Gallagher*, and *Margaret H. Spurlin*; and for the National Railway Labor Conference by *Ralph J. Moore, Jr.*, *I. Michael Greenberger*, and *David P. Lee*.

Briefs of *amici curiae* urging affirmance were filed for the State of Hawaii et al. by *Robert A. Marks*, Attorney General of Hawaii, and *Steven*

## Opinion of the Court

JUSTICE BLACKMUN delivered the opinion of the Court.

This action involves the scope of federal pre-emption under the Railway Labor Act (RLA), 45 U. S. C. § 151 *et seq.* The RLA, which was extended in 1936 to cover the airline industry, see Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; 45 U. S. C. §§ 181–188, sets up a mandatory arbitral mechanism to handle disputes “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions,” 45 U. S. C. § 153 First (i). The question in this case is whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered unsafe and for reporting his safety concerns to the Federal Aviation Administration may pursue available state-law remedies for wrongful discharge, or whether he may seek redress only through the RLA’s arbitral mechanism. We hold that the RLA does not pre-empt his state-law causes of action.

## I

Respondent Grant Norris is an aircraft mechanic licensed by the Federal Aviation Administration (FAA). His aircraft mechanic’s license authorizes him to approve an airplane and

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*S. Michaels*, Deputy Attorney General, *Grant Woods*, Attorney General of Arizona, *Richard Blumenthal*, Attorney General of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Roland W. Burris*, Attorney General of Illinois, *Pamela Fanning Carter*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Michael E. Carpenter*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *Joseph P. Mazurek*, Attorney General of Montana, *Tom Udall*, Attorney General of New Mexico, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, and *Richard Weil*, Acting Attorney General of the Northern Mariana Islands; for the Allied Educational Foundation by *Bertram R. Gelfand* and *Jeffrey C. Dannenberg*; for the National Employment Lawyers Association by *Mary Ann B. Oakley*, *Janette Johnson*, and *Robert B. Fitzpatrick*; and for the Railway Labor Executives’ Association by *John O’B. Clarke, Jr.*



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return it to service after he has made, supervised, or inspected certain repairs performed on that plane. See Certification: Airmen Other Than Flight Crewmembers, 14 CFR §§ 65.85 and 65.87 (1987). If he were to approve any aircraft on which the repairs did not conform to FAA safety regulations, the FAA could suspend or revoke his license. See Maintenance, Preventive Maintenance, Rebuilding and Alteration, 14 CFR § 43.12 (1992).

On February 2, 1987, respondent was hired by petitioner Hawaiian Airlines, Inc. (HAL). Many of the terms of his employment were governed by a collective-bargaining agreement (CBA) negotiated between the carrier and the International Association of Machinists and Aerospace Workers. Under the CBA, respondent's duties included inspecting and repairing all parts of a plane and its engine. On July 15, 1987, during a routine preflight inspection of a DC-9 plane, he noticed that one of the tires was worn. When he removed the wheel, respondent discovered that the axle sleeve, which should have been mirror smooth, was scarred and grooved. This damaged sleeve could cause the landing gear to fail. Respondent recommended that the sleeve be replaced, but his supervisor ordered that it be sanded and returned to the plane. This was done, and the plane flew as scheduled. At the end of the shift, respondent refused to sign the maintenance record to certify that the repair had been performed satisfactorily and that the airplane was fit to fly. See 14 CFR § 43.9(a) (1992). The supervisor immediately suspended him pending a termination hearing. Respondent immediately went home and called the FAA to report the problem with the sleeve.<sup>1</sup>

Respondent then invoked the grievance procedure outlined in the CBA, and a "Step 1" grievance hearing was held

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<sup>1</sup>In response, the FAA initiated a comprehensive investigation, proposed a civil penalty of \$964,000 against HAL, proposed the revocation of the license of the supervisor who terminated respondent, and ultimately settled all charges for a substantial fine.

## Opinion of the Court

on July 31, 1987. Petitioner HAL accused respondent of insubordination, claiming that his refusal to sign the record violated the CBA's provision that an aircraft mechanic "may be required to sign work records in connection with the work he performs." Respondent relied on the CBA's guarantees that an employee may not be discharged without just cause and may not be disciplined for refusing to perform work that is in violation of health or safety laws. The hearing officer terminated respondent for insubordination.

Still conforming to the CBA procedures, respondent appealed his termination, seeking a "Step 3" grievance hearing. Before this hearing took place, HAL offered to reduce respondent's punishment to suspension without pay, but warned him that "any further instance of failure to perform [his] duties in a responsible manner" could result in discharge. Respondent did not respond to this offer, nor, apparently, did he take further steps to pursue his grievance through the CBA procedures.

On December 18, 1987, respondent filed suit against HAL in Hawaii Circuit Court. His complaint included two wrongful-discharge torts—discharge in violation of the public policy expressed in the Federal Aviation Act of 1958 and implementing regulations, and discharge in violation of Hawaii's Whistleblower Protection Act, Haw. Rev. Stat. §§ 378–61 to 378–69 (1988).<sup>2</sup> He also alleged that HAL had breached the CBA. HAL removed the action to the United States District Court for the District of Hawaii, which dismissed the breach-of-contract claim as pre-empted by the

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<sup>2</sup>The Hawaii Whistleblower Protection Act forbids an employer to "discharge, threaten, or otherwise discriminate against an employee . . . because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." § 378–62(1). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. § 378–63(a).

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RLA, and remanded the other claims to the state trial court. The trial court then dismissed respondent's claim of discharge in violation of public policy, holding that it, too, was pre-empted by the RLA's provision of exclusive arbitral procedures. The state court certified its order as final to permit respondent to take an immediate appeal.

In the meantime, respondent had filed a second lawsuit in state court, naming as defendants three of HAL's officers who allegedly directed, confirmed, or ratified the claimed retaliatory discharge.<sup>3</sup> He again sought relief for, among other things, discharge in violation of public policy and of the Hawaii Whistleblower Protection Act. The Hawaii trial court dismissed these two counts as pre-empted by the RLA and certified the case for immediate appeal.

The Supreme Court of Hawaii reversed in both cases, concluding that the RLA did not pre-empt respondent's state tort actions. *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 842 P. 2d 634 (1992); 74 Haw. 648, 847 P. 2d 263 (1993). That court concluded that the plain language of § 153 First (i) does not support pre-emption of disputes independent of a labor agreement, 74 Haw., at 251, 842 P. 2d, at 642, and interpreted the opinion in *Consolidated Rail Corporation v. Railway Labor Executives' Assn.*, 491 U. S. 299 (1989) (*Conrail*), to limit RLA pre-emption to "disputes involving contractually defined rights." 74 Haw., at 250, 842 P. 2d, at 642. The court rejected petitioners' argument that the retaliatory discharge claims were pre-empted because determining whether HAL discharged respondent for insubordination, and thus for just cause, required construing the CBA. The court pointed to *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399 (1988), a case involving § 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185, in which the Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim

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<sup>3</sup>These managerial officers, petitioners here, are Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma.

## Opinion of the Court

did not require interpretation of a CBA, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Because the same was true in this action, said the Supreme Court of Hawaii, respondent's state tort claims were not pre-empted.

We granted certiorari in these consolidated cases, 510 U. S. 1083 (1994).

## II

## A

Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent. See *Allis-Chalmers Corp. v. Lueck*, 471 U. S. 202, 208 (1985). Pre-emption of employment standards "within the traditional police power of the State" "should not be lightly inferred." *Fort Halifax Packing Co. v. Coyne*, 482 U. S. 1, 21 (1987); see also *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985) (a federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress").

Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 562 (1987); see also 45 U. S. C. § 151a. To realize this goal, the RLA establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. 45 U. S. C. § 151a. The first class, those concerning "rates of pay, rules or working conditions," *ibid.*, are deemed "major" disputes. Major disputes relate to "the formation of collective [bargaining] agreements or efforts to secure them." *Conrail*, 491 U. S., at 302, quoting *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 723 (1945). The second class of disputes, known as "minor" disputes, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates

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of pay, rules, or working conditions.” 45 U. S. C. § 151a. Minor disputes involve “controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.” *Trainmen v. Chicago R. & I. R. Co.*, 353 U. S. 30, 33 (1957). Thus, “major disputes seek to create contractual rights, minor disputes to enforce them.” *Conrail*, 491 U. S., at 302, citing *Burley*, 325 U. S., at 723.

Petitioners contend that the conflict over respondent’s firing is a minor dispute. If so, it must be resolved only through the RLA mechanisms, including the carrier’s internal dispute-resolution processes and an adjustment board established by the employer and the unions. See 45 U. S. C. § 184; *Buell*, 480 U. S., at 563; *Conrail*, 491 U. S., at 302. Thus, a determination that respondent’s complaints constitute a minor dispute would pre-empt his state-law actions.

## B

The Court’s inquiry into the scope of minor disputes begins, of course, with the text of the statute. Petitioners point out that the statute defines minor disputes to include “disputes . . . growing out of grievances, *or* out of the interpretation or application of [CBA’s].” Petitioners argue that this disjunctive language must indicate that “grievances” means something other than labor-contract disputes, else the term “grievances” would be superfluous. Accordingly, petitioners suggest that “grievances” should be read to mean all employment-related disputes, including those based on statutory or common law. Even if we were persuaded that the word “or” carried this weight, but cf. *United States v. Olano*, 507 U. S. 725, 732 (1993) (reading “error or defect” to create one category of “error”), citing *United States v. Young*, 470 U. S. 1, 15, n. 12 (1985); *McNally v. United States*, 483 U. S. 350, 358–359 (1987) (second phrase in disjunctive added simply to make the meaning of the first phrase “unmistakable”), petitioners’ interpretation produces an overlap not unlike the one it purports to avoid. Their

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expansive definition of “grievances” necessarily encompasses disputes growing out of “the interpretation or application” of CBA’s. Thus, in attempting to save the term “grievances” from superfluity, petitioners would make the phrase after the “or” mere surplusage.

We think it more likely that “grievances,” like disputes over “the interpretation or application” of CBA’s, refers to disagreements over how to give effect to the bargained-for agreement. The use of “grievance” to refer to a claim arising out of a CBA is common in the labor-law context in general, see, *e. g.*, *Paperworkers v. Misco, Inc.*, 484 U. S. 29, 36 (1987), and it has been understood in this way in the RLA context. See H. R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934) (referring to RLA settlement of “minor disputes known as ‘grievances,’ which develop from the interpretation and/or application of the contracts between the labor unions and the carriers”). Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights. See, *e. g.*, NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board (Board) is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board’s authority); NRAB Third Div. Award No. 19790 (1973) (“[T]his Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreements”); *Northwest Airlines/Airline Pilots Assn., Int’l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 (“[B]oth the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]”); *United Airlines, Inc.*, 48 LA 727, 733 (BNA) (1967) (“The

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jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act”).

Accordingly, we believe that the most natural reading of the term “grievances” in this context is as a synonym for disputes involving the application or interpretation of a CBA. See Webster’s Third New International Dictionary 1585 (1986) (the word “or” may be used to indicate “the synonymous, equivalent, or substitutive character of two words or phrases”). Nothing in the legislative history of the RLA<sup>4</sup> or other sections of the statute<sup>5</sup> undermines this conclusion. But even accepting that § 151a is susceptible of more than one interpretation, no proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime

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<sup>4</sup>During the debates surrounding the RLA’s enactment in 1926, floor statements that, in isolation, could support a broader interpretation of “grievances” were counterbalanced by other statements—some even by the same legislators—that equated grievances with contract interpretation. Compare 67 Cong. Rec. 4517, 8807 (1926), with *id.*, at 4510, 8808. This inconclusive debate hardly calls for fashioning a broad rule of pre-emption. Moreover, in 1934 when Congress amended the RLA to make arbitration mandatory for minor disputes, the accompanying House Report stated that the bill was intended “to provide sufficient and effective means for the settlement of minor disputes known as ‘grievances,’ which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions.” H. R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934).

<sup>5</sup>Petitioners cite the statute’s reference to the parties’ general duties as including “settling all disputes, whether arising out of the application of [collective bargaining] agreements or otherwise.” 45 U. S. C. § 152 First. This provision, which is phrased more broadly than the operative language of § 153 First (i), does not clearly refer only to minor disputes. But even if this provision is read to require parties to try to settle certain issues arising out of the employment relationship but not specifically addressed by the CBA, this does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby pre-empted. Our precedents squarely reject this pervasive pre-emption.

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that broadly pre-empts substantive protections extended by the States, independent of any negotiated labor agreement.

## C

Our case law confirms that the category of minor disputes contemplated by § 151a are those that are grounded in the CBA. We have defined minor disputes as those involving the interpretation or application of existing labor agreements. See, e.g., *Conrail*, 491 U.S., at 305 (“The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]”); *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives’ Assn.*, 491 U.S. 490, 496, n. 4 (1989) (“Minor disputes are those involving the interpretation or application of existing contracts”); *Trainmen*, 353 U.S., at 33 (minor disputes are “controversies over the meaning of an existing collective bargaining agreement”); *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 243 (1950) (RLA arbitral mechanism is meant to provide remedies for “adjustment of railroad-employee disputes growing out of the interpretation of existing agreements”).

Moreover, we have held that the RLA’s mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA. More than 60 years ago, the Court rejected a railroad’s argument that the existence of the RLA arbitration scheme pre-empted a state statute regulating the number of workers required to operate certain equipment. *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931) (“No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration”). Not long thereafter, the Court rejected a claim that the RLA pre-empted an order by the Illinois Commerce Commission requiring cabooses on all trains; the operative CBA required cabooses only on some of the trains. *Terminal Railroad Assn. of St. Louis v. Train-*



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*men*, 318 U. S. 1 (1943). Although the Court assumed that a railroad adjustment board would have jurisdiction under the RLA over this dispute, *id.*, at 6, it concluded that the state law was enforceable nonetheless:

“State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by work[ers] for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. . . . But it cannot be said that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the [RLA] was not a preemption of the field of regulating working conditions themselves . . . .” *Id.*, at 6–7.

Thus, under *Norwood*, substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA.

Although *Norwood* and *Terminal Railroad* involved state workplace safety laws, the Court has taken a consistent approach in the context of state actions for wrongful discharge. In *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 320 (1972), the Court held that a state-law claim of wrongful termination was pre-empted, *not* because the RLA broadly pre-empted state-law claims based on discharge or discipline, but because the employee’s claim was firmly rooted in a breach of the CBA itself. He asserted no right independent of that agreement:

“Here it is conceded by all that the *only source* of [Andrews’] right not to be discharged, and therefore to treat an alleged discharge as a ‘wrongful’ one that entitles him

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to damages, is the [CBA]. . . . [T]he disagreement turns on the extent of [the railroad's] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the [CBA]. Thus [Andrews'] claim, and [the railroad's] disallowance of it, stem from differing interpretations of the [CBA]. . . . His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment." *Id.*, at 324 (emphasis added).

Here, in contrast, the CBA is not the "only source" of respondent's right not to be discharged wrongfully. In fact, the "only source" of the right respondent asserts in this action is state tort law. Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistle-blowing. The parties' obligation under the RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve petitioners of this duty.

*Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557 (1987), confirms that "minor disputes" subject to RLA arbitration are those that involve duties and rights created or defined by the CBA. In *Buell*, a railroad employee sought damages for workplace injuries under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, which provides a remedy for a railroad worker injured through an employer's or co-worker's negligence. The railroad argued that, because the alleged injury resulted from conduct that was subject to the CBA, the employee's sole remedy was through RLA arbitration. The Court unanimously rejected this argument, emphasizing that the rights derived from the FELA were independent of the CBA:

"The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been

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subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." 480 U. S., at 564–565.

It likened *Buell* to other cases in which the Court had concluded that "notwithstanding the strong policies encouraging arbitration, '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,'" *id.*, at 565, quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981), and distinguished it from *Andrews*, which involved a state wrongful-discharge claim "based squarely" on an alleged breach of a CBA, 480 U. S., at 566.<sup>6</sup>

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<sup>6</sup> *Buell*, of course, involved possible RLA preclusion of a cause of action arising out of a *federal* statute, while this case involves RLA pre-emption of a cause of action arising out of *state* law and existing entirely independent of the CBA. That distinction does not rob *Buell* of its force in this context. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399, 412 (1988) (*Buell* principles applicable to determine whether federal labor law pre-empts a state statute). Principles of federalism demand no less caution in finding that a federal statute pre-empts state law. See *Fort Halifax Packing Co. v. Coyne*, 482 U. S. 1, 21 (1987) (pre-emption of state statute "should not be lightly inferred in this [labor] area, since the establishment of labor standards falls within the traditional police power of the State").

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## D

The pre-emption standard that emerges from the line of cases leading to *Buell*—that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the CBA—is virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA, 29 U. S. C. § 185.<sup>7</sup> In *Allis-Chalmers Corp. v. Lueck*, 471 U. S. 202 (1985), the Court applied § 301 pre-emption to a state-law claim for bad-faith handling of a worker’s compensation claim because the duties the employer owed the employee, including the duty of good faith, were rooted firmly in the CBA. Its pre-emption finding was based on the fact that “the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, [so that] any attempt to assess liability here inevitably will involve contract interpretation.” *Id.*, at 218.

It cautioned, however, that other state-law rights, those that existed independent of the contract, would not be similarly pre-empted:

“Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. . . . Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach

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<sup>7</sup>Section 301(a) provides federal-court jurisdiction over controversies involving CBA’s and “authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements.” *Textile Workers v. Lincoln Mills of Ala.*, 353 U. S. 448, 451 (1957).

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of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.” *Id.*, at 211–212.<sup>8</sup>

In a case remarkably similar to the case before us now, this Court made clear that the existence of a potential CBA-based remedy did not deprive an employee of independent remedies available under state law. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S. 399 (1988), an employee covered by a labor agreement was fired for filing an allegedly false worker’s compensation claim. After filing a grievance pursuant to her CBA, which protected employees against discharge except for “proper” or “just” cause, she filed a complaint in state court, alleging that she had been discharged for exercising her rights under Illinois worker’s compensation laws. The state court had held her state-law claim pre-empted because “the same analysis of the facts” was required in both the grievance proceeding and the state-court action. This Court reversed.

It recognized that where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is pre-empted. *Id.*, at 405–406, citing *Lueck, supra*; *Teamsters v. Lucas Flour Co.*, 369 U. S. 95 (1962). It observed, however, that “purely factual questions” about an employee’s conduct or an employer’s conduct and motives do not “requir[e] a court to interpret any term of a collective-bargaining agreement.”

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<sup>8</sup>The Court applies these principles in *Livadas v. Bradshaw*, in which we reject the claim that an employee’s state-law right to receive a penalty payment from her employer was pre-empted under § 301 because the penalty was pegged to her wages, which were determined by the governing CBA. The Court states that “when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.” *Ante*, at 124, citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U. S., at 413, n. 12. In addition, it reaffirms that “§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law.” *Ante*, at 123.

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486 U. S., at 407. The state-law retaliatory discharge claim turned on just this sort of purely factual question: whether the employee was discharged or threatened with discharge, and, if so, whether the employer's motive in discharging her was to deter or interfere with her exercise of rights under Illinois worker's compensation law.

While recognizing that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause," *id.*, at 408, the Court disagreed that

"such parallelism render[ed] the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, § 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.*, at 408–410.

The Court's ruling in *Lingle* that the LMRA pre-empts state law only if a state-law claim is dependent on the interpretation of a CBA is fully consistent with the holding in *Buell*, 480 U. S., at 564–565, that the RLA does not pre-empt "substantive protection . . . independent of the [CBA]," with the holding in *Terminal Railroad*, 318 U. S., at 7, that the RLA does not pre-empt basic "protection . . . laid down by state authority," with the conclusion in *Andrews*, 406 U. S.,

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at 324, that a state-law claim is pre-empted where it “depend[s] on the interpretation” of the CBA, and with the description in *Conrail*, 491 U. S., at 305, of a minor dispute as one that can be “conclusively resolved” by reference to an existing CBA. *Lingle*, in fact, expressly relied on *Buell*, see 486 U. S., at 411–412, just as earlier RLA cases have drawn analogies to LMRA principles, see, e. g., *Machinists v. Central Airlines, Inc.*, 372 U. S. 682, 692 (1963). Given this convergence in the pre-emption standards under the two statutes, we conclude that *Lingle* provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA pre-emption.<sup>9</sup>

## E

In reaching this conclusion, we reject petitioners’ suggestion that this contract-dependent standard for minor dis-

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<sup>9</sup>It is true, as petitioners observe, that the RLA and the LMRA are not identical in language, history, and purpose. The LMRA, unlike the RLA, does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements. Nonetheless, the common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law, see, e. g., *Machinists v. Central Airlines, Inc.*, 372 U. S. 682, 691–692 (1963); *Allis-Chalmers Corp. v. Lueck*, 471 U. S. 202, 210 (1985), and the desirability of having a uniform common law of labor law pre-emption, cf. *Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 383–384 (1969), support the application of the *Lingle* standard in RLA cases as well.

Lower courts, too, have recognized the appropriateness of the *Lingle* standard to RLA pre-emption analysis. See, e. g., *Anderson v. American Airlines, Inc.*, 2 F. 3d 590, 595 (CA5 1993) (applying *Lingle* to analyze RLA pre-emption); *Davies v. American Airlines, Inc.*, 971 F. 2d 463, 466–467 (CA10 1992) (same), cert. denied, 508 U. S. 950 (1993); *O’Brien v. Consolidated Rail Corp.*, 972 F. 2d 1, 4 (CA1 1992) (same), cert. denied, 506 U. S. 1054 (1993); *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N. J. 455, 472–473, 593 A. 2d 750, 758 (1991) (same). But see, e. g., *Hubbard v. United Airlines, Inc.*, 927 F. 2d 1094, 1097 (CA9 1991) (*Lingle* does not govern in RLA cases); *Lorenz v. CSX Transp., Inc.*, 980 F. 2d 263, 268 (CA4 1992) (same).

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putes is inconsistent with two of our prior cases, *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), and *Conrail*, 491 U.S., at 302. *Burley* was not a pre-emption case. Rather, it concerned the authority of union officials to settle railroad workers' individual claims for damages for alleged violations of the CBA. The railroad urged that the union representative, who had the authority to negotiate CBA's in major disputes, enjoyed similar authority to settle individual claims in minor disputes. In the course of rejecting this claim, the Court described minor disputes as including the "omitted case," that is, one "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e. g.*, claims on account of personal injuries." 325 U.S., at 723.

This language is sweeping, but its effect is limited. The conflict in *Burley*, which the parties agreed was a minor dispute, concerned the terms of a CBA, and not some other "incident of the employment relationship," or any "omitted case." These references, therefore, are dicta. Moreover, even the "omitted case" dictum logically can refer to a norm that the parties have created but have omitted from the CBA's *explicit* language, rather than to a norm established by a legislature or a court.<sup>10</sup> Finally, *Burley*'s one specific example of an "omitted case"—claims for personal injury that do not depend on the contract—was found in *Buell* to be outside the RLA's exclusive jurisdiction. Nonetheless, to avoid any confusion, we expressly disavow any language in

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<sup>10</sup> See *Detroit & Toledo Shore Line R. Co. v. Transportation Union*, 396 U.S. 142, 154–155 (1969) ("Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others") (emphasis added); *Consolidated Rail Corporation v. Railway Labor Executives' Assn.*, 491 U.S. 299, 311–312 (1989) (recognizing that CBA's include implied terms arising from "practice, usage and custom"); see also *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578–579 (1960) (a CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draft[ers] cannot wholly anticipate").



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*Burley* suggesting that minor disputes encompass state-law claims that exist independent of the CBA.

*Conrail*, like *Burley*, involved no pre-emption analysis. The parties agreed that the dispute—a workers’ challenge to the railroad’s drug-testing policies—was governed by the RLA, because Conrail’s policy of conducting physical examinations was an implied term of the CBA. 491 U. S., at 301. The only question before the Court was whether the employer’s drug-testing policy constituted an attempt to add a new term to the existing agreement, making it a major dispute subject to a “protracted process” of bargaining and mediation, *id.*, at 303, or whether the testing reflected the employer’s interpretation and application of an implied term of the existing contract, producing a minor dispute subject to a less onerous process of arbitration. We concluded that the dispute was minor, stating that “[t]he distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA].” *Id.*, at 305, citing Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 *Yale L. J.* 567, 568, 576 (1937). Obviously, to say that a minor dispute can be “conclusively resolved” by interpreting the CBA is another way of saying that the dispute does not involve rights that exist independent of the CBA.

Petitioners, however, pin their hopes on the observation that “[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is *arguably justified* by the terms of the parties’ collective-bargaining agreement.” 491 U. S., at 307 (emphasis added). They argue that this action involves a minor dispute because the termination of respondent was “arguably justified” by the CBA’s provision permitting termination for “just cause.” This “arguably justified” standard, however, was employed only for policing the line between major and minor disputes. Recognizing that accepting a party’s characterization of a dispute as “minor” ran the risk of under-

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cutting the RLA's prohibition "against unilateral imposition of new contractual terms," *id.*, at 306, the Court held that a dispute would be deemed minor only if there was a sincere, nonfrivolous argument that it turned on the application of the existing agreement, that is, if it was "arguably justified" by that agreement. Obviously, this test said nothing about the threshold question whether the dispute was subject to the RLA in the first place.

## III

Returning to the action before us, the question under *Lingle* is whether respondent's state-law wrongful-discharge claims are independent of the CBA. Petitioners argue that resort to the CBA is necessary to determine whether respondent, in fact, was discharged. This argument is foreclosed by *Lingle* itself. *Lingle* teaches that the issue to be decided in this action—whether the employer's actions make out the element of discharge under Hawaii law—is a "purely factual questio[n]." 486 U. S., at 407.

Nor are we persuaded by petitioners' contention that the state tort claims require a determination whether the discharge, if any, was justified by respondent's failure to sign the maintenance record, as the CBA required him to do. Although such a determination would be required with regard to respondent's separate allegation of discharge in violation of the CBA, the District Court dismissed that count as pre-empted by the RLA, and respondent does not challenge that dismissal. The state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer.

Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

*It is so ordered.*

## Syllabus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, DEPARTMENT OF LABOR *v.* GREEN-  
WICH COLLIERIES ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 93-744. Argued April 25, 1994—Decided June 20, 1994\*

In adjudicating separate benefits claims under the Black Lung Benefits Act (BLBA) and the Longshore and Harbor Workers' Compensation Act (LHWCA), the Department of Labor Administrative Law Judges (ALJ's) both applied the Department's "true doubt" rule. This rule essentially shifts the burden of persuasion to the party opposing the claim so that when, as here, the evidence is evenly balanced, the benefits claimant wins. In both cases, the Department's Benefits Review Board affirmed the ALJ's decision to award benefits. However, the Court of Appeals vacated the Board's decision in the BLBA case, holding that the true doubt rule is inconsistent with the Department's own BLBA regulations, as well as with *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135. And, in the LHWCA case, the court reversed on the ground that the true doubt rule violates § 7(c) of the Administrative Procedure Act (APA), which states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

*Held:*

1. Section 7(c)'s burden of proof provision applies to adjudications under the LHWCA and the BLBA, each of which contains a section incorporating the APA. Neither 33 U.S.C. § 923(a), which relieves the Department of certain evidentiary and procedural requirements in LHWCA investigations and hearings, nor an ambiguous BLBA regulation providing that claimants be given the benefit of all reasonable doubt, is sufficient to overcome the presumption that adjudications are subject to the APA. See *Brownell v. Tom We Shung*, 352 U.S. 180, 185. Pp. 270-271.

2. The true doubt rule is not consistent with § 7(c). Pp. 272-281.

(a) An examination of *Hill v. Smith*, 260 U.S. 592, 594, and other relevant cases, as well as contemporary evidence treatises, demon-

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\*Together with *Director, Office of Workers' Compensation Programs, Department of Labor v. Maher Terminals, Inc., et al.*, also on certiorari to the same court (see this Court's Rule 12.2).

Syllabus

strates that, in 1946, the year the APA was enacted, the ordinary meaning of § 7(c)'s "burden of proof" phrase was burden of persuasion (*i. e.*, the obligation to persuade the trier of fact of the truth of a proposition), not simply burden of production (*i. e.*, the obligation to come forward with evidence to support a claim). This Court presumes that Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment. See, *e. g.*, *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 268. Because the true doubt rule places the burden of persuasion on the party opposing a benefits award, it violates § 7(c)'s requirement that that burden rest with the party seeking the award. Pp. 272–276.

(b) In light of the foregoing, the cursory conclusion set forth in *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 404, n. 7—in which the Court stated that § 7(c) determines only the burden of going forward, not the burden of persuasion—cannot withstand scrutiny. Pp. 276–278.

(c) The Department's reliance on imprecise and marginally relevant passages from the APA's legislative history is unavailing. Pp. 278–280.

(d) The true doubt rule runs afoul of the APA's goal of greater uniformity of procedure and standardization of administrative practice among the diverse federal agencies, for under the Department's reading each agency would be free to decide who bears the burden of persuasion. Pp. 280–281.

3. Because these cases are decided on the basis of § 7(c), this Court need not address the Court of Appeals' holding that the true doubt rule conflicts with BLBA regulations and *Mullins Coal*. P. 281.

990 F. 2d 730 (first case) and 992 F. 2d 1277 (second case), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 281.

*Edward C. DuMont* argued the cause for petitioner in both cases. With him on the briefs were *Solicitor General Days*, *Deputy Solicitor General Kneedler*, *Steven J. Mandel*, and *Edward D. Sieger*.

*Mark E. Solomons* argued the cause for respondents in both cases. With him on the brief for respondent Greenwich Collieries were *Laura Metcoff Klaus* and *John J. Bagnato*. *Joseph T. Stearns* filed a brief for respondent Maher Termi-

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nals, Inc. *Philip J. Rooney* filed a brief for respondent Pasqualina Santoro.†

JUSTICE O’CONNOR delivered the opinion of the Court.

In adjudicating benefits claims under the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 U. S. C. § 901 *et seq.* (1988 ed. and Supp. IV), and the Longshore and Harbor Workers’ Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, the Department of Labor applies what it calls the “true doubt” rule. This rule essentially shifts the burden of persuasion to the party opposing the benefits claim—when the evidence is evenly balanced, the benefits claimant wins. This litigation presents the question whether the rule is consistent with § 7(c) of the Administrative Procedure Act (APA), which states that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U. S. C. § 556(d).

## I

We review two separate decisions of the Court of Appeals for the Third Circuit. In one, Andrew Ondecko applied for disability benefits under the BLBA after working as a coal miner for 31 years. The Administrative Law Judge (ALJ) determined that Ondecko had pneumoconiosis (or black lung disease), that he was totally disabled by the disease, and that the disease resulted from coal mine employment. In resolving the first two issues, the ALJ relied on the true doubt rule. In resolving the third, she relied on the rebuttable presumption that a miner with pneumoconiosis who worked in the mines for at least 10 years developed the disease be-

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†Briefs of *amici curiae* urging affirmance were filed for the American Insurance Association by *William J. Kilberg, Theodore J. Boutrous, Jr., Craig A. Berrington, and Bruce C. Wood*; for the National Association of Waterfront Employers et al. by *Charles T. Carroll, Jr., Thomas D. Wilcox, and Franklin W. Losey*; and for the National Coal Association by *Harold P. Quinn, Jr.*

cause of his employment. 20 CFR § 718.203(b) (1993). The Department's Benefits Review Board affirmed, concluding that the ALJ had considered all the evidence, had found each side's evidence to be equally probative, and had properly resolved the dispute in Ondecko's favor under the true doubt rule. The Court of Appeals vacated the Board's decision, holding that the true doubt rule is inconsistent with the Department's own regulations under the BLBA, § 718.403, as well as with *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987). 990 F.2d 730 (1993).

In the other case, Michael Santoro suffered a work-related back and neck injury while employed by respondent Maher Terminals. Within a few months Santoro was diagnosed with nerve cancer, and he died shortly thereafter. His widow filed a claim under the LHWCA alleging that the work injury had rendered her husband disabled and caused his death. After reviewing the evidence for both sides, the ALJ found it equally probative and, relying on the true doubt rule, awarded benefits to the claimant. The Board affirmed, finding no error in the ALJ's analysis or his application of the true doubt rule. The Court of Appeals reversed, holding that the true doubt rule is inconsistent with § 7(c) of the APA. 992 F.2d 1277 (1993). In so holding, the court expressly disagreed with *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (CA7 1993). We granted certiorari to resolve the conflict. 510 U.S. 1068 (1994).

## II

As a threshold matter, we must decide whether § 7(c)'s burden of proof provision applies to adjudications under the LHWCA and the BLBA. Section 7(c) of the APA applies "[e]xcept as otherwise provided by statute," and the Department argues that the statutes at issue here make clear that § 7(c) does not apply. We disagree.

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The Department points out that in conducting investigations or hearings pursuant to the LHWCA, the “Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter.” 33 U. S. C. § 923(a). But the assignment of the burden of proof is a rule of substantive law, *American Dredging Co. v. Miller*, 510 U. S. 443, 454 (1994), so it is unclear whether this exception even applies. More importantly, § 923 by its terms applies “except as provided by this chapter,” and the chapter provides that § 7(c) does indeed apply to the LHWCA. 33 U. S. C. § 919(d) (“Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]”); 5 U. S. C. § 554(c)(2). We do not lightly presume exemptions to the APA, *Brownell v. Tom We Shung*, 352 U. S. 180, 185 (1956), and we do not think § 923 by its terms exempts the LHWCA from § 7(c).

The Department’s argument under the BLBA fares no better. The BLBA also incorporates the APA (by incorporating parts of the LHWCA), but it does so “except as otherwise provided . . . by regulations of the Secretary.” 30 U. S. C. § 932(a). The Department argues that the following BLBA regulation so provides: “In enacting [the BLBA], Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis.” 20 CFR § 718.3(c) (1993). But we do not think this regulation can fairly be read as authorizing the true doubt rule and rejecting the APA’s burden of proof provision. Not only does the regulation fail to mention the true doubt rule or § 7(c), it does not even mention the concept of burden shifting or burdens of proof. Accordingly—and assuming, *arguendo*, that the Department has the authority to displace § 7(c) through regulation—this ambiguous regulation does not overcome the presumption that these adjudications under the BLBA are subject to § 7(c)’s burden of proof provision.

### III

We turn now to the meaning of “burden of proof” as used in §7(c). Respondents contend that the Court of Appeals was correct in reading “burden of proof” to include the burden of *persuasion*. The Department disagrees, contending that “burden of proof” imposes only the burden of *production* (*i. e.*, the burden of going forward with evidence). The cases turn on this dispute, for if respondents are correct, the true doubt rule must fall: because the true doubt rule places the burden of persuasion on the party opposing the benefits award, it would violate §7(c)’s requirement that the burden of persuasion rest with the party seeking the award.

#### A

Because the term “burden of proof” is nowhere defined in the APA, our task is to construe it in accord with its ordinary or natural meaning. *Smith v. United States*, 508 U. S. 223, 228 (1993). It is easier to state this task than to accomplish it, for the meaning of words may change over time, and many words have several meanings even at a fixed point in time. *Victor v. Nebraska*, 511 U. S. 1, 13–14 (1994); see generally Cunningham, Levi, Green, & Kaplan, Plain Meaning and Hard Cases, 103 Yale L. J. 1561 (1994). Here we must seek to ascertain the ordinary meaning of “burden of proof” in 1946, the year the APA was enacted.

For many years the term “burden of proof” was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party’s obligation to come forward with evidence to support its claim. See J. Thayer, *Evidence at the Common Law* 355–384 (1898) (detailing various uses of the term “burden of proof” among 19th-century English and American courts).



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The Supreme Judicial Court of Massachusetts was the leading proponent of the view that burden of proof should be limited to burden of persuasion. In what became an oft-cited case, Chief Justice Lemuel Shaw attempted to distinguish the burden of proof from the burden of producing evidence. *Powers v. Russell*, 30 Mass. 69 (1833). According to the Massachusetts court, “the party whose case requires the proof of [a] fact, has all along the burden of proof.” *Id.*, at 76. Though the burden of proving the fact remains where it started, once the party with this burden establishes a prima facie case, the burden to “produce evidence” shifts. *Ibid.* The only time the burden of proof—as opposed to the burden to produce evidence—might shift is in the case of affirmative defenses. *Id.*, at 77. In the century after *Powers*, the Supreme Judicial Court of Massachusetts continued to carefully distinguish between the burden of proof and the burden of production. See, e.g., *Smith v. Hill*, 232 Mass. 188, 122 N. E. 310 (1919).

Despite the efforts of the Massachusetts court, the dual use of the term continued throughout the late 19th and early 20th centuries. See 4 J. Wigmore, *Evidence* §§2486–2487, pp. 3524–3529 (1905); Thayer, *supra*, at 355; 1 B. Elliott & W. Elliott, *Law of Evidence* §129, pp. 184–185 (1904); 2 C. Chamberlayne, *Modern Law of Evidence* §936, pp. 1096–1098 (1911). The ambiguity confounded the treatise writers, who despaired over the “lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered.” Wigmore, *supra*, at 3521–3522. The writers praised the “clear-thinking” efforts of courts like the Supreme Judicial Court of Massachusetts, Chamberlayne, *supra*, at 1097, n. 3, and agreed that the legal profession should endeavor to clarify one of its most basic terms. According to Thayer, *supra*, at 384–385, “[i]t seems impossible to approve a continuance of the present state of things, under which such different ideas, of great practical importance and of frequent application, are indicated by this single ambigu-

ous expression.” See also Chamberlayne, *supra*, at 1098. To remedy this problem, writers suggested that the term “burden of proof” be limited to the concept of burden of persuasion, while some other term—such as “burden of proceeding” or “burden of evidence”—be used to refer to the concept of burden of production. Chamberlayne, *supra*, § 936; Elliott & Elliott, *supra*, at 185, n. 3. Despite the efforts at clarification, however, a dwindling number of courts continued to obscure the distinction. See Annot., 2 A. L. R. 1672 (1919) (noting that some courts still fail to properly distinguish “between the burden of proof and the duty of going forward with the evidence”).

This Court tried to eliminate the ambiguity in the term “burden of proof” when it adopted the Massachusetts approach. *Hill v. Smith*, 260 U. S. 592 (1923). Justice Holmes wrote for a unanimous Court that “it will not be necessary to repeat the distinction, familiar in Massachusetts since the time of Chief Justice Shaw, [*Powers, supra*], and elaborated in the opinion below, between the burden of proof and the necessity of producing evidence to meet that already produced. The distinction is now very generally accepted, although often blurred by careless speech.” *Id.*, at 594.

In the two decades after *Hill*, our opinions consistently distinguished between burden of proof, which we defined as burden of persuasion, and an alternative concept, which we increasingly referred to as the burden of production or the burden of going forward with the evidence. See, *e. g.*, *Brosnan v. Brosnan*, 263 U. S. 345, 349 (1923) (imposition of burden of proof imposes the burden of persuasion, not simply the burden of establishing a prima facie case); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U. S. 1, 7–8 (1934) (party who bears the burden of proof “bears a heavy burden of persuasion”); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, 111 (1941) (party with the burden of proof bears the “burden of persuasion,” though the opposing party may bear a burden

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to “go forward with evidence”); *Webre Steib Co. v. Commissioner*, 324 U. S. 164, 171 (1945) (claimant bears a “burden of going forward with evidence . . . *as well as* the burden of proof”) (emphasis added). During this period the Courts of Appeals also limited the meaning of burden of proof to burden of persuasion, and explicitly distinguished this concept from the burden of production.\*

The emerging consensus on a definition of burden of proof was reflected in the evidence treatises of the 1930’s and 1940’s. “The burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings.” W. Richardson, *Evidence* 143 (6th ed. 1944); see also 1 B. Jones, *Law of Evidence in Civil Cases* 310 (4th ed. 1938) (“The modern authorities are substantially agreed that, in its strict primary sense, ‘burden of proof’ signifies the duty or obligation of establishing, in the mind of the trier of facts, conviction on the ultimate issue”); J. McKelvey, *Evidence* 64 (4th ed. 1932) (“[T]he proper meaning of [burden of proof]” is “the duty of the person alleging the case to prove it,” rather than “the duty of the one party or the other to introduce evidence”).

We interpret Congress’ use of the term “burden of proof” in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment. *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992); *Miles v. Apex Marine Corp.*, 498 U. S. 19, 32 (1990); *Cannon*

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\*See, e. g., *Lee v. State Bank & Trust Co.*, 38 F. 2d 45, 48 (CA2 1930); *United States v. Knoles*, 75 F. 2d 557, 561 (CA8 1935); *Department of Water and Power of Los Angeles v. Anderson*, 95 F. 2d 577, 583 (CA9 1938); *Rossmann v. Blunt*, 104 F. 2d 877, 880 (CA6 1939); *Cory v. Commissioner*, 126 F. 2d 689, 694 (CA3 1942); *Commissioner v. Bain Peanut Co. of Tex.*, 134 F. 2d 853, 860, n. 2 (CA5 1943); *New York Life Ins. Co. v. Taylor*, 147 F. 2d 297, 301 (CADC 1945).

*v. University of Chicago*, 441 U. S. 677, 696–698 (1979). These principles lead us to conclude that the drafters of the APA used the term “burden of proof” to mean the burden of persuasion. As we have explained, though the term had once been ambiguous, that ambiguity had largely been eliminated by the early 20th century. After *Hill*, courts and commentators almost unanimously agreed that the definition was settled. And Congress indicated that it shared this settled understanding, when in the Communications Act of 1934 it explicitly distinguished between the burden of proof and the burden of production. 47 U. S. C. §§ 309(e) and 312(d) (a party has *both* the “burden of proceeding with the introduction of evidence and the burden of proof”). Accordingly, we conclude that as of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to “burden of proof” to refer to the burden of persuasion.

## B

We recognize that we have previously asserted the contrary conclusion as to the meaning of burden of proof in § 7(c) of the APA. In *NLRB v. Transportation Management Corp.*, 462 U. S. 393 (1983), we reviewed the National Labor Relations Board’s (NLRB’s) conclusion that the employer had discharged the employee because of the employee’s protected union activity. In such cases the NLRB employed a burden shifting formula typical in dual motive cases: The employee had the burden of persuading the NLRB that antiunion animus contributed to the employer’s firing decision; the burden then shifted to the employer to establish as an affirmative defense that it would have fired the employee for permissible reasons even if the employee had not been involved in union activity. *Id.*, at 401–402. The employer claimed that the NLRB’s burden shifting formula was inconsistent with the National Labor Relations Act (NLRA), but we upheld it as a reasonable construction of the NLRA. *Id.*, at 402–403.

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The employer in *Transportation Management* argued that the NLRB's approach violated § 7(c)'s burden of proof provision, which the employer read as imposing the burden of persuasion on the employee. In a footnote, we summarily rejected this argument, concluding that "[§ 7(c)] . . . determines only the burden of going forward, not the burden of persuasion. *Environmental Defense Fund, Inc. v. EPA*, [548 F. 2d 998, 1004, 1013–1015 (CADDC 1976)]." *Id.*, at 404, n. 7. In light of our discussion in Part II–A above, we do not think our cursory conclusion in the *Transportation Management* footnote withstands scrutiny. The central issue in *Transportation Management* was whether the NLRB's burden shifting approach was consistent with the NLRA. The parties and the *amici* in *Transportation Management* treated the APA argument as an afterthought, devoting only one or two sentences to the question. None of the briefs in the case attempted to explain the ordinary meaning of the term. *Transportation Management's* cursory answer to an ancillary and largely unbriefed question does not warrant the same level of deference we typically give our precedents.

Moreover, *Transportation Management* reached its conclusion without referring to *Steadman v. SEC*, 450 U. S. 91 (1981), our principal decision interpreting the meaning of § 7(c). In *Steadman* we considered what *standard* of proof § 7(c) required, and we held that the proponent of a rule or order under § 7(c) had to meet its burden by a preponderance of the evidence, not by clear and convincing evidence. Though we did not explicitly state that § 7(c) imposes the burden of persuasion on the party seeking the rule or order, our reasoning strongly implied that this must be so. We assumed that burden of proof meant burden of persuasion when we said that we had to decide "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." *Id.*, at 95 (emphasis added). More important, our holding that the party with the burden of proof must prove

its case by a preponderance only makes sense if the burden of proof means the burden of persuasion. A standard of proof, such as preponderance of the evidence, can apply only to a burden of persuasion, not to a burden of production.

We do not slight the importance of adhering to precedent, particularly in a case involving statutory interpretation. But here our precedents are in tension, and we think our approach in *Steadman* makes more sense than does the *Transportation Management* footnote. And although we reject *Transportation Management's* reading of §7(c), the holding in that case remains intact. The NLRB's approach in *Transportation Management* is consistent with §7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.

### C

In addition to the *Transportation Management* footnote, the Department relies on the Senate and House Judiciary Committee Reports on the APA to support its claim that burden of proof means only burden of production. See *Environmental Defense Fund v. EPA*, 548 F. 2d, at 1014–1015 (accepting this argument), cited in *Transportation Management, supra*, at 404, n. 7. We find this legislative history unavailing. The Senate Judiciary Committee Report on the APA states as follows:

“That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by

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that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a *prima facie* showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.” S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945).

The House Judiciary Committee Report contains identical language, along with the following:

“In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated.” H. R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946).

The Department argues that this legislative history indicates congressional intent to impose a burden of production on the proponent. But even if that is so, it does not mean that § 7(c) is concerned *only* with imposing a burden of production. That Congress intended to impose a burden of production does not mean that Congress did not also intend to impose a burden of persuasion.

Moreover, these passages are subject to a natural interpretation compatible with congressional intent to impose a burden of persuasion on the party seeking an order. The primary purpose of these passages is not to define or allocate the burden of proof. The quoted passages are primarily

concerned with the burden placed on the *opponent* in administrative hearings (“other parties . . . have a burden to maintain”), particularly where the opponent is the Government. The Committee appeared concerned with those cases in which the “proponent” seeks a license or other privilege from the Government, and in such cases did not want to allow the agency “to stand mute and arbitrarily disbelieve credible evidence.” The Reports make clear that once the licensee establishes a *prima facie* case, the burden shifts to the Government to rebut it. This is perfectly compatible with a rule placing the burden of persuasion on the applicant, because when the party with the burden of persuasion establishes a *prima facie* case supported by “credible and credited evidence,” it must either be rebutted or accepted as true.

The legislative history the Department relies on is imprecise and only marginally relevant. Congress chose to use the term “burden of proof” in the text of the statute, and given the substantial evidence that the ordinary meaning of burden of proof was burden of persuasion, this legislative history cannot carry the day.

#### D

In part due to Congress’ recognition that claims such as those involved here would be difficult to prove, claimants in adjudications under these statutes benefit from certain statutory presumptions easing their burden. See 33 U. S. C. § 920; 30 U. S. C. § 921(c); *Del Vecchio v. Bowers*, 296 U. S. 280, 286 (1935). Similarly, the Department’s solicitude for benefits claimants is reflected in the regulations adopting additional presumptions. See 20 CFR §§ 718.301–718.306 (1993); *Mullins Coal*, 484 U. S., at 158. But with the true doubt rule the Department attempts to go one step further. In so doing, it runs afoul of the APA, a statute designed “to introduce greater uniformity of procedure and standardization of administrative practice among the diverse



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agencies whose customs had departed widely from each other.” *Wong Yang Sung v. McGrath*, 339 U. S. 33, 41 (1950). That concern is directly implicated here, for under the Department’s reading each agency would be free to decide who shall bear the burden of persuasion. Accordingly, the Department cannot allocate the burden of persuasion in a manner that conflicts with the APA.

#### IV

Under the Department’s true doubt rule, when the evidence is evenly balanced the claimant wins. Under §7(c), however, when the evidence is evenly balanced, the benefits claimant must lose. Accordingly, we hold that the true doubt rule violates §7(c) of the APA.

Because we decide these cases on the basis of §7(c), we need not address the Court of Appeals’ holding in *Greenwich Collieries* that the true doubt rule conflicts with § 718.403 or with *Mullins Coal*, *supra*.

*Affirmed.*

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

For more than 50 years, in adjudicating benefits claims under the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U. S. C. § 901 *et seq.*, and for more than 15 years under the Black Lung Benefits Act (BLBA), 30 U. S. C. § 901 *et seq.* (1988 ed. and Supp. IV), the Department of Labor has applied the “true doubt” rule, providing that when the evidence submitted by a claimant and by a party opposing the award is of equal weight, the claimant wins. The rule thus places the risk of nonpersuasion on the opponent of the benefits claim. Today, the Court strikes the rule down as conflicting with §7(c) of the Administrative Procedure Act (APA), 5 U. S. C. § 556(d), passed by Congress in 1946. I respectfully dissent.

I

So far as relevant, § 7(c) of the APA states that

“[e]xcept 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.” 5 U. S. C. § 556(d).

The majority’s holding that “burden of proof” in the first sentence of this provision means “burden of persuasion” surely carries the force of the preferred meaning of the term in today’s general usage, as the Court’s opinion demonstrates. But we are concerned here not with the commonly preferred meaning of the term today, but with its meaning as understood and intended by Congress in enacting § 7(c) of the APA in 1946. That is not a matter about which preference has been constant, or Congress silent, or even a subject of first impression for this Court.

The phrase “burden of proof” has been used in two ways, to mean either the burden of persuasion (the risk of nonpersuasion), see 9 J. Wigmore, *Evidence* §2486 (J. Chadbourn rev. 1981) (hereinafter Wigmore), or the burden of production (of going forward with evidence), see *id.*, §2487. The latter sense arose from the standard common-law rule that in order “to keep the jury within the bounds of reasonable action,” the party bearing the burden of production had to put forth enough evidence to make a *prima facie* case in order to get to the jury. *Ibid.* At the turn of the century, Thayer noted that burden of proof, in the sense of “going forward with argument or evidence,” is “the meaning of the term in common speech . . . [and] also a familiar legal

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usage . . . .” J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 385–386 (1898). Thayer described Chief Justice Shaw’s unsuccessful attempts to restrict the Massachusetts courts to the other (burden of persuasion) meaning of the phrase, *id.*, at 355–357, 385–387, and n. 1, and argued that since the “widest legal usage” of the phrase and “the use of the phrase in ordinary discourse” was to mean burden of production, burden of proof should only be used in that sense, see Thayer, *The Burden of Proof*, 4 *Harv. L. Rev.* 45, 69 (1890).

Although the Court works hard to show that the phrase had acquired a settled meaning in the alternative sense by the time the APA was passed in 1946, there is good evidence that the courts were still using the term either way and that Congress followed Thayer. Indeed, just nine years after *Hill v. Smith*, 260 U. S. 592 (1923), in which Justice Holmes is said to have firmed up the use of “burden of proof” to mean burden of persuasion, this Court reverted to using the phrase in its burden of production sense instead.<sup>1</sup> See *Heiner v. Donnan*, 285 U. S. 312, 329 (1932) (“A rebuttable [prima facie] presumption clearly is a rule of evidence which has the effect of shifting the burden of proof”) (citing *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 43 (1910) (stating that “[t]he only legal effect of this [presumption] is to cast upon [defendant] the duty of producing some evidence to the contrary”). In such usage *Heiner* appears in line with *Hawes v. Georgia*, 258 U. S. 1 (1922) (upholding rebuttable presumption casting “burden of proof” on defendant in criminal case); see *Tot v. United States*, 319 U. S. 463, 470–471 (1943) (describing *Hawes* as involving statutory provision that permissibly “shift[ed] the burden of proof” once a prima facie case was made by prosecution). And courts just three years before the passage of the APA held that burden of proof was at least sometimes used by Congress to mean

<sup>1</sup> One can hardly blame the great Justice, who had left the bench at the beginning of that year.

“burden of going forward with the evidence,” and not burden of persuasion. *Northwestern Elec. Co. v. Federal Power Comm’n*, 134 F. 2d 740, 743 (CA9 1943) (interpreting “burden of proof” in Federal Power Act, 16 U. S. C. § 825(a)), *aff’d*, 321 U. S. 119 (1944).

Contrary to the Court’s understanding, commentators did not think the ambiguity of the phrase had disappeared before passage of the APA, and, at the time, some even thought it unsettled whether burden of persuasion or of going forward with the evidence was the primary meaning of the phrase. As one commentator (relied on by the majority here) explained in 1938, although in its “strict primary sense, ‘burden of proof’ signifies” burden of persuasion, “[i]n its secondary sense, the expression ‘burden of proof’ signifies the duty that rests upon a party of going forward with the evidence at any given stage of the case—although eminent authority holds that this is, or should be, its primary sense.” 1 B. Jones, *Law of Evidence in Civil Cases* § 176, p. 310 (4th ed. 1938) (citing Thayer). He noted: “The expression ‘burden of proof’ has not a fixed and unvarying meaning and application. On the contrary, it is used, at times indiscriminately, to signify one or both of two distinct and separate ideas. Courts and commentators have striven to correct this variable usage and bring clarity and uniformity to the subject, but without noticeable success.” Jones, *supra*, at 309 (footnote omitted). That commentary retained substantially the same description 20 years later, and thereafter, see 1 B. Jones, *Law of Evidence, Civil and Criminal*, § 204, pp. 361–363 (5th ed. 1958); 1 S. Gard, *Jones on Evidence* § 5:1, pp. 519–520 (6th ed. 1972). Other commentators noted the persistent confusion of the terms in the 1940’s. See, *e. g.*, W. Richardson, *Law of Evidence* § 172 (6th ed. 1944) (“[B]urden of proof’ is frequently misused by our courts”); J. Maguire, *Evidence, Common Sense and Common Law* 175 (1947) (“Under our law the term burden of proof has been used to express two rather different ideas, and as might be expected

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this usage has led to a jumble”). Further, at the time of the APA’s passage, the American Law Institute, Model Code of Evidence (1942), noted both meanings, see Wigmore §2485, at 284, comments. Thus, courts and commentators continued to note the two meanings both before and long after the enactment of the APA, and use of “burden of proof” in either of its senses continued to create “the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered,” *id.*, §2485.

Although standard usage had not made a choice of meanings by 1946, Congress did make one, and the meaning it chose for the phrase as used in §7(c) was “burden of production.” In extensive Reports on the pending legislation, both the Senate and the House explained the meaning of §7(c):

“That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. . . .” S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945), reprinted in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 208 (1946) (hereinafter Leg. Hist.); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946), Leg. Hist. 270–271.

The House Report added that,

“[i]n other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor . . . .

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“The first and second sentences of the section therefore mean that, where 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.” *Id.*, at 36–37, Leg. Hist. 270–271.<sup>2</sup>

Because Congress stated that “burden of proof means” a “burden of coming forward,” and further explained that the burden could be shouldered by both proponents and opponents of a rule or order, the strong probability is that Congress meant to use “burden of proof” to mean burden of coming forward and not burden of persuasion, for a burden of persuasion cannot simultaneously rest on both parties. See generally Wigmore § 2489. The commentators agree. “The legislative history suggests that the term ‘burden of proof’ was intended to denote the ‘burden of going forward.’” 1 C. Koch, *Administrative Law and Practice* § 6.42, p. 486 (1985); “The legislative history of the A. P. A. burden of proof provision states that the party initiating the proceeding has, at a minimum, the burden of establishing a *prima facie* case, but a burden of proof may also rest on other parties seeking a different decision by the agency.” 4 J. Stein, G. Mitchell, & B. Mezines, *Administrative Law* § 24.02, p. 24–25 (1994); accord, 3 K. Davis, *Administrative Law Treatise* § 16.9, pp. 257–258 (2d ed. 1980) (citing a lower court’s “analysis of the Senate and House reports on the APA and the Attorney General’s Manual”).

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<sup>2</sup>The Attorney General found the phrase ambiguous, noting that “[t]here is some indication that the term ‘burden of proof’ was not employed in any strict sense, but rather as synonymous with the ‘burden of going forward.’ In either case, it is clear from the introductory clause that this general statement was not intended to repeal specific provisions of other statutes which, as by establishing presumptions, alter what would otherwise be the ‘burden of proof’ or the ‘burden of going forward.’” Attorney General’s Manual on the Administrative Procedure Act 75 (1947) (footnote omitted).

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The congressional choice of the burden of production meaning was in fact understood from the first and was the subject of some lament by commentators, who criticized the first sentence of § 7(c) (already in its current formulation as “the proponent of a rule or order has the burden of proof”) as unhelpful:

“The first sentence is confusing, and is at best unimportant. . . . For example, where a hearing is called to determine whether or not a license application should be granted, the ‘proponent’ of the ‘order’ would seem to be the applicant if the order turns out to be an order granting the application, or the agency if the order turns out to be an order denying the application. We conclude that this sentence should be eliminated from the bill.” Committee on Administrative Law of New York State Bar Assn. and Association of the Bar of the City of New York, Joint Report on Proposed Federal Administrative Procedure Act 16 (Dec. 26, 1945).

It was certainly not their understanding that this provision established a uniform burden of persuasion.<sup>3</sup>

## II

Until today, this Court’s reading of § 7(c) has been consonant with the congressional understanding. In *NLRB v.*

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<sup>3</sup> Congressional intent that in § 7(c) burden of proof mean burden of production is further confirmed by the fact that as originally introduced in the House, § 7(c) stated that “[t]he proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide.” H. R. 1203, 79th Cong., 1st Sess., § 7(c), (introduced Jan. 1945), Leg. Hist. 158; see Leg. Hist. 11, 300. Congress prepared extensive side-by-side comparisons of the bill as introduced and as amended into its enacted form, but neither Congress nor any of the commentators gave any indication that the change in language was intended to change the meaning of the sentence. See generally Senate Judiciary Committee, Text of S. 7, Respecting Federal Administrative Procedure and Judicial Review and Revised Text, 79th Cong., 1st Sess. (Comm. Print 1945).

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*Transportation Management Corp.*, 462 U. S. 393 (1983), this Court considered the phrase “burden of proof” as used in that section and rejected the position the Court now takes. In *Transportation Management*, the Court upheld the rule of the National Labor Relations Board (Board), that its General Counsel has the burden of persuading the Board that antiunion animus contributed to an employer’s decision to fire the employee, and that the burden of persuasion then shifts to the employer to prove that the employee would have been fired even without involvement in protected union activities. Confronting the employer’s argument that § 7(c) barred the Board from ever shifting the burden of persuasion to the employer, the Court rejected it, on the ground that § 7(c) “determines only the burden of going forward, not the burden of persuasion.” *Id.*, at 404, n. 7 (citing *Environmental Defense Fund, Inc. v. EPA*, 548 F. 2d 998, 1004, 1013–1015 (CADDC 1976) (Leventhal, J.)).

Today’s abandonment of *Transportation Management’s* holding is not only a mistake, but one that puts the Court at odds with that fundamental principle of precedent that “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for . . . Congress remains free to alter what we have done.” *Patterson v. McLean Credit Union*, 491 U. S. 164, 172–173 (1989); accord, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736 (1977).<sup>4</sup> Even on the assumption that the conclusion reached in *Transportation Management* was debatable at the time the case was decided, it was undoubtedly a reasonable construction of a phrase that (as shown above) was ambiguous

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<sup>4</sup>I note in this regard that none of the parties argued for overruling *Transportation Management*; only *amicus* American Insurance Association did so; and the courts below did not pass on the question. Rather, respondents argue that *Transportation Management* does not bar the conclusion that a different sentence of § 7(c) places the burden of persuasion on the proponent of an order.



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in the general usage of 1946, and in the 11 years since the construction was settled by *Transportation Management*, Congress has not seen fit to disturb it by amending §7(c). Compare, *e. g.*, *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 629–630, n. 7 (1987), with *Califano v. Sanders*, 430 U. S. 99, 105–107 (1977). The settled construction should therefore stand.

This Court, like the court below, tries to avoid *Transportation Management* by implying that the Court's definition of burden of proof in §7(c) as burden of production was inessential to its holding, since the Court only allowed the burden of persuasion to be placed on the employer after the NLRB had met its burden of persuasion on the elements of an unfair labor practice. 992 F. 2d 1277, 1281–1284 (CA3 1993); *cf. ante*, at 278 (“[T]he holding in that case remains intact”). The problem with this reading of *Transportation Management*, however, is that it is not at all what this Court said, or could have said. The reasoning chosen by the Court to justify its conclusion was that burden of proof in §7(c) means burden of production, and thus is no impediment to the Board's rule. And in so explaining, the Court cited the leading case from the Court of Appeals for the District of Columbia Circuit that had held “proof” synonymous with “production” in the text under examination. *Environmental Defense Fund, supra*.

The Court also reasons that the burden of proof holding of *Transportation Management* should be abandoned as conflicting with *Steadman v. SEC*, 450 U. S. 91 (1981), a decision announced just two Terms prior to *Transportation Management*. But *Steadman* and *Transportation Management* are simply not inconsistent with each other. Indeed, neither the parties to *Transportation Management* nor the Court itself saw *Steadman* as even relevant to the questions presented in *Transportation Management*. In *Steadman*, a mutual funds manager argued that in a disciplinary proceeding to determine whether he had violated the federal securities

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laws, the Securities and Exchange Commission had no choice but to use the clear-and-convincing standard of proof, rather than the standard of preponderance of the evidence. *Steadman* read the third sentence of § 7(c) (a rule or order must be “supported by and in accordance with the reliable, probative, and substantial evidence”) to mean that preponderance of the evidence, not the clear-and-convincing standard, applies in adjudications under the APA. *Steadman* thus holds that the party with the burden of persuasion must satisfy it by a preponderance, but does not purport to define “burden of proof” under the APA or to decide who bears the burden of persuasion, since it was uncontested in that case that the burden of persuasion was on the Government in a securities disciplinary proceeding. *Transportation Management*, on the other hand, holds that “burden of proof” in § 7(c) means burden of production. The question left open by each decision is who bears the burden of persuasion. As to that, § 7(c) is silent.

It is also worth remarking that *Transportation Management* came as no surprise when it was decided, other federal courts having anticipated this Court’s reading of the § 7(c) burden as one of production. See, *e. g.*, *Environmental Defense Fund, Inc. v. EPA*, 548 F. 2d, at 1013 (“‘burden of proof’ [§ 7(c)] casts upon the ‘proponent’ is the burden of coming forward with proof, and not the ultimate burden of persuasion”); *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, United States Dept. of Interior*, 523 F. 2d 25, 40 (CA7 1975) (“burden of putting forth a *prima facie* case”); *Maine v. United States Dept. of Labor*, 669 F. 2d 827, 829 (CA1 1982) (burden “of producing sufficient evidence to make out a *prima facie* case”); but cf. *Kerner v. Flemming*, 283 F. 2d 916, 921–922, and n. 8 (CA2 1960) (assuming, *arguendo*, the term meant burden of persuasion). And at least since *Transportation Management*, every Court of Appeals (except the one below in this case) to have reached the issue has understood that the question was firmly settled by

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*Transportation Management* and its predecessor in the District of Columbia Circuit, *Environmental Defense Fund*. See, e.g., *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F. 2d 706, 711 (CA7 1993) ("The Supreme Court has resolved this ambiguity [in §7(c)]. 'Burden of proof' as that term is used in the APA means the burden of going forward, not the burden of persuasion"); *Hazardous Waste Treatment Council v. EPA*, 886 F. 2d 355, 366 (CA10 1989) (*per curiam*) ("initial burden of going forward with a *prima facie* case"), cert. denied, 498 U. S. 849 (1990); *Merritt v. United States*, 960 F. 2d 15, 18 (CA2 1992) ("refers only to the burden of going forward with evidence, not the burden of persuasion"); *Bosma v. United States Dept. of Agriculture*, 754 F. 2d 804, 810 (CA9 1984) ("burden of going forward with evidence"); *Alameda Cty. Training and Employment Bd./Associated Community Action Program v. Donovan*, 743 F. 2d 1267, 1269 (CA9 1984) ("merely places the burden of production on [proponent], not the ultimate burden of persuasion"); *Dazzio v. FDIC*, 970 F. 2d 71, 77 (CA5 1992) ("refers only to the burden of going forward with evidence, not the ultimate burden of persuasion"); *Skukan v. Consolidation Coal Co.*, 993 F. 2d 1228, 1236–1238 (CA6 1993) ("burden of production"). Moreover, the lower courts' views were in accord with the commentators. See, e.g., 3 Davis, *Administrative Law Treatise* § 16.9, at 257 (burden of proof in § 7(c) means only "burden of going forward" and not burden of persuasion) (citing *Environmental Defense Fund, supra*); 1 Koch, *Administrative Law and Practice* § 6.42, at 245 (1994 Supp.) ("The phrase 'burden of proof' as used in the APA § 556(d) means the burden of going forward with evidence. That phrase in the context of the APA does not mean the ultimate burden of persuasion") (footnote omitted); 4 Stein, Mitchell, & Mezines, *Administrative Law* § 24.02, at 24–21, n. 3 (§ 7(c) "only directs that the [proponent] has the burden of production"); G. Edles & J. Nelson, *Federal Regulatory Process* § 6.7, pp. 151–152 (2d

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ed. 1992) (“[T]he burden of proof under the APA refers only to the burden of going forward with evidence”) (each citing *Transportation Management*, 462 U. S., at 403, n. 7).

Nor is there any argument that the vitality has gone out of *Transportation Management* over the last 11 years. This Court, indeed, has cited the case for the very proposition that the Court now repudiates, in the course of explaining that we ourselves had used the term “burden of proof” in Title VII suits to mean burden of production, not burden of persuasion:

“[T]o the extent that those cases speak of an employer’s ‘burden of proof’ with respect to a legitimate business justification defense . . . they should have been understood to mean an employer’s production—but not persuasion—burden. Cf., e. g., *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 404, n. 7 (1983).” *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 660 (1989).

If the *Wards Cove* Court could rely on *Transportation Management* to hold that in innumerable Title VII disparate-impact cases over many years we (and the lower courts) had used the term “burden of proof” to mean only “burden of production” it is hard to place much weight on the majority’s reference to a consistent practice to the contrary since 1923.

Today’s decision to repudiate *Transportation Management* is made more regrettable by the fact that the Court’s adherence to the case in *Ward’s Cove* came after the Court had been made aware of the role of the true doubt rule in black lung litigation, which presupposed *Transportation Management’s* reading of §7(c). In *Mullins Coal Co. of Va. v. Director, Office of Workers’ Compensation Programs*, 484 U. S. 135 (1987), upholding the Secretary of Labor’s interpretation of a BLBA interim regulation about the prima facie standard for invoking a statutory presumption of eligibility, this Court explicitly noted the operation of the true doubt

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rule once both parties' evidence had been introduced and (as here) the presumption had dropped out of the case. See *id.*, at 144, n. 12 (true doubt rule “ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant’s”). We acknowledged the Secretary’s position that the BLBA “‘embodies the principle that doubt is to be resolved in favor of the claimant, [which] plays an important role in claims determinations . . . [.]’” *id.*, at 156, n. 29 (quoting 43 Fed. Reg. 36826 (1978)), and that the Benefits Review Board “has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant,” 484 U. S., at 144, n. 12 (internal quotation marks and citation omitted).

Had we, indeed, suggested otherwise, we would have been bucking the strong tide that the Court turns back today, for the other federal courts have been applying some form of the true doubt rule, either as judicial statutory interpretation or as the agency’s rule, in adjudicating claims after enactment of the APA, as well as before it, for a good 50 years. See, e. g., *Friend v. Britton*, 220 F. 2d 820, 821 (CA DC 1955) (“Doubts, including the factual, are to be resolved in favor of the employee or his dependent family”); *Bath Iron Works Corp. v. White*, 584 F. 2d 569, 574 (CA1 1978) (“[T]he judicial policy [is] that ‘all doubtful questions are to be resolved in favor of the injured employee’ . . . in order to place the burden of possible error on the employer who is better able to bear it”); *Volpe v. Northeast Marine Terminals*, 671 F. 2d 697, 701 (CA2 1982) (“[A]ll doubtful questions of fact [are to] be resolved in favor of the injured employee”) (internal quotation marks omitted);<sup>5</sup> *Adkins v. Director, Office of*

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<sup>5</sup>Until the decision below, the Court of Appeals for the Third Circuit itself applied the true doubt rule. See, e. g., *Bonessa v. United States Steel Corp.*, 884 F. 2d 726, 730 (1989) (“The [Administrative Law Judge] noted that the contradictory nature of the x-ray evidence established ‘true doubt’ as to the existence of pneumoconiosis and resolved that doubt, as is proper, in favor of [claimant]”).

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*Workers' Compensation Programs, Dept. of Labor*, 958 F. 2d 49, 52, n. 4 (CA4 1992) ("Equally probative evidence creates a 'true doubt,' which must be resolved in favor of the miner"); *Greer v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 940 F. 2d 88, 91 (CA4 1991) ("We have a true doubt. We give [claimant] the benefit of that doubt"); *Army & Air Force Exchange Serv. v. Greenwood*, 585 F. 2d 791, 794 (CA5 1978) ("[T]he judicial policy has long been to resolve all doubts in favor of the employee and his family"); *Skukan v. Consolidation Coal Co.*, 993 F. 2d, at 1239 ("true doubt rule is utilized to have equally probative but conflicting evidence weighed in favor of the claimant"); *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F. 2d, at 711 (applying true doubt rule as "judicial assignment of the burden of persuasion to the employer"); *Jones v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 977 F. 2d 1106, 1109 (CA7 1992) (true doubt rule places "burden of possible error on those best able to bear it," *i. e.*, employers); *Ware v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 814 F. 2d 514, 517 (CA8 1987) ("[A]ny doubts should be resolved in favor of the disabled miner"); *Parsons Corp. of Cal. v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 619 F. 2d 38, 41 (CA9 1980) ("statutory policy that all doubtful questions of fact be resolved in favor of the injured employee"); *Hansen v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 984 F. 2d 364, 369 (CA10 1993) ("'true doubt' rule applies where equally probative but contradictory medical documentation exists"); *Bosco v. Twin Pines Coal Co.*, 892 F. 2d 1473, 1476 (CA10 1989) ("[D]oubts should be resolved in favor of the disabled miner"); *Stomps v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 816 F. 2d 1533, 1534 (CA11 1987) (same); for a sampling of the pre-APA cases, see, *e. g.*, *F. H. McGraw & Co. v. Lowe*, 145 F. 2d 886, 887, n. 2, 888 (CA2 1944) (upholding agency policy that "doubtful questions

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incapable of scientific resolution are to be resolved in favor of the workman” under LHWCA); *Southern S. S. Co. v. Norton*, 101 F. 2d 825, 827 (CA3 1939) (“doubts should be resolved in [claimant’s] favor” under LHWCA); *Southern Pac. Co. v. Sheppard*, 112 F. 2d 147, 148 (CA5 1940) (“[W]here there is doubt it should be resolved in favor of the injured employee or his family” under LHWCA).

### III

Because § 7(c) is silent on the burden of persuasion, the job of placing it is left to the bounded discretion of the agencies, subject to judicial review, when interpreting their organic statutes, by customary reference to statutory text, congressional intent, experience, policy, and relevant evidentiary probabilities. See 3 Davis, *Administrative Law* § 16.9, at 257–258.<sup>6</sup> This is only to be expected, since the issue of who bears the risk of nonpersuasion raises a traditional “question of policy and fairness based on experience in . . . different situations.” *Keyes v. School Dist. No. 1, Denver*, 413 U. S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, p. 275 (3d ed. 1940)); accord, 2 J. Strong, *McCormick on Evidence* § 337, p. 427 (4th ed. 1992), not a matter readily lumped in with the formalities of procedure. While the APA was meant to provide for uniform procedures in administrative adjudications, it is unremarkable that it stopped short of making a substantive policy choice that in every formal hearing the burden of persuasion must rest on one party or the other.

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<sup>6</sup> See, e. g., *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 401–403 (1983); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 786–796 (1990); *Bowen v. Yuckert*, 482 U. S. 137, 146–147, n. 5 (1987); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 246–249 (1942); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 621–631 (1993); 38 CFR § 3.102 (1993) (doubts in veteran’s benefits adjudications resolved in favor of claimant); 38 U. S. C. § 5107 (1988 ed., Supp. IV) (same).

Nor, apart from § 7(c), are the choices made under the statutes in question here vulnerable on judicial scrutiny. In LHWCA cases over the last 50 years, the assignment to the employer of the risk of nonpersuasion can be seen as placing it on “those best able to bear it,” *F. H. McGraw & Co., supra*, at 887, 888, and as comporting with both the remedial nature of the LHWCA, see *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977), and the dangerous nature of longshoring, see S. Rep. No. 92-1125, p. 2 (1972). As to the BLBA, there is no question about the consistency of congressional intent with the recitation in the Secretary’s regulation, 20 CFR § 718.3(c) (1993), that “Congress intended that [BLBA] claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis.” As Congress explained, the BLBA “is intended to be a remedial law. . . . In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.” S. Rep. No. 92-743, p. 11 (1972). The true doubt rule has been applied in these benefits adjudications for more than 15 years, see, *e. g.*, *Black Lung—A Study in Occupational Disease Compensation* (1976), reprinted in *Black Lung Benefits Reform Act, 1976: Hearings on H. R. 10760 and S. 3183 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 459, 488-489 (1976)* (“[C]onflicts in the evidence are required to be resolved by the adjudicator in favor of the claimant”); *Provanance v. United States Steel Corp.*, 1 BLR 1-483, 485-486 (Benefits Rev. Bd. 1978), and the Secretary’s true doubt rule fully comports with Congress’s “expectation that the Secretary of Labor will promulgate standards which give the benefit of any doubt to the coal miner.” S. Rep. No. 95-209, p. 13 (1977); see 43 Fed. Reg. 36826 (1978).

The court below did not deny the harmony of the true doubt rule with congressional policy in these cases, but it held instead that the use of the true doubt rule in BLBA



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cases conflicts with 20 CFR § 718.403 (1993), a Department of Labor regulation providing that “[e]xcept as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.” But the phrase “burden of proving,” like its cognate, “burden of proof,” is susceptible of two meanings, including the meaning given by the agency interpretation, as imposing only the burden of producing evidence. The Department of Labor is entitled to “substantial deference” in the interpretation of its own regulations, and the agency’s interpretation need only be reasonable in light of the regulations’ text and purpose, *Martin v. Occupational Safety and Health Review Comm’n*, 499 U. S. 144, 150–151 (1991); accord, *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). The agency’s interpretation of its regulation is surely reasonable here, given our own prior interpretation of “burden of proof” as referring only to production.

The Department of Labor’s decision in the true doubt rule, to assign the burden of persuasion to the employer in cases involving harms to workers in the longshore and coal mining industries, is thus permissible and free from conflict with § 7(c) of the APA. I would sustain the Department’s rule, and accordingly offer this respectful dissent.

## Syllabus

BARCLAYS BANK PLC *v.* FRANCHISE TAX BOARD  
OF CALIFORNIACERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,  
THIRD APPELLATE DISTRICT

No. 92–1384. Argued March 28, 1994—Decided June 20, 1994\*

During the years at issue in these consolidated cases, California used a “worldwide combined reporting” method to determine the corporate franchise tax owed by unitary multinational corporate group members doing business in California. California’s method first looked to the worldwide income of the unitary business, and then taxed a percentage of that income equal to the average of the proportions of worldwide payroll, property, and sales located within California. In contrast, the Federal Government employs a “separate accounting” method, which treats each corporate entity discretely for the purpose of determining income tax liability. In *Container Corp. of America v. Franchise Tax Bd.*, 463 U. S. 159, this Court upheld the California scheme as applied to domestic-based multinationals, but did not address the constitutionality of the scheme as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries. Both petitioner Barclays Bank PLC (Barclays)—a foreign multinational—and petitioner Colgate-Palmolive Co. (Colgate)—a domestic multinational—have operations in California. In separate cases, two members of the Barclays group and Colgate were denied refunds by the California authorities.

*Held:* The Constitution does not impede application of California’s tax to Barclays and Colgate. Pp. 310–331.

(a) Absent congressional approval, a state tax on interstate or foreign commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services the State provides. *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 279. A tax affecting *foreign* commerce raises two additional concerns: one prompted by the “enhanced risk of multiple taxation,” *Container Corp.*, 463 U. S., at 185, and the other related to the Federal Government’s capacity to “speak with one voice when regulating

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\*Together with No. 92–1839, *Colgate-Palmolive Co. v. Franchise Tax Board of California*, also on certiorari to the same court.

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commercial relations with foreign governments,'” *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 449. California’s tax easily meets all but the third of the *Complete Auto* criteria. As to the third, Barclays has not shown that the system in fact operates to impose inordinate compliance burdens on foreign enterprises, and its claim of unconstitutional discrimination against foreign commerce thus fails. Pp. 310–314.

(b) Nor has Barclays shown that California’s “reasonable approximations” method of reducing the compliance burden is incompatible with due process. Barclays argues that California employs no standard to determine what approximations will be accepted, but Barclays has presented no example of an approximation California rejected as unreasonable. Furthermore, the state judiciary has construed California law to curtail the discretion of state tax officials, and the State has afforded Barclays the opportunity to seek clarification of the meaning of the relevant regulations. Rules governing international multijurisdictional income allocation have an inescapable imprecision given the subject matter’s complexity, and rules against vagueness are not mechanically applied; rather, their application is tied to the nature of the enactment. Pp. 314–316.

(c) California’s system does not expose foreign multinationals, such as Barclays, to constitutionally intolerable multiple taxation. In the face of a similar challenge, *Container Corp.* approved this very tax when applied to a domestic-based multinational. The considerations that informed the *Container Corp.* decision are not dispositively diminished when the tax is applied to a foreign-based enterprise. Multiple taxation is not the inevitable result of California’s tax, and the alternative reasonably available to the State—separate accounting—cannot eliminate, and in some cases may even enhance, the risk of double taxation. Pp. 316–320.

(d) California’s scheme also does not prevent the Federal Government from speaking with “one voice” in international trade. Congress holds the control rein in this area. In the 11 years since *Container Corp.*, Congress has not barred States from using the worldwide combined reporting method. In the past three decades, aware that foreign governments deplored use of the method, Congress nevertheless failed to enact any of numerous bills, or to ratify a treaty provision, that would have prohibited the practice. Executive Branch actions, statements, and *amicus* filings do not supply the requisite federal directive proscribing States’ use of worldwide combined reporting, for the regulatory authority is Congress’ to wield. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitu-

## Syllabus

tional California's otherwise valid, congressionally condoned scheme. Pp. 320–331.

No. 92–1384, 10 Cal. App. 4th 1742, 14 Cal. Rptr. 2d 537, and No. 92–1839, 10 Cal. App. 4th 1768, 13 Cal. Rptr. 2d 761, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, and SOUTER, JJ., joined, and in all but Part IV–B of which SCALIA, J., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 331. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 331. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 332.

*Joanne M. Garvey* argued the cause for petitioner in No. 92–1384. With her on the briefs were *Joan K. Irion*, *Miles N. Ruthberg*, and *Teresa A. Maloney*. *James P. Kleier* argued the cause for petitioner in No. 92–1839. With him on the briefs were *Walter Hellerstein*, *Prentiss Willson, Jr.*, *Clare M. Rathbone*, and *Franklin C. Latcham*.

*Timothy G. Laddish*, Assistant Attorney General of California, argued the cause for respondent in both cases. With him on the brief for respondent in No. 92–1384 were *Daniel E. Lungren*, Attorney General of California, *Robert D. Milam*, Deputy Attorney General, and *Benjamin F. Miller*. Mr. Lungren, *Lawrence K. Keethe*, Supervising Deputy Attorney General of California, *John D. Schell*, Deputy Attorney General, and *Claudia K. Land* filed a brief for respondent in No. 92–1839.

*Solicitor General Days* argued the cause for the United States as *amicus curiae* urging affirmance in both cases. With him on the brief were *Assistant Attorney General Argrett* and *Deputy Solicitor General Wallace*.†

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†*Kendall L. Houghton* and *William D. Peltz* filed a brief for the Committee on State Taxation as *amicus curiae* urging reversal in both cases.

Briefs of *amici curiae* urging reversal in No. 92–1384 were filed for the Government of the United Kingdom by *Jerome B. Libin* and *William H. Morris*; for the Member States of the European Communities et al. by Messrs. Libin and Morris; for Banque Nationale de Paris by *Roy E. Crawford* and *Russell D. Uzes*; for the Confederation of British Industry by *Lee H. Spence*; for the Council of Netherlands Industrial Federations by

## Opinion of the Court

JUSTICE GINSBURG delivered the opinion of the Court.

Eleven years ago, in *Container Corp. of America v. Franchise Tax Bd.*, 463 U. S. 159 (1983), this Court upheld California's income-based corporate franchise tax, as applied to a

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*F. Eugene Wirwahn*; for the Federation of German Industries et al. by Mr. Wirwahn; for Keidanren (Japan Federation of Economic Organizations) by *C. David Swenson*, *Dennis I. Meyer*, *Leonard B. Terr*, and *Harry A. Franks, Jr.*; for the Japan Tax Association by *John A. Sturgeon*; for the Organization for International Investment Inc. et al. by *James Merle Carter*; for Reuters Ltd. by *Steven Alan Reiss* and *Philip T. Kaplan*; and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging reversal in No. 92-1839 were filed for the Chamber of Commerce of the United States by *Timothy B. Dyk*, *Beth Heifetz*, *Robin S. Conrad*, *Mona C. Zeiberg*, and *Jan S. Amundson*; and for the National Foreign Trade Council, Inc., et al. by *Philip D. Morrison* and *Mary C. Bennett*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Alaska et al. by *Bruce M. Botelho*, Attorney General of Alaska, and *Lauri J. Adams*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Joseph P. Mazurek* of Montana, *Jeffrey R. Howard* of New Hampshire, and *Theodore R. Kulongoski* of Oregon; for the State of New Mexico et al. by *Tom Udall*, Attorney General of New Mexico, *Daniel Yohalen*, Assistant Attorney General, and *Bruce J. Fort* and *Frank D. Katz*, Special Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Larry EchoHawk* of Idaho, *Michael E. Carpenter* of Maine, and *Jeffrey B. Pine* of Rhode Island; for the State of North Dakota et al. by *M. K. Heidi Heitkamp*, Attorney General of North Dakota, and *Donnita A. Wald*, Assistant Attorney General, *Robert A. Marks*, Attorney General of Hawaii, and *Kevin T. Wakayama*, Supervising Deputy Attorney General, and *Robert T. Stephan*, Attorney General of Kansas; for the California Legislature by *Bion M. Gregory*, *James A. Marsala*, *Baldev S. Heir*, and *Michael R. Kelly*; for the California Tax Reform Association et al. by *Jack A. Blum* and *Martin Lobel*; for Citizens for Tax Justice by *Jonathan P. Hiatt*; for the Council of State Governments et al. by *Richard Ruda* and *Lee Fennell*; for the Multistate Tax Commission by *Alan H. Friedman* and *Paul Mines*; for Senator Dorgan et al. by *Charles Rothwell Nesson*; and for Congressman Edwards et al. by *Martin Lobel*, *Jack A. Blum*, and *Dina R. Lassow*.

*Eric J. Miethke*, *John E. Mueller*, and *Sheridan M. Cranmer* filed a brief for Litton Industries, Inc., et al. as *amici curiae* urging affirmance in No. 92-1839.

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multinational enterprise, against a comprehensive challenge made under the Due Process and Commerce Clauses of the Federal Constitution. *Container Corp.* involved a corporate taxpayer domiciled and headquartered in the United States; in addition to its stateside components, the taxpayer had a number of overseas subsidiaries incorporated in the countries in which they operated. The Court's decision in *Container Corp.* did not address the constitutionality of California's taxing scheme as applied to "domestic corporations with foreign parents or [to] foreign corporations with either foreign parents or foreign subsidiaries." *Id.*, at 189, n. 26. In the consolidated cases before us, we return to the taxing scheme earlier considered in *Container Corp.* and resolve matters left open in that case.

The petitioner in No. 92-1384, Barclays Bank PLC (Barclays), is a United Kingdom corporation in the Barclays Group, a multinational banking enterprise. The petitioner in No. 92-1839, Colgate-Palmolive Co. (Colgate), is the United States-based parent of a multinational manufacturing and sales enterprise. Each enterprise has operations in California. During the years here at issue, California determined the state corporate franchise tax due for these operations under a method known as "worldwide combined reporting." California's scheme first looked to the worldwide income of the multinational enterprise, and then attributed a portion of that income (equal to the average of the proportions of worldwide payroll, property, and sales located in California) to the California operations. The State imposed its tax on the income thus attributed to Barclays' and Colgate's California business.

Barclays urges that California's tax system distinctively burdens foreign-based multinationals and results in double international taxation, in violation of the Commerce and Due Process Clauses. Both Barclays and Colgate contend that the scheme offends the Commerce Clause by frustrating the Federal Government's ability to "speak with one voice when

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regulating commercial relations with foreign governments.” *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 449 (1979) (internal quotation marks omitted). We reject these arguments, and hold that the Constitution does not impede application of California’s corporate franchise tax to Barclays and Colgate. Accordingly, we affirm the judgments of the California Court of Appeal.

## I

## A

The Due Process and Commerce Clauses of the Constitution, this Court has held, prevent States that impose an income-based tax on nonresidents from “tax[ing] value earned outside [the taxing State’s] borders.” *ASARCO Inc. v. Idaho Tax Comm’n*, 458 U. S. 307, 315 (1982). But when a business enterprise operates in more than one taxing jurisdiction, arriving at “precise territorial allocations of ‘value’ is often an elusive goal, both in theory and in practice.” *Container Corp.*, 463 U. S., at 164. Every method of allocation devised involves some degree of arbitrariness. See *id.*, at 182.

One means of deriving locally taxable income, generally used by States that collect corporate income-based taxes, is the “unitary business” method. As explained in *Container Corp.*, unitary taxation “rejects geographical or transactional accounting,” which is “subject to manipulation” and does not fully capture “the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise.” *Id.*, at 164–165. The “unitary business/formula apportionment” method

“calculates the local tax base by first defining the scope of the ‘unitary business’ of which the taxed enterprise’s activities in the taxing jurisdiction form one part, and then apportioning the total income of that ‘unitary business’ between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account ob-

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jective measures of the corporation's activities within and without the jurisdiction." *Id.*, at 165.<sup>1</sup>

During the income years at issue in these cases—1977 for Barclays, 1970–1973 for Colgate—California assessed its corporate franchise tax by employing a “worldwide combined reporting” method. California’s scheme required the taxpayer to aggregate the income of all corporate entities composing the unitary business enterprise, including in the aggregation both affiliates operating abroad and those operating within the United States. Having defined the scope of the “unitary business” thus broadly, California used a long-accepted method of apportionment, commonly called the “three-factor” formula, to arrive at the amount of income attributable to the operations of the enterprise in California. Under the three-factor formula, California taxed a percentage of worldwide income equal to the arithmetic average of the proportions of worldwide payroll, property, and sales located inside the State. Cal. Rev. & Tax. Code Ann. § 25128

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<sup>1</sup>This Court first considered the “unitary business principle” in 1897, *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220–221; we revisited this “settled jurisprudence” most recently in *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U. S. 768, 779–788 (1992). See generally 1 J. Hellerstein & W. Hellerstein, *State Taxation: Corporate Income and Franchise Taxes* ¶ 8.03, p. 8–29 (2d ed. 1993); *id.*, ¶ 8.05. On the determination whether a business is “unitary,” see *Allied-Signal*, 504 U. S., at 781–782 (business may be treated as unitary, compatibly with constitutional limitations, if it exhibits functional integration, centralization of management, and economies of scale); *Edison California Stores, Inc. v. McColgan*, 30 Cal. 2d 472, 481, 183 P. 2d 16, 21 (1947) (“If the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary.”); *Butler Brothers v. McColgan*, 17 Cal. 2d 664, 678, 111 P. 2d 334, 341 (1941) (A business is unitary if there is “(1) [u]nity of ownership; (2) [u]nity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use of its centralized executive force and general system of operation.”), *aff’d*, 315 U. S. 501 (1942).



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(West 1992). Thus, if a unitary business had 8% of its payroll, 3% of its property, and 4% of its sales in California, the State took the average—5%—and imposed its tax on that percentage of the business' total income.<sup>2</sup>

## B

The corporate income tax imposed by the United States employs a “separate accounting” method, a means of apportioning income among taxing sovereigns used by all major developed nations. In contrast to combined reporting, separate accounting treats each corporate entity discretely for the purpose of determining income tax liability.<sup>3</sup>

Separate accounting poses the risk that a conglomerate will manipulate transfers of value among its components to minimize its total tax liability. To guard against such manipulation, transactions between affiliated corporations must be scrutinized to ensure that they are reported on an “arm’s-length” basis, *i. e.*, at a price reflecting their true market value. See 26 U. S. C. § 482; Treas. Reg. § 1.482-1T(b), 26 CFR § 1.482-1T(b) (1993).<sup>4</sup> Assuming that all transactions are assigned their arm’s-length values in the corporate accounts, a jurisdiction using separate accounting taxes corporations that operate within its borders only on the income

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<sup>2</sup>In 1993, California modified the formula to double the weight of the sales factor. Cal. Rev. & Tax. Code Ann. § 25128 (West Supp. 1994); 1993 Cal. Stats., ch. 946, § 1.

<sup>3</sup>An affiliated group of domestic corporations may, however, elect to file a consolidated federal tax return in lieu of separate returns. 26 U. S. C. § 1501.

<sup>4</sup>Effective enforcement of arm’s-length standards requires exacting scrutiny by the taxing jurisdiction, and some commentators maintain that the results are arbitrary in any event. See 1 Hellerstein & Hellerstein, *supra*, ¶ 8.03 (describing “three inherent defects” of separate accounting: compliance expense, impracticability, and the difficulty of arriving at “arm’s-length” prices).

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those corporations recognize on their own books. See *Container Corp.*, 463 U. S., at 185.<sup>5</sup>

At one time, a number of States used worldwide combined reporting, as California did during the years at issue. In recent years, such States, including California, have modified their systems at least to allow corporate election of some variant of an approach that confines combined reporting to the United States' "water's edge." See 1 Hellerstein & Hellerstein, *supra* n. 1, ¶ 8.16, at 8-185 to 8-187. California's 1986 modification of its corporate franchise tax, effective in 1988, 1986 Cal. Stats., ch. 660, § 6, made it nearly the last State to give way. 1 Hellerstein & Hellerstein, *supra* n. 1, ¶ 8.16, at 8-187.

California corporate taxpayers, under the State's water's edge alternative, may elect to limit their combined reporting group to corporations in the unitary business whose individual presence in the United States surpasses a certain threshold. Cal. Rev. & Tax. Code Ann. § 25110 (West 1992); see Leegstra, Eager, & Stolte, *The California Water's-Edge Election*, 6 J. St. Tax'n 195 (1987) (explaining operation of California's water's edge system). The 1986 amendment conditioned a corporate group's water's edge election on payment of a substantial fee, and allowed the California Franchise Tax Board (Tax Board) to disregard a water's edge election under certain circumstances. In 1993, California again modified its corporate franchise tax statute, this time to allow domestic and foreign enterprises to elect water's edge treatment without payment of a fee and without the threat of disregard. 1993 Cal. Stats., ch. 31, § 53; *id.*, ch. 881,

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<sup>5</sup>Under the Internal Revenue Code, a foreign corporation reports only income derived from a United States source or otherwise effectively connected with the corporation's conduct of a United States trade or business. 26 U. S. C. §§ 881, 882, 884, 864(c). Domestic corporations must report all income, whether the source is domestic or foreign, § 11, though they receive a tax credit for qualifying taxes paid to foreign sovereigns, 26 U. S. C. §§ 901-908 (1988 ed. and Supp. IV).

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§ 22. See Cal. Rev. & Tax. Code Ann. § 25110 (West Supp. 1994). The new amendments became effective in January 1994.

## C

The first of these consolidated cases, No. 92–1384, is a tax refund suit brought by two members of the Barclays Group, a multinational banking enterprise. Based in the United Kingdom, the Barclays Group includes more than 220 corporations doing business in some 60 nations. The two refund-seeking members of the Barclays corporate family did business in California and were therefore subject to California’s franchise tax. Barclays Bank of California (Barcal), one of the two taxpayers, was a California banking corporation wholly owned by Barclays Bank International Limited (BBI), the second taxpayer. BBI, a United Kingdom corporation, did business in the United Kingdom and in more than 33 other nations and territories.

In computing its California franchise tax based on 1977 income, Barcal reported only the income from its own operations. BBI reported income on the assumption that it participated in a unitary business composed of itself and its subsidiaries, but not its parent corporation and the parent’s other subsidiaries. After auditing BBI’s and Barcal’s 1977 income year franchise tax returns, the Tax Board, respondent here, determined that both were part of a worldwide unitary business, the Barclays Group. Ultimately, the Tax Board assessed additional tax liability of \$1,678 for BBI and \$152,420 for Barcal.<sup>6</sup>

<sup>6</sup>The figures used by the Tax Board were:

<i>Taxpayer</i>	<i>Worldwide Taxable Income</i>	<i>California Formula Percentage</i>	<i>Business Income</i>	<i>Franchise Tax</i>
Barcal	\$401,566,973	.0139032%	\$5,583,066	\$693,696
BBI	401,566,973	.0003232%	129,786	16,126

App. in No. 92–1384, pp. A–13 to A–14 (Joint Stipulation of Facts ¶ 22).

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Barcal and BBI paid the assessments and sued for refunds. They prevailed in California's lower courts, but were unsuccessful in California's Supreme Court. The California Supreme Court held that the tax did not impair the Federal Government's ability to "speak with one voice" in regulating foreign commerce, see *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S., at 449, and therefore did not violate the Commerce Clause. Having so concluded, the California Supreme Court remanded the case to the Court of Appeal for further development of Barclays' claim that the compliance burden on foreign-based multinationals imposed by California's tax violated both the Due Process Clause and the non-discrimination requirement of the Commerce Clause. *Barclay's Bank Int'l, Ltd. v. Franchise Tax Bd.*, 2 Cal. 4th 708, 829 P. 2d 279, cert. denied, 506 U. S. 870 (1992). On remand, the Court of Appeal decided the compliance burden issues against Barclays, 10 Cal. App. 4th 1742, 14 Cal. Rptr. 2d 537 (3d Dist. 1992), and the California Supreme Court denied further review. The case is therefore before us on writ of certiorari to the California Court of Appeal. 510 U. S. 942 (1993). Barclays has conceded, for purposes of this litigation, that the entire Barclays Group formed a worldwide unitary business in 1977.<sup>7</sup>

The petitioner in No. 92-1839, Colgate-Palmolive Co., is a Delaware corporation headquartered in New York. Colgate and its subsidiaries doing business in the United States engaged principally in the manufacture and distribution of household and personal hygiene products. In addition, Colgate owned some 75 corporations that operated entirely outside the United States; these foreign subsidiaries also engaged primarily in the manufacture and distribution of household and personal hygiene products. When Colgate

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<sup>7</sup>The petitioner in No. 92-1384, Barclays Bank PLC, is the successor in interest to the tax refund claims of both Barcal and BBI. For convenience, this opinion uses "Barclays" to refer collectively to the taxpayers and the petitioner in No. 92-1384.

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filed California franchise tax returns based on 1970–1973 income, it reported the income earned from its foreign operations on a separate accounting basis. Essentially, Colgate maintained that the Constitution compelled California to limit the reach of its unitary principle to the United States’ water’s edge. See *supra*, at 306. The Tax Board determined that Colgate’s taxes should be computed on the basis of worldwide combined reporting, and assessed a 4-year deficiency of \$604,765.<sup>8</sup> Colgate paid the tax and sued for a refund.

Colgate prevailed in the California Superior Court, which found that the Federal Government had condemned worldwide combined reporting as impermissibly intrusive upon the Nation’s ability uniformly to regulate foreign commercial relations. No. 319715 (Super. Ct. Sacramento Cty., Apr. 19, 1989) (reprinted in App. to Pet. for Cert. in No. 92–1839, pp. 88a–102a). The Court of Appeal reversed, concluding

<sup>8</sup> Colgate offered the following figures, using a water’s edge approach:

<i>Income Year</i>	<i>Water's edge Taxable Income</i>	<i>Formula Percentage</i>	<i>California Business Income</i>	<i>Franchise Tax</i>
1970	\$25,652,055	9.31920%	\$2,390,566	\$167,340
1971	27,520,141	9.01730%	2,481,574	173,710
1972	32,440,358	9.21640%	2,989,833	227,227
1973	36,554,060	8.88730%	3,248,669	269,640

No. 319715 (Super. Ct. Sacramento Cty., Apr. 19, 1989) (reprinted in App. to Pet. for Cert. in No. 92–1839, p. 85a).

Under California’s worldwide combined reporting method, the computations were:

<i>Income Year</i>	<i>Worldwide Taxable Income</i>	<i>Formula Percentage</i>	<i>California Business Income</i>	<i>Franchise Tax</i>
1970	\$ 91,566,729	4.42075%	\$4,047,936	\$283,356
1971	108,177,612	4.12017%	4,457,101	311,997
1972	123,779,352	4.03444%	4,993,803	379,529
1973	151,585,860	3.71812%	5,636,144	467,800

*Id.*, at 84a.

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that evidence of the Federal Executive's opposition to the tax was insufficient. 4 Cal. App. 4th 1681, 1700–1712, 284 Cal. Rptr. 780, 792–800 (3d Dist. 1991). The California Supreme Court returned the case to the Court of Appeal with instructions “to vacate its decision and to refile the opinion after modification in light of” that Court's decision in *Barclays*. 9 Cal. Rptr. 2d 358, 831 P. 2d 798 (1992). In its second decision, the Court of Appeal again ruled against Colgate. 10 Cal. App. 4th 1768, 13 Cal. Rptr. 2d 761 (3d Dist. 1992). The California Supreme Court denied further review, and the case is before us on writ of certiorari to the Court of Appeal. 510 U. S. 942 (1993). Like Barclays, Colgate concedes, for purposes of this litigation, that during the years in question, its business, worldwide, was unitary.

## II

The Commerce Clause expressly gives Congress power “[t]o regulate Commerce with foreign Nations, and among the several States.” U. S. Const., Art. I, §8, cl. 3. It has long been understood, as well, to provide “protection from state legislation inimical to the national commerce [even] where Congress has not acted . . . .” *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945); see also *South Carolina Highway Dept. v. Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938) (Commerce Clause “by its own force prohibits discrimination against interstate commerce”).<sup>9</sup> The Clause does not shield interstate (or foreign) commerce from its “fair share of the state tax burden.” *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 750 (1978). Absent congressional approval, however, a state tax on such commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly appor-

<sup>9</sup> Our jurisprudence refers to the self-executing aspect of the Commerce Clause as the “dormant” or “negative” Commerce Clause.

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tioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 279 (1977).

In “the unique context of foreign commerce,” a State’s power is further constrained because of “the special need for federal uniformity.” *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U. S. 1, 8 (1986). “‘In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.’” *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S., at 448, quoting *Board of Trustees of Univ. of Ill. v. United States*, 289 U. S. 48, 59 (1933). A tax affecting *foreign* commerce therefore raises two concerns in addition to the four delineated in *Complete Auto*. The first is prompted by “the enhanced risk of multiple taxation.” *Container Corp.*, 463 U. S., at 185. The second relates to the Federal Government’s capacity to “‘speak with one voice when regulating commercial relations with foreign governments.’” *Japan Line*, 441 U. S., at 449, quoting *Michelin Tire Corp. v. Wages*, 423 U. S. 276, 285 (1976).

California’s worldwide combined reporting system easily meets three of the four *Complete Auto* criteria. The nexus requirement is met by the business all three taxpayers—Barcal, BBI, and Colgate—did in California during the years in question. See *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U. S. 425, 436–437 (1980).<sup>10</sup> The “fair apportion-

<sup>10</sup> *Amicus curiae* the Government of the United Kingdom points to *Quill Corp. v. North Dakota*, 504 U. S. 298 (1992), which held that the Commerce Clause demands more of a connection than the “minimum contacts” that suffice to satisfy the due process nexus requirement for assertion of judicial jurisdiction. Brief for Government of United Kingdom as *Amicus Curiae* in No. 92–1384, pp. 24–25. Noting the absence of “any meaningful contact” between California and the activities of Barclays Group members operating exclusively *outside* the United States, *id.*, at 25, the United Kingdom asserts that the trial court erred if it concluded

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ment” standard is also satisfied. Neither Barclays nor Colgate has demonstrated the lack of a “rational relationship between the income attributed to the State and the intrastate values of the enterprise,” *Container Corp.*, 463 U. S., at 180–181 (internal quotation marks omitted); nor have the petitioners shown that the income attributed to California is “out of all appropriate proportion to the business transacted by the [taxpayers] in that State.” *Id.*, at 181 (internal quotation marks omitted). We note in this regard that, “if applied by every jurisdiction,” California’s method “would result in no more than all of the unitary business’ income being taxed.” *Id.*, at 169. And surely California has afforded Colgate and the Barclays taxpayers “protection, opportunities and benefits” for which the State can exact a return. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940); see *ASARCO Inc. v. Idaho State Tax Comm’n*, 458 U. S., at 315.

Barclays (but not Colgate) vigorously contends, however, that California’s worldwide combined reporting scheme violates the antidiscrimination component of the *Complete Auto*

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that “California had the requisite nexus with *every member* of the Barclays group,” *id.*, at 27 (emphasis added).

The trial court, however, did not reach the conclusion the United Kingdom suggests it did, nor was there cause for it so to do. As the United Kingdom recognizes, the theory underlying unitary taxation is that “certain intangible ‘flows of value’ within the unitary group serve to link the various members together as if they were essentially a single entity.” *Id.*, at 26. Formulary apportionment of the income of a multijurisdictional (but unitary) business enterprise, if fairly done, taxes only the “income generated within a State.” *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U. S., at 783 (upholding “unitary business principle” as “an appropriate means for distinguishing between income generated within a State and income generated without”). *Quill* held that the Commerce Clause requires a *taxpayer’s* “physical presence” in the taxing jurisdiction before that jurisdiction can constitutionally impose a use tax. 504 U. S., at 317. The California presence of the taxpayers before us is undisputed, and we find nothing in *Quill* to suggest that California may not reference the income of corporations worldwide with whom those taxpayers are closely intertwined in order to approximate the taxpayers’ California income.



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test. Barclays maintains that a foreign owner of a taxpayer filing a California tax return “is forced to convert its diverse financial and accounting records from around the world into the language, currency, and accounting principles of the United States” at “prohibitiv[e]” expense. Brief for Petitioner in No. 92–1384, p. 44.<sup>11</sup> Domestic-owned taxpayers, by contrast, need not incur such expense because they “already keep most of their records in English, in United States currency, and in accord with United States accounting principles.” *Id.*, at 45. Barclays urges that imposing this “prohibitive administrative burden,” *id.*, at 43, on foreign-owned enterprises gives a competitive advantage to their United States-owned counterparts and constitutes “economic protectionism” of the kind this Court has often condemned. *Id.*, at 43–46.

Compliance burdens, if disproportionately imposed on out-of-jurisdiction enterprises, may indeed be inconsonant with the Commerce Clause. See, e. g., *Hunt v. Washington State Apple Advertising Comm’n*, 432 U. S. 333, 350–351 (1977) (increased costs imposed by North Carolina statute on out-of-state apple producers “would tend to shield the local apple industry from the competition of Washington apple growers,” thereby discriminating against those growers). The factual predicate of Barclays’ discrimination claim, however, is infirm.

Barclays points to provisions of California’s implementing regulations setting out three discrete means for a taxpayer to fulfill its franchise tax reporting requirements. Each of these modes of compliance would require Barclays to gather and present much information not maintained by the unitary

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<sup>11</sup> Barclays estimates, and the trial court found, that an accounting system capable of conveying the information Barclays thought California’s worldwide reporting scheme required for all of the enterprise’s foreign affiliates would cost more than \$5 million to set up, and more than \$2 million annually to maintain. Brief for Petitioner in No. 92–1384, p. 44, n. 13; Nos. 325059 and 325061 (Super. Ct. Sacramento Cty., Aug. 20, 1987) (reprinted in App. to Pet. for Cert. in No. 92–1384, pp. A–27 to A–28).

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group in the ordinary course of business.<sup>12</sup> California's regulations, however, also provide that the Tax Board "shall consider the effort and expense required to obtain the necessary information" and, in "appropriate cases, such as when the necessary data cannot be developed from financial records maintained in the regular course of business," may accept "reasonable approximations." Cal. Code of Regs., Title 18, § 25137-6(e)(1) (1985). As the Court of Appeal comprehended, in determining Barclays' 1977 worldwide income, Barclays and the Tax Board "used these [latter] provisions and [made] computations based on reasonable approximations," 10 Cal. App. 4th, at 1756, 14 Cal. Rptr. 2d, at 545, thus allowing Barclays to avoid the large compliance costs of which it complains.<sup>13</sup> Barclays has not shown that California's provision for "reasonable approximations" systematically "overtaxes" foreign corporations generally or BBI or Barcal in particular.

In sum, Barclays has not demonstrated that California's tax system in fact operates to impose inordinate compliance burdens on foreign enterprises. Barclays' claim of unconstitutional discrimination against foreign commerce therefore fails.

## III

Barclays additionally argues that California's "reasonable approximations" method of reducing the compliance burden

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<sup>12</sup> Under the regulations to which Barclays refers, a "unitary business with operations in foreign countries" may determine its worldwide income based upon either (1) "[a] profit and loss statement . . . for each foreign branch or corporation," Cal. Code of Regs., Title 18, § 25137-6(b)(1) (1985); (2) the "consolidated profit and loss statement prepared for the related corporations of which the unitary business is a member which is prepared for filing with the Securities and Exchange Commission," § 25137-6(b)(2); or (3) "the consolidated profit and loss statement prepared for reporting to shareholders and subject to review by an independent auditor," *ibid.*

<sup>13</sup> The California Court of Appeal additionally found that Barclays' actual compliance costs were "relatively modest" during the years just prior to those here at issue, ranging from \$900 to \$1,250 per annum, for BBI. See 10 Cal. App. 4th, at 1760, n. 9, 14 Cal. Rptr. 2d, at 548, n. 9.

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is incompatible with due process. “Foreign multinationals,” Barclays maintains, “remain at peril in filing their tax returns because there is no standard to determine what ‘approximations’ will be accepted.” Brief for Petitioner in No. 92–1384, at 49. Barclays presents no substantive grievance concerning the treatment it has received, *i. e.*, no example of an approximation rejected by the Tax Board as unreasonable. Barclays instead complains that “[t]he grant of standardless discretion itself violates due process,” so that the taxpayer need not show “actual harm from arbitrary application.” *Ibid.*

We note, initially, that “reasonableness” is a guide admitting effective judicial review in myriad settings, from encounters between the police and the citizenry, see *Terry v. Ohio*, 392 U. S. 1, 27 (1968) (Fourth Amendment permits police officer’s limited search for weapons in circumstances where “reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger” based upon “reasonable inferences . . . draw[n] from the facts in light of [officer’s] experience”), to the more closely analogous federal income tax context. See, *e. g.*, 26 U. S. C. § 162(a)(1) (allowing deductions for ordinary business expenses, including a “reasonable allowance for salaries or other compensation”); § 167(a) (permitting a “reasonable allowance” for wear and tear as a depreciation deduction); see also *United States v. Ragen*, 314 U. S. 513, 522 (1942) (noting that determinations “by reference to a standard of ‘reasonableness’ [are] not unusual under federal income tax laws”).

We next observe that California’s judiciary has construed the California law to curtail the discretion of California tax officials. See 10 Cal. App. 4th, at 1762, 14 Cal. Rptr. 2d, at 549 (the Tax Board must consider “regularly-maintained or other readily-accessibly corporate documents” in deciding whether the “cost and effort of producing [worldwide combined reporting] information” justifies submission of “reasonable approximations”). We note, furthermore, that California has afforded Barclays the opportunity “to clarify the

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meaning of the regulation[s] by its own inquiry, or by resort to an administrative process.” See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982). Taxpayers, under the State’s scheme, may seek “an advance determination” from the Tax Board regarding the tax consequences of a proposed course of action. Cal. Code of Regs., Title 18, §25137–6(e)(2) (1985).

Rules governing international multijurisdictional income allocation have an inescapable imprecision given the complexity of the subject matter. See *Container Corp.*, 463 U. S., at 192 (allocation “bears some resemblance . . . to slicing a shadow”).<sup>14</sup> Mindful that rules against vagueness are not “mechanically applied” but depend, in their application, on “the nature of the enactment,” *Hoffman Estates*, 455 U. S., at 498, we hold that California’s scheme does not transgress constitutional limitations in this regard, and that Barclays’ due process argument is no more weighty than its claim of discrimination first placed under a Commerce Clause heading.

## IV

## A

Satisfied that California’s corporate franchise tax is “proper and fair” as tested under *Complete Auto’s* guides,

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<sup>14</sup>As noted by the California Court of Appeal, even the federal separate accounting scheme preferred by Barclays entails recourse to a standard “akin to reasonable approximation.” 10 Cal. App. 4th 1742, 1763, 14 Cal. Rptr. 2d 537, 550 (1993). The Internal Revenue Code allows the Secretary of Treasury to “distribute, apportion, or allocate gross income, deductions, credits, or allowances” among a controlled group of businesses “if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income” of such businesses. 26 U. S. C. §482; see App. in No. 92–1384, p. A–829 (testimony of Barclays’ expert witness that §482 requires “reasonable approximation[s]” of arm’s-length prices); *Peck v. Commissioner*, 752 F. 2d 469, 472 (CA9 1985) (under §482, Internal Revenue Service determination of arm’s-length prices will be sustained unless unreasonable, arbitrary, or capricious).

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see *Container Corp.*, 463 U. S., at 184, we proceed to the “additional scrutiny” required when a State seeks to tax *foreign* commerce. *Id.*, at 185. First of the two additional considerations is “the enhanced risk of multiple taxation.” *Ibid.*

In *Container Corp.*, we upheld application of California’s combined reporting obligation to “foreign subsidiaries of domestic corporations,” *id.*, at 193 (emphasis added), against a charge that such application unconstitutionally exposed those subsidiaries to a risk of multiple international taxation.<sup>15</sup> Barclays contends that its situation compels a different outcome, because application of the combined reporting obligation to foreign multinationals creates a “‘more aggravated’ risk . . . of double taxation.” Brief for Petitioner in No. 92–1384, at 32, quoting Nos. 325059 and 325061 (Super. Ct. Sacramento Cty., Aug. 20, 1987) (reprinted in App. to Pet. for Cert. in No. 92–1384, p. A–26). Barclays rests its argument on the observation that “foreign multinationals typically have more of their operations and entities outside of the United States [compared to] domestic multinationals, which typically have a smaller share of their operations and entities outside of the United States.” Brief for Petitioner in No. 92–1384, at 33.<sup>16</sup> As a result, a higher proportion of the income of a foreign multinational is subject to taxation by foreign sovereigns. This reality, Barclays concludes, means that for the foreign multinational, which must include all its foreign operations in the California combined reporting group, “the breadth of double taxation and the degree of burden on foreign commerce are greater than in the case of domestic multinationals.” *Ibid.*

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<sup>15</sup>We reserved judgment on whether an altered analysis would be required where the taxpayer was part of a foreign-based enterprise. See *Container Corp.*, 463 U. S., at 189, n. 26; *id.*, at 195, n. 32.

<sup>16</sup>To illustrate, Barclays points to its own operations: only 3 of the more than 220 entities in the Barclays Group did any business in the United States. Brief for Petitioner in No. 92–1384, at 33.

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We do not question Barclays' assertion that multinational enterprises with a high proportion of income taxed by jurisdictions with wage rates, property values, and sales prices lower than California's face a correspondingly high risk of multiple international taxation. See *Container Corp.*, 463 U. S., at 187; cf. *id.*, at 199–200 (Powell, J., dissenting) (describing how formulary apportionment leads to multiple taxation). Nor do we question that foreign-based multinationals have a higher proportion of such income, on average, than do their United States counterparts. But *Container Corp.*'s approval of this very tax, in the face of a multiple taxation challenge, did not rest on any insufficiency in the evidence that multiple taxation might occur; indeed, we accepted in that case the taxpayer's assertion that multiple taxation in fact had occurred. *Id.*, at 187 (“[T]he tax imposed here, like the tax in *Japan Line*, has resulted in actual double taxation, in the sense that some of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the State's share of the total income of the unitary business of which those subsidiaries are a part.”); see also *id.*, at 187, n. 22.

*Container Corp.*'s holding on multiple taxation relied on two considerations: first, that multiple taxation was not the “inevitable result” of the California tax;<sup>17</sup> and, second, that the “alternativ[e] reasonably available to the taxing State” (*i. e.*, some version of the separate accounting/“arm's length”

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<sup>17</sup>The Court stated: “[T]he double taxation in this case, although real, is not the ‘inevitabl[e]’ result of the California taxing scheme. . . . [W]e are faced with two distinct methods of allocating the income of a multinational enterprise. The ‘arm's-length’ approach divides the pie on the basis of formal accounting principles. The formula apportionment method divides the same pie on the basis of a mathematical generalization. Whether the combination of the two methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case.” *Container Corp.*, 463 U. S., at 188 (citation omitted).

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approach), *id.*, at 188–189, “could not eliminate the risk of double taxation” and might in some cases enhance that risk. *Id.*, at 191.<sup>18</sup> We underscored that “even though most nations have adopted the arm’s-length approach in its general outlines, the precise rules under which they reallocate income among affiliated corporations often differ substantially, and *whenever that difference exists, the possibility of double taxation also exists.*” *Ibid.* (emphasis added); see also *id.*, at 192 (“California would have trouble avoiding multiple taxation even if it adopted the ‘arm’s-length’ approach . . .”).

These considerations are not dispositively diminished when California’s tax is applied to the components of foreign, as opposed to domestic, multinationals. Multiple taxation of such entities because of California’s scheme is not “inevitable”; the existence *vel non* of actual multiple taxation of income remains, as in *Container Corp.*, dependent “on the facts of the individual case.” *Id.*, at 188. And if, as we have held, adoption of a separate accounting system does not dispositively lessen the risk of multiple taxation of the income earned by foreign affiliates of *domestic*-owned corporations, we see no reason why it would do so in respect of the income earned by foreign affiliates of *foreign*-owned corporations. We refused in *Container Corp.* “to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation.” *Id.*, at 193. The

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<sup>18</sup>The Court’s decision in *Container Corp.* effectively modified, for purposes of *income* taxation, the Commerce Clause multiple taxation inquiry described in *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434 (1979) (holding unconstitutional application of California’s ad valorem property tax to cargo containers based in Japan and used exclusively in foreign commerce). In *Japan Line*, confronting a property tax on containers used as “instrumentalities of [foreign] commerce,” not an income tax on companies, we said that a state tax is incompatible with the Commerce Clause if it “creates a substantial risk of international multiple taxation.” *Id.*, at 451.

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foreign domicile of the taxpayer (or the taxpayer's parent) is a factor inadequate to warrant retraction of that position.

Recognizing that multiple taxation of international enterprise may occur whatever taxing scheme the State adopts, JUSTICE O'CONNOR, dissenting in No. 92-1384, finds impermissible under "the [dormant] Foreign Commerce Clause" only double taxation that (1) burdens a foreign corporation in need of protection for lack of access to the political process, and (2) occurs "because [the State] does not conform to international practice." *Post*, at 336. But the image of a politically impotent foreign transactor is surely belied by the battalion of foreign governments that has marched to Barclays' aid, deploring worldwide combined reporting in diplomatic notes, *amicus* briefs, and even retaliatory legislation. See *infra*, at 324, n. 22; *post*, at 337. Indeed, California responded to this impressive political activity when it eliminated mandatory worldwide combined reporting. See *supra*, at 306. In view of this activity, and the control rein Congress holds, see *infra*, at 329-331, we cannot agree that "international practice" has such force as to dictate this Court's Commerce Clause jurisprudence. We therefore adhere to the precedent set in *Container Corp.*

## B

We turn, finally, to the question ultimately and most energetically presented: Did California's worldwide combined reporting requirement, as applied to Barcal, BBI, and Colgate, "impair federal uniformity in an area where federal uniformity is essential," *Japan Line*, 441 U. S., at 448; in particular, did the State's taxing scheme "preven[t] the Federal Government from 'speaking with one voice' in international trade"? *Id.*, at 453, quoting *Michelin Tire Corp. v. Wages*, 423 U. S., at 285.

## 1

Two decisions principally inform our judgment: first, this Court's 1983 determination in *Container Corp.*; and second, our decision three years later in *Wardair Canada Inc. v.*



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*Florida Dept. of Revenue*, 477 U. S. 1 (1986). *Container Corp.* held that California's worldwide combined reporting requirement, as applied to domestic corporations with foreign subsidiaries, did not violate the "one voice" standard. *Container Corp.* bears on Colgate's case, but not Barcal's or BBI's, to this extent: "[T]he tax [in *Container Corp.*] was imposed, not on a foreign entity . . . , but on a domestic corporation." 463 U. S., at 195.<sup>19</sup> Other factors emphasized in *Container Corp.*, however, are relevant to the complaints of all three taxpayers in the consolidated cases now before us.<sup>20</sup> Most significantly, the Court found no "specific indications of congressional intent" to preempt California's tax:

"First, there is no claim here that the federal tax statutes themselves provide the necessary pre-emptive force. Second, although the United States is a party to a great number of tax treaties that require the Federal Government to adopt some form of 'arm's-length' analysis in taxing the domestic income of multinational enterprises, that requirement is generally waived with respect to the taxes imposed by each of the contracting nations on its own domestic corporations. . . . Third, the tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units such as States, and in none of the

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<sup>19</sup> *Container Corp.* noted:

"We recognize that the fact that legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis." 463 U. S., at 195, n. 32.

<sup>20</sup> *Container Corp.* observed that "the tax here does not create an *automatic* 'asymmetry' . . . in international taxation," *id.*, at 194–195, quoting *Japan Line*, 441 U. S., at 453—*i. e.*, it does not inevitably lead to double taxation. See *supra*, at 319–320, and n. 17. Furthermore, Colgate, Barcal, and BBI are "without a doubt amenable to be taxed in California in one way or another," and "the amount of tax [they] pa[y] is much more the function of California's tax rate than of its allocation method." 463 U. S., at 195.

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treaties does the restriction on ‘non-arm’s-length’ methods of taxation apply to the States. Moreover, the Senate has on at least one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended that restriction to the States. Finally, . . . Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income.” *Id.*, at 196–197 (footnotes and internal quotation marks omitted).

The Court again confronted a “one voice” argument in *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U. S. 1 (1986), and there rejected a Commerce Clause challenge to Florida’s tax on the sale of fuel to common carriers, including airlines. Air carriers were taxed on all aviation fuel purchased in Florida, without regard to the amount the carrier consumed within the State or the amount of its in-state business. The carrier in *Wardair*, a Canadian airline that operated charter flights to and from the United States, conceded that the challenged tax satisfied the *Complete Auto* criteria and entailed no threat of multiple international taxation. Joined by the United States as *amicus curiae*, however, the carrier urged that Florida’s tax “threaten[ed] the ability of the Federal Government to ‘speak with one voice.’” 477 U. S., at 9. There is “a federal policy,” the carrier asserted, “of reciprocal tax exemptions for aircraft, equipment, and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic”; this policy, the carrier argued, “represents the statement that the ‘one voice’ of the Federal Government wishes to make,” a statement “threatened by [Florida’s tax].” *Ibid.*

This Court disagreed, observing that the proffered evidence disclosed no federal policy of the kind described and indeed demonstrated that the Federal Government intended to *permit* the States to impose sales taxes on aviation fuel. The international convention and resolution and more than 70 bilateral treaties on which the carrier relied to show a

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United States policy of tax exemption for the instrumentalities of international air traffic, the Court explained, in fact indicated far less: “[W]hile there appears to be an international *aspiration* on the one hand to eliminate all impediments to foreign air travel—including taxation of fuel—the *law* as it presently stands acquiesces in taxation of the sale of that fuel by political subdivisions of countries.” *Id.*, at 10 (emphasis in original). Most of the bilateral agreements prohibited the Federal Government from imposing national taxes on aviation fuel used by foreign carriers, but none prohibited the States or their subdivisions from taxing the sale of fuel to foreign airlines. The Court concluded that “[b]y negative implication arising out of [these international accords,] the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel,” and therefore upheld Florida’s tax. *Id.*, at 12.

In both *Wardair* and *Container Corp.*, the Court considered the “one voice” argument only after determining that the challenged state action was otherwise constitutional. An important premise underlying both decisions<sup>21</sup> is this: Congress may more passively indicate that certain state practices do *not* “impair federal uniformity in an area where federal uniformity is essential,” *Japan Line*, 441 U. S., at 448; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce or otherwise falls short under *Complete Auto* inspection. See, e. g., *Maine v. Taylor*, 477 U. S. 131, 139 (1986) (requiring an “unambiguous indication of congressional intent” to insulate “otherwise invalid state legislation” from judicial dormant Commerce Clause scru-

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<sup>21</sup> See also *Itel Containers Int’l Corp. v. Huddleston*, 507 U. S. 60, 75 (1993) (upholding Tennessee’s tax on lease of cargo containers used exclusively in international shipping; because tax in question was not among those proscribed by “various conventions, statutes, and regulations[,] . . . the most rational inference to be drawn is that th[e] tax, one quite distinct from the general class of import duties, is permitted”).

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tiny); *Northwest Airlines, Inc. v. County of Kent*, 510 U. S. 355, 373, and n. 19 (1994) (same).

## 2

As in *Container Corp.* and *Wardair*, we discern no “specific indications of congressional intent” to bar the state action here challenged. Our decision upholding California’s franchise tax in *Container Corp.* left the ball in Congress’ court; had Congress, the branch responsible for the regulation of foreign commerce, see U. S. Const., Art. I, § 8, cl. 3, considered nationally uniform use of separate accounting “essential,” *Japan Line*, 441 U. S., at 448, it could have enacted legislation prohibiting the States from taxing corporate income based on the worldwide combined reporting method. In the 11 years that have elapsed since our decision in *Container Corp.*, Congress has failed to enact such legislation.

In the past three decades—both before and after *Container Corp.*—Congress, aware that foreign governments were displeased with States’ worldwide combined reporting requirements,<sup>22</sup> has on many occasions studied state taxation

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<sup>22</sup>The governments of many of our trading partners have expressed their strong disapproval of California’s method of taxation, as demonstrated by the *amici* briefs in support of Barclays from the Government of the United Kingdom, and from the Member States of the European Communities (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain) and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden, and Switzerland. Barclays has also directed our attention to a series of diplomatic notes similarly protesting the tax. See, e. g., App. in No. 92–1384, at A–92 to A–123, A–127 to A–128, A–131 to A–138; see also p. A–603 (letter from Secretary of State George Schultz to California Governor Deukmejian (Jan. 30, 1986)) (“The Department of State has received diplomatic notes complaining about state use of the worldwide unitary method of taxation from virtually every developed country in the world.”). The British Parliament has gone further, enacting retaliatory legislation that would, if implemented, tax United States corporations on dividends they receive from their United Kingdom subsidiaries. See Finance Act 1985, pt. 2, ch. 1, § 54, and sch. 13, ¶ 5 (Eng.), reenacted in Income and Corporation Taxes Act 1988, pt. 18, ch. 3, § 812 and sch. 30, ¶¶ 20, 21 (Eng.).

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of multinational enterprises.<sup>23</sup> The numerous bills introduced have varied, but all would have prohibited the California reporting requirement here challenged. One group of bills would have prohibited States using combined reporting from compelling inclusion, in the combined reporting group, of corporate affiliates whose income was derived substan-

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<sup>23</sup> Pursuant to §201 of Pub. L. 86-272, 73 Stat. 556, in which Congress undertook to “make full and complete studies of all matters pertaining to the taxation . . . of interstate commerce . . . by the States,” the House Committee on the Judiciary held extensive hearings on the (primarily domestic) implications of alternative tax apportionment schemes. See *State Income Taxation of Mercantile and Manufacturing Corporations: Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary*, 87th Cong., 1st Sess. (1961). The Subcommittee’s comprehensive final Report recommended, *inter alia*, that “formula apportionment be used as the sole method of dividing income among the States for tax purposes,” *State Taxation of Interstate Commerce: Report of the Special Subcommittee on State Taxation of Interstate Commerce*, House Committee on the Judiciary, H. R. Rep. No. 952, 89th Cong., 1st Sess., 1144 (1965), and that States be required to refrain from taxing any foreign income exempt from federal taxation. *Id.*, at 1135. Congress, however, enacted no legislation embodying these recommendations.

Congress continued to study and debate this matter over the next two decades. See *Interstate Taxation Act*, H. R. 11798 and Companion Bills: Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d Sess. (1966); *State Taxation of Interstate Commerce: Hearings before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance*, 93d Cong., 1st Sess. (1973); *Interstate Taxation*, S. 1273: Hearings before the Senate Committee on the Judiciary, 95th Cong., 1st and 2d Sess. (1977-1978); *Recommendations of the Task Force on Foreign Source Income*, House Committee on Ways and Means, 95th Cong., 1st Sess. (Comm. Print 1977); *State Taxation of Foreign Source Income*, 1980: Hearings on H. R. 5076 before the House Committee on Ways and Means, 96th Cong., 2d Sess. (1980); *State Taxation of Interstate Commerce and Worldwide Corporate Income*, Hearings on S. 983 and S. 1688 before the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance, 96th Cong., 2d Sess. (1980); *Unitary Taxation: Hearing before the Subcommittee on International Economic Policy of the Senate Committee on Foreign Relations*, 98th Cong., 2d Sess. (1984).

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tially from sources outside the United States.<sup>24</sup> Another set would have barred the States from requiring taxpayers to report any income that was not subject to *federal* income tax;<sup>25</sup> thus, “foreign source income” of foreign corporations ordinarily would not be reported. See *supra*, at 306, n. 5. None of these bills, however, was enacted.

The history of Senate action on a United States/United Kingdom tax treaty, to which we referred in *Container Corp.*, see 463 U. S., at 196, reinforces our conclusion that Congress implicitly has *permitted* the States to use the worldwide combined reporting method. As originally negotiated by the President, this treaty—known as the Convention for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains—would have precluded States from requiring that United Kingdom-controlled corporate taxpayers use combined reporting to compute their state income. See Art. 9(4), 31 U. S. T. 5670, 5677, T. I. A. S. No. 9682.<sup>26</sup> The Senate

<sup>24</sup> See, *e. g.*, S. 1245, 93d Cong., 1st Sess. (1973); S. 2173, 95th Cong., 1st Sess. (1978); H. R. 6146, 98th Cong., 2d Sess. (1984); H. R. 4940, 98th Cong., 2d Sess. (1984); S. 3061, 98th Cong., 2d Sess. (1984); S. 1974, 99th Cong., 1st Sess. (1985); H. R. 3980, 99th Cong., 1st Sess. (1986); S. 1139, 101st Cong., 1st Sess. (1989); S. 1775, 102d Cong., 1st Sess. (1991).

<sup>25</sup> See, *e. g.*, H. R. 11798, 89th Cong., 1st Sess. (1965); H. R. 5076, 96th Cong., 1st Sess. (1979); S. 1688, 96th Cong., 1st Sess. (1979); H. R. 8277, 96th Cong., 2d Sess. (1980); H. R. 1983, 97th Cong., 1st Sess. (1981); H. R. 2918, 98th Cong., 1st Sess. (1983); S. 1225, 98th Cong., 1st Sess. (1983); S. 1113, 99th Cong., 1st Sess. (1985).

<sup>26</sup> Article 9(4) would have provided:

“Except as specifically provided in this Article, in determining the tax liability of an enterprise doing business in a Contracting State, or *in a political subdivision or local authority* of a Contracting State, such Contracting State, *political subdivision, or local authority* shall not take into account the income, deductions, receipts, or outgoings of a related enterprise of the other Contracting State or of an enterprise of any third State related to any enterprise of the other Contracting State.” (Emphasis added.)

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rejected this version of the treaty, 124 Cong. Rec. 18670 (1978), and ultimately ratified the agreement, *id.*, at 19076, “subject to the reservation that the provisions of [Article 9(4)] . . . shall not apply to any political subdivision or local authority of the United States,” *id.*, at 18416. The final version of the treaty prohibited state tax discrimination against British nationals, Art. 2(4), 31 U. S. T. 5671; Art. 24, *id.*, at 5687–5688,<sup>27</sup> but did not require States to use separate accounting or water’s edge apportionment of income, *id.*, at 5709.

Given these indicia of Congress’ willingness to tolerate States’ worldwide combined reporting mandates, even when those mandates are applied to foreign corporations and domestic corporations with foreign parents, we cannot conclude that “the foreign policy of the United States—whose nuances . . . are much more the province of the Executive Branch and Congress than of this Court—is [so] seriously threatened,” *Container Corp.*, 463 U. S., at 196, by California’s practice as to warrant our intervention.<sup>28</sup> For this reason, Barclays’ and its *amici*’s argument that California’s worldwide combined reporting requirement is unconstitutional because it is

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<sup>27</sup> Article 2(4) provides: “For the purpose of Article 24 (Non-discrimination), this Convention shall also apply to taxes of every kind and description imposed by each Contracting State, or by its political subdivisions or local authorities.”

<sup>28</sup> That “federal law has long embodied a *preference* for the arm’s length method, in the sense that this method is used in computing the federal income tax liability of multinational corporations,” does not render a State’s use of a different method unconstitutional, as the Solicitor General points out. Brief for United States as *Amicus Curiae* 17–18 (emphasis in original), citing *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U. S. 425, 448 (1980) (“Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States.”).

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likely to provoke retaliatory action by foreign governments<sup>29</sup> is directed to the wrong forum. The judiciary is not vested with power to decide “how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.” *Id.*, at 194.

## 3

To support its argument that California’s worldwide combined reporting method impermissibly interferes with the Federal Government’s ability to “speak with one voice,” and to distinguish *Container Corp.*, Colgate points to a series of Executive Branch actions, statements, and *amicus* filings, made both before and after our decision in *Container Corp.*<sup>30</sup> Colgate contends that, taken together, these Executive pronouncements constitute a “clear federal directive” proscribing States’ use of worldwide combined reporting. Brief for Petitioner in No. 92–1839, p. 36, quoting *Container Corp.*, 463 U. S., at 194.

The *Executive* statements to which Colgate refers, however, cannot perform the service for which Colgate would

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<sup>29</sup> See, *e. g.*, Brief for Petitioner in No. 92–1384, at 25–28; Brief for Government of United Kingdom as *Amicus Curiae* in No. 92–1384, at 19–24; Brief for Member States of European Communities et al. as *Amici Curiae* in No. 92–1384, pp. 16–17.

<sup>30</sup> Colgate cites, for example, President Reagan’s decision to introduce legislation confining States to a water’s edge method, State Taxation of Multinational Corporations, 21 Weekly Comp. of Pres. Doc. 1368 (Nov. 8, 1985) (statement of President Reagan); letters sent by members of the Reagan and Bush administrations to the Governor of California and the Chairman of the Senate Finance Committee, expressing the Federal Government’s opposition to worldwide combined reporting, App. in No. 92–1839, pp. 9–27; and Department of Justice *amicus* briefs filed in this Court, arguing that the worldwide combined reporting method violates the dormant Commerce Clause, *e. g.*, Brief for United States as *Amicus Curiae* in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, O. T. 1982, No. 81–349, cert. dismissed, 463 U. S. 1220 (1983); Brief for United States as *Amicus Curiae* in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, O. T. 1992, No. 92–212, cert. denied, 506 U. S. 870 (1992).



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enlist them. The Constitution expressly grants Congress, not the President, the power to “regulate Commerce with foreign Nations.” U.S. Const., Art. I, §8, cl. 3. As we have detailed, *supra*, at 324–327, and nn. 23–27, Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting. That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation’s ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others. Cf. *Itel Containers Int’l Corp. v. Huddleston*, 507 U. S. 60, 81 (1993) (SCALIA, J., concurring in part and concurring in judgment) (“[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.”).

Congress may “delegate very large grants of its power over foreign commerce to the President,” who “also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 109 (1948). We need not here consider the scope of the President’s power to preempt state law pursuant to authority delegated by a statute or a ratified treaty; nor do we address whether the President may displace state law pursuant to legally binding executive agreements with foreign nations<sup>31</sup> made “in the absence of either a congressional grant or denial of authority, [where] he can only rely upon his own independent powers.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). The Executive Branch ac-

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<sup>31</sup> See *United States v. Belmont*, 301 U. S. 324, 331–332 (1937).

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tions—press releases, letters, and *amicus* briefs—on which Colgate here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned, use of worldwide combined reporting.<sup>32</sup>

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The Constitution does “not make the judiciary the overseer of our government.” *Dames & Moore v. Regan*, 453 U. S. 654, 660 (1981), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S., at 594 (Frankfurter, J., concurring). Having determined that the taxpayers before us had an adequate nexus with the State, that worldwide combined reporting led to taxation which was fairly apportioned, nondiscriminatory, fairly related to the services provided by the State, and that its imposition did not result inevitably in multiple taxation,

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<sup>32</sup>The Solicitor General suggests that when a court analyzes “whether a state tax impairs the federal government’s ability to speak with one voice . . . the statements of executive branch officials are entitled to substantial evidentiary weight,” Brief for United States as *Amicus Curiae* 19, but he argues that the constitutionality of a State’s taxing practice must be assessed according to the federal policy, if any, in effect at the time the challenged taxes were assessed. He asserts that federal officials had not articulated a policy opposing use by the States of worldwide combined reporting prior to the mid-1980’s, and urges the Court to affirm the judgments below on the ground that California’s use of worldwide combined reporting was not unconstitutional during the years here at issue, even if it became unconstitutional in later years (a question on which he takes no position, see Tr. of Oral Arg. 38–41). Colgate, on the other hand, suggests that the relevant time frame is “when the tax is definitively enforced by the state taxing authority, through judicial proceedings if necessary, not when the tax technically accrues under state law,” Reply Brief for Petitioner in No. 92–1839, p. 7, and argues in the alternative that a federal policy opposing combined worldwide reporting had been established as of 1970–1973, *id.*, at 9. We need not resolve this dispute, because we have concluded that the Executive statements criticizing States’ use of worldwide combined reporting do not, in light of Congress’ acquiescence in the States’ actions, authorize judicial intervention here.

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we leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy. Accordingly, the judgments of the California Court of Appeal are

*Affirmed.*

JUSTICE BLACKMUN, concurring.

Last Term, in *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) (BLACKMUN, J., dissenting), I expressed my disagreement with the Court’s willingness, in applying the “one voice” test, to “infe[r] permission for [a] tax from Congress’ supposed failure to prohibit it.” See also *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 18 (1986) (BLACKMUN, J., dissenting). I accordingly would not rely in the present cases on congressional inaction to conclude that “Congress implicitly has *permitted* the States to use the worldwide combined reporting method.” *Ante*, at 326. Nevertheless, because today’s holding largely is controlled by *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), and because California’s corporate franchise tax does not directly burden the instrumentalities of foreign commerce, see *Itel, supra*; *Wardair, supra*; and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), I agree that the tax does not “impair federal uniformity in an area where federal uniformity is essential,” *id.*, at 448. I therefore join the opinion of the Court.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court and join all of its opinion except Part IV–B, which disposes of the petitioners’ “negative” Foreign Commerce Clause argument by applying the “speak with one voice” test of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

As I stated last Term in *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993) (opinion concurring in part

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and concurring in judgment), “I will enforce a self-executing, ‘negative’ Commerce Clause in two circumstances: (1) against a state law that facially discriminates against interstate [or foreign] commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.” *Id.*, at 78–79 (footnote omitted). Absent one of these circumstances, I will permit the States to employ whatever means of taxation they choose insofar as the Commerce Clause is concerned. Neither circumstance exists here, and the California tax therefore survives Commerce Clause attack.

I am not sure that the Court’s opinion today, which requires no more than legislative inaction to establish that “Congress implicitly has *permitted*” the States to impose a particular restriction on foreign commerce, *ante*, at 326, will prove much different from my approach in its consequences. It is, moreover, an unquestionable improvement over *Itel*: whereas the “speak with one voice” analysis of that opinion gave the power to determine the constitutionality of a state law to the Executive Branch, see 507 U. S., at 80 (SCALIA, J., concurring in part and concurring in judgment), today’s opinion restores the power to Congress—albeit in a form that strangely permits it to be exercised by silence.

JUSTICE O’CONNOR, with whom JUSTICE THOMAS joins, concurring in the judgment in part and dissenting in part.

I joined Justice Powell in dissent in *Container Corp. of America v. Franchise Tax Bd.*, 463 U. S. 159 (1983), and I continue to think the Court erred in upholding California’s use of worldwide combined reporting in taxing the income of a domestic-based corporate group. But because the State and private parties have justifiably relied on the constitutionality of taxing such corporations, and Congress has not seen fit to override our decision, I agree with the Court that *Container Corp.* should not be overruled, cf. *Quill Corp. v. North Dakota*, 504 U. S. 298, 318–319 (1992), and that it

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resolves the constitutional challenge raised by Colgate-Palmolive. I therefore concur in the judgment in No. 92–1839. Barclays Bank, on the other hand, is a *foreign*-based parent company of a multinational corporate group, and our holding in *Container Corp.* expressly does not extend to this situation. See 463 U. S., at 189, n. 26, and 195, n. 32. In my view, the California tax cannot constitutionally be applied to foreign corporations. I therefore respectfully dissent in No. 92–1384.

A state tax on interstate commerce must meet four requirements under our negative Commerce Clause precedents: the tax must be on an activity with a substantial nexus to the taxing State, it must be fairly apportioned, it must not discriminate against interstate commerce, and it must be fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 279 (1977). Substantially for the reasons explained by the Court, see *ante*, at 311–314, I agree that imposition of the California tax complies with the four *Complete Auto* factors. (I also agree that California's practice of accepting "reasonable approximations" of the statutorily required financial data does not violate due process. See *ante*, at 314–316.) A state tax on *foreign* commerce, however, must satisfy two additional inquiries: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes *either* of these precepts, it is unconstitutional under the Commerce Clause." *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 451 (1979) (emphasis added).

I am in general agreement with the Court, see *ante*, at 320–329, that the second *Japan Line* factor—the purported need for federal uniformity—does not prevent the use of worldwide combined reporting in taxing foreign corpora-

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tions. The Congress, not the Executive or the Judiciary, has been given the power to regulate commerce. U. S. Const., Art. I, § 8, cl. 3. The Legislature has neither approved nor disapproved the California tax. Although in such circumstances courts have the power to scrutinize taxes for consistency with our negative Commerce Clause jurisprudence, this determination should be made on the basis of the objective factors outlined in *Complete Auto* (and, in the foreign commerce context, the multiple taxation analysis discussed in *Japan Line*), not statements made and briefs filed by officials in the Executive Branch. Cf. *Itel Containers Int'l Corp. v. Huddleston*, 507 U. S. 60, 80–81 (1993) (SCALIA, J., concurring in part and concurring in judgment). Indeed, the inconsistent positions taken by the Solicitor General in the course of Barclays' challenge to the California tax illustrate the perils of resting constitutional determinations on such "evidence." Compare Brief for United States as *Amicus Curiae* 21–24 (arguing that the California tax was constitutionally applied to Barclays during the tax years in question), with Brief for United States as *Amicus Curiae* in *Barclays Bank v. Franchise Tax Board*, O. T. 1992, No. 92–212, pp. 9–16 (arguing that the imposition of the California tax on Barclays was unconstitutional).

But I cannot agree with the Court's resolution of the other *Japan Line* factor—the need to avoid international multiple taxation. See *ante*, at 316–320. Barclays does 98% of its business in countries other than the United States. California, through application of worldwide combined reporting, taxes some of that income. The trial court found as a fact that "[t]here is a definite risk of, as well as actual double taxation here." App. to Pet. for Cert. in No. 92–1384, p. A–25. This double taxation occurs because California has adopted a taxing system that is inconsistent with the taxing method used by foreign taxing authorities. California's formula assigns a higher proportion of income to jurisdictions where wage rates, property values, and sales prices are

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higher; to the extent that California is such a jurisdiction (and it usually will be) the formula inherently leads to double taxation. And whenever the three factors are higher in California, the State will tax income under its formula that already has been taxed by another country under accepted international practice.

In *Container Corp.*, we recognized that the California tax “ha[d] resulted in actual double taxation . . . stem[ming] from a serious divergence in the taxing schemes adopted by California and the foreign taxing authorities,” and that “the taxing method adopted by those foreign taxing authorities is consistent with accepted international practice.” 463 U. S., at 187. We nevertheless held that the tax did not violate the *Japan Line* principle. Two of the factors on which we relied—that the tax was on income rather than property, and that the multiple taxation was not “inevitable”—carry no more force today than they did 11 Terms ago, see 463 U. S., at 198–201 (Powell, J., dissenting), but they are present here as well.

We also relied on a third ground to distinguish the tax upheld in *Container Corp.* from the tax invalidated in *Japan Line*: “[T]he tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to ‘domestically owned instrumentalities engaged in foreign commerce,’ and . . . this case falls clearly within that reservation.” 463 U. S., at 188–189, quoting *Japan Line, supra*, at 444, n. 7 (citation omitted). In a footnote, we continued: “We have no need to address in this opinion the constitutionality of [the California tax] with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.” 463 U. S., at 189, n. 26; see also *id.*, at 195, and n. 32. As the Court recognizes, *ante*, at 317, and n. 15, Barclays’ challenge to the California tax therefore presents the question we ex-

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pressly left open in *Container Corp.*: does it make a constitutional difference that the multiple taxation resulting from California's use of worldwide combined reporting falls on a foreign corporation rather than a domestic one? In my view, the answer is yes.

*Japan Line* teaches that where the instrumentality of commerce—and analogously, the corporate domicile—is foreign, the multiple taxation resulting from a state taxing scheme may violate the Commerce Clause even though the same tax would be constitutional as applied to a domestic corporation. 441 U. S., at 447–448. When worldwide combined reporting is applied to American corporate groups with foreign affiliates, as in *Container Corp.*, income attributable to those foreign companies will be taxed by California, even though they are also subject to tax in foreign countries. But in such cases the incidence of the tax falls on the domestic parent corporation—a corporation subject to full taxation in the United States notwithstanding the source of its income. When the California tax is applied to a foreign corporate group with both domestic and foreign affiliates, some of the income of the foreign companies will also be taxed by California. The incidence of the tax in such cases falls on a *foreign* corporation, even though the United States (and its subnational governments) is entitled to tax only the income earned domestically.

In my view, the States are prohibited (absent express congressional authorization) by the Foreign Commerce Clause from adopting a system of taxation that, because it does not conform to international practice, results in multiple taxation of foreign corporations. It may be that such a rule “leave[s] California free to discriminate against a Delaware corporation in favor of an overseas corporation,” *Container Corp.*, 463 U. S., at 203 (Powell, J., dissenting), but the reason for this differential treatment is obvious. Domestic taxpayers have access to the political process, at both the state and national levels, that foreign taxpayers simply do not enjoy.



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If California's tax results in intolerable double taxation of domestic corporations, those companies can seek redress through the normal channels. Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U. S. 429, 444, n. 18 (1978). It is all too easy, however, for the state legislature to fill the State's coffers at the expense of outsiders.

Most of the United States' trading partners have objected to California's use of worldwide combined reporting. See Démarche from Danish Embassy, on behalf of Governments of European Community (Mar. 26, 1993) ("The views of the EC Member States on worldwide unitary taxation are well known to the United States Government. All Member States have expressed their strong opposition to [the California] tax in a number of diplomatic communiques to the United States Government from 1980 to the present date"); Démarche from Belgian Embassy, on behalf of Governments of Member States of European Community and of Australia, Austria, Canada, Finland, Japan, Norway, Sweden, and Switzerland (Sept. 23, 1993). At least one country has already enacted retaliatory legislation. See Brief for Government of United Kingdom as *Amicus Curiae* 19–23. Moreover, the possibility of multiple taxation undoubtedly deters foreign investment in this country. See Brief for Member States of European Communities et al. as *Amici Curiae* 14–16. These adverse consequences, which affect the Nation as a whole, result solely from California's refusal to conform its taxing practices to the internationally accepted standard.

Unlike the Court, see *ante*, at 319, I would not dismiss these difficulties solely by relying on our observation in *Container Corp.* that "it would be perverse, simply for the sake of avoiding double taxation, to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation." 463 U. S., at 193. In addition to being factually incorrect, see *id.*, at 199, n. 1 (Powell, J.,

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dissenting), our discussion of alternatives in *Container Corp.* proceeded from the well-established proposition that States need not conform their taxing practices to those of their neighbors, at least so far as domestic commerce is concerned. See, e. g., *Moorman Mfg. Co. v. Bair*, 437 U. S. 267, 277–281 (1978). Multiple taxation of domestic companies is avoided, to the extent necessary, by the fair apportionment requirement. See *Container Corp.*, *supra*, at 185; *General Motors Corp. v. Washington*, 377 U. S. 436, 440 (1964).

But in *Japan Line* we squarely rejected the argument that the same principle applies to taxes imposed on foreign-owned instrumentalities:

“[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. . . . Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though ‘fairly apportioned’ to reflect an instrumentality’s presence within the State, may subject foreign commerce to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.” 441 U. S., at 447–448 (footnote and internal quotation marks omitted).

In my view, the risk of multiple taxation created by California’s use of worldwide combined reporting—a risk that has materialized with respect to Barclays—is sufficient to render the California tax constitutionally infirm. I therefore respectfully dissent from the Court’s conclusion to the contrary.

## Syllabus

REED *v.* FARLEY, SUPERINTENDENT, INDIANA  
STATE PRISON, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

No. 93-5418. Argued March 28, 1994—Decided June 20, 1994

The Interstate Agreement on Detainers Act (IAD), a compact among 48 States, the District of Columbia, and the Federal Government, provides that the trial of a prisoner transferred from one participating jurisdiction to another shall commence within 120 days of the prisoner's arrival in the receiving State, Article IV(c), and directs dismissal with prejudice when trial does not occur within the time prescribed, Article V(c). Petitioner Reed was transferred in April 1983 from a federal prison in Indiana to state custody pursuant to an IAD detainer lodged by Indiana officials. Trial on the state charges was originally set for a date 19 days beyond the 120-day IAD period and was subsequently postponed for an additional 35 days. Although Reed's many and wide-ranging pretrial motions contained a few general references to the IAD time limit, he did not specifically object to his trial date until four days after the 120-day period expired. The trial court denied Reed's petition for discharge on the grounds that the judge had previously been unaware of the 120-day limitation and that Reed had not earlier objected to the trial date or requested a speedier trial. Reed then successfully moved for a continuance to enable him to prepare his defense. After his trial and conviction in October 1983, Reed unsuccessfully pursued an appeal and sought postconviction relief in Indiana's courts. He then petitioned for a federal writ of habeas corpus under 28 U. S. C. § 2254. The District Court denied relief, and the Court of Appeals affirmed.

*Held:* The judgment is affirmed.

984 F. 2d 209, affirmed.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, III, and all but the final paragraph of Part IV, concluding that a state court's failure to observe IAD Article IV(c)'s 120-day rule is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement. Because Reed failed to make the requisite showing of prejudice, he cannot tenably maintain that his Sixth Amendment speedy trial right was violated. See *Barker v. Wingo*, 407 U. S. 514, 530. Reed's petition is properly considered under the "fundamental defect" standard set forth in *Hill v. United*

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*States*, 368 U. S. 424, 428. Reed urges that the *Hill* standard applies only to *federal* prisoners under §2255, not to *state* prisoners under §2254. This Court's decisions have recognized, however, that, at least where only statutory violations are at issue, §§2254 and 2255 mirror each other in operative effect, see *Davis v. United States*, 417 U. S. 333, 344; *Hill* controls collateral review—under both §§2254 and 2255—when a federal statute, but not the Constitution, is the basis for the postconviction attack. See, e. g., *Stone v. Powell*, 428 U. S. 465, 477, n. 10. There is no reason to afford habeas review to a state prisoner like Reed, who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated. Pp. 341–346, 353–355.

JUSTICE GINSBURG, joined by THE CHIEF JUSTICE and JUSTICE O'CONNOR, concluded in Part II and the final paragraph of Part IV that habeas review is not available to check the trial court's failure to comply with Article IV(c). That failure does not qualify as a "fundamental defect which inherently results in a complete miscarriage of justice, [o]r an omission inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U. S., at 428. When a defendant obscures Article IV(c)'s time prescription and avoids clear objection until the clock has run, an unwitting judicial slip of the kind involved here ranks with similar nonconstitutional lapses that are not cognizable in a postconviction proceeding. See, e. g., *id.*, at 429. Because Reed did not alert the trial judge to the 120-day period until four days after the period expired, the Court has no cause to consider whether an omission of the kind contemplated in *Hill* would occur if a state court, presented with a timely request to set a trial date within the IAD's 120-day period, nonetheless refused to comply with Article IV(c). The reservation of that question, together with the IAD's status as both federal law and the law of Indiana, mutes Reed's concern that state courts might be hostile to the federal law here at stake. Pp. 347–352, 355.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that the "fundamental defect" test of *Hill v. United States*, 368 U. S. 424, 428, is the appropriate standard for evaluating alleged statutory violations under both §§2254 and 2255, but concluded that the standard's application is broader than the principal opinion suggests. The class of nonconstitutional procedural rights that are inherently necessary to avoid "a complete miscarriage of justice," or numbered among "the rudimentary demands of fair procedure," is no doubt a small one, if it is not a null set. If there was ever a technical rule, it is the 120-day limit set forth in Article IV(c) of the Interstate Agreement on Detainers. Declining to state the obvious produces confusion: Violation of that technicality, whether intentional or unintentional, is no basis for federal habeas relief. Pp. 355–358.

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GINSBURG, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and all but the final paragraph of Part IV, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II and the final paragraph of Part IV, in which REHNQUIST, C. J., and O'CONNOR, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 355. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, KENNEDY, and SOUTER, JJ., joined, *post*, p. 359.

*Jerold S. Solovy* argued the cause for petitioner. With him on the briefs were *Barry Levenstam*, *Ellen R. Kordik*, and *Douglas A. Graham*.

*Arend J. Abel*, Deputy Attorney General of Indiana, argued the cause for respondents. With him on the brief were *Pamela Carter*, Attorney General, and *Matthew R. Gutwein*, *Wayne E. Uhl*, and *Suzann Weber Lupton*, Deputy Attorneys General.\*

JUSTICE GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and all but the final paragraph of Part IV, and an opinion with respect to Part II and the final paragraph of Part IV, in which THE CHIEF JUSTICE and JUSTICE O'CONNOR join.

The Interstate Agreement on Detainers Act (IAD), 18 U. S. C. App. §2, is a compact among 48 States, the District of Columbia, and the Federal Government. It enables a participating State to gain custody of a prisoner incarcerated in another jurisdiction, in order to try him on criminal charges. Article IV(c) of the IAD provides that trial of a transferred prisoner “shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, . . . the court

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\**Solicitor General Days*, *Assistant Attorney General Harris*, *Deputy Solicitor General Bryson*, and *Richard H. Seamon* filed a brief for the United States as *amicus curiae* urging affirmance.

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having jurisdiction of the matter may grant any necessary or reasonable continuance.” IAD Article V(c) states that when trial does not occur within the time prescribed, the charges shall be dismissed with prejudice.

The petitioner in this case, Orrin Scott Reed, was transferred in April 1983 from a federal prison in Indiana to state custody pursuant to an IAD request made by Indiana officials. Reed was tried in October of that year, following postponements made and explained in his presence in open court. Reed’s petition raises the question whether a state prisoner, asserting a violation of IAD Article IV(c)’s 120-day limitation, may enforce that speedy trial prescription in a federal habeas corpus action under 28 U. S. C. § 2254.

We hold that a state court’s failure to observe the 120-day rule of IAD Article IV(c) is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement. Accordingly, we affirm the judgment of the Court of Appeals.

## I

In December 1982, while petitioner Reed was serving time in a Terre Haute, Indiana, federal prison, the State of Indiana charged him with theft and habitual offender status. Indiana authorities lodged a detainer<sup>1</sup> against Reed and, on April 27, 1983, took custody of him. The 120-day rule of IAD Article IV(c) thus instructed that, absent any continuance, Reed’s trial was to commence on or before August 25, 1983.

At two pretrial conferences, one on June 27, the other on August 1, the trial judge discussed with Reed (who chose to represent himself) and the prosecutor the number of days needed for the trial and the opening date. At the June 27

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<sup>1</sup>A detainer is “a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking . . . either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.” *Carchman v. Nash*, 473 U. S. 716, 719 (1985).

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conference, the court set a July 18 deadline for submission of the many threshold motions Reed said he wished to file, and September 13 as the trial date. That trial date exceeded IAD Article IV(c)'s 120-day limit, but neither the prosecutor nor Reed called the IAD limit to the attention of the judge, and neither asked for a different trial date. Reed did indicate a preference for trial at a time when he would be out of jail on bond (or on his own recognizance); he informed the court that he would be released from federal custody two weeks before September 13, unless federal authorities revoked his "good days" credits, in which case he would be paroled on September 14. App. 39; see *id.*, at 76.

At the August 1 pretrial conference, Reed noted his imminent release from federal custody and asked the court to set bond. *Id.*, at 76–79. In response, the court set bond at \$25,000. Also, because of a calendar conflict, the court reset the trial date to September 19. *Id.*, at 79–81.<sup>2</sup> Reed inquired about witness subpoenas and requested books on procedure, but again, he said nothing at the conference to alert the judge to Article IV(c)'s 120-day limit, nor did he express any other objection to the September 19 trial date.

Interspersed in Reed's many written and oral pretrial motions are references to IAD provisions other than Article IV(c). See *id.*, at 28–31, 44 (alleging illegality of transfer from federal to state custody without a pretransfer hearing); *id.*, at 46 (asserting failure to provide hygienic care in violation of IAD Article V). Reed did refer to the IAD prescription on trial commencement in three of the written motions he filed during the 120-day period; indeed, one of these motions was filed on the very day of the August 1 pretrial conference.<sup>3</sup> In none of the three motions, however, did Reed

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<sup>2</sup> Reed posted bond by corporate surety on September 28 and was thereupon released from pretrial incarceration. See App. 148.

<sup>3</sup> See Petition for Relief of Violations (filed July 25, 1983), *id.*, at 56 (requesting that "trial be held within the legal guidelines of the [IAD]" and asserting that the State was "forcing [him] to be tried beyond the limits

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mention Article IV(c) or the September 13 trial date previously set. In contrast, on August 29, four days after the 120-day period expired, Reed presented a clear statement and citation. In a “Petition for Discharge,” he alleged that Indiana had failed to try him within 120 days of his transfer to state custody, and therefore had violated Article IV(c);<sup>4</sup> consequently, he urged, the IAD mandated his immediate release.<sup>5</sup> The trial judge denied the petition, explaining:

“Today is the first day I was aware that there was a 120 day limitation on the Detainer Act. The Court made its setting and while there has been a request for moving the trial forward, there has not been any speedy trial request filed, nor has there been anything in the nature of an objection to the trial setting, but only an urging that it be done within the guidelines that have been set out.” *Id.*, at 113–114.

The morning trial was to commence, September 19, Reed filed a motion for continuance, saying he needed additional time for trial preparation. *Id.*, at 128. A newspaper article published two days earlier had listed the names of persons

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as set forth in the [IAD]”); Petition for Revision of Pre-trial Procedure and Relief of Violations (filed Aug. 1, 1983), *id.*, at 88 (seeking dismissal of charges, referring, *inter alia*, to “the limited time left for trial within the laws”); Petition for Subpoena for Depositions upon Oral Examination, and for Production of Documentary Evidence (filed Aug. 11, 1983), *id.*, at 91 (requesting action “as soon as possible due to approaching trial date and Detainer Act time limits”).

<sup>4</sup>*Id.*, at 94. Specifically, Reed wrote: “That petitioner is being detained contrary to Indiana law and procedure: 35–33–10–4, Article 4(c) . . . trial shall be commenced within one hundred twenty (120) days of arrival of the prisoner in the receiving state . . . .”

<sup>5</sup>The prosecutor, in response, pointed out that Article IV(c) permits “any necessary or reasonable continuance,” and that Reed had not objected at the time the trial court set the date. *Id.*, at 113. He also expressed confusion about the effect of the 120-day rule and its relationship to the 180-day time limit prescribed by a different IAD provision. *Id.*, at 114; see n. 6, *infra*.



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called for jury duty and the 1954 to 1980 time frame of Reed's alleged prior felony convictions. Concerned that the article might jeopardize the fairness of the trial, the judge offered Reed three options: (1) start the trial on schedule; (2) postpone it for one week; or (3) continue it to a late October date. Reed chose the third option, *id.*, at 134, 142, and the trial began on October 18; the jury convicted Reed of theft, and found him a habitual offender. He received a sentence of 4 years in prison on the theft conviction, and 30 years on the habitual offender conviction, the terms to run consecutively.

The Indiana Supreme Court affirmed the convictions. *Reed v. State*, 491 N. E. 2d 182 (1986). Concerning Reed's objection that the trial commenced after the 120-day period specified in IAD Article IV(c), the Indiana Supreme Court stressed the timing of Reed's pleas in court: Reed had vigorously urged at the August 1 pretrial conference other alleged IAD violations (particularly, his asserted right to a hearing in advance of the federal transfer to state custody), but he did not then object to the trial date. *Id.*, at 184–185; see App. 67–74. “The relevant times when [Reed] should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset,” the Indiana Supreme Court concluded. 491 N. E. 2d, at 185.

Reed unsuccessfully sought postconviction relief in the Indiana courts, and then petitioned under 28 U. S. C. § 2254 for a federal writ of habeas corpus. The District Court denied the petition. Examining the record, that court concluded that “a significant amount of the delay of trial is attributable to the many motions filed . . . by [Reed] or filed on [Reed's] behalf”; delay chargeable to Reed, the court held, was excludable from the 120-day period. *Reed v. Clark*, Civ. No. S 90–226 (ND Ind., Sept. 21, 1990), App. 195–196.

The Court of Appeals for the Seventh Circuit affirmed. *Reed v. Clark*, 984 F. 2d 209 (1993). Preliminarily, the Court of Appeals recognized that the IAD, although state law, is also a “law of the United States” within the meaning of

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§ 2254(a). *Id.*, at 210. Nonetheless, that court held collateral relief unavailable because Reed's IAD speedy trial arguments and remedial contentions had been considered and rejected by the Indiana courts. *Stone v. Powell*, 428 U. S. 465 (1976), the Court of Appeals concluded, "establishes the proper framework for evaluating claims under the IAD." 984 F. 2d, at 213. In *Stone*, this Court held that the exclusionary rule, devised to promote police respect for the Fourth Amendment rights of suspects, should not be applied on collateral review unless the state court failed to consider the defendant's arguments. We granted certiorari, 510 U. S. 963 (1993), to resolve a conflict among the Courts of Appeals on the availability of habeas review of IAD speedy trial claims.<sup>6</sup>

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<sup>6</sup>The IAD's other speedy trial provision, Article III(a), requires that a prisoner against whom a detainer has been lodged be tried within 180 days of the prosecuting State's receipt of the prisoner's notice requesting speedy disposition of the charges. *Fex v. Michigan*, 507 U. S. 43 (1993).

The Seventh Circuit's rationale is one of several approaches taken by Courts of Appeals addressing the availability of habeas review for violations of Articles IV(c) and III(a). Some courts have denied relief without regard to whether the petitioner alerted the trial court to the IAD's speedy trial provisions. In this category, some decisions state that IAD speedy trial claims are never cognizable under § 2254, because IAD speedy trial violations do not constitute a "fundamental defect which inherently results in a complete miscarriage of justice," under *Hill v. United States*, 368 U. S. 424, 428 (1962). See, e. g., *Reilly v. Warden, FCI Petersburg*, 947 F. 2d 43, 44–45 (CA2 1991) (*per curiam*); *Fasano v. Hall*, 615 F. 2d 555, 558–559 (CA1 1980). Other courts applying the *Hill* standard have said § 2254 is not available for failure to meet IAD speedy trial specifications unless the petitioner shows actual prejudice. See, e. g., *Seymore v. Alabama*, 846 F. 2d 1355, 1359–1360 (CA11 1988); *Kerr v. Finkbeiner*, 757 F. 2d 604, 607 (CA4 1985). Still other courts have reached the merits of IAD speedy trial contentions raised in habeas actions under § 2254. See, e. g., *Birdwell v. Skeen*, 983 F. 2d 1332 (CA5 1993) (affirming District Court's grant of the writ, where state court failed to comply with IAD Article III(a) in spite of petitioner's repeated request for compliance with the 180-day rule); *Cody v. Morris*, 623 F. 2d 101, 103 (CA9 1980) (remanding to District Court for resolution of factual dispute over whether habeas

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## II

A state prisoner may obtain federal habeas corpus relief “only on the ground that he is in custody in violation of the Constitution or *laws or treaties of the United States*.” 28 U. S. C. § 2254(a) (emphasis added). Respondent Indiana initially argues that the IAD is a voluntary interstate agreement, not a “la[w] . . . of the United States” within the meaning of § 2254(a). Our precedent, however, has settled that issue: While the IAD is indeed state law, it is a law of the United States as well. See *Carchman v. Nash*, 473 U. S. 716, 719 (1985) (§ 2254 case, holding that the IAD “is a congressionally sanctioned interstate compact within the Compact Clause, U. S. Const., Art. I, § 10, cl. 3, and thus is a federal law subject to federal construction”); *Cuyler v. Adams*, 449 U. S. 433, 438–442 (1981) (“congressional consent transforms an interstate compact . . . into a law of the United States”).

The Court of Appeals recognized that the IAD is both a law of Indiana and a federal statute. 984 F. 2d, at 210. Adopting *Stone v. Powell*, 428 U. S. 465 (1976), as its framework, however, that court held relief under § 2254 unavailable to Reed. 984 F. 2d, at 213. *Stone* holds that a federal court may not, under § 2254, consider a claim that evidence from an unconstitutional search was introduced at a state prisoner’s trial if the prisoner had “an opportunity for full and fair litigation of [the] claim in the state courts.” 428 U. S., at 469. Our opinion in *Stone* concentrated on “the nature and purpose of the Fourth Amendment exclusionary rule.” *Id.*, at 481. The Court emphasized that its decision confined the exclusionary rule, not the scope of § 2254 generally:

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petitioner had been tried within Article IV(c)’s 120-day limit); *United States ex rel. Esola v. Groomes*, 520 F. 2d 830, 839 (CA3 1975) (remanding to District Court for determination on whether state trial court had granted continuance for good cause pursuant to Article IV(c)).

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“Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding.” *Id.*, at 495, n. 37 (emphasis in original).

We have “repeatedly declined to extend the rule in *Stone* beyond its original bounds.” *Withrow v. Williams*, 507 U. S. 680, 687 (1993) (holding that *Stone* does not apply to a state prisoner’s claim that his conviction rests on statements obtained in violation of the safeguards set out in *Miranda v. Arizona*, 384 U. S. 436 (1966)).<sup>7</sup> Because precedent already in place suffices to resolve Reed’s case, we do not adopt the Seventh Circuit’s *Stone*-based rationale.

We have stated that habeas review is available to check violations of federal laws when the error qualifies as “a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.” *Hill v. United States*, 368 U. S. 424, 428 (1962); accord, *United States v. Timmreck*, 441 U. S. 780, 783 (1979); *Davis v. United States*, 417 U. S. 333, 346 (1974). The IAD’s purpose—providing a nationally uniform means of transferring prisoners between jurisdictions—can be effectuated only by nationally uniform interpretation. See 984 F. 2d, at 214 (Ripple, J., dissenting from denial of rehearing in banc). Therefore, the argument that

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<sup>7</sup> See also *Kimmelman v. Morrison*, 477 U. S. 365, 375–377 (1986) (*Stone* does not bar habeas review of claim of ineffective assistance of counsel based on counsel’s failure to file a timely suppression motion); *Rose v. Mitchell*, 443 U. S. 545, 559–564 (1979) (refusing to extend *Stone* to equal protection claim of racial discrimination in selection of state grand jury foreman); *Jackson v. Virginia*, 443 U. S. 307, 321–324 (1979) (*Stone* does not bar habeas review of due process claim of insufficiency of evidence supporting conviction).

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the compact would be undermined if a State's courts resisted steadfast enforcement, with total insulation from § 2254 review, is not without force. Cf. *Stone v. Powell*, 428 U. S., at 526 (Brennan, J., dissenting) (institutional constraints preclude Supreme Court from overseeing adequately whether state courts have properly applied federal law). This case, however, gives us no cause to consider whether we would confront an omission of the kind contemplated in *Hill*, *Timmreck*, or *Davis*, if a state court, presented with a timely request to set a trial date within the IAD's 120-day period, nonetheless refused to comply with Article IV(c).

When a defendant obscures Article IV(c)'s time prescription and avoids clear objection until the clock has run, cause for collateral review scarcely exists. An unwitting judicial slip of the kind involved here ranks with the nonconstitutional lapses we have held not cognizable in a postconviction proceeding. In *Hill*, for example, a federal prisoner sought collateral relief, under 28 U. S. C. § 2255,<sup>8</sup> based on the trial court's failure at sentencing to afford him an opportunity to make a statement and present information in mitigation of punishment, as required by Rule 32(a) of the Federal Rules of Criminal Procedure. The petitioner, however, had not sought to assert his Rule 32(a) rights at the time of sentencing, a point we stressed:

“[W]e are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak.” 368 U. S., at 429.

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<sup>8</sup>The text of § 2255, in relevant part, is set out at n. 12, *infra*.

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“[W]hen all that is shown is a failure to comply with the formal requirements” of Rule 32(a), we held, “collateral relief is not available.” *Ibid.* But we left open the question whether “[collateral] relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances.” *Ibid.*

*Hill* controlled our decision in *United States v. Timmreck*, 441 U. S. 780 (1979), where a federal prisoner sought collateral review, under §2255, to set aside a conviction based on a guilty plea. The complainant in *Timmreck* alleged that the judge who accepted his plea failed to inform him, in violation of Rule 11 of the Federal Rules of Criminal Procedure, that he faced a mandatory postincarceration special parole term. We rejected the collateral attack, observing that the violation of Rule 11 was technical, and did not “resul[t] in a ‘complete miscarriage of justice’ or in a proceeding ‘inconsistent with the rudimentary demands of fair procedure.’” *Id.*, at 784, quoting *Hill*, 368 U. S., at 428. “As in *Hill*,” we found it unnecessary to consider whether “[postconviction] relief would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances.” 441 U. S., at 784–785.

Reed’s case similarly lacks “aggravating circumstances” rendering “‘the need for the remedy afforded by the writ of *habeas corpus* . . . apparent.’” *Hill*, 368 U. S., at 428, quoting *Bowen v. Johnston*, 306 U. S. 19, 27 (1939). Reed had two clear chances to alert the trial judge in open court if he indeed wanted his trial to start on or before August 25, 1993. He let both opportunities pass by. At the pretrial hearings at which the trial date was set and rescheduled, on June 27 and August 1, Reed not only failed to mention the 120-day limit; he indicated a preference for holding the trial after his release from federal imprisonment, which was due to occur after the 120 days expired. See *supra*, at 342. Then, on the 124th day, when it was no longer possible to meet Article

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IV(c)'s deadline, Reed produced his meticulously precise "Petition for Discharge." See *supra*, at 344, and n. 4.<sup>9</sup>

As the Court of Appeals observed, had Reed objected to the trial date on June 27 or August 1 "instead of burying his demand in a flood of other documents, the [trial] court could have complied with the IAD's requirements." 984 F. 2d, at 209–210. The Court of Appeals further elaborated:

"During the pretrial conference of August 1, 1983, Reed presented several arguments based on the IAD, including claims that the federal government should have held a hearing before turning him over to the state and that his treatment in Indiana fell short of the state's obligations under Art. V(d) and (h). Reed did not mention the fact that the date set for trial would fall outside the 120 days allowed by Art. IV(c). Courts often require litigants to flag important issues orally rather than bury vital (and easily addressed) problems in reams of paper, as Reed did. E. g., Fed. R. Crim. P. 30 (requiring a distinct objection to jury instructions); cf. Fed. R. Crim. P. 12(b) (a district judge may require motions to be made orally). It would not have been difficult for the judge to advance the date of the trial or make a finding on the record of good cause, either of which would have satisfied Art. IV(c). Because the subject never came up, however, the trial judge overlooked the problem." *Id.*, at 213.

Reed regards the Court of Appeals' description of his litigation conduct, even if true, as irrelevant. He maintains

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<sup>9</sup> In contrast, the defendant in *United States v. Ford*, 550 F. 2d 732 (CA2 1977), aff'd *sub nom. United States v. Mauro*, 436 U. S. 340 (1978), made "[timely and] vigorous protests," to several Government-requested continuances, yet was tried 13 months after Article IV(c)'s 120-day period expired. 550 F. 2d, at 735. Reed's trial occurred within two months of the period's expiration. See *infra*, at 353.

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that the IAD dictates the result we must reach, for Article V(c) directs dismissal with prejudice when Article IV(c)'s time limit has passed.<sup>10</sup> Article V(c) instructs only that “the appropriate court of the jurisdiction where the indictment . . . has been pending”—*i. e.*, the original trial court—shall dismiss the charges if trial does not commence within the time Article IV(c) prescribes. Article V(c) does not address the discrete question whether relief for violations of the IAD's speedy trial provisions is available on collateral review. That matter is governed instead by the principles and precedent generally controlling availability of the great writ. See *id.*, at 212. Referring to those guides, and particularly the *Hill* and *Timmreck* decisions, we conclude that a state court's failure to observe the 120-day rule of IAD Article IV(c) is not cognizable under §2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement.

## III

Reed argues that he is entitled to habeas relief because the IAD's speedy trial provision “effectuates a constitutional right,” the Sixth Amendment guarantee of a speedy trial. Brief for Petitioner 26. Accordingly, he maintains, the alleged IAD violation should be treated as a constitutional violation or as a “fundamental defect” satisfying the *Hill* standard, not as a mere technical error. Reed's argument is insubstantial for, as he concedes, his constitutional right to a speedy trial was in no way violated. See Tr. of Oral Arg. 7.

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<sup>10</sup> Article V(c) provides in relevant part:

“[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.”



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Reed's trial commenced 54 days after the 120-day period expired. He does not suggest that his ability to present a defense was prejudiced by the delay. Nor could he plausibly make such a claim.<sup>11</sup> Indeed, asserting a need for more time to prepare for a trial that would be "fair and meaningful," App. 128, Reed himself *requested* a delay beyond the scheduled September 19 opening. A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here. See *Barker v. Wingo*, 407 U. S. 514, 530 (1972) (four factors figure in the determination of Sixth Amendment speedy trial claims; one of the four is "prejudice to the defendant").

## IV

More strenuously, Reed argues that *Hill* and similar decisions establish a standard for *federal* prisoners seeking relief under 28 U. S. C. § 2255,<sup>12</sup> not for *state* prisoners seeking relief under § 2254. But it is scarcely doubted that, at least where mere statutory violations are at issue, "§ 2255 was intended to mirror § 2254 in operative effect." *Davis v. United States*, 417 U. S. 333, 344 (1974). Far from suggesting that the *Hill* standard is inapplicable to § 2254 cases, our decisions assume that *Hill* controls collateral review—under both §§ 2254 and 2255—when a federal statute, but not the

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<sup>11</sup> As the Court of Appeals noted:

"Had Indiana put Reed to trial within 120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983." 984 F. 2d, at 212.

<sup>12</sup> Section 2255 provides in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

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Constitution, is the basis for the postconviction attack. For example, in *Stone v. Powell*, a §2254 case, we recalled “the established rule with respect to nonconstitutional claims” as follows: “[N]onconstitutional claims . . . can be raised on collateral review only if the alleged error constituted a “fundamental defect which inherently results in a complete miscarriage of justice.” ’” 428 U. S., at 477, n. 10, quoting *Davis*, 417 U. S., at 346, quoting *Hill*, 368 U. S., at 428.<sup>13</sup>

Reed nevertheless suggests that we invoked the fundamental defect standard in *Hill* and *Timmreck* for this sole reason: “So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal.” *Sunal v. Large*, 332 U. S. 174, 178 (1947) (emphasis added). The same “general rule,” however, applies to §2254. Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes “cause” for the waiver and shows “actual prejudice resulting from the alleged . . . violation.” *Wainwright v. Sykes*, 433 U. S. 72, 84 (1977); *id.*, at 87.

We see no reason to afford habeas review to a state prisoner like Reed, who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated. See *Francis v. Henderson*, 425 U. S. 536, 542 (1976) (“Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no

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<sup>13</sup> See also *United States v. Addonizio*, 442 U. S. 178 (1979), in which we reiterated that the *Hill* standard governs habeas review of all claims of federal statutory error, citing *Stone*:

“[U]nless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. *Stone v. Powell*, 428 U. S. 465, 477, n. 10. The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted ‘a fundamental defect which inherently results in a complete miscarriage of justice.’” 442 U. S., at 185, quoting *Hill*, 368 U. S., at 428.

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reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.’”) (quoting *Kaufman v. United States*, 394 U. S. 217, 228 (1969)); see also *United States v. Frady*, 456 U. S. 152, 167–168 (1982) (collateral review of procedurally defaulted claims is subject to same “cause and actual prejudice” standard, whether the claim is brought by a state prisoner under § 2254 or a federal prisoner under § 2255).

Reed contends that the scope of review should be broader under § 2254 than under § 2255, because state prisoners, unlike their federal counterparts, have “had no meaningful opportunity to have a federal court consider any federal claim.” Brief for Petitioner 34. But concern that state courts might be hostile to the federal law here at stake is muted by two considerations. First, we have reserved the question whether federal habeas review is available to check violations of the IAD’s speedy trial prescriptions when the state court disregards timely pleas for their application. See *supra*, at 349. Second, the IAD is both federal law and the law of Indiana. Ind. Code § 35–33–10–4 (1993). As the Court of Appeals noted: “We have no more reason to suppose that the Supreme Court of Indiana seeks to undermine the IAD than we have to suppose that it seeks to undermine any other law of Indiana.” 984 F. 2d, at 211.

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For the reasons stated, the judgment of the Court of Appeals is

*Affirmed.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I join all the Court’s opinion except Part II, and the last paragraph of Part IV (which incorporates some of the analysis of Part II). I thus agree that the “fundamental defect” test of *Hill v. United States*, 368 U. S. 424, 428 (1962), is the

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appropriate standard for evaluating alleged statutory violations under both §§ 2254 and 2255, see *ante*, at 352–354, but I disagree with what seems to me (in Part II) too parsimonious an application of that standard.

## I

This Court has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction. See *Withrow v. Williams*, 507 U. S. 680, 715–721 (1993) (SCALIA, J., concurring in part and dissenting in part). One class of those limitations consists of substantive restrictions upon the type of claim that will be entertained. *Hill*, for example, holds that the claim of a federal statutory violation will not be reviewed unless it alleges “a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.” 368 U. S., at 428. Most statutory violations, at least when they do not occur “in the context of other aggravating circumstances,” are simply not important enough to invoke the extraordinary habeas jurisdiction. *Id.*, at 429. See also *United States v. Timmreck*, 441 U. S. 780, 783–785 (1979).

Although JUSTICE GINSBURG concludes that an unobjected-to violation of the Interstate Agreement on Detainers Act (IAD), 18 U. S. C. App. § 2, is not “‘a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure,’” she declines to decide whether that judgment would be altered “if a state court, presented with a timely request to set a trial date within the IAD’s 120-day period, nonetheless refused to comply with Article IV(c),” *ante*, at 348, 349. To avoid the latter question, she conducts an analysis of how petitioner waived his IAD rights. See *ante*, at 350–351. The issue thus avoided is not a constitutional one, and the avoiding of it (when the answer is so obvious) may invite a misunderstanding of the *Hill* test.

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The class of procedural rights that are *not* guaranteed by the Constitution (which includes the Due Process Clauses), but that nonetheless *are* inherently necessary to avoid “a complete miscarriage of justice,” or numbered among “the rudimentary demands of fair procedure,” is no doubt a small one, if it is indeed not a null set. The guarantee of trial within 120 days of interjurisdictional transfer unless good cause is shown—a provision with no application to prisoners involved with only a single jurisdiction or incarcerated in one of the two States that do not participate in the voluntary IAD compact—simply cannot be among that select class of statutory rights.

As for *Hill* and *Timmreck*’s reservation of the question whether habeas would be available “in the context of other aggravating circumstances,” that seems to me clearly a reference to circumstances *that cause additional prejudice to the defendant*, thereby elevating the error to a fundamental defect or a denial of rudimentary procedural requirements—not a reference to circumstances that make the trial judge’s behavior more willful or egregious. I thus think it wrong to suggest that if only petitioner had not waived his IAD speedy trial rights by failing to assert them in a timely fashion, “aggravating circumstances” might exist. See *ante*, at 349, 350–351. That says, in effect, that “aggravating circumstances” which can entitle a mere statutory violation to habeas review may consist of the mere fact that the statutory violation *was not waived*. Surely that sucks the life out of *Hill*.<sup>\*</sup> Nor do I accept JUSTICE GINSBURG’s suggestion that an interest in uniform interpretation of the IAD might

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<sup>\*</sup>Many courts, including the Indiana Supreme Court in evaluating this petitioner’s claim, see *Reed v. State*, 491 N. E. 2d 182, 185 (Ind. 1986), have held that a prisoner’s waiver of the 120-day limit will prevent violation of the IAD, or will preclude the remedy of dismissal with prejudice. See, e. g., *United States v. Odom*, 674 F. 2d 228 (CA4 1982). Perhaps, therefore, JUSTICE GINSBURG’s effort to decide the jurisdictional issue on as narrow a ground as possible has caused her to decide the merits.

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counsel in favor of habeas review in a nonwaiver situation. See *ante*, at 348–349. I see no reason why this Court’s direct review of state and federal decisions will not suffice for that purpose, as it does in most other contexts. Cf. *Cuyler v. Adams*, 449 U. S. 433, 442 (1981). More importantly, however, federal habeas jurisdiction was not created with the intent, nor should we seek to give it the effect, of altering the fundamental disposition that *this Court*, and not individual federal district judges, has appellate jurisdiction, as to federal questions, over the supreme courts of the States.

If there was ever a technical rule, the IAD’s 120-day limit is one. I think we produce confusion by declining to state the obvious: that violation of that technicality, intentional or unintentional, neither produces nor is analogous to (1) lack of jurisdiction of the convicting court, (2) constitutional violation, or (3) miscarriage of justice or denial of rudimentary procedures. It is no basis for federal habeas relief.

## II

In addition to substantive limitations on the equitable exercise of habeas jurisdiction, the Court has imposed procedural restrictions. For example, a habeas claim cognizable under § 2255 (the correlative of § 2254 for federal prisoners), such as a constitutional claim, will not be heard if it was procedurally defaulted below, absent a showing of cause and actual prejudice. See *United States v. Frady*, 456 U. S. 152, 167–168 (1982). And claims will ordinarily not be entertained under § 2255 that have already been rejected on direct review. See *Kaufman v. United States*, 394 U. S. 217, 227, n. 8 (1969); see also *Withrow*, 507 U. S., at 720–721 (SCALIA, J., concurring in part and dissenting in part) (collecting cases showing that lower courts have uniformly followed the *Kaufman* dictum). Together, these two rules mean that “a prior opportunity for full and fair litigation is normally dispositive of a federal prisoner’s habeas claim.” 507 U. S., at 721.

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Although this procedural limitation has not been raised as a defense in the present case, I note my view that, at least where mere statutory violations are at issue, a prior opportunity for full and fair litigation precludes a state-prisoner petition no less than a federal-prisoner petition. As the Court today reaffirms, ““§ 2255 was intended to mirror § 2254 in operative effect.”” *Ante*, at 353, quoting *Davis v. United States*, 417 U. S. 333, 344 (1974). Cf. *Frady, supra*, at 166. Otherwise a prisoner, like petitioner, transferred from federal to state prison under the IAD would have three chances to raise his claim (state direct, state habeas, and § 2254) while a prisoner transferred from state to federal prison under the IAD would have only one. Since the present petitioner raised his IAD claim on direct appeal in the Indiana courts and on state habeas review, his federal habeas claim could have been rejected on the ground that the writ ordinarily will not be used to readjudicate fully litigated statutory claims.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE SOUTER join, dissenting.

The federal habeas corpus statute allows a state prisoner to challenge his conviction on the ground that he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U. S. C. § 2254(a). The Court acknowledges, as it must, that the Interstate Agreement on Detainers (IAD) is a “[a]w . . . of the United States” under this statute. See *Carchman v. Nash*, 473 U. S. 716, 719 (1985); *Cuyler v. Adams*, 449 U. S. 433, 438–442 (1981). In addition, respondents concede that a defendant tried in clear violation of the IAD’s 120-day limit would be held in custody in violation of a law of the United States. Tr. of Oral Arg. 37. Nevertheless, the Court appears to conclude that a violation of the IAD is simply not serious enough to warrant collateral relief, at least where the defendant fails to invoke

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his IAD rights according to the precise rules the Court announces for the first time today.

The Court purports to resolve this case by relying on “precedent already in place,” *ante*, at 348, referring to “principles and precedent generally controlling availability of the great writ,” *ante*, at 352. Our precedent, on its face, does not reach nearly so far, and its extension to this case is unwarranted under general habeas corpus principles. Most seriously, the Court disregards Congress’ unambiguous judgment about the severity of, and the necessary remedy for, a violation of the IAD time limits. I respectfully dissent.

## I

The Court purports to resolve this issue by relying on the *Hill-Timmreck* line of cases. See *Hill v. United States*, 368 U. S. 424 (1962); *Davis v. United States*, 417 U. S. 333 (1974); *United States v. Timmreck*, 441 U. S. 780 (1979); see also *Sunal v. Large*, 332 U. S. 174 (1947); *United States v. Frady*, 456 U. S. 152 (1982). Despite the professed narrowness of the Court’s ultimate holding, however, its decision reflects certain assumptions about the nature of habeas review of state court judgments that do not withstand close analysis. Each of the cases relied on by the majority—*Hill*, *Timmreck*, and *Davis*—concerned a *federal* prisoner’s request under 28 U. S. C. § 2255 for collateral relief from alleged defects in his federal trial. Before today, this Court never had applied those precedents to bar review of a § 2254 petition.<sup>1</sup> It does so now without a full discussion of, or appreciation for, the different policy concerns that should shape the exercise of federal courts’ discretion in § 2254 cases.

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<sup>1</sup>The majority notes, *ante*, at 354, that the Court cited *Hill* in *Stone v. Powell*, 428 U. S. 465, 477, n. 10 (1976), a § 2254 case. The decision in that case, however, rested not on *Hill*, but on considerations unique to the exclusionary rule.



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## A

While there are stray remarks in our opinions suggesting that this Court has treated §§ 2254 and 2255 as equivalents,<sup>2</sup> there are other indications to the contrary, see, e. g., *Withrow v. Williams*, 507 U. S. 680, 715 (1993) (SCALIA, J., concurring in part and dissenting in part). In any event, there are sound reasons to refrain from treating the two as identical. Primary among them is the importance under § 2254 of providing a federal forum for review of state prisoners' federal claims, not only in order to ensure the enforcement of federal rights, but also to promote uniformity in the state courts' interpretation and application of federal law.<sup>3</sup>

We recognized in *United States v. Frady*, 456 U. S., at 166, that the “federal prisoner . . . , unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums.” For the federal pris-

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<sup>2</sup>The Court relies, for instance, on the remark in *Davis* that “‘§ 2255 was intended to mirror § 2254 in operative effect.’” *Ante*, at 353, quoting *Davis v. United States*, 417 U. S. 333, 344 (1974). That statement, however, did no more than parry the suggestion that federal prisoners, unlike state prisoners, were restricted to bringing claims “of constitutional dimension,” and not those grounded in statutes. *Ibid.* The *Davis* Court was addressing only the threshold statutory basis for relief—specifically whether relief was available to federal prisoners for violations of “laws” of the United States. It said nothing about the equitable considerations that might guide the Court’s exercise of its discretion to grant or deny relief. In other words, *Davis* concerned jurisdictional, not prudential, limits on habeas review. See *Withrow v. Williams*, 507 U. S. 680, 716 (1993) (SCALIA, J., concurring in part and dissenting in part) (the “sweeping” breadth of habeas jurisdiction is “tempered by the restraints that accompany the exercise of equitable discretion”).

<sup>3</sup>As a practical matter, this Court’s direct review of state court decisions cannot adequately ensure uniformity. See *id.*, at 721, n. (SCALIA, J., concurring in part and dissenting in part) (“Of course a federal forum is theoretically available in this Court, by writ of certiorari. Quite obviously, however, this mode of review cannot be generally applied due to practical limitations”) (citation omitted).

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oner claiming statutory violations, habeas courts serve less to guarantee uniformity of federal law or to satisfy a threshold need for a federal forum than to provide a backstop to catch and correct certain nonconstitutional errors that evaded the trial and appellate courts.<sup>4</sup> Thus, this Court has determined that “where the trial or appellate court has had a ‘say’ on a federal prisoner’s claim, it may be open to the § 2255 court to determine that . . . ‘the prisoner is entitled to no relief.’” *Kaufman v. United States*, 394 U. S. 217, 227, n. 8 (1969) (citation omitted). Under *Hill* and *Timmreck*, relief may be limited to the correction of “fundamental defect[s]” or “omission[s] inconsistent with the rudimentary demands of fair procedure.” *Hill*, 368 U. S., at 428. The *Hill* principle, in short, is that where the error is not egregious, the habeas court need not cover the ground already covered by other federal courts.

For the state prisoner, by contrast, a primary purpose of § 2254 is to provide a federal forum to review a state prisoner’s claimed violations of federal law, claims that were, of necessity, addressed to the state courts. See *Brown v. Allen*, 344 U. S. 443, 508 (1953) (opinion of Frankfurter, J.) (§ 2254 collateral review is necessary to permit a federal court to have the “last say” with respect to questions of federal law); *Vasquez v. Hillery*, 474 U. S. 254 (1986) (requiring exhaustion of federal claims in state courts). Thus, § 2254 motions anticipate that the federal court will undertake an independent review of the work of the state courts, even where the federal claim was fully and fairly litigated. *Wright v. West*, 505 U. S. 277 (1992) (O’CONNOR, J., concurring in judgment) (affirming that a state court’s determina-

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<sup>4</sup> In fact, § 2255 requires a prisoner to file his motion in the court that imposed his sentence as a further step in his criminal case, not as a separate civil action. Advisory Committee’s Note on Habeas Corpus Rule 1, 28 U. S. C., p. 416 (governing § 2255 proceedings).

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tion of federal law and of mixed questions of federal law and fact are entitled to *de novo* review by federal habeas court).<sup>5</sup> Even if we recognize valid reasons for limiting this review to claims of serious or substantial error, where no federal court previously has addressed the § 2254 petitioner's federal claims, there is less reason to sift these claims through so fine a screen as *Hill* and *Timmreck* provide.

Similarly, prudential justifications for *Hill*'s "fundamental error" standard may differ from state to federal proceedings. In a federal trial and appeal, virtually any procedural error, however minor, will violate a "law" of the United States. In this context, it is both impracticable and unnecessary to allow collateral review of all claims of error, particularly since the defendant has had the opportunity both to raise them in and to appeal them to a federal forum. It is hardly surprising, therefore, that the *Hill-Timmreck* screening device, which sorts the substantial errors from the mere technical violations, was developed in § 2255. A state trial, by contrast, implicates few federal laws outside the Constitution. On the extraordinary occasions when Congress does consider a federal law to be so important as to warrant its application in state proceedings, this alone counsels an approach other

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<sup>5</sup> JUSTICE SCALIA proposes to foreclose § 2254 review of federal nonconstitutional claims where the state prisoner was afforded a full and fair opportunity to litigate those claims in state court. This proposal fails for obvious reasons. To hold that full and fair litigation in state courts is a substitute for a federal forum would be, to borrow a phrase, to "suc[k] the life out of [§ 2254]." See *ante*, at 357 (concurring opinion). At the heart of § 2254 is federal court review of state court decisions on federal law. With one notable exception, see *Stone v. Powell*, 428 U. S. 465, 486–496 (1976), this Court uniformly has rejected a "full and fair opportunity to litigate" as a bar to § 2254 review. See *Withrow v. Williams*, *supra*; *Kimmel v. Morrison*, 477 U. S. 365 (1986); *Rose v. Mitchell*, 443 U. S. 545 (1979); *Jackson v. Virginia*, 443 U. S. 307 (1979); see also *Wright v. West*, 505 U. S. 277, 299 (1992) (O'CONNOR, J., concurring in judgment) (disputing that a "full and fair hearing in the state courts" required deferential review in habeas).

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than *Hill-Timmreck* to determine whether a violation of that law warrants federal court review and enforcement.<sup>6</sup>

The difference in the roles that federal statutes play in state and federal criminal proceedings points to another danger attendant to the uncritical application of the *Hill* standard in § 2254. *Hill* has been read to disfavor habeas review of federal statutory violations as a class. See, *e. g.*, *ante*, at 356 (concurring opinion) (reading *Hill* for the proposition that “[m]ost statutory violations . . . are simply not important enough to invoke the extraordinary habeas jurisdiction”). This distinction between statutory and constitutional violations, exaggerated even in the context of § 2255,<sup>7</sup> has even less justification under § 2254.

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<sup>6</sup>There is an additional reason to question the application of the *Hill-Timmreck* “fundamental error” or “miscarriage of justice” standard to Reed’s § 2254 claim. In both *Hill* and *Timmreck*, a federal prisoner bypassed an available federal appeal, and this Court endorsed the rule of *Sunal v. Large*, 332 U. S. 174, 178 (1947), that collateral attack cannot “do service for an appeal.” See *Hill*, 368 U. S., at 428–429 (finding “apposite” the reasoning in *Sunal*, 332 U. S., at 178, that “[w]ise judicial administration of the federal courts” counseled against permitting a collateral attack to supplant appeals); *Timmreck*, 441 U. S., at 784 (seeing “no basis here for allowing collateral attack ‘to do service for an appeal’”) (quoting *Sunal*, 332 U. S., at 178); see also *Hill*, 368 U. S., at 428–429 (noting that Congress “‘provided a regular, orderly method for correction’” of errors by “‘granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction’” and that if defendants were permitted to bypass this orderly method, “[e]rror which was not deemed sufficiently adequate to warrant an appeal would acquire new implications’”) (quoting *Sunal*, 332 U. S., at 181–182). Thus, this standard appears to have been based in part on principles of default. Our habeas jurisprudence subsequently has imposed a procedural default bar in § 2254 cases, *Wainwright v. Sykes*, 433 U. S. 72, 84, 87 (1977), and that bar was not applied to Reed.

<sup>7</sup>*Hill* and *Timmreck* can be read for the proposition that at least *some* nonconstitutional violations “are simply not important enough” to warrant habeas relief. In *Hill*, for example, a federal prisoner who did not appeal his conviction was not permitted to obtain collateral relief based on the sentencing court’s “failure to comply with the formal requirements” of

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The language of §2254 itself permits a state prisoner to seek relief for a violation “of the Constitution or laws or treaties of the United States.” By its own terms, then, §2254 applies equally to claims of statutory or constitutional violations. When construing the similar language of Rev. Stat. §1979, 42 U. S. C. §1983, which permits civil actions against state actors for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States, we concluded that “the phrase ‘and laws,’ as used in §1983, means what it says.” *Maine v. Thiboutot*, 448 U. S.

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Federal Rule of Criminal Procedure 32(a), which commands that every defendant be allowed to make a statement before he is sentenced. 368 U. S., at 429. Similarly, in *Timmreck*, the Court held that a federal prisoner who did not appeal the validity of his guilty plea could not obtain collateral relief under §2255 for technical violation of Federal Rule of Criminal Procedure 11, which requires the court to ask a defendant represented by an attorney whether he wishes to say anything on his own behalf. 441 U. S., at 784.

These cases could also be read narrowly as relying on the habeas petitioner’s default on direct review, see n. 6, *supra*, or as encompassing only violations of procedural rules. But even if read to establish a line between “important” and “merely technical” violations, this line is not identical to the line between statutory and constitutional violations. We made this point clear in *Davis v. United States*, 417 U. S., at 345–346:

“[T]here is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under §2255 merely because it is grounded in the ‘laws of the United States’ rather than the Constitution. It is true, of course, that in *Sunal v. Large*, 332 U. S. 174 (1947), the Court held that the nonconstitutional claim in that case could not be asserted to set aside a conviction on collateral attack. But *Sunal* was merely an example of ‘the general rule . . . that the writ of *habeas corpus* will not be allowed to do service for an appeal.’ . . . Thus, *Sunal* cannot be read to stand for the broad proposition that nonconstitutional claims can never be asserted in collateral attacks upon criminal convictions. Rather, the implication would seem to be that, absent the particular considerations regarded as dispositive in that case, the fact that a contention is grounded not in the Constitution, but in the ‘laws of the United States’ would not preclude its assertion in a §2255 proceeding.”

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1, 4 (1980) (refusing to construe “and laws” as limited to civil rights or equal protection laws); *Hague v. CIO*, 307 U. S. 496, 525–526 (1939) (§ 1983 “include[s] rights, privileges and immunities secured by the laws of the United States as well as by the Constitution”). Section 1983 was enacted contemporaneously with § 2254, and it shares the common purpose of making the federal courts available for the uniform interpretation and enforcement of federal rights in state settings. There is no reason to read § 1983 as placing statutes on a par with the Constitution, but to read § 2254 as largely indifferent to violations of statutes.

Moreover, at least until today, this Court never had held that a properly preserved claim of a violation of a federal statute should be treated differently in a § 2254 proceeding from a claim of a violation of the Constitution. Nor is there any reason to do so. Congress’ decision to apply a federal statute to state criminal proceedings, which ordinarily are the exclusive province of state legislatures, generally should be read to reflect the congressional determination that important national interests are at stake. Where Congress has made this determination, the federal courts should be open to ensure the uniform enforcement and interpretation of these interests.

It should be clear, then, that the distinction drawn in § 2255 between fundamental errors and “omission[s] of the kind contemplated in *Hill*, *Timmreck*, or *Davis*,” *ante*, at 349, simply does not support a distinction in § 2254 between constitutional and statutory violations.

## II

Even putting aside any misgivings about the general extension of *Hill* to § 2254 proceedings, there is a specific, and I believe insurmountable, obstacle to applying this standard to violations of the IAD. In concluding that an “unwitting judicial slip of the kind involved here ranks with the nonconstitutional lapses we have held not cognizable,” *ante*, at 349,

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in *Hill* and *Timmreck*, the majority overlooks Congress' own determination about the seriousness of such a "slip" and its consequences.

Congress spoke with unmistakable clarity when it prescribed both the time limits for trying a prisoner whose custody was obtained under the IAD and the remedy for a violation of those limits. Article IV(c) of the IAD provides that the trial of a transferred prisoner "shall be commenced within one hundred and twenty days" of his arrival in the receiving jurisdiction.<sup>8</sup> The IAD is equally clear about the consequences of a failure to bring a defendant to trial within the prescribed time limits. Article V(c) states:

"[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

Quite simply, Congress has determined that a receiving State must try the defendant within 120 days or not at all. This determination undermines the majority's approach for two reasons.

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<sup>8</sup>This command is subject to only two qualifications. First, Article IV(c) itself provides that "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Second, Article VI(a) provides: "In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." The majority relies on neither qualification, nor did the Indiana state courts.

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First, the congressional imposition of the drastic sanction of dismissal forecloses any argument that a violation of the IAD time limits is somehow a mere “technical” violation too trivial to warrant habeas review. The dismissal with prejudice of criminal charges is a remedy rarely seen in criminal law, even for constitutional violations. See, *e. g.*, *Barker v. Wingo*, 407 U. S. 514 (1972) (violation of Sixth Amendment speedy trial right); *Oregon v. Kennedy*, 456 U. S. 667 (1982) (violation of Double Jeopardy Clause). In fact, there are countless constitutional violations for which habeas review is allowed, but dismissal is not required. However this Court might have assessed the “fundamentality” of a violation of the IAD time limits in the absence of this sanction, this congressional directive does not leave us free to determine that violating the IAD time limits is no more serious than failure to comply with the technical requirements of Federal Rule of Criminal Procedure 11, *United States v. Timmreck*, 441 U. S. 780 (1979), or the formal requirements of Federal Rule of Criminal Procedure 32(a), *Hill*, 368 U. S., at 428.

Surely, a violation that Congress found troubling enough to warrant the severe remedy of dismissal cannot become trivial simply because the defendant did not utter what this Court later determines to be the magic words at the magic moment, particularly in the absence of any congressional requirement that the defendant either invoke his right to a timely trial or object to the setting of an untimely trial date. In the absence of any suggestion that Reed procedurally defaulted on his IAD claim so as to deprive him of relief on direct review, it is curious, to say the least, to deny habeas relief based largely on a sort of “quasi-default” standard. Such a two-tiered “default” standard is unwarranted, and to my knowledge, unprecedented.<sup>9</sup> Cf. *Davis v. United States*,

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<sup>9</sup> *Sunal*, *Hill*, and *Timmreck*, in which the defendant took no appeal from a federal conviction, provide no support for this quasi-waiver standard. None of these cases presents a situation in which the defendant’s



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411 U. S. 233, 239, n. 6 (1973) (finding it “difficult to conceptualize the application of one waiver rule for purposes of federal appeal and another for purposes of federal habeas corpus”).

Second, Congress’ clear mandate of the remedy of dismissal can be read to constrain this Court’s equitable or supervisory powers to determine an appropriate remedy, either on direct review or on habeas.<sup>10</sup> Nothing in our case law even suggests that, where Congress has mandated a remedy for the violation of a federal law, a habeas court is free to cast about for a different remedy. The remedy prescribed by the statute must be the remedy that “law and justice require.” 28 U. S. C. §2243. In other words, the prerogative writ of habeas corpus should be exercised in accord with an express legislative command. See IAD, Art. IX, §5 (directing “[a]ll courts . . . of the United States . . . to enforce the agreement on detainers and to cooperate . . . with all party States in enforcing the agreement and effectuating its purpose”). At the very least, the drastic remedy of dismissal saves the IAD from falling below the *Hill* fundamentality line.

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conduct was sufficient to present and preserve an issue for appeal, but was found somehow wanting for habeas purposes.

<sup>10</sup> *McCarthy v. United States*, 394 U. S. 459, 464, 468–472 (1969), and *Timmreck*, 441 U. S., at 784, are not to the contrary. In *McCarthy*, the Court looked to the language and purposes of Federal Rule of Criminal Procedure 11 and to the lower courts’ varying responses to noncompliance before requiring, as an exercise of the Court’s supervisory powers, relief for Rule 11 violations raised on direct review. In *Timmreck*, the Court denied relief on collateral review for a comparable Rule 11 violation, in part because, under *McCarthy*, the defendant could have challenged it on direct appeal, but did not. In these cases, of course, the remedy for a violation was left to the Court. In requiring relief on direct review, but not on habeas, the Court was at most differing with itself. It was not disregarding a congressional directive.

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In sum, under a faithful reading of the IAD, the state trial court was required to dismiss with prejudice all charges against Reed because his trial did not commence within 120 days of his transfer to Indiana state custody. Faced with the state courts' failure to impose this remedy, the federal habeas court should have done so.

## III

A final word is in order about the Court's emphasis on Reed's conduct and its suggestion that relief might be in order if only Reed had objected at the "relevant" moments. Under one reading of the majority opinion, the Court concludes that Reed's failure to make oral objections at the pretrial hearings somehow mitigates the seriousness of the failure to bring him to trial within the IAD time limits. In other words, the majority suggests that it is the "unobjected-to" nature of the violation, *ante*, at 356 (concurring opinion), that reduces it to the level of a *Hill-Timmreck* error, one with which the habeas court should not concern itself. But as already explained, the statute itself does not permit this Court to denigrate the significance of the violation.

It is also possible, however, to read the majority opinion as relying on a theory of waiver or procedural default. This theory is equally untenable, particularly when due consideration is given not only to the language of the IAD, but also to Reed's repeated attempts to invoke its protections. The IAD itself does not require dismissal for a violation of its 120-day limit only "upon motion of the defendant," much less "upon defendant's timely oral objection to the setting of the trial date." Instead, the statute unambiguously directs courts to dismiss charges when the time limits are breached. This arguably puts the responsibility on courts and States to police the applicable time limits. This is a reasonable choice for Congress to make. Judges and prosecutors are players who can be expected to know the IAD's straightforward re-

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quirements and to make a simple time calculation at the outset of the proceedings against a transferred defendant.

Indeed, in this case, the trial court and prosecutor both had constructive notice of the IAD time limits. The Fulton County Circuit Court signed and certified that the request for temporary custody was transmitted “for action in accordance with its terms *and the provisions of the Agreement on Detainers.*” App. 5–6 (emphasis added). The State’s request stated: “I propose to bring this person to trial on this [information] within the time period specified in Article IV(c) of the [IAD].” *Id.*, at 5.

Even assuming, however, that a defendant must invoke the IAD’s time limits in order to obtain its protections, Reed clearly did so here. In *United States v. Mauro*, 436 U. S. 340 (1978), this Court agreed that the defendant’s “failure to invoke the [IAD] *in specific terms* in his speedy trial motions before the District Court did not result in a waiver” of his claim that the Government violated the IAD. *Id.*, at 364 (emphasis added). We concluded, instead, that the prosecution and the court were “on notice of the substance” of an inmate’s IAD claims when he “persistently requested that he be given a speedy trial” and “sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the state prison.” *Id.*, at 364, 365. Reed did no less.

On May 9, 1983, at his first appearance before the court, Reed, appearing without counsel, informed the court that he would be in a halfway house but for the detainer. App. 12. The court acknowledged that there is a “world of difference” between a halfway house and the Fulton County jail. *Id.*, at 14. The court later observed that Reed’s incarceration rendered him incapable of preparing his defense. *Id.*, at 54.

At the June 27 pretrial conference, Reed asked the court if it would prefer future motions orally or in writing. The court responded, “I want it in writing,” and “I read better

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than I listen.” *Id.*, at 39–40; see also *id.*, at 123 (noting preference for written motions). Conforming to this request, Reed filed a motion on July 25, requesting that “trial be held within the legal guidelines of the Agreement on Detainer Act.” *Id.*, at 56. Clarifying his concerns, Reed complained that the State of Indiana was “forcing [him] to be tried beyond the limits as set forth in the Agreement on Detainer Act,” and specifically “request[ed that] no extension of time be granted beyond those guidelines.” *Ibid.* This *pro se* motion was filed 31 days before the 120-day period expired.

Three days later, Reed filed a motion stating that there was “limited time left for trial within the laws.” *Id.*, at 88. This *pro se* motion was filed 28 days before the IAD clock ran out. Finally, on August 11, he filed a motion for subpoenas that sought prompt relief because the “Detainer Act time limits” were “approaching.” *Id.*, at 91. This *pro se* motion was filed 15 days before the 120-day IAD time limit expired.

Thus, after being instructed that the court wanted all motions in writing, Reed filed three timely written motions indicating his desire to be tried within the IAD time limits. The Supreme Court of Indiana concluded that Reed’s July 26 motion constituted “a general demand that trial be held within the time limits of the IAD.” 491 N. E. 2d 182, 185 (1993). Under *Mauvo*, this was enough to put the court on notice of his demands. Even as an original matter, when a trial court instructs a *pro se* defendant to put his motions in writing, and the defendant does so, not once, but three times, it is wholly unwarranted then to penalize him for failing to object orally at what this Court later singles out as the magic moment.<sup>11</sup>

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<sup>11</sup> The Court, referring to the “clarity” of Reed’s August 29 motion seeking discharge of the indictment, suggests that he deliberately obscured his request until after the clock had run. *Ante*, at 344, 349. The Court fails to mention, however, that Reed prepared his earlier motions both without counsel and without adequate access to legal materials. It was only at the August 1 pretrial conference that the court ordered the sheriff to pro-

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This should be a simple matter. Reed invoked, and the trial court denied, his right to be tried within the IAD's 120-day time limit. Section 2254 authorizes federal courts to grant for such a violation whatever relief law and justice require. The IAD requires dismissal of the indictment. Nothing in the IAD, in §2254, or in our precedent requires or even suggests that federal courts should refrain from entertaining a state prisoner's claims of a violation of the IAD. Accordingly, I respectfully dissent.

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vide Reed with access to legal materials. App. 85. On August 9, Reed was given two lawbooks, including one on Indiana criminal procedure, and thereafter his draftsmanship improved.

## Syllabus

DOLAN *v.* CITY OF TIGARD

## CERTIORARI TO THE SUPREME COURT OF OREGON

No. 93–518. Argued March 23, 1994—Decided June 24, 1994

The City Planning Commission of respondent city conditioned approval of petitioner Dolan's application to expand her store and pave her parking lot upon her compliance with dedication of land (1) for a public greenway along Fanno Creek to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development and (2) for a pedestrian/bicycle pathway intended to relieve traffic congestion in the city's Central Business District. She appealed the commission's denial of her request for variances from these standards to the Land Use Board of Appeals (LUBA), alleging that the land dedication requirements were not related to the proposed development and therefore constituted an uncompensated taking of her property under the Fifth Amendment. LUBA found a reasonable relationship between (1) the development and the requirement to dedicate land for a greenway, since the larger building and paved lot would increase the impervious surfaces and thus the runoff into the creek, and (2) alleviating the impact of increased traffic from the development and facilitating the provision of a pathway as an alternative means of transportation. Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed.

*Held:* The city's dedication requirements constitute an uncompensated taking of property. Pp. 383–396.

(a) Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. In evaluating Dolan's claim, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837. If one does, then it must be decided whether the degree of the exactions demanded by the permit conditions bears the required relationship to the projected impact of the proposed development. *Id.*, at 834. Pp. 383–386.

(b) Preventing flooding along Fanno Creek and reducing traffic congestion in the district are legitimate public purposes; and a nexus exists between the first purpose and limiting development within the creek's

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floodplain and between the second purpose and providing for alternative means of transportation. Pp. 386–388.

(c) In deciding the second question—whether the city’s findings are constitutionally sufficient to justify the conditions imposed on Dolan’s permit—the necessary connection required by the Fifth Amendment is “rough proportionality.” No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development’s impact. This is essentially the “reasonable relationship” test adopted by the majority of the state courts. Pp. 388–391.

(d) The findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and Dolan’s proposed building. The Community Development Code already required that Dolan leave 15% of her property as open space, and the undeveloped floodplain would have nearly satisfied that requirement. However, the city has never said why a public, as opposed to a private, greenway is required in the interest of flood control. The difference to Dolan is the loss of her ability to exclude others from her property, yet the city has not attempted to make any individualized determination to support this part of its request. The city has also not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by Dolan’s development reasonably relates to the city’s requirement for a dedication of the pathway easement. The city must quantify its finding beyond a conclusory statement that the dedication could offset some of the traffic demand generated by the development. Pp. 392–396.

317 Ore. 110, 854 P. 2d 437, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O’CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and GINSBURG, JJ., joined, *post*, p. 396. SOUTER, J., filed a dissenting opinion, *post*, p. 411.

*David B. Smith* argued the cause and filed briefs for petitioner.

*Timothy V. Ramis* argued the cause for respondent. With him on the brief were *James M. Coleman* and *Richard J. Lazarus*.

## Counsel

*Deputy Solicitor General Kneedler* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Schiffer, James E. Brookshire, and Martin W. Matzen*.\*

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\*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *James D. Holzhauer, Timothy S. Bishop, John J. Rademacher, and Richard L. Krause*; for Defenders of Property Rights et al. by *Nancie G. Marzulla*; for the Georgia Public Policy Foundation et al. by *G. Stephen Parker*; for the Institute for Justice by *William H. Mellor III, Clint Bolick, and Richard A. Epstein*; for the National Association of Home Builders et al. by *William H. Ethier, Mary DiCrescenzo, and Stephanie McEvily*; for the National Association of Realtors et al. by *Richard M. Stephens*; for the Pacific Legal Foundation by *Ronald A. Zumbrun, Robin L. Rivett, James S. Burling, Deborah J. La Fetra, and John M. Groen*; for the Washington Legal Foundation et al. by *Daniel J. Popeo and Paul D. Kamenar*; for Jon A. Chandler, *pro se*; and for Terence Wellner et al. by *Daniel G. Marsh*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *Deborah T. Poritz, Attorney General of New Jersey, Jack M. Sabatino and Mary Carol Jacobson, Assistant Attorneys General, and Rachel J. Horowitz, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: Grant Woods of Arizona, Richard Blumenthal of Connecticut, Robert A. Butterworth of Florida, Elizabeth Barrett-Anderson of Guam, Robert A. Marks of Hawaii, Michael E. Carpenter of Maine, Scott Harshbarger of Massachusetts, Frank J. Kelley of Michigan, Joseph P. Mazurek of Montana, Frankie Sue Del Papa of Nevada, Tom Udall of New Mexico, G. Oliver Koppell of New York, Lee Fisher of Ohio, Jeffrey B. Pine of Rhode Island, Charles W. Burson of Tennessee, Rosalie S. Ballentine of the Virgin Islands, and Joseph B. Meyer of Wyoming*; for the State of Oregon by *Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, Virginia L. Linder, Solicitor General, and Michael D. Reynolds and John T. Bagg, Assistant Attorneys General*; for Broward County by *John J. Copelan, Jr., and Anthony C. Musto*; for the City of New York by *Paul A. Crotty, Leonard J. Koerner, and Linda H. Young*; for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg, Walter Kamiat, and Laurence Gold*; for the Association of State Floodplan Managers by *Michael J. Bean*; for the Rails-to-Trails Conservancy et al. by *Andrea C. Ferster, Daniel L. Rabinowitz, and Glenn P. Sugameli*; for the National Association of Counties et al. by *Richard Ruda, Lee Fennell, and Barbara E. Etkind*; for the National Audubon



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CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 317 Ore. 110, 854 P. 2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

## I

The State of Oregon enacted a comprehensive land use management program in 1973. Ore. Rev. Stat. §§ 197.005–197.860 (1991). The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. §§ 197.175(1), 197.250. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. §§ 197.175, 197.175(2)(b). Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. CDC, ch. 18.66, App. to Pet. for Cert. G–16 to G–17. After the completion of a transportation study that identified

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Society by *John D. Echeverria*; and for 1000 Friends of Oregon et al. by *H. Bissell Carey III*, *Dwight H. Merriam*, and *Edward J. Sullivan*.

Briefs of *amici curiae* were filed for the Mountain States Legal Foundation et al. by *William Perry Pendley*; for the Northwest Legal Foundation by *Jeanette R. Burrage*; and for Thomas H. Nelson, *pro se*, et al.

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congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.<sup>1</sup>

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. Record, Doc. No. F, ch. 2, pp. 2–5 to 2–8; 4–2 to 4–6; Figure 4–1. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. App. to Pet. for Cert. G–13, G–38. Other recommendations included ensuring that the floodplain remains free of structures and that it be preserved as greenways to minimize flood damage to structures. Record, Doc. No. F, ch. 5, pp. 5–16 to 5–21. The Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive. *Id.*, ch. 8, p. 8–11. CDC Chapters 18.84 and 18.86

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<sup>1</sup>CDC §18.86.040.A.1.b provides: “The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths.” App. to Brief for Respondent B–33 to B–34.

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and CDC § 18.164.100 and the Tigard Park Plan carry out these recommendations.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67-acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100-year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39-space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District. CDC § 18.66.030, App. to Brief for Petitioner C-1 to C-3.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

“Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the

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floodplain in accordance with the adopted pedestrian/bicycle plan.” CDC §18.120.180.A.8, App. to Brief for Respondent B–45 to B–46.

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.<sup>2</sup> The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city’s zoning scheme. App. to Pet. for Cert. G–28 to G–29. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.*, at G–44 to G–45.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause “an undue or unnecessary hardship” unless the variance is granted. CDC §18.134.010, App. to Brief for Respondent B–47.<sup>3</sup> Rather than posing alterna-

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<sup>2</sup>The city’s decision includes the following relevant conditions: “1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i. e.*, all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area.” App. to Pet. for Cert. G–43.

<sup>3</sup>CDC §18.134.050 contains the following criteria whereby the decision-making authority can approve, approve with modifications, or deny a variance request:

“(1) The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive

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tive mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. *Id.*, at E-4. The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G-24. The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." *Ibid.* In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation "could

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plan, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

"(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

"(3) The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

"(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

"(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship." App. to Brief for Respondent B-49 to B-50.

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offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.” *Ibid.*

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner’s request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the “anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.” *Id.*, at G-37. Based on this anticipated increased storm water flow, the Commission concluded that “the requirement of dedication of the floodplain area on the site is related to the applicant’s plan to intensify development on the site.” *Ibid.* The Tigard City Council approved the Commission’s final order, subject to one minor modification; the city council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city’s engineering department. *Id.*, at G-7.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city’s dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city’s findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. Tigard*, LUBA 91-161 (Jan. 7, 1992), reprinted at App. to Pet. for Cert. D-15, n. 9. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that “there is a ‘reasonable relationship’ between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.” *Id.*, at D-16. With respect to the pedestrian/bicycle pathway, LUBA noted the Commission’s finding that a signifi-

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cantly larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a “reasonable relationship” between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation. *Ibid.*

The Oregon Court of Appeals affirmed, rejecting petitioner’s contention that in *Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987), we had abandoned the “reasonable relationship” test in favor of a stricter “essential nexus” test. 113 Ore. App. 162, 832 P. 2d 853 (1992). The Oregon Supreme Court affirmed. 317 Ore. 110, 854 P. 2d 437 (1993). The court also disagreed with petitioner’s contention that the *Nollan* Court abandoned the “reasonably related” test. 317 Ore., at 118, 854 P. 2d, at 442. Instead, the court read *Nollan* to mean that an “exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve.” 317 Ore., at 120, 854 P. 2d, at 443. The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. *Id.*, at 121, 854 P. 2d, at 443. Therefore, the court found the conditions to be reasonably related to the impact of the expansion of petitioner’s business. *Ibid.*<sup>4</sup> We granted certiorari, 510 U. S. 989 (1993), because of an alleged conflict between the Oregon Supreme Court’s decision and our decision in *Nollan, supra*.

## II

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chi-*

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<sup>4</sup>The Supreme Court of Oregon did not address the consequences of petitioner’s failure to provide alternative mitigation measures in her variance application and we take the case as it comes to us. Accordingly, we do not pass on the constitutionality of the city’s variance provisions.

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*cago*, 166 U. S. 226, 239 (1897), provides: “[N]or shall private property be taken for public use, without just compensation.”<sup>5</sup> One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U. S. 40, 49 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. *Nollan, supra*, at 831. Such public access would deprive petitioner of the right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979).

On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). “Government hardly could go on if to some extent values incident to property could not be diminished

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<sup>5</sup> JUSTICE STEVENS’ dissent suggests that this case is actually grounded in “substantive” due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States, see *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 122 (1978); *Nollan v. California Coastal Comm’n*, 483 U. S. 825, 827 (1987). Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897), to reach that result. See, e. g., *Penn Central, supra*, at 122 (“The issu[e] presented . . . [is] whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the Terminal site effect a ‘taking’ of appellants’ property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897)”).



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without paying for every such change in the general law.” *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (1922). A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.” *Agins v. City of Tiburon*, 447 U. S. 255, 260 (1980).<sup>6</sup>

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann*, 408 U. S. 593 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth

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<sup>6</sup>There can be no argument that the permit conditions would deprive petitioner of “economically beneficial us[e]” of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property. See, e. g., *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1019 (1992); *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City, supra*, at 124.

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Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

## III

In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan*, 483 U. S., at 837. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. *Id.*, at 838. Here, however, we must decide this question.

## A

We addressed the essential nexus question in *Nollan*. The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. *Id.*, at 828. The public easement was designed to connect two public beaches that were separated by the Nollans' property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate

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public interest. *Id.*, at 835. We also agreed that the permit condition would have been constitutional “even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.” *Id.*, at 836. We resolved, however, that the Coastal Commission’s regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans’ beachfront lot. *Id.*, at 837. How enhancing the public’s ability to “traverse to and along the shorefront” served the same governmental purpose of “visual access to the ocean” from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into “‘an out-and-out plan of extortion.’” *Ibid.*, quoting *J. E. D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14–15 (1981).

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. *Agins*, 447 U. S., at 260–262. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek’s 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city’s attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: “Pedestrians and bicyclists occupying dedicated

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spaces for walking and/or bicycling . . . remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.” A. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits 11*, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994). See also Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, 105 Stat. 1914 (recognizing pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion).

## B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development. *Nollan, supra*, at 834, quoting *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 127 (1978) (“[A] use restriction may constitute a “taking” if not reasonably necessary to the effectuation of a substantial government purpose”). Here the Oregon Supreme Court deferred to what it termed the “city’s unchallenged factual findings” supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner’s business. 317 Ore., at 120–121, 854 P. 2d, at 443.

The city required that petitioner dedicate “to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] . . . and all property 15 feet above [the floodplain] boundary.” *Id.*, at 113, n. 3, 854 P. 2d, at 439, n. 3. In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission’s rather tentative findings that increased storm water flow from petitioner’s property “can only add to the public need to manage the [floodplain] for drainage purposes” to support its conclusion that the “requirement of dedication of the floodplain area on

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the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC, App. to Pet. for Cert. G-37.

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

"In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Id.*, at G-24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, *e. g.*, *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P. 2d 182 (1964); *Jenad, Inc. v. Scarsdale*, 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966). We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961).<sup>7</sup> Under this standard,

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<sup>7</sup>The "specifically and uniquely attributable" test has now been adopted by a minority of other courts. See, *e. g.*, *J. E. D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 585, 432 A. 2d 12, 15 (1981); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 66 N. J. 582, 600-601, 334 A. 2d 30, 40

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if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes “a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.” *Id.*, at 381, 176 N. E. 2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a “reasonable relationship” between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska’s opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N. W. 2d 297, 301 (1980), where that court stated:

“The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.”

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not “occasioned by the construction sought to be permitted.” *Id.*, at 248, 292 N. W. 2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. See, e. g., *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N. W. 2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N. W. 2d 19 (1976) (requiring a showing of a reasonable relationship between

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(1975); *McKain v. Toledo City Plan Comm’n*, 26 Ohio App. 2d 171, 176, 270 N. E. 2d 370, 374 (1971); *Frank Ansuini, Inc. v. Cranston*, 107 R. I. 63, 69, 264 A. 2d 910, 913 (1970).

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the planned subdivision and the municipality's need for land); *College Station v. Turtle Rock Corp.*, 680 S. W. 2d 802, 807 (Tex. 1984); *Call v. West Jordan*, 606 P. 2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test). Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]." *Ibid.* See generally Note, "'Take' My Beach Please!": *Nollan v. California Coastal Commission* and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 B. U. L. Rev. 823 (1989); see also *Parks v. Watson*, 716 F. 2d 646, 651-653 (CA9 1983).

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.<sup>8</sup>

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<sup>8</sup>JUSTICE STEVENS' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e. g., *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U. S., at 836. This conclusion is not, as he suggests, undermined by our decision in *Moore v. East Cleveland*, 431 U. S. 494 (1977), in which we struck down a housing ordinance

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JUSTICE STEVENS' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Post*, at 402. But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. In *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment. See also *Air Pollution Variance Bd. of Colo. v. Western Alfalfa Corp.*, 416 U. S. 861 (1974); *New York v. Burger*, 482 U. S. 691 (1987). And in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances. We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Record, Doc. No. F, ch. 4,

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that limited occupancy of a dwelling unit to members of a single family as violating the Due Process Clause of the Fourteenth Amendment. The ordinance at issue in *Moore* intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. *Id.*, at 499.



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p. 4–29. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner’s development. In fact, because petitioner’s property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. App. to Pet. for Cert. G–16 to G–17. But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna*, 444 U. S., at 176. It is difficult to see why recreational visitors trampling along petitioner’s floodplain easement are sufficiently related to the city’s legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.

The city contends that the recreational easement along the greenway is only ancillary to the city’s chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner’s property is commercial in character and, therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting *United States v. Orito*, 413 U. S. 139, 142 (1973) (“The Constitution extends special safeguards to the privacy of the home”). The city maintains that “[t]here is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store].” *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 83 (1980).

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Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the greenway is different in character from the exercise of state-protected rights of free expression and petition that we permitted in *PruneYard*. In *PruneYard*, we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers-by to sign their petitions. *Id.*, at 85. We based our decision, in part, on the fact that the shopping center “may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.” *Id.*, at 83. By contrast, the city wants to impose a permanent recreational easement upon petitioner’s property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.

If petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. See *Nollan*, 483 U. S., at 836 (“Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end”). But that is not the case here. We conclude that the findings upon which the city re-

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lies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day.<sup>9</sup> Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."<sup>10</sup>

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." 317 Ore., at 127, 854 P. 2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in

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<sup>9</sup>The city uses a weekday average trip rate of 53.21 trips per 1,000 square feet. Additional Trips Generated =  $53.21 \times (17,600 - 9,720)$ . App. to Pet. for Cert. G-15.

<sup>10</sup>In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between petitioner's development and added traffic is shown.

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support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

#### IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U. S., at 416.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE GINSBURG join, dissenting.

The record does not tell us the dollar value of petitioner Florence Dolan's interest in excluding the public from the greenway adjacent to her hardware business. The mountain of briefs that the case has generated nevertheless makes it obvious that the pecuniary value of her victory is far less important than the rule of law that this case has been used to establish. It is unquestionably an important case.

Certain propositions are not in dispute. The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion. The city has nev-

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ertheless agreed to grant Dolan's application if she will comply with two conditions, each of which admittedly will mitigate the adverse effects of her proposed development. The disputed question is whether the city has violated the Fourteenth Amendment to the Federal Constitution by refusing to allow Dolan's planned construction to proceed unless those conditions are met.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright. I also agree that state court decisions dealing with ordinances that govern municipal development plans provide useful guidance in a case of this kind. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

## I

Candidly acknowledging the lack of federal precedent for its exercise in rulemaking, the Court purports to find guidance in 12 "representative" state court decisions. To do so is certainly appropriate.<sup>1</sup> The state cases the Court consults, however, either fail to support or decidedly undermine the Court's conclusions in key respects.

First, although discussion of the state cases permeates the Court's analysis of the appropriate test to apply in this case, the test on which the Court settles is not naturally derived from those courts' decisions. The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), because they serve the legitimate interests in minimizing floods and traffic con-

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<sup>1</sup> Cf. *Moore v. East Cleveland*, 431 U. S. 494, 513–521 (1977) (STEVENS, J., concurring in judgment).

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gestions. *Ante*, at 387–388.<sup>2</sup> The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate “rough proportionality” between the harm caused by the new land use and the benefit obtained by the condition. *Ante*, at 391. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an “individualized determination” that the condition in question satisfies the proportionality requirement. See *ibid.*

Not one of the state cases cited by the Court announces anything akin to a “rough proportionality” requirement. For the most part, moreover, those cases that invalidated municipal ordinances did so on state law or unspecified grounds roughly equivalent to *Nollan*’s “essential nexus” requirement. See, e.g., *Simpson v. North Platte*, 206 Neb. 240, 245–248, 292 N. W. 2d 297, 301–302 (1980) (ordinance lacking “reasonable relationship” or “rational nexus” to property’s use violated Nebraska Constitution); *J. E. D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 583–585, 432 A. 2d 12, 14–15 (1981) (state constitutional grounds). One case pur-

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<sup>2</sup>In *Nollan* the Court recognized that a state agency may condition the grant of a land use permit on the dedication of a property interest if the dedication serves a legitimate police-power purpose that would justify a refusal to issue the permit. For the first time, however, it held that such a condition is unconstitutional if the condition “utterly fails” to further a goal that would justify the refusal. 483 U.S., at 837. In the *Nollan* Court’s view, a condition would be constitutional even if it required the Nollans to provide a viewing spot for passers-by whose view of the ocean was obstructed by their new house. *Id.*, at 836. “Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.” *Ibid.*

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porting to apply the strict “specifically and uniquely attributable” test established by *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 176 N. E. 2d 799 (1961), nevertheless found that test was satisfied because the legislature had decided that the subdivision at issue created the need for a park or parks. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33–36, 394 P. 2d 182, 187–188 (1964). In only one of the seven cases upholding a land use regulation did the losing property owner petition this Court for certiorari. See *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N. W. 2d 442 (1965), appeal dismissed, 385 U. S. 4 (1966) (want of substantial federal question). Although 4 of the 12 opinions mention the Federal Constitution—2 of those only in passing—it is quite obvious that neither the courts nor the litigants imagined they might be participating in the development of a new rule of federal law. Thus, although these state cases do lend support to the Court’s reaffirmance of *Nollan*’s reasonable nexus requirement, the role the Court accords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive.

In addition, the Court ignores the state courts’ willingness to consider what the property owner gains from the exchange in question. The Supreme Court of Wisconsin, for example, found it significant that the village’s approval of a proposed subdivision plat “enables the subdivider to profit financially by selling the subdivision lots as home-building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands.” *Jordan v. Menomonee Falls*, 28 Wis. 2d, at 619–620; 137 N. W. 2d, at 448. The required dedication as a condition of that approval was permissible “[i]n return for this benefit.” *Ibid.* See also *Collis v. Bloomington*, 310 Minn. 5, 11–13, 246 N. W. 2d 19, 23–24 (1976) (citing *Jordan*); *College Station v. Turtle Rock Corp.*, 680 S. W. 2d 802, 806 (Tex. 1984) (dedication requirement only triggered when developer chooses

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to develop land). In this case, moreover, Dolan's acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business. As the United States pointed out at oral argument, the improvement that the city's drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, "confer[ring] considerable benefits on the property owners immediately adjacent to the creek." Tr. of Oral Arg. 41-42.

The state court decisions also are enlightening in the extent to which they required that the *entire parcel* be given controlling importance. All but one of the cases involve challenges to provisions in municipal ordinances requiring developers to dedicate either a percentage of the entire parcel (usually 7 or 10 percent of the platted subdivision) or an equivalent value in cash (usually a certain dollar amount per lot) to help finance the construction of roads, utilities, schools, parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment. See, e. g., *Jenad, Inc. v. Scarsdale*, 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966); *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N. W. 2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N. W. 2d 19 (1976). None of the decisions identified the surrender of the fee owner's "power to exclude" as having any special significance. Instead, the courts uniformly examined the character of the entire economic transaction.

## II

It is not merely state cases, but our own cases as well, that require the analysis to focus on the impact of the city's action on the entire parcel of private property. In *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978), we stated that takings jurisprudence "does not divide a single parcel



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into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Id.*, at 130–131. Instead, this Court focuses “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.” *Ibid.* *Andrus v. Allard*, 444 U. S. 51 (1979), reaffirmed the nondivisibility principle outlined in *Penn Central*, stating that “[a]t least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.” 444 U. S., at 65–66.<sup>3</sup> As recently as last Term, we approved the principle again. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 644 (1993) (explaining that “a claimant’s parcel of property [cannot] first be divided into what was taken and what was left” to demonstrate a compensable taking). Although limitation of the right to exclude others undoubtedly constitutes a significant infringement upon property ownership, *Kaiser Aetna v. United States*, 444 U. S. 164, 179–180 (1979), restrictions on that right do not alone constitute a taking, and do not do so in any event unless they “unreasonably impair the value or use” of the property. *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 82–84 (1980).

The Court’s narrow focus on one strand in the property owner’s bundle of rights is particularly misguided in a case involving the development of commercial property. As Professor Johnston has noted:

“The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is

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<sup>3</sup>Similarly, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 498–499 (1987), we concluded that “[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes” and that “[t]here is no basis for treating the less than 2% of petitioners’ coal as a separate parcel of property.”

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not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations." Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 *Cornell L. Q.* 871, 923 (1967).<sup>4</sup>

The exactions associated with the development of a retail business are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity.

In Johnston's view, "if the municipality can demonstrate that its assessment of financial burdens against subdividers is rational, impartial, and conducive to fulfillment of authorized planning objectives, its action need be invalidated only in those extreme and presumably rare cases where the burden of compliance is sufficiently great to deter the owner from proceeding with his planned development." *Id.*, at 917. The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." Dolan, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to ex-

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<sup>4</sup> Johnston's article also sets forth a fair summary of the state cases from which the Court purports to derive its "rough proportionality" test. See 52 *Cornell L. Q.*, at 917. Like the Court, Johnston observed that cases requiring a "rational nexus" between exactions and public needs created by the new subdivision—especially *Jordan v. Menomonee Falls*, 28 *Wis. 2d* 608, 137 *N. W. 2d* 442 (1965)—"steer[r] a moderate course" between the "judicial obstructionism" of *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 *Ill. 2d* 375, 176 *N. E. 2d* 799 (1961), and the "excessive deference" of *Billings Properties, Inc. v. Yellowstone County*, 144 *Mont. 25*, 394 *P. 2d* 182 (1964). 52 *Cornell L. Q.*, at 917.

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clude from an evaluation of the benefit to be derived from the permit to enlarge the store and the parking lot.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning," *ante*, at 396—even twice avowing that "[n]o precise mathematical calculation is required," *ante*, at 391, 395—are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings," *ante*, at 395, and make "individualized determination[s]" with respect to the nature *and* the extent of the relationship between the conditions and the impact, *ante*, at 391, 393, but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.<sup>5</sup> The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

### III

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. *Ante*, at 392–395. Second,

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<sup>5</sup>Dolan's attorney overstated the danger when he suggested at oral argument that without some requirement for proportionality, "[t]he City could have found that Mrs. Dolan's new store would have increased traffic by one additional vehicle trip per day [and] could have required her to dedicate 75, 95 percent of her land for a widening of Main Street." Tr. of Oral Arg. 52–53.

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while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. *Ante*, at 395–396. Even under the Court’s new rule, both defects are, at most, nothing more than harmless error.

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers “trampling along petitioner’s floodplain,” *ante*, at 393, are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset. That may explain why Dolan never conceded that she could be prevented from building on the floodplain. The city attorney also pointed out that absent a dedication, property owners would be required to “build on their own land” and “with their own money” a storage facility for the water runoff. Tr. of Oral Arg. 30–31. Dolan apparently “did have that option,” but chose not to seek it. *Id.*, at 31. If Dolan might have been entitled to a variance confining the city’s condition in a manner this Court would accept, her failure to seek that narrower form of relief at any stage of the state administrative and judicial proceedings clearly should preclude that relief in this Court now.

The Court’s rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path “could” offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it *will* do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Cer-

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tainly the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

## IV

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.<sup>6</sup>

The Court begins its constitutional analysis by citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897), for the proposition that the Takings Clause of the Fifth Amendment is "applicable to the States through the Fourteenth Amendment." *Ante*, at 383. That opinion, however, contains no mention of either the Takings Clause or the Fifth Amendment;<sup>7</sup> it held that the protection afforded by the Due Process Clause of the Fourteenth Amendment extends to matters of substance as well as procedure,<sup>8</sup> and that the sub-

<sup>6</sup> See, e. g., *Ferguson v. Skrupa*, 372 U. S. 726 (1963).

<sup>7</sup> An earlier case deemed it "well settled" that the Takings Clause "is a limitation on the power of the Federal government, and not on the States." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177 (1872).

<sup>8</sup> The Court held that a State "may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must

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stance of “the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.” 166 U. S., at 235, 236–241. It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker’s liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York*, 198 U. S. 45 (1905).<sup>9</sup>

Later cases have interpreted the Fourteenth Amendment’s substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment’s Takings Clause. See, e. g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 481, n. 10 (1987). There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427–433 (1982); *Kaiser Aetna v. United States*, 444 U. S., at 178–180. Justice Holmes charted a significant new course, however, when he opined that a state law making it “commercially impracticable to mine certain coal” had “very nearly the same effect for constitutional purposes as appropriating or destroying it.” *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 414 (1922). The so-called “regulatory

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be had to substance, not to form.” *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 234–235 (1897).

<sup>9</sup>The *Lochner* Court refused to presume that there was a reasonable connection between the regulation and the state interest in protecting the public health. 198 U. S., at 60–61. A similar refusal to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion proves fatal to the city’s permit conditions in this case under the Court’s novel approach.

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takings” doctrine that the Holmes dictum<sup>10</sup> kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the “unconstitutional conditions” label to a mutually beneficial transaction between a property owner and a city. The Court tells us that the city’s refusal to grant Dolan a discretionary benefit infringes her right to receive just compensation for the property interests that she has refused to dedicate to the city “where the property sought has little or no relationship to the benefit.”<sup>11</sup> Although it is well settled that a government cannot deny a benefit on a basis that infringes constitutionally protected interests—“especially [one’s] interest in freedom of speech,” *Perry v. Sindermann*, 408 U. S. 593, 597 (1972)—the “unconstitutional conditions” doctrine provides an inadequate framework in which to analyze this case.<sup>12</sup>

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<sup>10</sup> See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S., at 484 (explaining why this portion of the opinion was merely “advisory”).

<sup>11</sup> *Ante*, at 385. The Court’s entire explanation reads: “Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”

<sup>12</sup> Although it has a long history, see *Home Ins. Co. v. Morse*, 20 Wall. 445, 451 (1874), the “unconstitutional conditions” doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question. See, e. g., Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B. U. L. Rev. 593, 620 (1990) (doctrine is “too crude and too general to provide help in contested cases”); Sullivan, *Unconstitutional*

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Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation. See *Preseault v. ICC*, 494 U. S. 1, 11–17 (1990) (finding takings claim premature because property owner had not yet sought compensation under Tucker Act); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 294–295 (1981) (no taking where no one “identified any property . . . that has allegedly been taken”).

Even if Dolan should accept the city’s conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied “just compensation” since it would be appropriate to consider the receipt of that benefit in any calculation of “just compensation.” See *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415 (noting that an “average reciprocity of advantage” was deemed to justify many laws); *Hodel v. Irving*, 481 U. S. 704, 715 (1987) (such “‘reciprocity of advantage’” weighed in favor of a statute’s consti-

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Conditions, 102 Harv. L. Rev. 1415, 1416 (1989) (doctrine is “riven with inconsistencies”); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321, 322 (1935) (“The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them”). As the majority’s case citations suggest, *ante*, at 385, modern decisions invoking the doctrine have most frequently involved First Amendment liberties, see also, *e. g.*, *Connick v. Myers*, 461 U. S. 138, 143–144 (1983); *Elrod v. Burns*, 427 U. S. 347, 361–363 (1976) (plurality opinion); *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Speiser v. Randall*, 357 U. S. 513, 518–519 (1958). But see *Posadas de Puerto Rico Associates v. Tourism Co. of P. R.*, 478 U. S. 328, 345–346 (1986) (“[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling”). The necessary and traditional breadth of municipalities’ power to regulate property development, together with the absence here of fragile and easily “chilled” constitutional rights such as that of free speech, make it quite clear that the Court is really writing on a clean slate rather than merely applying “well-settled” doctrine. *Ante*, at 385.



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tutionality). Particularly in the absence of any evidence on the point, we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can retain or surrender at her option. But even if that discretionary benefit were so trifling that it could not be considered just compensation when it has “little or no relationship” to the property, the Court fails to explain why the same value would suffice when the required nexus is present. In this respect, the Court’s reliance on the “unconstitutional conditions” doctrine is assuredly novel, and arguably incoherent. The city’s conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan’s First Amendment rights in exchange for a building permit. One can only hope that the Court’s reliance today on First Amendment cases, see *ante*, at 385 (citing *Perry v. Sindermann, supra*, and *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968)), and its candid disavowal of the term “rational basis” to describe its new standard of review, see *ante*, at 391, do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.

The Court has decided to apply its heightened scrutiny to a single strand—the power to exclude—in the bundle of rights that enables a commercial enterprise to flourish in an urban environment. That intangible interest is undoubtedly worthy of constitutional protection—much like the grandmother’s interest in deciding which of her relatives may share her home in *Moore v. East Cleveland*, 431 U. S. 494 (1977). Both interests are protected from arbitrary state action by the Due Process Clause of the Fourteenth Amendment. It is, however, a curious irony that Members of the majority in this case would impose an almost insurmountable burden of proof on the property owner in the *Moore* case

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while saddling the city with a heightened burden in this case.<sup>13</sup>

In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present. On November 13, 1922, the village of Euclid, Ohio, adopted a zoning ordinance that effectively confiscated 75 percent of the value of property owned by the Ambler Realty Company. Despite its recognition that such an ordinance “would have been rejected as arbitrary and oppressive” at an earlier date, the Court (over the dissent of Justices Van Devanter, McReynolds, and Butler) upheld the ordinance. Today’s majority should heed the words of Justice Sutherland:

“Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract

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<sup>13</sup>The author of today’s opinion joined Justice Stewart’s dissent in *Moore v. East Cleveland*, 431 U.S. 494 (1977). There the dissenters found it sufficient, in response to my argument that the zoning ordinance was an arbitrary regulation of property rights, that “if the ordinance is a rational attempt to promote ‘the city’s interest in preserving the character of its neighborhoods,’ *Young v. American Mini Theatres, [Inc.]* 427 U.S. 50, 71 (opinion of STEVENS, J.), it is . . . a permissible restriction on the use of private property under *Euclid v. Ambler Realty Co.*, 272 U.S. 365, and *Nectow v. Cambridge*, 277 U.S. 183.” *Id.*, at 540, n. 10. The dissent went on to state that my calling the city to task for failing to explain the need for enacting the ordinance “*place[d] the burden on the wrong party.*” *Ibid.* (emphasis added). Recently, two other Members of today’s majority severely criticized the holding in *Moore*. See *United States v. Carlton*, 512 U.S. 26, 40–42 (1994) (SCALIA, J., concurring in judgment); see also *id.*, at 39 (SCALIA, J., concurring in judgment) (calling the doctrine of substantive due process “an oxymoron”).

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to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.” *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 387 (1926).

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action’s constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

I respectfully dissent.

JUSTICE SOUTER, dissenting.

This case, like *Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987), invites the Court to examine the relationship between conditions imposed by development permits, requiring landowners to dedicate portions of their land for use by the public, and governmental interests in mitigating the adverse effects of such development. *Nollan* declared the need for a nexus between the nature of an exaction of an interest in land (a beach easement) and the nature of governmental interests. The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the

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adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

First, as to the floodplain and greenway, the Court acknowledges that an easement of this land for open space (and presumably including the five feet required for needed creek channel improvements) is reasonably related to flood control, see *ante*, at 387, 392–393, but argues that the “permanent recreational easement” for the public on the greenway is not so related, see *ante*, at 393–395. If that is so, it is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of *Nollan*'s nexus analysis. As the Court notes, “[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public.” *Ante*, at 394. But that, of course, was not the fact, and the city of Tigard never sought to justify the public access portion of the dedication as related to flood control. It merely argued that whatever recreational uses were made of the bicycle path and the 1-foot edge on either side were incidental to the permit condition requiring dedication of the 15-foot easement for an 8-foot-wide bicycle path and for flood control, including open space requirements and relocation of the bank of the river by some 5 feet. It seems to me such incidental recreational use can stand or fall with the bicycle path, which the city justified by reference to traffic congestion. As to the relationship the Court examines, between the recreational easement and a purpose never put forth as a justification by the city, the Court unsurprisingly finds a recreation area to be unrelated to flood control.

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Second, as to the bicycle path, the Court again acknowledges the “theor[etically]” reasonable relationship between “the city’s attempt to reduce traffic congestion by providing [a bicycle path] for alternative means of transportation,” *ante*, at 387, and the “correct” finding of the city that “the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District,” *ante*, at 395. The Court only faults the city for saying that the bicycle path “could” rather than “would” offset the increased traffic from the store, *ante*, at 396. That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection (“could offset”) between traffic congestion and bicycle paths is too tenuous; only if the bicycle path “would” offset the increased traffic by some amount could the bicycle path be said to be related to the city’s legitimate interest in reducing traffic congestion.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally.\* Having thus assigned the burden, the Court concludes that the city loses based on one word (“could” instead of “would”), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that

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\*See, e. g., *Goldblatt v. Hempstead*, 369 U. S. 590, 594–596 (1962); *United States v. Sperry Corp.*, 493 U. S. 52, 60 (1989). The majority characterizes this case as involving an “adjudicative decision” to impose permit conditions, *ante*, at 391, n. 8, but the permit conditions were imposed pursuant to Tigard’s Community Development Code. See, e. g., § 18.84.040, App. to Brief for Respondent B–26. The adjudication here was of Dolan’s requested variance from the permit conditions otherwise required to be imposed by the Code. This case raises no question about discriminatory, or “reverse spot,” zoning, which “singles out a particular parcel for different, less favorable treatment than the neighboring ones.” *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 132 (1978).

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the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. See, *e. g.*, App. to Brief for Respondent A-5, quoting City of Tigard's Comprehensive Plan ("Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community"). *Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. As Members of this Court have said before, "the common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell v. San Jose*, 485 U. S. 1, 20 (1988) (SCALIA, J., concurring in part and dissenting in part). The bicycle path permit condition is fundamentally no different from these.

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. The right case for the enunciation of takings doctrine seems hard to spot. See *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1076 (1992) (statement of SOUTER, J.).

## Syllabus

HONDA MOTOR CO., LTD., ET AL. *v.* OBERG

## CERTIORARI TO THE SUPREME COURT OF OREGON

No. 93–644. Argued April 20, 1994—Decided June 24, 1994

After finding petitioner Honda Motor Co., Ltd., liable for injuries respondent Oberg received while driving a three-wheeled all-terrain vehicle manufactured and sold by Honda, an Oregon jury awarded Oberg \$5 million in punitive damages, over five times the amount of his compensatory damages award. In affirming, both the State Court of Appeals and the State Supreme Court rejected Honda's argument that the punitive damages award violated due process because it was excessive and because Oregon courts have no power to correct excessive verdicts under a 1910 amendment to the State Constitution, which prohibits judicial review of the amount of punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict." The latter court relied heavily on the fact that the State's product liability punitive damages statute and the jury instructions in this case provided at least as much guidance as those upheld in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1. The court also declined to interpret *Haslip* to hold that due process requires the amount of a punitive damages award to be subject to postverdict or appellate review, and noted that Oregon courts are not powerless because they may vacate a judgment if there is no evidence supporting the jury's decision, and because appellate review is available to test the sufficiency of jury instructions.

*Held:* Oregon's denial of review of the size of punitive damages awards violates the Fourteenth Amendment's Due Process Clause. Pp. 420–435.

(a) The Constitution imposes a substantive limit on the size of punitive damages awards. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443. The opinions in these cases strongly emphasized the importance of the procedural component of the Due Process Clause, and suggest that the analysis here should focus on Oregon's departure from traditional procedures. Pp. 420–421.

(b) Judicial review of the size of punitive damages awards was a safeguard against excessive awards under the common law, see, e. g., *Blunt v. Little*, 3 F. Cas. 760, 761–762, and in modern practice in the federal courts and every State, except Oregon, judges review the size of such awards. See, e. g., *Dagnello v. Long Island R. Co.*, 289 F. 2d 797, 799–800, n. 1. Pp. 421–426.

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(c) There is a dramatic difference between judicial review under the common law and the scope of review available in Oregon. At least since the State Supreme Court definitively construed the 1910 amendment in *Van Lom v. Schneiderman*, 187 Ore. 89, 210 P. 2d 461, Oregon law has provided no procedure for reducing or setting aside a punitive damages award where the only basis for relief is the *amount* awarded. No Oregon court for more than half a century has inferred passion or prejudice from the size of a damages award, and no court in more than a decade has even hinted that it might possess the power to do so. If courts had such power, the State Supreme Court would have mentioned it in responding to Honda's arguments in this very case. The review that is provided ensures only that there is evidence to support *some* punitive damages, not that the evidence supports the amount actually awarded, thus leaving the possibility that a guilty defendant may be unjustly punished. Pp. 426–429.

(d) This Court has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common-law protection against arbitrary and inaccurate adjudication. See, *e. g.*, *Tumey v. Ohio*, 273 U. S. 510. Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses. Oregon has removed one of the few procedural safeguards which the common law provided against that danger without providing any substitute procedure and without any indication that the danger has in any way subsided over time. *Hurtado v. California*, 110 U. S. 516, 538; *International Shoe Co. v. Washington*, 326 U. S. 310, distinguished. Pp. 430–432.

(e) The safeguards that Oberg claims Oregon has provided—the limitation of punitive damages to the amount specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions—do not adequately safeguard against arbitrary awards. Nor does the fact that a jury's arbitrary decision to acquit a defendant charged with a crime is unreviewable offer a historic basis for such discretion in civil cases. The Due Process Clause says nothing about arbitrary grants of freedom, but its whole purpose is to prevent arbitrary deprivations of liberty or property. Pp. 432–435.

316 Ore. 263, 851 P. 2d 1084, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. SCALIA,



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J., filed a concurring opinion, *post*, p. 435. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 436.

*Andrew L. Frey* argued the cause for petitioners. With him on the briefs were *Kenneth S. Geller*, *Charles A. Rothfeld*, *Evan M. Tager*, *Thomas W. Brown*, *Jeffrey R. Brooke*, and *Paul G. Cereghini*.

*Laurence H. Tribe* argued the cause for respondent. With him on the brief were *William A. Gaylord*, *Kenneth J. Chesebro*, *Michael H. Gottesman*, and *Raymond F. Thomas*.\*

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\*Briefs of *amici curiae* urging reversal were filed for the American Council of Life Insurance et al. by *Erwin N. Griswold*, *Patricia A. Dunn*, *Stephen J. Goodman*, *Richard E. Barnsback*, *Phillip E. Stano*, and *Patrick J. McNally*; for the Equal Employment Advisory Council by *Douglas S. McDowell* and *Kimberly L. Japinga*; for the Product Liability Advisory Council, Inc., et al. by *Malcolm E. Wheeler*; for Snap-on Tools Corp. et al. by *Gary M. Elden* and *Donald A. Vogelsang*; and for the Washington Legal Foundation by *Arvin Maskin*, *Steven Alan Reiss*, *Peter A. Antonucci*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the State of Hawaii et al. by *Theodore R. Kulongoski*, Attorney General of Oregon, *Thomas A. Balmer*, Deputy Attorney General, *Virginia L. Linder*, Solicitor General, and *Rives Kistler*, Assistant Attorney General, *Robert A. Marks*, Attorney General of Hawaii, *Robert T. Stephan*, Attorney General of Kansas, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, and *Joseph P. Mazurek*, Attorney General of Montana; for the Association of Trial Lawyers of America by *Jeffrey Robert White*, *Cheryl Flax-Davidson*, and *Barry J. Nace*; and for Trial Lawyers for Public Justice by *Arthur H. Bryant*, *Leslie Brueckner*, and *Michael Rustad*.

Briefs of *amici curiae* were filed for CBS Inc. et al. by *P. Cameron DeVore*, *Marshall J. Nelson*, *Douglas P. Jacobs*, *David C. Kohler*, *Devereaux Chatillon*, *Mark L. Tuft*, *Harold W. Fuson, Jr.*, *R. Bruce Rich*, *Kenneth M. Vittor*, *Slade R. Metcalf*, *John F. Sturm*, *René P. Milam*, *J. Laurent Scharff*, *Jane E. Kirtley*, *Bruce W. Sanford*, and *Henry S. Hoberman*; for Legal Historian Daniel R. Coquillette et al. by *Arthur F. McEvoy III*; and for the Oregon Trial Lawyers Association by *Kathryn H. Clarke* and *Maureen Leonard*.

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JUSTICE STEVENS delivered the opinion of the Court.

An amendment to the Oregon Constitution prohibits judicial review of the amount of punitive damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict.” The question presented is whether that prohibition is consistent with the Due Process Clause of the Fourteenth Amendment. We hold that it is not.

## I

Petitioner Honda Motor Co., Ltd., manufactured and sold the three-wheeled all-terrain vehicle that overturned while respondent was driving it, causing him severe and permanent injuries. Respondent brought suit alleging that petitioner knew or should have known that the vehicle had an inherently and unreasonably dangerous design. The jury found petitioner liable and awarded respondent \$919,390.39 in compensatory damages and punitive damages of \$5 million. The compensatory damages, however, were reduced by 20% to \$735,512.31, because respondent’s own negligence contributed to the accident. On appeal, relying on our then-recent decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991), petitioner argued that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment, because the punitive damages were excessive and because Oregon courts lacked the power to correct excessive verdicts.

The Oregon Court of Appeals affirmed, as did the Oregon Supreme Court. The latter court relied heavily on the fact that the Oregon statute governing the award of punitive damages in product liability actions and the jury instructions in this case<sup>1</sup> contain substantive criteria that provide

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<sup>1</sup>The jury instructions, in relevant part, read: “Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct. In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must

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at least as much guidance to the factfinders as the Alabama statute and jury instructions that we upheld in *Haslip*. The Oregon Supreme Court also noted that Oregon law provides an additional protection by requiring the plaintiff to prove entitlement to punitive damages by clear and convincing evidence rather than a mere preponderance. Recognizing that other state courts had interpreted *Haslip* as including a “clear . . . constitutional mandate for meaningful judicial scrutiny of punitive damage awards,” *Adams v. Murakami*, 54 Cal. 3d 105, 118, 813 P. 2d 1348, 1356 (1991); see also *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md. App. 672, 596 A. 2d 687 (1991), the court nevertheless declined to “interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur.” 316 Ore. 263, 284, 851 P. 2d 1084, 1096 (1993). It also noted that trial and appellate courts were “not entirely powerless” because a judgment may be vacated if “there is no evidence to support the jury’s decision,” and because “appellate review is available to test the sufficiency of the jury instructions.” *Id.*, at 285, 851 P. 2d, at 1096–1097.

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prove by clear and convincing evidence that defendant[s have] shown wanton disregard for the health, safety, and welfare of others. . . . If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of that discretion, you shall consider evidence, if any, of the following: First, the likelihood at the time of the sale [of the three-wheeled vehicle] that serious harm would arise from defendants’ misconduct. Number two, the degree of the defendants’ awareness of that likelihood. Number three, the duration of the misconduct. Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle. Number five, the financial condition of the defendant[s]. And the amount of punitive damages may not exceed the sum of \$5 million.” 316 Ore. 263, 282, n. 11, 851 P. 2d 1084, 1095, n. 11 (1993).

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We granted certiorari, 510 U. S. 1068 (1994), to consider whether Oregon's limited judicial review of the size of punitive damages awards is consistent with our decision in *Haslip*.

## II

Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443 (1993). Although they fail to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,” *id.*, at 458; *Haslip*, 499 U. S., at 18, a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards. A plurality in *TXO* assented to the proposition that “grossly excessive” punitive damages would violate due process, 509 U. S., at 453–455, while JUSTICE O’CONNOR, who dissented because she favored more rigorous standards, noted that “[i]t is thus common ground that an award may be so excessive as to violate due process,” *id.*, at 480. In the case before us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather, we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner. More specifically, the question is whether the Due Process Clause requires judicial review of the amount of punitive damages awards.

The opinions in both *Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause. In *Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of both “meaningful and adequate review by the trial court” and subsequent appellate review. 499 U. S., at 20. Similarly, in *TXO*, the plurality opinion

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found that the fact that the “award was reviewed and upheld by the trial judge” and unanimously affirmed on appeal gave rise “to a strong presumption of validity.” 509 U. S., at 457. Concurring in the judgment, JUSTICE SCALIA (joined by JUSTICE THOMAS) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that “‘procedural due process’ requires judicial review of punitive damages awards for reasonableness.” *Id.*, at 471.

All of those opinions suggest that our analysis in this case should focus on Oregon’s departure from traditional procedures. We therefore first contrast the relevant common-law practice with Oregon’s procedure, which that State’s Supreme Court once described as “a system of trial by jury in which the judge is reduced to the status of a mere monitor.” *Van Lom v. Schneiderman*, 187 Ore. 89, 113, 210 P. 2d 461, 471 (1949). We then examine the constitutional implications of Oregon’s deviation from established common-law procedures.

## III

Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded. One of the earliest reported cases involving exemplary damages, *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C. P. 1763), arose out of King George III’s attempt to punish the publishers of the allegedly seditious *North Briton*, No. 45. The King’s agents arrested the plaintiff, a journeyman printer, in his home and detained him for six hours. Although the defendants treated the plaintiff rather well, feeding him “beef steakes and beer, so that he suffered very little or no damages,” 2 Wils., at 205, 95 Eng. Rep., at 768, the jury awarded him £300, an enormous sum almost 300 times the plaintiff’s weekly wage. The defendant’s lawyer requested a new trial, arguing that the jury’s award was excessive. Plain-

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tiff's counsel, on the other hand, argued that "in cases of tort . . . the court will never interpose in setting aside verdicts for excessive damages." *Id.*, at 206, 95 Eng. Rep., at 768. While the court denied the motion for new trial, the Chief Justice explicitly rejected plaintiff's absolute rule against review of damages amounts. Instead, he noted that when the damages are "outrageous" and "all mankind at first blush must think so," a court may grant a new trial "for excessive damages." *Id.*, at 207, 95 Eng. Rep., at 769. In accord with his view that the amount of an award was relevant to the motion for a new trial, the Chief Justice noted that "[u]pon the whole I am of opinion the damages are not excessive." *Ibid.*

Subsequent English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high. *Fabrigas v. Mostyn*, 2 Black. W. 929, 96 Eng. Rep. 549 (C. P. 1773) (Damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury");<sup>2</sup> *Sharpe v. Brice*, 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774) ("It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort"); *Leith v. Pope*, 2 Black. W. 1327, 1328, 96 Eng. Rep. 777, 778 (C. P. 1779) ("[I]n cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partial-

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<sup>2</sup>As in many early cases, it is unclear whether this case specifically concerns punitive damages or merely ordinary compensatory damages. Since there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases. See Brief for Legal Historians Daniel R. Coquillette et al. as *Amici Curiae* 2, 3, 6-7, 15 (discussing together "punitive damages, personal injury, and other cases involving difficult-to-quantify damages").

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ity of the jury”); *Jones v. Sparrow*, 5 T. R. 257, 101 Eng. Rep. 144 (K. B. 1793) (new trial granted for excessive damages); *Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng. Rep. 1046 (Exch. 1796) (same); *Hewlett v. Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C. P. 1813) (“[I]t is now well acknowledged in all the Courts of *Westminster-hall*, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury”).

Respondent calls to our attention the case of *Beardmore v. Carrington*, 2 Wils. 244, 95 Eng. Rep. 790 (C. P. 1764), in which the court asserted that “there is not one single case, (that is law), in all the books to be found, where the court has granted a new trial for excessive damages in actions for torts.” *Id.*, at 249, 95 Eng. Rep., at 793. Respondent would infer from that statement that 18th-century common law did not provide for judicial review of damages. Respondent’s argument overlooks several crucial facts. First, the *Beardmore* case antedates all but one of the cases cited in the previous paragraph. Even if respondent’s interpretation of the case were correct, it would be an interpretation the English courts rejected soon thereafter. Second, *Beardmore* itself cites at least one case that it concedes granted a new trial for excessive damages, *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K. B. 1726), although it characterizes the case as wrongly decided. Third, to say that “there is not one single case . . . in all the books” is to say very little, because then, much more so than now, only a small proportion of decided cases was reported. For example, for 1764, the year *Beardmore* was decided, only 16 Common Pleas cases are recorded in the standard reporter. 2 Wils. 208–257, 95 Eng. Rep. 769–797. Finally, the inference respondent would draw, that 18th-century English common law did not permit a judge to order new trials for excessive damages, is explicitly rejected by *Beardmore* itself,

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which cautioned against that very inference: “We desired to be understood that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in tort where the court may not grant a new trial.” 2 Wils., at 250, 95 Eng. Rep., at 793.

Common-law courts in the United States followed their English predecessors in providing judicial review of the size of damages awards. They too emphasized the deference ordinarily afforded jury verdicts, but they recognized that juries sometimes awarded damages so high as to require correction. Thus, in 1822, Justice Story, sitting as Circuit Justice, ordered a new trial unless the plaintiff agreed to a reduction in his damages.<sup>3</sup> In explaining his ruling, he noted:

“As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. . . . It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.” *Blunt v. Little*, 3 F. Cas. 760, 761–762 (No. 1,578) (CC Mass. 1822).

See also *Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 937–938 (No. 17, 516) (CC Me. 1843).

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<sup>3</sup> While Justice Story’s grant of a new trial was clearly in accord with established common-law procedure, the remittitur—withdrawal of new trial if the plaintiff agreed to a specific reduction of damages—may have been an innovation. See *Dimick v. Schiedt*, 293 U. S. 474, 482–485 (1935). On the other hand, remittitur may have a better historical pedigree than previously thought. See *King v. Watson*, 2 T. R. 199–200, 100 Eng. Rep. 108 (K. B. 1788) (“[O]n a motion in the Common Pleas to set aside the verdict for excessive damages . . . the Court recommended a compromise, and on *Hurry’s* agreeing to accept 1500 [pounds] they discharged the rule”).



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In the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for “partiality” or “passion and prejudice.” Nevertheless, because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award.<sup>4</sup> *Coffin v. Coffin*, 4 Mass. 1, 41 (1808) (In cases of personal injury, “a verdict may be set aside for excessive damages” when “from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption”); *Taylor v. Giger*, 3 Ky. 586, 587 (1808) (“In actions of tort . . . a new trial ought not to be granted for excessiveness of damages, unless the damages found are so enormous as to shew that the jury were under some improper influence, or were led astray by the violence of prejudice or passion”); *McConnell v. Hampton*, 12 Johns. 234, 235 (N. Y. 1815) (granting new trial for excessive damages and noting: “That Courts have a legal right to grant new trials, for excessive damages in actions for torts, is no where denied . . .”); *Belknap v. Boston & Maine R. Co.*, 49 N. H. 358, 374 (1870) (setting aside both compensatory and punitive damages, because “[w]e think it evident that the jury were affected by some partiality or prejudice”).

Nineteenth-century treatises similarly recognized judges’ authority to award new trials on the basis of the size of damages awards. 1 D. Graham, *A Treatise on the Law of New Trials* 442 (2d ed. 1855) (“[E]ven in personal torts, where the jury find *outrageous damages*, clearly evincing partiality, prejudice and passion, the court will interfere for the relief

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<sup>4</sup>This aspect of passion and prejudice review has been recognized in many opinions of this Court. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 272 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 21, n. 10 (1991); *id.*, at 27 (SCALIA, J., concurring); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443, 467 (1993) (KENNEDY, J., concurring); *id.*, at 476–478 (O’CONNOR, J., dissenting).

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of the defendant, and order a new trial”); T. Sedgwick, *A Treatise on the Measure of Damages* 707 (5th ed. 1869) (“The court again holds itself at liberty to set aside verdicts and grant new trials . . . whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance”); 3 J. Sutherland, *A Treatise on the Law of Damages* 469 (1883) (When punitive damages are submitted to the jury, “the amount which they may think proper to allow will be accepted by the court, unless so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment”).

Modern practice is consistent with these earlier authorities. In the federal courts and in every State, except Oregon, judges review the size of damages awards. See *Dagnello v. Long Island R. Co.*, 289 F. 2d 797, 799–800, n. 1, (CA2 1961) (citing cases from all 50 States except Alaska, Maryland, and Oregon); *Nome v. Ailak*, 570 P. 2d 162, 173–174 (Alaska 1977); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md. App., at 716–722, 596 A. 2d, at 709–711, cert. denied, 605 A. 2d 137 (Md. 1992); *Texaco, Inc. v. Pennzoil, Co.*, 729 S. W. 2d 768 (Tex. App. 1987); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Draper, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 A. L. R. 5th 195 (1993); Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

## IV

There is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon. An Oregon trial judge, or an Oregon appellate court, may order a new trial if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all. But if the defendant’s only basis for relief is the *amount* of punitive damages the jury awarded, Oregon

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provides no procedure for reducing or setting aside that award. This has been the law in Oregon at least since 1949 when the State Supreme Court announced its opinion in *Van Lom v. Schneiderman*, 187 Ore. 89, 210 P. 2d 461 (1949), definitively construing the 1910 amendment to the Oregon Constitution.<sup>5</sup>

In that case the court held that it had no power to reduce or set aside an award of both compensatory and punitive damages that was admittedly excessive.<sup>6</sup> It recognized that the constitutional amendment placing a limitation on its power was a departure from the traditional common-law approach.<sup>7</sup> That opinion's characterization of Oregon's "lonely eminence" in this regard, *id.*, at 113, 210 P. 2d, at 471, is still an accurate portrayal of its unique position. Every other State in the Union affords postverdict judicial review of the

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<sup>5</sup>The amended Article VII, §3, of the Oregon Constitution provides: "In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict."

<sup>6</sup>"The court is of the opinion that the verdict of \$10,000.00 is excessive. Some members of the court think that only the award of punitive damages is excessive; others that both the awards of compensatory and punitive damages are excessive. Since a majority are of the opinion that this court has no power to disturb the verdict, it is not deemed necessary to discuss the grounds for these divergent views." *Van Lom v. Schneiderman*, 187 Ore., at 93, 210 P. 2d, at 462 (1949).

<sup>7</sup>"The guaranty of the right to jury trial in suits at common law, incorporated in the Bill of Rights as one of the first ten amendments of the Constitution of the United States, was interpreted by the Supreme Court of the United States to refer to jury trial as it had been theretofore known in England; and so it is that the federal judges, like the English judges, have always exercised the prerogative of granting a new trial when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason. The state courts were conceded similar powers. . . . [U]p to 1910, when the people adopted Art. VII, §3, of our Constitution, there was no state in the union, so far as we are advised, where this method of control of the jury did not prevail." *Id.*, at 112-113, 210 P. 2d, at 471.

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amount of a punitive damages award, see *supra*, at 426, and subsequent decisions have reaffirmed Oregon judges' lack of authority to order new trials or other relief to remedy excessive damages. *Fowler v. Courtemanche*, 202 Ore. 413, 448, 274 P. 2d 258, 275 (1954) ("If this court were authorized to exercise its common law powers, we would unhesitatingly hold that the award of \$35,000 as punitive damages was excessive . . ."); *Tenold v. Weyerhaeuser Co.*, 127 Ore. App. 511, 873 P. 2d 413 (1994) (Oregon court cannot examine jury award to ensure compliance with \$500,000 statutory limit on noneconomic damages).

Respondent argues that Oregon's procedures do not deviate from common-law practice, because Oregon judges have the power to examine the size of the award to determine whether the jury was influenced by passion and prejudice. This is simply incorrect. The earliest Oregon cases interpreting the 1910 amendment squarely held that Oregon courts lack precisely that power. *Timmins v. Hale*, 122 Ore. 24, 43–44, 256 P. 770, 776 (1927); *McCulley v. Homestead Bakery, Inc.*, 141 Ore. 460, 465–466, 18 P. 2d 226, 228 (1933). Although dicta in later cases have suggested that the issue might eventually be revisited, see *Van Lom*, 187 Ore., at 106, 210 P. 2d, at 468, the earlier holdings remain Oregon law. No Oregon court for more than half a century has inferred passion and prejudice from the size of a damages award, and no court in more than a decade has even hinted that courts might possess the power to do so.<sup>8</sup> Finally, if Oregon courts

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<sup>8</sup>The last reported decision to suggest that a new trial might be ordered because the size of the award suggested passion and prejudice was *Trenery v. Score*, 45 Ore. App. 611, 615, 609 P. 2d 388, 389 (1980) (noting that "[i]t is doubtful" that passion and prejudice review continues to be available); see also *Foley v. Pittenger*, 264 Ore. 310, 503 P. 2d 476 (1972). More recent decisions suggest that the type of passion and prejudice review envisioned by the common law and former Ore. Rev. Stat. §17.610 (repealed by 1979 Ore. Laws, ch. 284, §199) is no longer available. See *Tenold v. Weyerhaeuser Co.*, 127 Ore. App. 511, 873 P. 2d 413 (1994).

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could evaluate the excessiveness of punitive damages awards through passion and prejudice review, the Oregon Supreme Court would have mentioned that power in this very case. Petitioners argued that Oregon procedures were unconstitutional precisely because they failed to provide judicial review of the size of punitive damages awards. The Oregon Supreme Court responded by rejecting the idea that judicial review of the size of punitive damages awards was required by *Haslip*. 316 Ore., at 263, 851 P. 2d, at 1084. As the court noted, two state appellate courts, including the California Supreme Court, had reached the opposite conclusion. *Id.*, at 284, n. 13, 851 P. 2d, at 1096, n. 13. If, as respondent claims, Oregon law provides passion and prejudice review of excessive verdicts, the Oregon Supreme Court would have had a more obvious response to petitioners' argument.

Respondent also argues that Oregon provides adequate review, because the trial judge can overturn a punitive damages award if there is no substantial evidence to support an award of punitive damages. See *Fowler v. Courtemanche*, 202 Ore., at 448–449, 274 P. 2d, at 275. This argument is unconvincing, because the review provided by Oregon courts ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded. While Oregon's judicial review ensures that punitive damages are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts. What we are concerned with is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing.

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## V

Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856); *Tumey v. Ohio*, 273 U. S. 510 (1927); *Brown v. Mississippi*, 297 U. S. 278 (1936); *In re Winship*, 397 U. S. 358, 361 (1970); *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991). Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. *Ownbey v. Morgan*, 256 U. S. 94 (1921); *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991).

Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. *Hurtado v. California*, 110 U. S. 516 (1884); *Tumey v. Ohio*, 273 U. S. 510 (1927); *Brown v. Mississippi*, 297 U. S. 278 (1936); *In re Oliver*, 333 U. S. 257 (1948); *In re Winship*, 397 U. S., at 361. When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process. *Tumey v. Ohio*, 273 U. S. 510 (1927); *Brown v. Mississippi*, 297 U. S. 278 (1936); *In re Oliver*, 333 U. S. 257 (1948); *In re Winship*, 397 U. S., at 361. Of course, not all deviations from established procedures result in constitutional infirmity. As the Court noted in *Hurtado*, to hold all procedural

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change unconstitutional “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.” 110 U. S., at 529. A review of the cases, however, suggests that the case before us is unlike those in which abrogations of common-law procedures have been upheld.

In *Hurtado*, for example, examination by a neutral magistrate provided criminal defendants with nearly the same protection as the abrogated common-law grand jury procedure. *Id.*, at 538. Oregon, by contrast, has provided no similar substitute for the protection provided by judicial review of the amount awarded by the jury in punitive damages. Similarly, in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), this Court upheld the extension of state-court jurisdiction over persons not physically present, in spite of contrary well-established prior practice. That change, however, was necessitated by the growth of a new business entity, the corporation, whose ability to conduct business without physical presence had created new problems not envisioned by rules developed in another era. See *Burnham*, 495 U. S., at 617. In addition, the dramatic improvements in communication and transportation made litigation in a distant forum less onerous. No similar social changes suggest the need for Oregon’s abrogation of judicial review, nor do improvements in technology render unchecked punitive damages any less onerous. If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries.<sup>9</sup>

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<sup>9</sup> Respondent cites as support for his argument *Chicago, R. I. & P. R. Co. v. Cole*, 251 U. S. 54, 55 (1919) (Holmes, J.). In that case, the Court upheld a provision of the Oklahoma Constitution providing that “the defense of contributory negligence . . . shall . . . be left to the jury.” *Chicago, R. I.* provides little support for respondent’s case. Justice Holmes’ reasoning relied on the fact that a State could completely abolish the defense of contributory negligence. This case, however, is different,

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Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.<sup>10</sup>

## VI

Respondent argues that Oregon has provided other safeguards against arbitrary awards and that, in any event, the exercise of this unreviewable power by the jury is consistent with the jury's historic role in our judicial system.

Respondent points to four safeguards provided in the Oregon courts: the limitation of punitive damages to the amount specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions. The first,

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because the *TXO* and *Haslip* opinions establish that States cannot abolish limits on the award of punitive damages.

<sup>10</sup>This case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, 443 U. S. 307, 324 (1979) (whether "no rational trier of fact could have" reached the same verdict).



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limitation of punitive damages to the amount specified, is hardly a constraint at all, because there is no limit to the amount the plaintiff can request, and it is unclear whether an award exceeding the amount requested could be set aside. See *Tenold v. Weyerhaeuser Co.*, 127 Ore. App. 511, 873 P. 2d 413 (1994) (Oregon Constitution bars court from examining jury award to ensure compliance with \$500,000 statutory limit on noneconomic damages). The second safeguard, the clear and convincing standard of proof, is an important check against unwarranted imposition of punitive damages, but, like the “no substantial evidence” review discussed *supra*, at 429, it provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts. Regarding the third purported constraint, respondent cites no cases to support the idea that Oregon courts do or can set maximum punitive damages awards in advance of the verdict. Nor are we aware of any court which implements that procedure. Respondent’s final safeguard, proper jury instruction, is a well-established and, of course, important check against excessive awards. The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict.<sup>11</sup>

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<sup>11</sup> Respondent also argues that empirical evidence supports the effectiveness of these safeguards. It points to the analysis of an *amicus* showing that the average punitive damages award in a products liability case in Oregon is less than the national average. Brief for Trial Lawyers for Public Justice as *Amicus Curiae*. While we welcome respondent’s introduction of empirical evidence on the effectiveness of Oregon’s legal rules, its statistics are undermined by the fact that the Oregon average is computed from only two punitive damages awards. It is well known that one cannot draw valid statistical inferences from such a small number of observations.

Empirical evidence, in fact, supports the importance of judicial review of the size of punitive damages awards. The most exhaustive study of punitive damages establishes that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages. In over 10% of the cases

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In support of his argument that there is a historic basis for making the jury the final arbiter of the amount of punitive damages, respondent calls our attention to early civil and criminal cases in which the jury was allowed to judge the law as well as the facts. See *Johnson v. Louisiana*, 406 U. S. 356, 374, n. 11 (1972) (Powell, J., concurring). As we have already explained, in civil cases, the jury's discretion to determine the amount of damages was constrained by judicial review.<sup>12</sup> The criminal cases do establish—as does our practice today—that a jury's arbitrary decision to acquit a defendant charged with a crime is completely unreviewable. There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter. A decision to punish a tortfeasor by means of an exaction of

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appealed, the judge found the damages to be excessive. Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 57 (1992). The above statistics understate the importance of judicial review, because they consider only appellate review, rather than review by the trial court, which may be even more significant, and because they ignore the fact that plaintiffs often settle for less than the amount awarded because they fear appellate reduction of damages. See *ibid.*

<sup>12</sup>Judicial deference to jury verdicts may have been stronger in 18th-century America than in England, and judges' power to order new trials for excessive damages more contested. See Nelson, The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich. L. Rev. 893, 904–917 (1978); M. Horwitz, The Transformation of American Law, 1780–1860, p. 142 (1977). Nevertheless, because this case concerns the Due Process Clause of the Fourteenth Amendment, 19th-century American practice is the “crucial time for present purposes.” *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604, 611 (1990). As demonstrated *supra*, at 424–426, by the time the Fourteenth Amendment was ratified in 1868, the power of judges to order new trials for excessive damages was well established in American courts. In addition, the idea that jurors can find law as well as fact is not inconsistent with judicial review for excessive damages. See *Coffin v. Coffin*, 4 Mass. 1, 25, 41 (1808).

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exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common-law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

The judgment is reversed, and the case is remanded to the Oregon Supreme Court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, concurring.

I join the opinion of the Court, but a full explanation of why requires that I supplement briefly the description of what has occurred here.

Before the 1910 amendment to Article VII, § 3, of the Oregon Constitution, Oregon courts had developed and were applying common-law standards that limited the size of damages awards. See, e. g., *Adcock v. Oregon R. Co.*, 45 Ore. 173, 179–182, 77 P. 78, 80 (1904) (approving trial court’s decision to grant a remittitur because the jury’s damages award was excessive); see also *Van Lom v. Schneiderman*, 187 Ore. 89, 96–98, 112–113, 210 P. 2d 461, 464, 471 (1949). The 1910 amendment, by its terms, did not eliminate those substantive standards but altered the procedures of judicial review: “[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict” (emphasis added). The Oregon courts appear to believe that a state-law “reasonableness” limit upon the amount of punitive damages subsists, but cannot be enforced through the process of judicial review. In *Van Lom*, for example, the Oregon Supreme Court had no trouble concluding that the damages award was excessive, see 187 Ore., at 91–93, 210 P. 2d, at

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462, but held that the amendment had removed its “power to correct a miscarriage of justice by ordering a new trial,” *id.*, at 112–113, 210 P. 2d, at 471.

The Court’s opinion establishes that the right of review eliminated by the amendment was a procedure traditionally accorded at common law. The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

In product liability cases, Oregon guides and limits the factfinder’s discretion on the availability and amount of punitive damages. The plaintiff must establish entitlement to punitive damages, under specific substantive criteria, by clear and convincing evidence. Where the factfinder is a jury, its decision is subject to judicial review to this extent: The trial court, or an appellate court, may nullify the verdict if reversible error occurred during the trial, if the jury was improperly or inadequately instructed, or if there is no evidence to support the verdict. Absent trial error, and if there is evidence to support the award of punitive damages, however, Oregon’s Constitution, Article VII, §3, provides that a properly instructed jury’s verdict shall not be reexamined.<sup>1</sup> Oregon’s procedures, I conclude, are adequate to pass the Constitution’s due process threshold. I therefore dissent from the Court’s judgment upsetting Oregon’s disposition in this case.

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<sup>1</sup> Article VII, §3, of the Oregon Constitution reads:

“In actions at law, where the value in controversy shall exceed \$200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”

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## I

## A

To assess the constitutionality of Oregon's scheme, I turn first to this Court's recent opinions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443 (1993). The Court upheld punitive damage awards in both cases, but indicated that due process imposes an outer limit on remedies of this type. Significantly, neither decision declared any specific procedures or substantive criteria essential to satisfy due process. In *Haslip*, the Court expressed concerns about "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages," but refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." 499 U. S., at 18. Regarding the components of "the constitutional calculus," the Court simply referred to "general concerns of reasonableness and [the need for] adequate guidance from the court when the case is tried to a jury." *Ibid.*

And in *TXO*, a majority agreed that a punitive damage award may be so grossly excessive as to violate the Due Process Clause. 509 U. S., at 453–454, 458 (plurality opinion); *id.*, at 466–467 (KENNEDY, J., concurring in part and concurring in judgment); *id.*, at 479–480 (O'CONNOR, J., dissenting). In the plurality's view, however, "a judgment that is a product" of "fair procedures . . . is entitled to a strong presumption of validity"; this presumption, "persuasive reasons" indicated, "should be irrebuttable, . . . or virtually so." *Id.*, at 457, citing *Haslip*, 499 U. S., at 24–40 (SCALIA, J., concurring in judgment), and *id.*, at 40–42 (KENNEDY, J., concurring in judgment). The opinion stating the plurality position recalled *Haslip*'s touchstone: A "concern [for] reasonableness" is what due process essentially requires. 509

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U. S., at 458, quoting *Haslip*, 499 U. S., at 18. Writing for the plurality, JUSTICE STEVENS explained:

“[W]e do not suggest that a defendant has a substantive due process right to a correct determination of the ‘reasonableness’ of a punitive damages award. As JUSTICE O’CONNOR points out, state law generally imposes a requirement that punitive damages be ‘reasonable.’ A violation of a state law ‘reasonableness’ requirement would not, however, necessarily establish that the award is so ‘grossly excessive’ as to violate the Federal Constitution.” 509 U. S., at 458, n. 24 (citation omitted).

## B

The procedures Oregon’s courts followed in this case satisfy the due process limits indicated in *Haslip* and *TXO*; the jurors were adequately guided by the trial court’s instructions, and Honda has not maintained, in its full presentation to this Court, that the award in question was “so ‘grossly excessive’ as to violate the Federal Constitution.” *TXO*, 509 U. S., at 458, n. 24.<sup>2</sup>

## 1

Several preverdict mechanisms channeled the jury’s discretion more tightly in this case than in either *Haslip* or *TXO*. First, providing at least some protection against unguided, utterly arbitrary jury awards, respondent Karl Oberg was permitted to recover no more than the amounts specified in the complaint, \$919,390.39 in compensatory damages and \$5 million in punitive damages. See Ore. Rule Civ. Proc. 18B (1994); *Wiebe v. Seely*, 215 Ore. 331, 355–358, 335 P. 2d 379, 391 (1959); *Lovejoy Specialty Hosp. v. Advocates for Life, Inc.*, 121 Ore. App. 160, 167, 855 P. 2d 159, 163 (1993). The trial court properly instructed the jury on this damage

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<sup>2</sup>The Supreme Court of Oregon noted that “procedural due process in the context of an award of punitive damages relates to the requirement that the procedure employed in making that award be fundamentally fair,” while the substantive limit declared by this Court relates to the size of the award. 316 Ore. 263, 280, n. 10, 851 P. 2d 1084, 1094, n. 10 (1993).

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cap. See 316 Ore. 263, 282, n. 11, 851 P. 2d 1084, 1095, n. 11 (1993). No provision of Oregon law appears to preclude the defendant from seeking an instruction setting a lower cap, if the evidence at trial cannot support an award in the amount demanded. Additionally, if the trial judge relates the incorrect maximum amount, a defendant who timely objects may gain modification or nullification of the verdict. See *Timber Access Industries Co. v. U. S. Plywood-Champion Papers, Inc.*, 263 Ore. 509, 525–528, 503 P. 2d 482, 490–491 (1972).<sup>3</sup>

Second, Oberg was not allowed to introduce evidence regarding Honda's wealth until he "presented evidence sufficient to justify to the court a prima facie claim of punitive damages." Ore. Rev. Stat. §41.315(2) (1991); see also §30.925(2) ("During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover [punitive damages]"). This evidentiary rule is designed to lessen the risk "that juries will use their verdicts to express biases against big businesses." *Ante*, at 432; see also Ore. Rev. Stat. §30.925(3)(g) (1991) (requiring factfinder to take into account "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct").

Third, and more significant, as the trial court instructed the jury, Honda could not be found liable for punitive damages unless Oberg established by "clear and convincing evidence" that Honda "show[ed] wanton disregard for the health, safety and welfare of others." §30.925 (governing product liability actions); see also §41.315(1) ("Except as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence.").

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<sup>3</sup>The Court's contrary suggestion, *ante*, at 433, is based on *Tenold v. Weyerhaeuser Co.*, 127 Ore. App. 511, 873 P. 2d 413 (1994), a decision by an intermediate appellate court, in which the defendant does not appear to have objected to the trial court's instructions as inaccurate, incomplete, or insufficient, for failure to inform the jury concerning a statutorily mandated \$500,000 cap on noneconomic damages.

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“[T]he clear-and-convincing evidence requirement,” which is considerably more rigorous than the standards applied by Alabama in *Haslip*<sup>4</sup> and West Virginia in *TXO*,<sup>5</sup> “constrain[s] the jury’s discretion, limiting punitive damages to the more egregious cases.” *Haslip*, 499 U. S., at 58 (O’CONNOR, J., dissenting). Nothing in Oregon law appears to preclude a new trial order if the trial judge, informed by the jury’s verdict, determines that his charge did not adequately explain what the “clear and convincing” standard means. See Ore. Rule Civ. Proc. 64G (1994) (authorizing court to grant new trial “on its own initiative”).

Fourth, and perhaps most important, in product liability cases, Oregon requires that punitive damages, if any, be awarded based on seven substantive criteria, set forth in Ore. Rev. Stat. § 30.925(3) (1991):

“(a) The likelihood at the time that serious harm would arise from the defendant’s misconduct;

“(b) The degree of the defendant’s awareness of that likelihood;

“(c) The profitability of the defendant’s misconduct;

“(d) The duration of the misconduct and any concealment of it;

“(e) The attitude and conduct of the defendant upon discovery of the misconduct;

“(f) The financial condition of the defendant; and

“(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to

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<sup>4</sup>The *Haslip* jury was told that it could award punitive damages if “‘reasonably satisfied from the evidence’” that the defendant committed fraud. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 6, n. 1 (1991).

<sup>5</sup>The *TXO* jury was instructed to apply a preponderance of the evidence standard. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U. S. 443, 463, n. 29 (1993).



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persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

These substantive criteria, and the precise instructions detailing them,<sup>6</sup> gave the jurors "adequate guidance" in making

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<sup>6</sup>The trial court instructed the jury:

"Punitive damages: If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.

"In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant[s] have] shown wanton disregard for the health, safety, and welfare of others. . . .

"If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

"In the exercise of that discretion, you shall consider evidence, if any, of the following:

"First, the likelihood at the time of the sale [of the all-terrain vehicle] that serious harm would arise from defendants' misconduct.

"Number two, the degree of the defendants' awareness of that likelihood.

"Number three, the duration of the misconduct.

"Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.

"Number five, the financial condition of the defendant[s]." 316 Ore., at 282, n. 11, 851 P. 2d, at 1095, n. 11.

The trial judge did not instruct the jury on § 30.925(3)(c), "profitability of [Honda's] misconduct," or § 30.925(3)(g), the "total deterrent effect of other punishment" to which Honda was subject. Honda objected to an instruction on factor (3)(c), which it argued was phrased "to assume the existence of misconduct," and expressly waived an instruction on factor (3)(g), on the ground that it had not previously been subject to punitive damages. App. to Brief for Plaintiff-Respondent in Opposition in No. S38436 (Ore.), p. 2. In its argument before the Supreme Court of Oregon, Honda did not contend that the trial court failed to instruct the jury concerning the "[§ 30.925(3)] criteria," or "that the jury did not properly apply those criteria." 316 Ore., at 282, n. 11, 851 P. 2d, at 1095, n. 11.

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their award, see *Haslip*, 499 U. S., at 18, far more guidance than their counterparts in *Haslip*<sup>7</sup> and *TXO*<sup>8</sup> received. In *Haslip*, for example, the jury was told only the purpose of

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<sup>7</sup>The trial judge in *Haslip* instructed the jury:

“Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don’t have to even find fraud, you wouldn’t have to, but you may, the law says you may award an amount of money known as punitive damages.

“This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff[s] . . . ha[ve] had a fraud perpetrated upon them and as a direct result they were injured [then] in addition to compensatory damages you may in your discretion award punitive damages.

“Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, . . . by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don’t have to award it unless this jury feels that you should do so.

“Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.” 499 U. S., at 6, n. 1 (internal quotation marks omitted).

<sup>8</sup>The jury instruction in *TXO* read:

“In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

“If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

“In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the

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punitive damages (punishment and deterrence) and that an award was discretionary, not compulsory. We deemed those instructions, notable for their generality, constitutionally sufficient. 499 U. S., at 19–20.

The Court's opinion in *Haslip* went on to describe the checks Alabama places on the jury's discretion *postverdict*—through excessiveness review by the trial court, and appellate review, which tests the award against specific substantive criteria. *Id.*, at 20–23. While postverdict review of that character is not available in Oregon, the seven factors against which Alabama's Supreme Court tests punitive awards<sup>9</sup> strongly resemble the statutory criteria Oregon's juries are instructed to apply. 316 Ore., at 283, and n. 12, 851 P. 2d, at 1095–1096, and n. 12. And this Court has often acknowledged, and generally respected, the presumption that juries follow the instructions they are given. See, *e. g.*,

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intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.'" 509 U. S., at 463, n. 29.

<sup>9</sup>The Alabama factors are:

"(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U. S., at 21–22, citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223–224 (Ala. 1989), and *Central Alabama Elec. Cooperative v. Tapley*, 546 So. 2d 371, 376–377 (Ala. 1989).

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*Shannon v. United States*, post, at 584–585; *Richardson v. Marsh*, 481 U. S. 200, 206 (1987).

As the Supreme Court of Oregon observed, *Haslip* “determined only that the Alabama procedure, as a whole and in its net effect, did not violate the Due Process Clause.” 316 Ore., at 284, 851 P. 2d, at 1096. The Oregon court also observed, correctly, that the Due Process Clause does not require States to subject punitive damage awards to a form of postverdict review “that includes the possibility of remittitur.”<sup>10</sup> *Ibid.* Because Oregon requires the factfinder to apply § 30.925’s objective criteria, moreover, its procedures are perhaps more likely to prompt rational and fair punitive damage decisions than are the *post hoc* checks employed in jurisdictions following Alabama’s pattern. See *Haslip*, 499 U. S., at 52 (O’CONNOR, J., dissenting) (“[T]he standards [applied by the Alabama Supreme Court] could assist juries to make fair, rational decisions. Unfortunately, Alabama courts do not give the[se] factors to the jury. Instead, the jury has standardless discretion to impose punitive damages whenever and in whatever amount it wants.”). As the Oregon court concluded, “application of objective criteria ensures that sufficiently definite and meaningful constraints are imposed on the finder of fact.” 316 Ore., at 283, 851 P. 2d, at 1096. The Oregon court also concluded that the statutory criteria, by adequately guiding the jury, worked to “ensur[e] that the resulting award is not disproportionate to a defendant’s conduct and to the need to punish and deter.” *Ibid.*<sup>11</sup>

<sup>10</sup> Indeed, the compatibility of the remittitur with the Seventh Amendment was not settled until *Dimick v. Schiedt*, 293 U. S. 474 (1935).

<sup>11</sup> Oregon juries, reported decisions indicate, rarely award punitive damages. Between 1965 and the present, awards of punitive damages have been reported in only two product liability cases involving Oregon law, including this one. See Brief for Trial Lawyers for Public Justice as *Amicus Curiae* 10, and n. 7. The punitive award in this case was about 5.4 times the amount of compensatory damages and about 258 times the plaintiff’s out-of-pocket expenses. This amount is not far distant from

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## 2

The Supreme Court of Oregon's conclusions are buttressed by the availability of at least some postverdict judicial review of punitive damage awards. Oregon's courts ensure that there is evidence to support the verdict:

“If there is no evidence to support the jury's decision—in this context, no evidence that the statutory prerequisites for the award of punitive damages were met—then the trial court or the appellate courts can intervene to vacate the award. See ORCP 64B(5) (trial court may grant a new trial if the evidence is insufficient to justify the verdict or is against law); *Hill v. Garner*, 277 Ore. 641, 643, 561 P. 2d 1016 (1977) (judgment notwithstanding the verdict is to be granted when there is no evidence to support the verdict); *State v. Brown*, 306 Ore. 599, 604, 761 P. 2d 1300 (1988) (a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision).” *Id.*, at 285, 851 P. 2d, at 1096–1097.

The State's courts have shown no reluctance to strike punitive damage awards in cases where punitive liability is not established, so that defendant qualifies for judgment on that issue as a matter of law. See, e. g., *Badger v. Paulson Investment Co.*, 311 Ore. 14, 28–30, 803 P. 2d 1178, 1186–1187 (1991); *Andor v. United Airlines*, 303 Ore. 505, 739 P. 2d 18 (1987); *Schmidt v. Pine Tree Land Development Co.*, 291 Ore. 462, 631 P. 2d 1373 (1981).

In addition, punitive damage awards may be set aside because of flaws in jury instructions. 316 Ore., at 285, 851 P. 2d, at 1097. See, e. g., *Honeywell v. Sterling Furniture*

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the award upheld in *Haslip*, which was more than 4 times the amount of compensatory damages and more than 200 times the plaintiff's out-of-pocket expenses. See 499 U. S., at 23. The \$10 million award this Court sustained in *TXO*, in contrast, was more than 526 times greater than the actual damages of \$19,000. 509 U. S., at 453.

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*Co.*, 310 Ore. 206, 210–214, 797 P. 2d 1019, 1021–1023 (1990) (setting aside punitive damage award because it was prejudicial error to instruct jury that a portion of any award would be used to pay plaintiff’s attorney’s fees and that another portion would go to State’s common injury fund). As the Court acknowledges, “proper jury instructio[n] is a well-established and, of course, important check against excessive awards.” *Ante*, at 433.

## II

In short, Oregon has enacted legal standards confining punitive damage awards in product liability cases. These state standards are judicially enforced by means of comparatively comprehensive preverdict procedures but markedly limited postverdict review, for Oregon has elected to make factfinding, once supporting evidence is produced, the province of the jury. Cf. *Chicago, R. I. & P. R. Co. v. Cole*, 251 U. S. 54, 56 (1919) (upholding against due process challenge Oklahoma Constitution’s assignment of contributory negligence and assumption of risk defenses to jury’s unreviewable decision; Court recognized State’s prerogative to “confer larger powers upon a jury than those that generally prevail”); *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 479 (1981) (STEVENS, J., dissenting) (observing that “allocation of functions within the structure of a state government” is ordinarily “a matter for the State to determine”). The Court today invalidates this choice, largely because it concludes that English and early American courts generally provided judicial review of the size of punitive damage awards. See *ante*, at 421–426. The Court’s account of the relevant history is not compelling.

## A

I am not as confident as the Court about either the clarity of early American common law or its import. Tellingly, the Court barely acknowledges the large authority exercised by American juries in the 18th and 19th centuries. In the early

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years of our Nation, juries “usually possessed the power to determine both law and fact.” Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 Mich. L. Rev. 893, 905 (1978); see, e. g., *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794) (Chief Justice John Jay, trying case in which State was party, instructed jury it had authority “to determine the law as well as the fact in controversy”).<sup>12</sup> And at the time trial by jury was recognized as the constitutional right of parties “[i]n [s]uits at common law,” U. S. Const., Amdt. 7, the assessment of “uncertain damages” was regarded, generally, as exclusively a jury function. See Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156, and n. 69 (1991); see also *id.*, at 156–158, 163, and n. 112.

More revealing, the Court notably contracts the scope of its inquiry. It asks: Did common-law judges claim the power to overturn jury verdicts they viewed as excessive? But full and fair historical inquiry ought to be wider. The Court should inspect, comprehensively and comparatively, the procedures employed—at trial *and* on appeal—to fix the amount of punitive damages.<sup>13</sup> Evaluated in this manner, Oregon’s scheme affords defendants like Honda *more* procedural safeguards than 19th-century law provided.

As detailed *supra*, at 440–441, Oregon instructs juries to decide punitive damage issues based on seven substantive factors and a clear and convincing evidence standard. When the Fourteenth Amendment was adopted in 1868, in contrast, “no particular procedures were deemed necessary to circumscribe a jury’s discretion regarding the award of [pu-

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<sup>12</sup> Not until *Sparf v. United States*, 156 U. S. 51, 102 (1895), was the jury’s power to decide the law conclusively rejected for the federal courts. See Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. J. 859, 900 (1991).

<sup>13</sup> An inquiry of this order is akin to the one made in *Haslip*. See *supra*, at 443–444.

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nitive] damages, or their amount.” *Haslip*, 499 U.S., at 27 (SCALIA, J., concurring in judgment). The responsibility entrusted to the jury surely was not guided by instructions of the kind Oregon has enacted. Compare 1 J. Sutherland, *Law of Damages* 720 (1882) (“If, in committing the wrong complained of, [the defendant] acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff, the jury in fixing the damages may disregard the rule of compensation; and, beyond that, may, as a punishment of the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper.”), with Ore. Rev. Stat. § 30–925 (1991) (requiring jury to consider, *inter alia*, “likelihood at the time that serious harm would arise from the defendant’s misconduct”; “degree of the defendant’s awareness of that likelihood”; “profitability of the defendant’s misconduct”; “duration of the misconduct and any concealment of it”).

Furthermore, common-law courts reviewed punitive damage verdicts extremely deferentially, if at all. See, e.g., *Day v. Woodworth*, 13 How. 363, 371 (1852) (assessment of “exemplary, punitive, or vindictive damages . . . has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case”); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) (“[t]he discretion of the jury in such cases is not controlled by any very definite rules”); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (in “actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict”). True, 19th-century judges occasionally asserted that they had authority to overturn damage awards upon concluding, from the size of an award, that the jury’s decision must have been based on “partiality” or “passion and prejudice.” *Ante*, at 425. But courts rarely *exer-*



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*cised* this authority. See T. Sedgwick, *Measure of Damages* 707 (5th ed. 1869) (power “very sparingly used”).

## B

Because Oregon’s procedures assure “adequate guidance from the court when the case is tried to a jury,” *Haslip*, 499 U. S., at 18, this Court has no cause to disturb the judgment in this instance, for Honda presses here only a *procedural* due process claim. True, in a footnote to its petition for certiorari, not repeated in its briefs, Honda attributed to this Court an “assumption that procedural due process requires [judicial] review of *both* federal substantive due process and state-law excessiveness challenges to the size of an award.” Pet. for Cert. 16, n. 10 (emphasis in original). But the assertion regarding “state-law excessiveness challenges” is extraordinary, for this Court has never held that the Due Process Clause requires a State’s courts to police jury factfindings to ensure their conformity with state law. See *Chicago, R. I. & P. R. Co. v. Cole*, 251 U. S., at 56. And, as earlier observed, see *supra*, at 438, the plurality opinion in *TXO* disavowed the suggestion that a defendant has a federal due process right to a correct determination under state law of the “reasonableness” of a punitive damages award. 509 U. S., at 458, n. 24.

Honda further asserted in its certiorari petition footnote:

“Surely . . . due process (not to mention Supremacy Clause principles) requires, at a minimum, that state courts entertain and pass on the federal-law contention that a particular punitive verdict is so grossly excessive as to violate substantive due process. Oregon’s refusal to provide even that limited form of review is particularly indefensible.” Pet. for Cert. 16, n. 10.

But Honda points to no definitive Oregon pronouncement postdating this Court’s precedent-setting decisions in *Haslip*

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and *TXO* demonstrating the hypothesized refusal to pass on a federal-law contention.<sup>14</sup>

It may be that Oregon's procedures guide juries so well that the "grossly excessive" verdict Honda projects in its certiorari petition footnote never materializes. Cf. *supra*, at 444, n. 11 (between 1965 and the present, awards of punitive damages in Oregon have been reported in only two product liability cases, including this one). If, however, in some future case, a plea is plausibly made that a particular punitive damage award is not merely excessive, but "so 'grossly excessive' as to violate the Federal Constitution," *TXO*, 509 U. S., at 458, n. 24, and Oregon's judiciary nevertheless insists that it is powerless to consider the plea, this Court might have cause to grant review. Cf. *Testa v. Katt*, 330 U. S. 386 (1947) (ruling on obligation of state courts to enforce federal law). No such case is before us today, nor does Honda, in this Court, maintain otherwise. See 316 Ore., at 286, n. 14, 851 P. 2d, at 1097, n. 14; *supra*, at 444–445, n. 11 (size of award against Honda does not appear to be out of line with awards upheld in *Haslip* and *TXO*).

To summarize: Oregon's procedures adequately guide the jury charged with the responsibility to determine a plaintiff's qualification for, and the amount of, punitive damages, and on that account do not deny defendants procedural due process; Oregon's Supreme Court correctly refused to rule that "an award of punitive damages, to comport with the requirements of the Due Process Clause, *always* must be subject to a form of post-verdict or appellate review" for excessiveness, 316 Ore., at 284, 851 P. 2d, at 1096 (emphasis

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<sup>14</sup>In its 1949 decision in *Van Lom v. Schneiderman*, 187 Ore. 89, 210 P. 2d 461, the Supreme Court of Oregon merely held that it lacked authority to order a new trial even though an award of damages was excessive under *state law*. See *ante*, at 435–436 (SCALIA, J., concurring). No federal limit had yet been recognized, and the *Van Lom* court had no occasion to consider its obligation to check jury verdicts deemed excessive under *federal law*.

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added); the verdict in this particular case, considered in light of this Court's decisions in *Haslip* and *TXO*, hardly appears "so 'grossly excessive' as to violate the substantive component of the Due Process Clause," *TXO*, 509 U. S., at 458. Accordingly, the Court's procedural directive to the state court is neither necessary nor proper. The Supreme Court of Oregon has not refused to enforce federal law, and I would affirm its judgment.

## Syllabus

DAVIS *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF  
MILITARY APPEALS

No. 92–1949. Argued March 29, 1994—Decided June 24, 1994

Petitioner, a member of the United States Navy, initially waived his rights to remain silent and to counsel when he was interviewed by Naval Investigative Service agents in connection with the murder of a sailor. About an hour and a half into the interview, he said, “Maybe I should talk to a lawyer.” However, when the agents inquired if he was asking for a lawyer, he replied that he was not. They took a short break, he was reminded of his rights, and the interview continued for another hour, until he asked to have a lawyer present before saying anything more. A military judge denied his motion to suppress statements made at the interview, holding that his mention of a lawyer during the interrogation was not a request for counsel. He was convicted of murder, and, ultimately, the Court of Military Appeals affirmed.

*Held:*

1. After a knowing and voluntary waiver of rights under *Miranda v. Arizona*, 384 U. S. 436, law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney. A suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. *Id.*, at 469–473. If the suspect invokes that right at any time, the police must immediately cease questioning him until an attorney is present. *Edwards v. Arizona*, 451 U. S. 477, 484–485. The *Edwards* rule serves the prophylactic purpose of preventing officers from badgering a suspect into waiving his previously asserted *Miranda* rights, and its applicability requires courts to determine whether the accused actually invoked his right to counsel. This is an objective inquiry, requiring some statement that can reasonably be construed to be an expression of a desire for an attorney’s assistance. However, if a reference is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, *Edwards* does not require that officers stop questioning the suspect. Extending *Edwards* to create such a requirement would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate investigative activity by needlessly preventing the police from questioning a suspect in the absence of an attorney, even if the

## Syllabus

suspect does not wish to have one present. The *Edwards* rule provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. This clarity and ease of application would be lost if officers were required to cease questioning based on an ambiguous or equivocal reference to an attorney, since they would be forced to make difficult judgment calls about what the suspect wants, with the threat of suppression if they guess wrong. While it will often be good police practice for officers to clarify whether a suspect making an ambiguous statement really wants an attorney, they are not required to ask clarifying questions. Pp. 456–462.

2. There is no reason to disturb the conclusion of the courts below that petitioner’s remark—“Maybe I should talk to a lawyer”—was not a request for counsel. P. 462.

36 M. J. 337, affirmed.

O’CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 462. SOUTER, J., filed an opinion concurring in the judgment, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, *post*, p. 466.

*David S. Jonas* argued the cause for petitioner. With him on the briefs were *Philip L. Sundel*, *Daniel S. Jonas*, and *David Rudovsky*.

*Richard H. Seamon* argued the cause for the United States. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Harris*, *Deputy Solicitor General Bryson*, *Joel M. Gershowitz*, *Theodore G. Hess*, and *Brett D. Barkey*.\*

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\**Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Richard M. Weintraub*, *William C. O’Malley*, and *Bernard J. Farber* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Association of Criminal Defense Lawyers by *Janet E. Ainsworth*; and for the Washington Legal Foundation et al. by *Paul G. Cassell*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

## Opinion of the Court

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Edwards v. Arizona*, 451 U. S. 477 (1981), we held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. In this case we decide how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.

## I

Pool brought trouble—not to River City, but to the Charleston Naval Base. Petitioner, a member of the United States Navy, spent the evening of October 2, 1988, shooting pool at a club on the base. Another sailor, Keith Shackleton, lost a game and a \$30 wager to petitioner, but Shackleton refused to pay. After the club closed, Shackleton was beaten to death with a pool cue on a loading dock behind the commissary. The body was found early the next morning.

The investigation by the Naval Investigative Service (NIS) gradually focused on petitioner. Investigative agents determined that petitioner was at the club that evening, and that he was absent without authorization from his duty station the next morning. The agents also learned that only privately owned pool cues could be removed from the club premises, and that petitioner owned two cues—one of which had a bloodstain on it. The agents were told by various people that petitioner either had admitted committing the crime or had recounted details that clearly indicated his involvement in the killing.

On November 4, 1988, petitioner was interviewed at the NIS office. As required by military law, the agents advised petitioner that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning. See Art. 31, Uniform Code of

## Opinion of the Court

Military Justice (UCMJ), 10 U. S. C. § 831; Mil. Rule Evid. 305; Manual for Courts-Martial A22–13 (1984). Petitioner waived his rights to remain silent and to counsel, both orally and in writing.

About an hour and a half into the interview, petitioner said, “Maybe I should talk to a lawyer.” App. 135. According to the uncontradicted testimony of one of the interviewing agents, the interview then proceeded as follows:

“[We m]ade it very clear that we’re not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren’t going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [‘]No, I’m not asking for a lawyer,’ and then he continued on, and said, ‘No, I don’t want a lawyer.’” *Id.*, at 136.

After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, “I think I want a lawyer before I say anything else.” *Id.*, at 137. At that point, questioning ceased.

At his general court-martial, petitioner moved to suppress statements made during the November 4 interview. The Military Judge denied the motion, holding that “the mention of a lawyer by [petitioner] during the course of the interrogation [was] not in the form of a request for counsel and . . . the agents properly determined that [petitioner] was not indicating a desire for or invoking his right to counsel.” *Id.*, at 164. Petitioner was convicted on one specification of unpremeditated murder, in violation of Art. 118, UCMJ, 10 U. S. C. § 918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest pay grade. The convening authority approved the findings and sentence. The Navy-

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Marine Corps Court of Military Review affirmed. App. to Pet. for Cert. 12a–15a.

The United States Court of Military Appeals granted discretionary review and affirmed. 36 M. J. 337 (1993). The court recognized that the state and federal courts have developed three different approaches to a suspect’s ambiguous or equivocal request for counsel:

“Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions . . . have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect’s] desires respecting counsel.” *Id.*, at 341 (internal quotation marks omitted).

Applying the third approach, the court held that petitioner’s comment was ambiguous, and that the NIS agents properly clarified petitioner’s wishes with respect to counsel before continuing questioning him about the offense. *Id.*, at 341–342.

Although we have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation, see *Connecticut v. Barrett*, 479 U. S. 523, 529–530, n. 3 (1987); *Smith v. Illinois*, 469 U. S. 91, 96, n. 3 (1984) (*per curiam*), we have not addressed the issue on the merits. We granted certiorari, 510 U. S. 942 (1993), to do so.

## II

The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, see *United*



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*States v. Gouveia*, 467 U. S. 180, 188 (1984), and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona*, 384 U. S. 436, 469–473 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a “series of recommended ‘procedural safeguards’ . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.” *Michigan v. Tucker*, 417 U. S. 433, 443–444 (1974); see U. S. Const., Amdt. 5 (“No person . . . shall be compelled in any criminal case to be a witness against himself”).\*

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\*We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings, see Art. 36(a), UCMJ, 10 U. S. C. § 836(a), has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. Mil. Rules Evid. 304(a) and (c)(3). Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, see, e. g., *United States v. McLaren*, 38 M. J. 112, 115 (1993); *United States v. Applewhite*, 23 M. J. 196, 198 (1987), and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

We also note that the Government has not sought to rely in this case on 18 U. S. C. § 3501, “the statute governing the admissibility of confessions in federal prosecutions,” *United States v. Alvarez-Sanchez*, 511 U. S. 350, 351 (1994), and we therefore decline the invitation of some *amici* to consider it. See Brief for Washington Legal Foundation et al. as *Amici Curiae* 7–14. Although we will consider arguments raised only in an *amicus* brief, see *Teague v. Lane*, 489 U. S. 288, 300 (1989) (plurality opinion), we are reluctant to do so when the issue is one of first impression involving

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The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it “requir[es] the special protection of the knowing and intelligent waiver standard.” *Edwards v. Arizona*, 451 U. S., at 483. See *Oregon v. Bradshaw*, 462 U. S. 1039, 1046–1047 (1983) (plurality opinion); *id.*, at 1051 (Powell, J., concurring in judgment). If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. *North Carolina v. Butler*, 441 U. S. 369, 372–376 (1979). But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, *supra*, at 484–485. This “second layer of prophylaxis for the *Miranda* right to counsel,” *McNeil v. Wisconsin*, 501 U. S. 171, 176 (1991), is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights,” *Michigan v. Harvey*, 494 U. S. 344, 350 (1990). To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present. *Minnick v. Mississippi*, 498 U. S. 146 (1990); *Arizona v. Roberson*, 486 U. S. 675 (1988). “It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment’s prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.” *Connecticut v. Barrett*, *supra*, at 528.

The applicability of the “‘rigid’ prophylactic rule” of *Edwards* requires courts to “determine whether the accused *actually invoked* his right to counsel.” *Smith v. Illinois*, *supra*, at 95 (emphasis added), quoting *Fare v. Michael C.*, 442 U. S. 707, 719 (1979). To avoid difficulties of proof and to

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the interpretation of a federal statute on which the Department of Justice expressly declines to take a position. See Tr. of Oral Arg. 44–47.

## Opinion of the Court

provide guidance to officers conducting interrogations, this is an objective inquiry. See *Connecticut v. Barrett*, *supra*, at 529. Invocation of the *Miranda* right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.” *McNeil v. Wisconsin*, 501 U. S., at 178. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. See *ibid.* (“[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards*”); *Edwards v. Arizona*, *supra*, at 485 (impermissible for authorities “to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel”) (emphasis added).

Rather, the suspect must unambiguously request counsel. As we have observed, “a statement either is such an assertion of the right to counsel or it is not.” *Smith v. Illinois*, 469 U. S., at 97–98 (brackets and internal quotation marks omitted). Although a suspect need not “speak with the discrimination of an Oxford don,” *post*, at 476 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine*, 475 U. S. 412, 433, n. 4 (1986) (“[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney”) (citations and internal quotation marks omitted).

We decline petitioner’s invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. See *Arizona v. Roberson*, *supra*, at 688

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(KENNEDY, J., dissenting) (“[T]he rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion”). The rationale underlying *Edwards* is that the police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning “would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,” *Michigan v. Mosley*, 423 U. S. 96, 102 (1975), because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. Nothing in *Edwards* requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer. In *Miranda* itself, we expressly rejected the suggestion “that each police station must have a ‘station house lawyer’ present at all times to advise prisoners,” 384 U. S., at 474, and held instead that a suspect must be told of his right to have an attorney present and that he may not be questioned after invoking his right to counsel. We also noted that if a suspect is “indecisive in his request for counsel,” the officers need not always cease questioning. See *id.*, at 485.

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. “[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.” *Moran v. Burbine*, *supra*, at 427. A suspect who knowingly and voluntarily waives his right to counsel after having that right explained

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to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's state-

SCALIA, J., concurring

ment is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

The courts below found that petitioner's remark to the NIS agents—"Maybe I should talk to a lawyer"—was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer. Because there is no ground for suppression of petitioner's statements, the judgment of the Court of Military Appeals is

*Affirmed.*

JUSTICE SCALIA, concurring.

Section 3501 of Title 18 of the United States Code is "the statute governing the admissibility of confessions in federal prosecutions." *United States v. Alvarez-Sanchez*, 511 U. S. 350, 351 (1994). That provision declares that "a confession . . . shall be admissible in evidence if it is voluntarily given," and that the issue of voluntariness shall be determined on the basis of "all the circumstances surrounding the giving of the confession, including whether or not [the] defendant was advised or knew that he was not required to make any statement . . . [;] . . . whether or not [the] defendant had been advised prior to questioning of his right to the assistance of counsel; and . . . whether or not [the] defendant was without the assistance of counsel when questioned . . . ."

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§§ 3501(a), (b) (emphases added). It continues (lest the import be doubtful): “The presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession.” § 3501(b). Legal analysis of the admissibility of a confession without reference to these provisions is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise. Yet as the Court observes, see *ante*, at 457–458, n., that is precisely what the United States has undertaken in this case. It did not raise § 3501(a) below and asserted that it is “not at issue” here, Brief for United States 18, n. 13.\*

This is not the first case in which the United States has declined to invoke § 3501 before us—nor even the first case in which that failure has been called to its attention. See Tr. of Oral Arg. in *United States v. Green*, O. T. 1992, No. 91–1521, pp. 18–21. In fact, with limited exceptions the

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\*The United States makes the unusually self-denying assertion that the provision “in any event would appear not to be applicable in court-martial cases” since (1) court-martial cases are not “‘criminal prosecutions’” within the meaning of the Sixth Amendment and “therefore would not appear to be ‘criminal prosecution[s]’ for purposes of Section 3501(a),” and (2) courts-martial are governed by Article 31 of the Uniform Code of Military Justice, 10 U. S. C. § 831, and Rules 304 and 305 of the Military Rules of Evidence. The first point seems to me questionable: The meaning of terms in statutes does not necessarily parallel their meaning in the Constitution. Moreover, even accepting the premise that § 3501 does not apply to courts-martial directly, it does apply indirectly, through Rule 101(b)(1) of the Military Rules of Evidence, which requires courts-martial to apply “the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” As for the second point: The cited provisions of the Uniform Code and the Military Rules may (though I doubt it) be independent reasons why the confession here should be excluded, but they cannot *possibly* be reasons why § 3501 does not prevent *Miranda v. Arizona*, 384 U. S. 436 (1966), from being a basis for excluding them, which is the issue before us. In any event, the Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it—and it is *that* refusal which my present statement addresses.

SCALIA, J., concurring

provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago. See Office of Legal Policy, U. S. Dept. of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72–73 (1986) (discussing “[t]he abortive implementation of § 3501” after its passage in 1968).

I agree with the Court that it is *proper*, given the Government’s failure to raise the point, to render judgment without taking account of § 3501. But the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary. See *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 445–448 (1993) (proper for Court of Appeals to consider whether an allegedly controlling statute had been repealed, despite parties’ failure, upon invitation, to assert the point). As far as I am concerned, such a time will have arrived when a case that comes within the terms of this statute is next presented to us.

For most of this century, voluntariness *vel non* was the touchstone of admissibility of confessions. See *Miranda v. Arizona*, 384 U. S. 436, 506–507 (1966) (Harlan, J., dissenting). Section 3501 of Title 18 *seems* to provide for that standard in federal criminal prosecutions today. I say “seems” because I do not wish to prejudge any issue of law. I am entirely open to the argument that § 3501 does not mean what it appears to say; that it is inapplicable for some other reason; or even that it is unconstitutional. But I will no longer be open to the argument that this Court should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them.

The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion. And it has the power (whether or not it



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has the right) to avoid application of § 3501 by simply declining to introduce into evidence confessions admissible under its terms. But once a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law. Section § 3501 of Title 18 is a provision of law directed *to the courts*, reflecting the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement. We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it.

The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda*" issues that might be entirely irrelevant under federal law. See, *e. g.*, in addition to the present case, *United States v. Green*, 507 U. S. 545 (1993) (dism'g cert. as moot); *United States v. Griffin*, 922 F. 2d 1343 (CA8 1990); *United States v. Vazquez*, 857 F. 2d 857 (CA1 1988); *United States v. Scalf*, 725 F. 2d 1272 (CA10 1984). Worse still, it may have produced—during an era of intense national concern about the problem of runaway crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this. Perhaps (though I do not immediately see why) the Justice Department has good basis for believing that allowing prosecutions to be defeated on grounds that could be avoided by invocation of § 3501 is consistent with the Executive's obligation to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, §3. That is not the point. The point is whether *our* continuing refusal to *consider* § 3501 is consistent with the Third Branch's obligation to decide according to the law. I think it is not.

SOUTER, J., concurring in judgment

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG join, concurring in the judgment.

In the midst of his questioning by naval investigators, petitioner said “Maybe I should talk to a lawyer.” The investigators promptly stopped questioning Davis about the killing of Keith Shackleton and instead undertook to determine whether he meant to invoke his right to counsel, see *Miranda v. Arizona*, 384 U. S. 436 (1966). According to testimony accepted by the courts below, Davis answered the investigators’ questions on that point by saying, “I’m not asking for a lawyer,” and “No, I don’t want to talk to a lawyer.” Only then did the interrogation resume (stopping for good when petitioner said, “I think I want a lawyer before I say anything else”).

I agree with the majority that the Constitution does not forbid law enforcement officers to pose questions (like those directed at Davis) aimed solely at clarifying whether a suspect’s ambiguous reference to counsel was meant to assert his Fifth Amendment right. Accordingly I concur in the judgment affirming Davis’s conviction, resting partly on evidence of statements given after agents ascertained that he did not wish to deal with them through counsel. I cannot, however, join in my colleagues’ further conclusion that if the investigators here had been so inclined, they were at liberty to disregard Davis’s reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover what a custodial subject meant by an ambiguous statement that could reasonably be understood to express a desire to consult a lawyer.

Our own precedent, the reasonable judgments of the majority of the many courts already to have addressed the issue before us,<sup>1</sup> and the advocacy of a considerable body of law

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<sup>1</sup>See, e. g., *United States v. Porter*, 776 F. 2d 370 (CA1 1985) (en banc); *United States v. Gotay*, 844 F. 2d 971, 975 (CA2 1988); *Thompson v. Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979) (en banc); *United States v. Fouche*, 833 F. 2d 1284, 1287 (CA9 1987); *United States v. March*, 999 F. 2d

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enforcement officials<sup>2</sup> are to the contrary. All argue against the Court's approach today, which draws a sharp line between interrogated suspects who "clearly" assert their right to counsel, *ante*, at 461, and those who say something that may, but may not, express a desire for counsel's presence, the former suspects being assured that questioning will not resume without counsel present, see *Miranda, supra*, at 474, *Edwards v. Arizona*, 451 U. S. 477, 484–485 (1981); *Minnick v. Mississippi*, 498 U. S. 146 (1990), the latter being left to fend for themselves. The concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials "reasonably do not know whether or not the suspect wants a lawyer," *ante*, at 460, they should stop their interrogation and ask him to make his choice clear.

## I

### A

While the question we address today is an open one,<sup>3</sup> its answer requires coherence with nearly three decades of case

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456, 461–462 (CA10 1993); *United States v. Mendoza-Cecelia*, 963 F. 2d 1467, 1472 (CA11 1992); see also *Howard v. Pung*, 862 F. 2d 1348 (CA8 1988). The weight of state-court authority is similarly lopsided, see, *e. g.*, *People v. Benjamin*, 732 P. 2d 1167, 1171 (Colo. 1987); *Crawford v. State*, 580 A. 2d 571, 576–577 (Del. 1990); *Martinez v. State*, 564 So. 2d 1071, 1074 (Fla. 1990); *State v. Robinson*, 427 N. W. 2d 217, 223 (Minn. 1988).

<sup>2</sup>See Brief for Americans for Effective Law Enforcement, Inc., International Association of Chiefs of Police, Inc., National District Attorneys Association, and National Sheriffs' Association as *Amici Curiae* 5 (The approach advocated here "is a common sense resolution of the problem. It fully accommodates the rights of the subject, while at the same time preserv[ing] the interests of law enforcement and of the public welfare"); see also Brief for United States 20 (approach taken by the Court does not "fulfill the fundamental purpose of *Miranda*") (internal quotation marks omitted).

<sup>3</sup>The majority acknowledges, *ante*, at 456, that we have declined (despite the persistence of divergent approaches in the lower courts) to decide the operative rule for such ambiguous statements, see, *e. g.*, *Connecticut v. Barrett*, 479 U. S. 523, 529, n. 3 (1987); *Mueller v. Virginia*, 507 U. S. 1043

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law addressing the relationship between police and criminal suspects in custodial interrogation. Throughout that period, two precepts have commanded broad assent: that the

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(1993) (White, J., dissenting from denial of certiorari), but then suggests that the conclusion it reaches was foreshadowed by *McNeil v. Wisconsin*, 501 U. S. 171 (1991), where we noted that the “likelihood that a suspect would wish counsel to be present” was not dispositive, *id.*, at 178. But we were not addressing the degree of clarity required to activate the counsel right (let alone endorsing the standard embraced today), as is evident from the very page of *McNeil* cited, where we were careful to say only that the *Miranda* counsel right “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.” 501 U. S., at 178. *McNeil* instead made the different and familiar point that courts may not presume that a silent defendant “would” want a lawyer whenever circumstances suggest that representation “would” be in his interest.

Nor may this case be disposed of by italicizing the words of *Edwards v. Arizona*, 451 U. S. 477, 485 (1981), to the effect that when a suspect “clearly assert[s]” his right, questioning must cease. See *ante*, at 459. Even putting aside that the particular statement in that case was not entirely clear (the highest court to address the question described it as “equivocal,” see *State v. Edwards*, 122 Ariz. 206, 211, 594 P. 2d 72, 77 (1979); see also 451 U. S., at 480, n. 6), *Edwards* no more decided the legal consequences of a less than “clear” statement than *Miranda*, by saying that explicit waivers are sufficient, 384 U. S., at 475, settled whether they are necessary. See *North Carolina v. Butler*, 441 U. S. 369, 373 (1979) (holding they are not). Were it otherwise, there would have been no reason after *Edwards* to identify the issue as unresolved, but see *Barrett, supra*; *Smith v. Illinois*, 469 U. S. 91, 95–96 (1984) (*per curiam*).

Nor, finally, is it plausible to read *Miranda* itself as a presage of the Court’s rule, on account of language suggesting that questioning need not stop when a request for counsel is “indecisive.” *Ante*, at 460 (quoting *Miranda*, 384 U. S., at 485). The statement quoted, however, is not taken from the Court’s holding, but rather from a lengthy direct quotation of a letter to the Court from the Solicitor General, purporting to summarize then-current FBI practice (which the Court observed was “consistent,” *id.*, at 484, with the rule announced). In any event, the letter further explains that, under the FBI policy, the “indecisive” suspect may be “question[ed] on whether he did or did not waive counsel,” *id.*, at 485, an approach closer to the one advocated here than to the one the Court adopts.

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*Miranda* safeguards exist “to assure that *the individual’s right to choose* between speech and silence remains unfettered throughout the interrogation process,” see *Connecticut v. Barrett*, 479 U. S. 523, 528 (1987) (quoting *Miranda*, 384 U. S., at 469, and supplying emphasis), and that the justification for *Miranda* rules, intended to operate in the real world, “must be consistent with . . . practical realities,” *Arizona v. Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting). A rule barring government agents from further interrogation until they determine whether a suspect’s ambiguous statement was meant as a request for counsel fulfills both ambitions. It assures that a suspect’s choice whether or not to deal with police through counsel will be “scrupulously honored,” *Miranda, supra*, at 479; cf. *Michigan v. Mosley*, 423 U. S. 96, 110, n. 2 (1975) (White, J., concurring in result), and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

## B

Tested against the same two principles, the approach the Court adopts does not fare so well. First, as the majority expressly acknowledges, see *ante*, at 460, criminal suspects who may (in *Miranda’s* words) be “thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures,” 384 U. S., at 457, would seem an odd group to single out for the Court’s demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, see, e. g., *United States v. De la Jara*, 973 F. 2d 746, 750 (CA9 1992); many are “woefully ignorant,” *Miranda, supra*, at 468; cf. *Davis v. North Carolina*, 384 U. S. 737, 742 (1966); and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that

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the ability to speak assertively will abandon them.<sup>4</sup> Indeed, the awareness of just these realities has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be “give[n] a broad, rather than a narrow, interpretation,” see *Michigan v. Jackson*, 475 U. S. 625, 633 (1986); *Barrett, supra*, at 529, and that courts “indulge every reasonable presumption,” *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938) (internal quotation marks omitted), that a suspect has not waived his right to counsel under *Miranda*, see, *e. g.*, *Oregon v. Bradshaw*, 462 U. S. 1039, 1051 (1983) (Powell, J., concurring) (“We are unanimous in agreeing . . . that the [*Miranda*] right to counsel is a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard”) (internal quotation marks and brackets omitted); cf. *Minnick*, 498 U. S., at 160 (SCALIA, J., dissenting) (“[W]e have adhered to the principle that nothing less than the *Zerbst* standard” is appropriate for *Miranda* waivers).

Nor may the standard governing waivers as expressed in these statements be deflected away by drawing a distinction between initial waivers of *Miranda* rights and subsequent

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<sup>4</sup>Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. See W. O’Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* 61–71 (1982). Suspects in police interrogation are strong candidates for these effects. Even while resort by the police to the “third degree” has abated since *Miranda*, the basic forms of psychological pressure applied by police appear to have changed less. Compare, *e. g.*, *Miranda, supra*, at 449 (“[T]he principal psychological factor contributing to a successful interrogation is *privacy*”) (quoting F. Inbau & J. Reid, *Criminal Interrogation and Confessions* 1 (1962)), with F. Inbau, J. Reid, & J. Buckley, *Criminal Interrogation and Confessions* 24 (3d ed. 1986) (“The principal psychological factor contributing to a successful interrogation is *privacy*”).

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decisions to reinvoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing a clear subsequent assertion. *Miranda* itself discredited the legitimacy of any such distinction. The opinion described the object of the warning as being to assure “a continuous opportunity to exercise [the right of silence],” 384 U. S., at 444; see also *Moran v. Burbine*, 475 U. S. 412, 458 (1986) (STEVENS, J., dissenting); accord, *id.*, at 423, n. 1. “[C]ontinuous opportunity” suggests an unvarying one, governed by a common standard of effectiveness. The suggestion is confirmed by the very first statement that follows, that “there can be no questioning” if the suspect “indicates in any manner and at any stage of the process that he wishes to consult with an attorney,” *Miranda*, 384 U. S., at 444–445. “[A]t any stage” obviously includes the stage after initial waiver and the commencement of questioning, and “indicates in any manner” is a rule plainly in tension with the indication “with a vengeance,” see *id.*, at 505 (Harlan, J., dissenting), that the Court would require for exercise of the “continuous” right at some point after initial waiver.

The Court defends as tolerable the certainty that some poorly expressed requests for counsel will be disregarded on the ground that *Miranda* warnings suffice to alleviate the inherent coercion of the custodial interrogation. *Ante*, at 460. But, “[a] once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice” to “assure that the . . . right to choose between silence and speech remains unfettered throughout the interrogation process,” 384 U. S., at 469. Nor does the Court’s defense reflect a sound reading of the case it relies on, *Moran v. Burbine*, *supra*:

“Beyond [the] duty to inform, *Miranda* requires that the police respect the [suspect’s] decision to exercise the rights outlined in the warnings. ‘If the individual indicates in any manner, at any time prior to or during ques-

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tioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease.’” 475 U. S., at 420 (quoting *Miranda, supra*, at 473–474).

While *Moran* held that a subject’s knowing and voluntary waiver of the right to counsel is not undermined by the fact that police prevented an unsummoned lawyer from making contact with him, it contains no suggestion that *Miranda* affords as ready a tolerance for police conduct frustrating the suspect’s subjectively held (if ambiguously expressed) desire for counsel. See 475 U. S., at 423 (contrasting *Escobedo v. Illinois*, 378 U. S. 478, 481 (1964), where “police incorrectly told the *suspect* that his lawyer ‘didn’t want to see him’”); see also *Miranda, supra*, at 468 (purpose of warnings is to “show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it”).

Indeed, it is easy, amidst the discussion of layers of protection, to lose sight of a real risk in the majority’s approach, going close to the core of what the Court has held that the Fifth Amendment provides. The experience of the timid or verbally inept suspect (whose existence the Court acknowledges) may not always closely follow that of the defendant in *Edwards v. Arizona* (whose purported waiver of his right to counsel, made after having invoked the right, was held ineffective, lest police be tempted to “badge[r]” others like him, see *Michigan v. Harvey*, 494 U. S. 344, 350 (1990)). Indeed, it may be more like that of the defendant in *Escobedo v. Illinois, supra*, whose sense of dilemma was heightened by his interrogators’ denial of his requests to talk to a lawyer. When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could “reasonably,” although not necessarily, take to be a request), in contravention of the “rights” just read to him by his interrogator, he may well



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see further objection as futile and confession (true or not) as the only way to end his interrogation.<sup>5</sup>

Nor is it enough to say that a “statement either is . . . an assertion of the right to counsel or it is not.” *Ante*, at 459 (quoting *Smith v. Illinois*, 469 U. S., at 97–98) (omitting brackets and internal quotation marks). In *Smith*, we neither denied the possibility that a reference to counsel could be ambiguous, see *id.*, at 98; accord, *id.*, at 101 (REHNQUIST, J., dissenting), nor suggested that particular statements should be considered in isolation, *id.*, at 98.<sup>6</sup> While it might be fair to say that every statement is meant either to express a desire to deal with police through counsel or not, this fact does not dictate the rule that interrogators who hear a statement consistent with either possibility may presume the latter and forge ahead; on the contrary, clarification is the intuitively sensible course.

The other justifications offered for the “requisite level of clarity” rule, *ante*, at 459, are that, whatever its costs, it will further society’s strong interest in “effective law enforcement,” *ante*, at 461, and maintain the “ease of application,”

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<sup>5</sup> See *People v. Harper*, 94 Ill. App. 3d 298, 300, 418 N. E. 2d 894, 896 (1981) (defendant who asked interrogator to retrieve an attorney’s business card from his wallet but was told that it “wouldn’t be necessary” held not to have “availed himself” of right to counsel); see also *Cooper v. Dupnik*, 963 F. 2d 1220, 1225 (CA9 1992) (en banc) (describing elaborate police Task Force plan to ignore systematically a suspect’s requests for counsel, on the theory that such would induce hopelessness and thereby elicit an admission, which would then be used to keep the suspect off the witness stand, see *Oregon v. Hass*, 420 U. S. 714 (1975) (statements obtained in violation of *Miranda* rules admissible for impeachment purposes)).

<sup>6</sup> Indeed, our *Smith* decision was quoting from the dissent below, which adverts in the same sentence to the possibility of “*bona fide* doubt the officer may still have as to whether the defendant desires counsel,” in which case “strictly” limited questioning is prescribed. See *People v. Smith*, 102 Ill. 2d 365, 375, 466 N. E. 2d 236, 241 (1984) (opinion of Simon, J.).

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*ibid.*, that has long been a concern of our *Miranda* jurisprudence. With respect to the first point, the margin of difference between the clarification approach advocated here and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel (at which point questioning would cease). While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne. Cf. Brief for Americans for Effective Law Enforcement, Inc., et al. as *Amici Curiae* 5 (the clarification approach “preserves the interests of law enforcement and of the public welfare”); *Escobedo, supra*, at 490 (“No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his constitutional] rights”).

As for practical application, while every approach, including the majority’s, will involve some “difficult judgment calls,”<sup>7</sup> the rule argued for here would relieve the officer of

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<sup>7</sup> In the abstract, nothing may seem more clear than a “clear statement” rule, but in police stations and trial courts the question, “how clear is clear?” is not so readily answered. When a suspect says, “uh, yeah, I’d like to do that” after being told he has a right to a lawyer, has he “clearly asserted” his right? Compare *Smith v. Illinois*, 469 U. S., at 97 (statement was “neither indecisive nor ambiguous”) (citation omitted), with *id.*, at 101 (REHNQUIST, J., dissenting) (questioning clarity); see also *Oregon v. Bradshaw*, 462 U. S. 1039, 1041–1042 (1983) (plurality opinion) (“I do want an attorney before it goes very much further”); *Edwards*, 451 U. S., at 479 (“I want an attorney before making a deal”); cf. n. 3, *supra*. Indeed, in this case, when Davis finally said, “I think I want a lawyer before I say anything else,” the agents ceased questioning; but see *People v. Kendrick*, 121 Ill. App. 3d 442, 446, 459 N. E. 2d 1137, 1139 (1984) (agents need not stop interrogation when suspect says, “I think I might need a lawyer”); cf. *People v. Santiago*, 133 App. Div. 429, 430–431, 519 N. Y. S. 2d 413, 414–415 (1987) (“Will you supply [a lawyer] now so that I may ask him should I continue with this interview at this moment?” held “not . . . an unequivocal invocation”). See generally *Smith, supra*, at 101 (REHNQUIST, J., dissenting) (noting that statements are rarely “crystal-clear”; “differences between certainty and hesitancy may well

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any responsibility for guessing “whether the suspect in fact wants a lawyer even though he hasn’t said so,” *ante*, at 461. To the contrary, it would assure that the “judgment call” will be made by the party most competent to resolve the ambiguity, who our case law has always assumed should make it: the individual suspect.

## II

Although I am convinced that the Court has taken the wrong path, I am not persuaded by petitioner’s contention that even ambiguous statements require an end to all police questioning. I recognize that the approach petitioner urges on us can claim some support from our case law, most notably in the “indicates in any manner” language of *Miranda*, and I do not deny that the rule I endorse could be abused by “clarifying” questions that shade subtly into illicitly badgering a suspect who wants counsel, but see *Thompson v. Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979); cf. *State v. Walkowiak*, 183 Wis. 2d 478, 515 N. W. 2d 863 (1994) (Abrahamson, J., concurring) (suggesting means properly to focus clarification enquiry). But petitioner’s proposal is not entirely in harmony with all the major themes of *Miranda* case law, its virtues and demerits being the reverse images of those that mark the Court’s rule. While it is plainly wrong, for example, to continue interrogation when the suspect wants it to stop (and so indicates), the strong bias in favor of individual choice may also be disserved by stopping questioning when a suspect wants it to continue (but where his statement might be understood otherwise), see *Michigan v.*

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turn on the inflection with which words are spoken, especially where [a] statement is isolated from the statements surrounding it”).

As a practical matter, of course, the primary arbiters of “clarity” will be the interrogators themselves, who tend as well to be courts’ preferred source in determining the precise words a suspect used. And when an inculpatory statement has been obtained as a result of an unrecorded, incommunicado interrogation, these officers rarely lose “swearing matches” against criminal defendants at suppression hearings.

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*Mosley*, 423 U. S. 96, 109 (1975) (White, J., concurring in result) (“[W]e have . . . rejected [the] paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case”). The costs to society of losing confessions would, moreover, be especially hard to bear where the suspect, if asked for his choice, would have chosen to continue. One need not sign the majority’s opinion here to agree that resort to the rule petitioner argues for should be had only if experience shows that less drastic means of safeguarding suspects’ constitutional rights are not up to the job, see generally *United States v. Leon*, 468 U. S. 897, 927–928 (1984) (BLACKMUN, J., concurring) (exclusionary rule exception must be “tested in the real world of state and federal law enforcement, and this Court will attend to the results”).

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Our cases are best respected by a rule that when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators’ questions should be confined to verifying whether the individual meant to ask for a lawyer. While there is reason to expect that trial courts will apply today’s ruling sensibly (without requiring criminal suspects to speak with the discrimination of an Oxford don) and that interrogators will continue to follow what the Court rightly calls “good police practice” (compelled up to now by a substantial body of state and Circuit law), I believe that the case law under *Miranda* does not allow them to do otherwise.

## Syllabus

HECK *v.* HUMPHREY ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

No. 93-6188. Argued April 18, 1994—Decided June 24, 1994

While petitioner Heck's direct appeal from an Indiana conviction was pending, he filed this suit under 42 U. S. C. § 1983, seeking damages—but not injunctive relief or release from custody—on the claim that respondents, acting under color of state law, had engaged in unlawful acts that had led to his arrest and conviction. After the Federal District Court dismissed this action without prejudice, the Indiana Supreme Court upheld Heck's conviction and sentence, and his two petitions for federal habeas relief were rejected. The Court of Appeals then affirmed the dismissal of the § 1983 complaint and approved the District Court's reasoning: If the plaintiff in a federal civil rights action is challenging the legality of his conviction, so that his victory would require his release even if he had not sought that relief, the suit must be classified as a habeas corpus action and dismissed if the plaintiff has failed to exhaust his state remedies.

*Held:* In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U. S. C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. *Preiser v. Rodriguez*, 411 U. S. 475, 494, and *Wolff v. McDonnell*, 418 U. S. 539, 554, distinguished. The foregoing conclusion follows upon recognition that the common law of torts provides the appropriate starting point for the § 1983 inquiry, see *Carey v. Piphus*, 435 U. S. 247, 257-258; that the tort of malicious prosecution, which provides the closest analogy to claims of the type considered here, requires the allegation and proof of termination of the prior criminal proceeding in favor of the accused, see, *e. g.*, *Carpenter v. Nutter*, 59 P. 301; and that this Court has long been concerned that judgments be final and consistent and has been disinclined to expand opportunities for collateral attack on criminal convictions, see, *e. g.*, *Parke v. Raley*, 506 U. S. 20, 29-30. Although the issue in cases such as this is not, therefore, the exhaustion of state remedies,

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the dismissal of Heck's § 1983 action was correct because both courts below found that his damages claims challenged the legality of his conviction. Pp. 480–490.  
997 F. 2d 355, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 490. SOUTER, J., filed an opinion concurring in the judgment, in which BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 491.

*Charles Rothfeld* argued the cause and filed briefs for petitioner.

*Matthew R. Gutwein* argued the cause for respondents. With him on the brief were *Pamela Carter*, Attorney General of Indiana, and *Arend J. Abel* and *Dana Childress-Jones*, Deputy Attorneys General.\*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U. S. C. § 1983.

## I

Petitioner Roy Heck was convicted in Indiana state court of voluntary manslaughter for the killing of Rickie Heck, his wife, and is serving a 15-year sentence in an Indiana prison. While the appeal from his conviction was pending, petitioner,

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\*A brief of *amici curiae* was filed for the State of Arizona et al. by *Grant Woods*, Attorney General of Arizona, *Paul J. McMurdie*, and *Linda L. Knowles*, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Robert A. Butterworth* of Florida, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Chris Gorman* of Kentucky, *Michael C. Moore* of Mississippi, *Joseph T. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Deborah T. Poritz* of New Jersey, *Lee Fisher* of Ohio, *T. Travis Medlock* of South Carolina, *Mark W. Barnett* of South Dakota, *Dan Morales* of Texas, *Jan Graham* of Utah, and *Joseph B. Meyer* of Wyoming.

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proceeding *pro se*, filed this suit in Federal District Court under 42 U. S. C. § 1983,<sup>1</sup> naming as defendants respondents James Humphrey and Robert Ewbank, Dearborn County prosecutors, and Michael Krinoph, an investigator with the Indiana State Police. The complaint alleged that respondents, acting under color of state law, had engaged in an “unlawful, unreasonable, and arbitrary investigation” leading to petitioner’s arrest; “knowingly destroyed” evidence “which was exculpatory in nature and could have proved [petitioner’s] innocence”; and caused “an illegal and unlawful voice identification procedure” to be used at petitioner’s trial. App. 5–6. The complaint sought, among other things, compensatory and punitive monetary damages. It did not ask for injunctive relief, and petitioner has not sought release from custody in this action.

The District Court dismissed the action without prejudice, because the issues it raised “directly implicate the legality of [petitioner’s] confinement,” *id.*, at 13. While petitioner’s appeal to the Seventh Circuit was pending, the Indiana Supreme Court upheld his conviction and sentence on direct appeal, *Heck v. State*, 552 N. E. 2d 446, 449 (Ind. 1990); his first petition for a writ of habeas corpus in Federal District Court was dismissed because it contained unexhausted claims; and his second federal habeas petition was denied, and the denial affirmed by the Seventh Circuit.

When the Seventh Circuit reached petitioner’s appeal from dismissal of his § 1983 complaint, it affirmed the judgment and approved the reasoning of the District Court: “If, regardless of the relief sought, the plaintiff [in a federal civil

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<sup>1</sup>Section 1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

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rights action] is challenging the legality of his conviction,<sup>[2]</sup> so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so." 997 F. 2d 355, 357 (1993). Heck filed a petition for certiorari, which we granted. 510 U. S. 1068 (1994).

## II

This case lies at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, and the federal habeas corpus statute, 28 U. S. C. § 2254. Both of these provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation. In general, exhaustion of state remedies “is *not* a prerequisite to an action under § 1983,” *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 501 (1982) (emphasis added), even an action by a state prisoner, *id.*, at 509. The federal habeas corpus statute, by

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<sup>2</sup> Neither in his petition for certiorari nor in his principal brief on the merits did petitioner contest the description of his monetary claims (by both the District Court and the Court of Appeals) as challenging the legality of his conviction. Thus, the question we understood to be before us was whether money damages premised on an unlawful conviction could be pursued under § 1983. Petitioner sought to challenge this premise in his reply brief, contending that findings validating his damages claims would not invalidate his conviction. See Reply Brief for Petitioner 5–6. That argument comes too late. We did not take this case to review such a fact-bound issue, and we accept the characterization of the lower courts.

We also decline to pursue, without implying the nonexistence of, another issue, suggested by the Court of Appeals' statement that, if petitioner's "conviction were proper, this suit would in all likelihood be barred by *res judicata*." 997 F. 2d 355, 357 (CA7 1993). The *res judicata* effect of state-court decisions in § 1983 actions is a matter of state law. See *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U. S. 75 (1984).



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contrast, requires that state prisoners first seek redress in a state forum.<sup>3</sup> See *Rose v. Lundy*, 455 U. S. 509 (1982).

*Preiser v. Rodriguez*, 411 U. S. 475 (1973), considered the potential overlap between these two provisions, and held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983. *Id.*, at 488–490. We emphasize that *Preiser* did *not* create an exception to the “no exhaustion” rule of § 1983; it merely held that certain claims by state prisoners are not *cognizable* under that provision, and must be brought in habeas corpus proceedings, which do contain an exhaustion requirement.

This case is clearly not covered by the holding of *Preiser*, for petitioner seeks not immediate or speedier release, but monetary damages, as to which he could not “have sought and obtained fully effective relief through federal habeas corpus proceedings.” *Id.*, at 488. See also *id.*, at 494; *Allen v. McCurry*, 449 U. S. 90, 104 (1980). In dictum, however, *Preiser* asserted that since a state prisoner seeking only damages “is attacking something other than the fact or length of . . . confinement, and . . . is seeking something other than immediate or more speedy release[,] . . . a damages action by a state prisoner could be brought under [§ 1983] in federal court without any requirement of prior exhaustion of state remedies.” 411 U. S., at 494. That statement may not be true, however, when establishing the basis for the damages claim necessarily demonstrates the invalidity of the

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<sup>3</sup>Title 28 U. S. C. § 2254(b) provides: “An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.”

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conviction. In that situation, the claimant *can* be said to be “attacking . . . the fact or length of . . . confinement,” bringing the suit within the other dictum of *Preiser*: “Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.” *Id.*, at 490. In the last analysis, we think the dicta of *Preiser* to be an unreliable, if not an unintelligible, guide: that opinion had no cause to address, and did not carefully consider, the damages question before us today.

Before addressing that question, we respond to petitioner’s contention that it has already been answered, in *Wolff v. McDonnell*, 418 U.S. 539 (1974). See Reply Brief for Petitioner 1. First of all, if *Wolff* had answered the question we would not have expressly reserved it 10 years later, as we did in *Tower v. Glover*, 467 U.S. 914 (1984). See *id.*, at 923. And secondly, a careful reading of *Wolff* itself does not support the contention. Like *Preiser*, *Wolff* involved a challenge to the procedures used by state prison officials to deprive prisoners of good-time credits. The § 1983 complaint sought restoration of good-time credits as well as “damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.” *Wolff, supra*, at 553. The Court said, after holding the claim for good-time credits to be foreclosed by *Preiser*, that the damages claim was nonetheless “properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time,” 418 U.S., at 554. Petitioner contends that this language authorized the plaintiffs in *Wolff* to recover damages measured by the actual loss of good time. We think not. In light of the earlier language characterizing the claim as one of “damages for the deprivation of civil rights,” rather than damages for the deprivation of good-time credits, we think this passage recognized a § 1983 claim for using the

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wrong procedures, not for reaching the wrong result (*i. e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement. See *Fulford v. Klein*, 529 F. 2d 377, 381 (1976), adhered to, 550 F. 2d 342 (CA5 1977) (en banc); Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 120–121, 145–146 (1988).

Thus, the question posed by § 1983 damages claims that do call into question the lawfulness of conviction or confinement remains open. To answer that question correctly, we see no need to abandon, as the Seventh Circuit and those courts in agreement with it have done, our teaching that § 1983 contains no exhaustion requirement beyond what Congress has provided. *Patsy*, 457 U. S., at 501, 509. The issue with respect to monetary damages challenging conviction is not, it seems to us, exhaustion; but rather, the same as the issue was with respect to injunctive relief challenging conviction in *Preiser*: whether the claim is cognizable under § 1983 at all. We conclude that it is not.

“We have repeatedly noted that 42 U. S. C. § 1983 creates a species of tort liability.” *Memphis Community School Dist. v. Stachura*, 477 U. S. 299, 305 (1986) (internal quotation marks omitted). “[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.” *Carey v. Piphus*, 435 U. S. 247, 257–258 (1978). Thus, to determine whether there is any bar to the present suit, we look first to the common law of torts. Cf. *Stachura*, *supra*, at 306.

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The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. “If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 888 (5th ed. 1984). But a successful malicious prosecution plaintiff may recover, in addition to general damages, “compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society.” *Id.*, at 887–888 (footnotes omitted). See also *Roberts v. Thomas*, 135 Ky. 63, 121 S. W. 961 (1909).

One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. Prosser and Keeton, *supra*, at 874; *Carpenter v. Nutter*, 127 Cal. 61, 59 P. 301 (1899). This requirement “avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.” 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* §28:5, p. 24 (1991). Furthermore, “to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.” *Ibid.*<sup>4</sup> This Court has long expressed

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<sup>4</sup>JUSTICE SOUTER criticizes our reliance on malicious prosecution’s favorable termination requirement as illustrative of the common-law principle barring tort plaintiffs from mounting collateral attacks on their out-

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similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack, see *Parke v. Raley*, 506 U. S. 20, 29–30 (1992); *Teague v. Lane*, 489 U. S. 288, 308 (1989); *Rooker v. Fidelity Trust Co.*,

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standing criminal convictions. Malicious prosecution is an inapt analogy, he says, because “[a] defendant’s conviction, under Reconstruction-era common law, dissolved his claim for malicious prosecution because the conviction was regarded as irrebuttable evidence that the prosecution never lacked probable cause.” *Post*, at 496, citing T. Cooley, *Law of Torts* 185 (1879). Chief Justice Cooley no doubt intended merely to set forth the general rule that a conviction defeated the malicious prosecution plaintiff’s allegation (essential to his cause of action) that the prior proceeding was without probable cause. But this was not an absolute rule in all jurisdictions, see *Goodrich v. Warner*, 21 Conn. 432, 443 (1852); *Richter v. Koster*, 45 Ind. 440, 441–442 (1874), and early on it was recognized that there must be exceptions to the rule in cases involving circumstances such as fraud, perjury, or mistake of law, see *Burt v. Place*, 4 Wend. 591 (N. Y. 1830); *Witham v. Gowen*, 14 Me. 362 (1837); *Olson v. Neal*, 63 Iowa 214, 18 N. W. 863 (1884). Some cases even held that a “conviction, although it be afterwards reversed, is *prima facie* evidence—and that only—of the existence of probable cause.” *Neher v. Dobbs*, 41 Neb. 863, 868, 66 N. W. 864, 865 (1896) (collecting cases). In *Crescent City Live Stock Co. v. Butchers’ Union Slaughter-House Co.*, 120 U. S. 141 (1887), we recognized that “[h]ow much weight as proof of probable cause shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question.” *Id.*, at 149. We attempted to “reconcile the apparent contradiction in the authorities,” *id.*, at 151, by observing that the presumption of probable cause arising from a conviction can be rebutted only by showing that the conviction had been obtained by some type of fraud, *ibid.* Although we ultimately held for the malicious prosecution defendant, our discussion in that case well establishes that the absolute rule JUSTICE SOUTER contends for did not exist.

Yet even if JUSTICE SOUTER were correct in asserting that a prior conviction, although reversed, “dissolved [a] claim for malicious prosecution,” *post*, at 496, our analysis would be unaffected. It would simply demonstrate that *no* common-law action, *not even* malicious prosecution, would permit a criminal proceeding to be impugned in a tort action, *even after* the conviction had been reversed. That would, if anything, strengthen our belief that §1983, which borrowed general tort principles, was not meant to permit such collateral attack.

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263 U. S. 413 (1923); *Voorhees v. Jackson*, 10 Pet. 449, 472–473 (1836). We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.<sup>5</sup>

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,<sup>6</sup> a § 1983 plaintiff must prove

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<sup>5</sup> JUSTICE SOUTER's discussion of abuse of process, *post*, at 494–495, does not undermine this principle. It is true that favorable termination of prior proceedings is not an element of that cause of action—but neither is an impugning of those proceedings one of its consequences. The gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends. See, e. g., *Donohoe Const. Co. v. Mount Vernon Associates*, 235 Va. 531, 539–540, 369 S. E. 2d 857, 862 (1988); see also 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* §§ 28:32–28:34 (1991). Cognizable injury for abuse of process is limited to the harm caused by the misuse of process, and does not include harm (such as conviction and confinement) resulting from that process's being carried through to its lawful conclusion. Thus, one could no more seek compensatory damages for an outstanding criminal conviction in an action for abuse of process than in one for malicious prosecution. This limitation is illustrated by *McGann v. Allen*, 105 Conn. 177, 191, 134 A. 810, 815 (1926), where the court held that expenses incurred by the plaintiff in defending herself against crimes charged against her were not compensable in a suit for abuse of process, since “[d]amage[s] for abuse of process must be confined to the damage flowing from such abuse, and be confined to the period of time involved in taking plaintiff, after her arrest, to [defendant's] store, and the detention there.”

<sup>6</sup> An example of this latter category—a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful—would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. (This is a common definition of that offense. See *People v. Peacock*, 68 N. Y. 2d 675, 496 N. E. 2d 683 (1986); 4 C. Torcia, *Wharton's Criminal Law* § 593, p. 307 (14th ed. 1981).) He then brings a § 1983 action against the

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that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U. S. C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed,<sup>7</sup> in the absence of some other bar to the suit.<sup>8</sup>

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arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning *res judicata*, see n. 2, *supra*, the § 1983 action will not lie.

<sup>7</sup>For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, see *Murray v. United States*, 487 U. S. 533, 539 (1988), and especially harmless error, see *Arizona v. Fulminante*, 499 U. S. 279, 307–308 (1991), such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, see *Memphis Community School Dist. v. Stachura*, 477 U. S. 299, 308 (1986), which, we hold today, does *not* encompass the “injury” of being convicted and imprisoned (until his conviction has been overturned).

<sup>8</sup>For example, if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel

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Respondents had urged us to adopt a rule that was in one respect broader than this: Exhaustion of state remedies should be required, they contended, not just when success in the § 1983 damages suit would necessarily show a conviction or sentence to be unlawful, but whenever “judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid.” Brief for Respondents 26, n. 10. Such a broad sweep was needed, respondents contended, lest a judgment in a prisoner’s favor in a federal-court § 1983 damages action claiming, for example, a Fourth Amendment violation, be given preclusive effect as to that subissue in a subsequent state-court post-conviction proceeding. Preclusion might result, they asserted, if the State exercised sufficient control over the officials’ defense in the § 1983 action. See *Montana v. United States*, 440 U. S. 147, 154 (1979). While we have no occasion to rule on the matter at this time, it is at least plain that preclusion will not necessarily be an automatic, or even a permissible, effect.<sup>9</sup>

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state-court proceedings. See *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800 (1976).

Moreover, we do not decide whether abstention might be appropriate in cases where a state prisoner brings a § 1983 damages suit raising an issue that also could be grounds for relief in a state-court challenge to his conviction or sentence. Cf. *Tower v. Glover*, 467 U. S. 914, 923 (1984).

<sup>9</sup>State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 1604 (3d ed. 1988) (“It is clear that where the federal court decided a federal question, federal res judicata rules govern”); *Deposit Bank v. Frankfort*, 191 U. S. 499, 514–518 (1903); *Stoll v. Gottlieb*, 305 U. S. 165, 170–171, 174–175 (1938). The federal rules on the subject of issue and claim preclusion, unlike those relating to exhaustion of state remedies, are “almost entirely judge-made.” Hart & Wechsler’s, *supra*, at 1598; see also Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 *Cornell L. Rev.* 733, 747–778 (1986). And in developing



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In another respect, however, our holding sweeps more broadly than the approach respondents had urged. We do not engraft an exhaustion requirement upon §1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under §1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. That makes it unnecessary for us to address the statute-of-limitations issue wrestled with by the Court of Appeals, which concluded that a federal doctrine of equitable tolling would apply to the §1983 cause of action while state challenges to the conviction or sentence were being exhausted. (The court distinguished our cases holding that state, not federal, tolling provisions apply in §1983 actions, see *Board of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U. S. 478 (1980); *Hardin v. Straub*, 490 U. S. 536 (1989), on the ground that petitioner's claim was "in part one for habeas corpus." 997 F. 2d, at 358.) Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the §1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, 1 C. Corman, *Limitation of Actions* §7.4.1, p. 532 (1991); *Carnes v. Atkins Bros. Co.*, 123 La. 26, 31, 48 So. 572, 574 (1909), so also a §1983 cause of action for damages

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them the courts can, and indeed should, be guided by the federal policies reflected in congressional enactments. Cf. *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 390–391 (1970). See also *United States v. Mendoza*, 464 U. S. 154 (1984) (recognizing exception to general principles of res judicata in light of overriding federal policy concerns). Thus, the court-made preclusion rules may, as judicial application of the categorical mandate of §1983 may not, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 509 (1982), take account of the policy embodied in §2254(b)'s exhaustion requirement, see *Rose v. Lundy*, 455 U. S. 509 (1982), that state courts be given the first opportunity to review constitutional claims bearing upon state prisoners' release from custody.

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attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.<sup>10</sup>

Applying these principles to the present action, in which both courts below found that the damages claims challenged the legality of the conviction, we find that the dismissal of the action was correct. The judgment of the Court of Appeals for the Seventh Circuit is

*Affirmed.*

JUSTICE THOMAS, concurring.

The Court and JUSTICE SOUTER correctly begin their analyses with the realization that “[t]his case lies at the intersection of . . . the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, and the federal habeas corpus statute, 28 U. S. C. § 2254.” *Ante*, at 480; *post*, at 491. One need only read the respective opinions in this case to under-

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<sup>10</sup>JUSTICE SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. *Post*, at 500. We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated. JUSTICE SOUTER opines that disallowing a damages suit for a former state prisoner framed by Ku Klux Klan-dominated state officials is “hard indeed to reconcile . . . with the purpose of § 1983.” *Post*, at 502. But if, as JUSTICE SOUTER appears to suggest, the goal of our interpretive enterprise under § 1983 were to provide a remedy for all conceivable invasions of federal rights that freedmen may have suffered at the hands of officials of the former States of the Confederacy, the entire landscape of our § 1983 jurisprudence would look very different. We would not, for example, have adopted the rule that judicial officers have absolute immunity from liability for damages under § 1983, *Pierson v. Ray*, 386 U. S. 547 (1967), a rule that would prevent recovery by a former slave who had been tried and convicted before a corrupt state judge in league with the Ku Klux Klan.

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stand the difficulty of the task before the Court today. Both the Court and JUSTICE SOUTER embark on a similar enterprise—harmonizing “[t]he broad language of § 1983,” a “general” statute, with “the specific federal habeas corpus statute.” *Preiser v. Rodriguez*, 411 U. S. 475, 489 (1973).

I write separately to note that it is we who have put § 1983 and the habeas statute on what JUSTICE SOUTER appropriately terms a “collision course.” *Post*, at 492. It has long been recognized that we have expanded the prerogative writ of habeas corpus and § 1983 far beyond the limited scope either was originally intended to have. Cf., e.g., *Wright v. West*, 505 U. S. 277, 285–286 (1992) (opinion of THOMAS, J.) (habeas); *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 117 (1989) (KENNEDY, J., dissenting) (§ 1983). Expanding the two historic statutes brought them squarely into conflict in the context of suits by state prisoners, as we made clear in *Preiser*.

Given that the Court created the tension between the two statutes, it is proper for the Court to devise limitations aimed at ameliorating the conflict, provided that it does so in a principled fashion. Cf. *Malley v. Briggs*, 475 U. S. 335, 342 (1986). Because the Court today limits the scope of § 1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute, *ante*, at 483, and with the state of the common law at the time § 1983 was enacted, *ante*, at 484–486, and n. 4, I join the Court’s opinion.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O’CONNOR join, concurring in the judgment.

The Court begins its analysis as I would, by observing that “[t]his case lies at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871, . . . 42 U. S. C. § 1983, and the federal habeas corpus statute, 28 U. S. C. § 2254,” two statutes that

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“provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials,” while “differ[ing] in their scope and operation.” *Ante*, at 480. But instead of analyzing the statutes to determine which should yield to the other at this intersection, the Court appears to take the position that the statutes were never on a collision course in the first place because, like the common-law tort of malicious prosecution, § 1983 requires (and, presumably, has always required) plaintiffs seeking damages for unconstitutional conviction or confinement to show the favorable termination of the underlying proceeding. See *ante*, at 484–487.

While I do not object to referring to the common law when resolving the question this case presents, I do not think that the existence of the tort of malicious prosecution alone provides the answer. Common-law tort rules can provide a “starting point for the inquiry under § 1983,” *Carey v. Phipps*, 435 U. S. 247, 258 (1978), but we have relied on the common law in § 1983 cases only when doing so was thought to be consistent with ordinary rules of statutory construction, as when common-law principles have textual support in other provisions of the Civil Rights Act of 1871, see, *e. g.*, *id.*, at 255–256 (damages under § 1983), or when those principles were so fundamental and widely understood at the time § 1983 was enacted that the 42d Congress could not be presumed to have abrogated them silently, see, *e. g.*, *Tenney v. Brandhove*, 341 U. S. 367, 376 (1951) (immunity under § 1983); *Pierson v. Ray*, 386 U. S. 547, 553–554 (1967) (same). At the same time, we have consistently refused to allow common-law analogies to displace statutory analysis, declining to import even well-settled common-law rules into § 1983 “if [the statute’s] history or purpose counsel against applying [such rules] in § 1983 actions.” *Wyatt v. Cole*, 504 U. S. 158, 164 (1992); see also *Tower v. Glover*, 467 U. S. 914, 920–921 (1984). Cf. *Anderson v. Creighton*, 483 U. S. 635, 645 (1987) (“[W]e have never suggested that the precise contours of official im-

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munity [under § 1983] can and should be slavishly derived from the often arcane rules of the common law”).<sup>1</sup>

An examination of common-law sources arguably relevant in this case confirms the soundness of our hierarchy of principles for resolving questions concerning § 1983. If the common law were not merely a “starting point” for the analysis under § 1983, but its destination, then (unless we were to have some authority to choose common-law requirements we like and discard the others) principle would compel us to accept as elements of the § 1983 cause of action not only the malicious-prosecution tort’s favorable-termination requirement, but other elements of the tort that cannot coherently be transplanted. In addition to proving favorable termina-

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<sup>1</sup>Our recent opinion in *Wyatt v. Cole*, 504 U. S. 158 (1992), summarized the manner in which the Court has analyzed the relationship between the common law and § 1983 in the context of immunity:

“Section 1983 ‘creates a species of tort liability that on its face admits of no immunities.’ *Imbler v. Pachtman*, 424 U. S. 409, 417 (1976). Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the ‘tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that “Congress would have specifically so provided had it wished to abolish the doctrine.”’ *Owen v. City of Independence*, 445 U. S. 622, 637 (1980) (quoting *Pierson v. Ray*, 386 U. S. 547, 555 (1967)). If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U. S. C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law. See *Tower v. Glover*, 467 U. S. 914, 920 (1984); *Imbler*, *supra*, at 421; *Pulliam v. Allen*, 466 U. S. 522, 529 (1984). Additionally, irrespective of the common law support, we will not recognize an immunity available at common law if § 1983’s history or purpose counsel against applying it in § 1983 actions. *Tower*, *supra*, at 920. See also *Imbler*, *supra*, at 424–429.” *Id.*, at 163–164.

In his concurrence, JUSTICE KENNEDY stated: “It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by the Congress, which ‘on its face does not provide for *any* immunities.’” *Id.*, at 171 (quoting *Malley v. Briggs*, 475 U. S. 335, 342 (1986)) (emphasis added in *Malley*).

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tion, a plaintiff in a malicious-prosecution action, according to the same sources the Court relies upon, must prove the “[a]bsence of probable cause for the proceeding” as well as “[m]alice,’ or a primary purpose other than that of bringing an offender to justice.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 871 (5th ed. 1984) (hereinafter *Prosser and Keeton*); see also 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* §28:7, p. 38, §28:11, p. 61 (1991). As §1983 requirements, however, these elements would mean that even a §1983 plaintiff whose conviction was invalidated as unconstitutional (premised, for example, on a confession coerced by an interrogation-room beating) could not obtain damages for the unconstitutional conviction and ensuing confinement if the defendant police officials (or perhaps the prosecutor) had probable cause to believe the plaintiff was guilty and intended to bring him to justice. Absent an independent statutory basis for doing so, importing into §1983 the malicious-prosecution tort’s favorable-termination requirement but not its probable-cause requirement would be particularly odd since it is from the latter that the former derives. See *Prosser and Keeton* 874 (“The requirement that the criminal prosecution terminate in favor of the malicious prosecution plaintiff . . . is primarily important not as an independent element of the malicious prosecution action but only for what it shows about probable cause or guilt-in-fact”); M. Bigelow, *Leading Cases on Law of Torts* 196 (1875) (“The action for a malicious prosecution cannot be maintained until the prosecution has terminated; for otherwise the plaintiff might obtain judgment in the one case and yet be convicted in the other, which would of course disprove the averment of a want of probable cause”).

If, in addition, the common law were the master of statutory analysis, not the servant (to switch metaphors), we would find ourselves with two masters to contend with here, for we would be subject not only to the tort of malicious

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prosecution but to the tort of abuse of process as well, see *Wyatt v. Cole*, *supra*, at 164 (calling these two actions “the most closely analogous torts” to §1983), the latter making it “unnecessary for the plaintiff to prove that the proceeding has terminated in his favor,” Prosser and Keeton 897. The Court suggests that the tort of malicious prosecution provides “the closest analogy to claims of the type considered here” because “it permits damages for confinement imposed pursuant to legal process.” *Ante*, at 484. But the same appears to be true for the tort of abuse of process. See Restatement (Second) of Torts §682, Illustration 1 (1977) (indicating that a person who, by causing a court to issue a writ of *habeas corpus* against someone to whom he lent money, caused the borrower to be “arrested . . . and kept in prison” is properly held liable for the arrest and imprisonment if the lender’s purpose in using legal process was wrongful (and regardless of favorable termination or want of probable cause)).<sup>2</sup>

Furthermore, even if the tort of malicious prosecution were today marginally more analogous than other torts to the type of §1983 claim in the class of cases before us (because it alone may permit damages for unlawful conviction or postconviction confinement, see n. 3, *infra*), the Court overlooks a significant historical incongruity that calls into question the utility of the analogy to the tort of malicious

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<sup>2</sup> As the Court observes, there are differences between the tort of abuse of process and that of malicious prosecution. *Ante*, at 486, n. 5. While “the gist of the tort [of malicious prosecution] is . . . commencing an action or causing process to issue without justification,” abuse of process involves “misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.” Prosser and Keeton 897. Neither common-law tort, however, precisely matches the statutory §1983 claim for damages for unlawful conviction or confinement; and, depending on the nature of the underlying right alleged to have been violated (consider, for example, the right not to be selected for prosecution solely because of one’s race), the tort of abuse of process might provide a better analogy to a §1983 claim for unconstitutional conviction or confinement than the malicious-prosecution tort.

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prosecution insofar as it is used exclusively to determine the scope of §1983: the damages sought in the type of §1983 claim involved here, damages for unlawful conviction or post-conviction confinement, were not available at all in an action for malicious prosecution at the time of §1983's enactment. A defendant's conviction, under Reconstruction-era common law, dissolved his claim for malicious prosecution because the conviction was regarded as irrebuttable evidence that the prosecution never lacked probable cause. See T. Cooley, *Law of Torts* 185 (1879) ("If the defendant is convicted in the first instance and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause"). Thus the definition of "favorable termination" with which the framers of §1983 were aware (if they were aware of any definition) included none of the events relevant to the type of §1983 claim involved in this case ("revers[al] on direct appeal, expunge[ment] by executive order, [a] declar[ation] [of] invalid[ity] by a state tribunal authorized to make such determination, or [the] call[ing] into question by a federal court's issuance of a writ of habeas corpus," *ante*, at 487), and it is easy to see why the analogy to the tort of malicious prosecution in this context has escaped the collective wisdom of the many courts and commentators to have addressed the issue previously, as well as the parties to this case. Indeed, relying on the tort of malicious prosecution to dictate the outcome of this case would logically drive one to the position, untenable as a matter of statutory interpretation (and, to be clear, disclaimed by the Court), that conviction of a crime wipes out a person's §1983 claim for damages for unconstitutional conviction or postconviction confinement.<sup>3</sup>

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<sup>3</sup> Some of the traditional common-law requirements appear to have liberalized over the years, see Prosser and Keeton 882 ("There is a considerable minority view which regards the conviction as creating only a presumption, which may be rebutted by any competent evidence showing that probable cause for the prosecution did not in fact exist"), strengthening the analogy the Court draws. But surely the Court is not of the view



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We are not, however, in any such strait, for our enquiry in this case may follow the interpretive methodology employed in *Preiser v. Rodriguez*, 411 U. S. 475 (1973) (a methodology uniformly applied by the Courts of Appeals in analyzing analogous cases, see, e. g., *Young v. Kenny*, 907 F. 2d 874, 875–876 (CA9 1990)). In *Preiser*, we read the “general” § 1983 statute in light of the “specific federal habeas corpus statute,” which applies only to “person[s] in custody,” 28 U. S. C. § 2254(a), and the habeas statute’s policy, embodied in its exhaustion requirement, § 2254(b), that state courts be given the first opportunity to review constitutional claims bearing upon a state prisoner’s release from custody. 411 U. S., at 489. Though in contrast to *Preiser* the state prisoner here seeks damages, not release from custody, the distinction makes no difference when the damages sought are for unconstitutional conviction or confinement. (As the Court explains, nothing in *Preiser* nor in *Wolff v. McDonnell*, 418 U. S. 539 (1974), is properly read as holding that the relief sought in a § 1983 action dictates whether a state prisoner can proceed immediately to federal court. See *ante*,

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that a single tort in its late 20th-century form can conclusively (and retroactively) dictate the requirements of a 19th-century statute for a discrete category of cases. Defending the historical analogy, the Court suggests that Chief Justice Cooley did not mean what he clearly said and that, despite the Cooley treatise, the Reconstruction-era common law recognized a limited exception to the rule denying a malicious-prosecution plaintiff the benefit of the invalidation of his conviction: an exception for convictions “obtained by some type of fraud.” *Ante*, at 485, n. 4 (citing *Crescent City Live Stock Co. v. Butchers’ Union Slaughter-House Co.*, 120 U. S. 141, 151 (1887)). Even if such a narrow exception existed, however, the tort of malicious prosecution as it stood during the mid-19th century would still make for a weak analogy to a statutory action under which, as even the Court accepts, defendants whose convictions were reversed as violating “any righ[t] . . . secured by the Constitution,” 42 U. S. C. § 1983, may obtain damages for the unlawful confinement associated with the conviction (assuming, of course, no immunity bar). Nor, of course, would the existence of such an exception explain how one element of a malicious-prosecution action may be imported into § 1983, but not the others.

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at 481–483.) Whether or not a federal-court § 1983 damages judgment against state officials in such an action would have preclusive effect in later litigation against the State, mounting damages against the defendant-officials for unlawful confinement (damages almost certainly to be paid by state indemnification) would, practically, compel the State to release the prisoner. Because allowing a state prisoner to proceed directly with a federal-court § 1983 attack on his conviction or sentence “would wholly frustrate explicit congressional intent” as declared in the habeas exhaustion requirement, *Preiser*, 411 U. S., at 489, the statutory scheme must be read as precluding such attacks. This conclusion flows not from a preference about how the habeas and § 1983 statutes ought to have been written, but from a recognition that “Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, [a] specific determination [that] must override the general terms of § 1983.” *Id.*, at 490.

That leaves the question of how to implement what statutory analysis requires. It is at this point that the malicious-prosecution tort’s favorable-termination requirement becomes helpful, not in dictating the elements of a § 1983 cause of action, but in suggesting a relatively simple way to avoid collisions at the intersection of habeas and § 1983. A state prisoner may seek federal-court § 1983 damages for unconstitutional conviction or confinement, but only if he has previously established the unlawfulness of his conviction or confinement, as on appeal or on habeas. This has the effect of requiring a state prisoner challenging the lawfulness of his confinement to follow habeas’s rules before seeking § 1983 damages for unlawful confinement in federal court, and it is ultimately the Court’s holding today. It neatly resolves a problem that has bedeviled lower courts, see 997 F. 2d 355, 357–358 (CA7 1993) (decision below); *Young v. Kenny*, *supra*, at 877 (discussing cases), legal commentators, see Schwartz, *The Preiser Puzzle*, 37 DePaul L. Rev. 85, 86–87, n. 6 (1988)

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(listing articles), and law students (some of whom doubtless have run up against a case like this in law-school exams). The favorable-termination requirement avoids the knotty statute-of-limitations problem that arises if federal courts dismiss § 1983 suits filed before an inmate pursues federal habeas, and (because the statute-of-limitations clock does not start ticking until an inmate's conviction is set aside) it does so without requiring federal courts to stay, and therefore to retain on their dockets, prematurely filed § 1983 suits. See *ante*, at 489.<sup>4</sup>

It may be that the Court's analysis takes it no further than I would thus go, and that any objection I may have to the Court's opinion is to style, not substance. The Court acknowledges the habeas exhaustion requirement and explains that it is the reason that the habeas statute "intersect[s]"

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<sup>4</sup>The requirement that a state prisoner seeking § 1983 damages for unlawful conviction or confinement be successful in state court or on federal habeas strikes me as soundly rooted in the statutory scheme. Because "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, [a] specific determination [that] override[s] the general terms of § 1983," *Preiser v. Rodriguez*, 411 U. S. 475, 490 (1973), a state prisoner whose constitutional attacks on his confinement have been rejected by state courts cannot be said to be unlawfully confined unless a federal habeas court declares his "custody [to be] in violation of the Constitution or laws or treaties of the United States," 28 U. S. C. § 2254(a). An unsuccessful federal habeas petitioner cannot, therefore, consistently with the habeas statute, receive § 1983 damages for unlawful confinement. That is not to say, however, that a state prisoner whose request for release has been (or would be) rejected by state courts or by a federal habeas court is necessarily barred from seeking any § 1983 damages for violations of his constitutional rights. If a § 1983 judgment in his favor would not demonstrate the invalidity of his confinement he is outside the habeas statute and may seek damages for a constitutional violation even without showing "favorable termination." A state prisoner may, for example, seek damages for an unreasonable search that produced evidence lawfully or harmlessly admitted at trial, or even nominal damages for, say, a violation of his right to procedural due process, see *Carey v. Piphus*, 435 U. S. 247, 266 (1978). See *ante*, at 487, and n. 7.

SOUTER, J., concurring in judgment

in this case with § 1983, which does not require exhaustion, see *ante*, at 480; it describes the issue it faces as “the same” as that in *Preiser*, *ante*, at 483; it recites the principle that common-law tort rules “‘provide the appropriate starting point for the inquiry under § 1983,’” *ibid.* (quoting *Carey v. Phiphus*, 435 U. S., at 257–258); and it does not transpose onto § 1983 elements of the malicious-prosecution tort that are incompatible with the policies of § 1983 and the habeas statute as relevant to claims by state prisoners. The Court’s opinion can be read as saying nothing more than that now, after enactment of the habeas statute and because of it, prison inmates seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort’s favorable-termination requirement. Cf. *ante*, at 491 (THOMAS, J., concurring).

That would be a sensible way to read the opinion, in part because the alternative would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not “in custody” for habeas purposes. If these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not “in custody” cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

SOUTER, J., concurring in judgment

It is one thing to adopt a rule that forces prison inmates to follow the federal habeas route with claims that fall within the plain language of § 1983 when that is necessary to prevent a requirement of the habeas statute from being undermined. That is what the Court did in *Preiser v. Rodriguez*, 411 U. S., at 489–492, and that is what the Court’s rule would do for state prisoners. Harmonizing § 1983 and the habeas statute by requiring a state prisoner seeking damages for unconstitutional conviction to establish the previous invalidation of his conviction does not run afoul of what we have called, repeatedly, “[t]he very purpose of” § 1983: “to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.” *Mitchum v. Foster*, 407 U. S. 225, 242 (1972); see also *Pulliam v. Allen*, 466 U. S. 522, 541 (1984); *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 503 (1982). A prisoner caught at the intersection of § 1983 and the habeas statute can still have his attack on the lawfulness of his conviction or confinement heard in federal court, albeit one sitting as a habeas court; and, depending on the circumstances, he may be able to obtain § 1983 damages.

It would be an entirely different matter, however, to shut off federal courts altogether to claims that fall within the plain language of § 1983. “[I]rrespective of the common law support” for a general rule disfavoring collateral attacks, the Court lacks the authority to do any such thing absent unambiguous congressional direction where, as here, reading § 1983 to exclude claims from federal court would run counter to “§ 1983’s history” and defeat the statute’s “purpose.” *Wyatt v. Cole*, 504 U. S., at 158. Consider the case of a former slave framed by Ku Klux Klan-controlled law-enforcement officers and convicted by a Klan-controlled state court of, for example, raping a white woman; and suppose that the unjustly convicted defendant did not (and could not) discover the proof of unconstitutionality until after his

SOUTER, J., concurring in judgment

release from state custody. If it were correct to say that § 1983 independently requires a person not in custody to establish the prior invalidation of his conviction, it would have been equally right to tell the former slave that he could not seek federal relief even against the law-enforcement officers who framed him unless he first managed to convince the state courts that his conviction was unlawful. That would be a result hard indeed to reconcile either with the purpose of § 1983 or with the origins of what was “popularly known as the Ku Klux Act,” *Collins v. Hardyman*, 341 U. S. 651, 657 (1951), the statute having been enacted in part out of concern that many state courts were “in league with those who were bent upon abrogation of federally protected rights,” *Mitchum v. Foster*, *supra*, at 240; cf. Cong. Globe, 42d Cong., 1st Sess., 577 (1871) (Sen. Trumbull explaining that, under the Civil Rights Act of 1871, “the Federal Government has a right to set aside . . . action of the State authorities” that deprives a person of his Fourteenth Amendment rights). It would also be a result unjustified by the habeas statute or any other post-§ 1983 enactment.

Nor do I see any policy reflected in a congressional enactment that would justify denying to an individual today federal damages (a significantly less disruptive remedy than an order compelling release from custody) merely because he was unconstitutionally fined by a State, or to a person who discovers after his release from prison that, for example, state officials deliberately withheld exculpatory material. And absent such a statutory policy, surely the common law can give us no authority to narrow the “broad language” of § 1983, which speaks of deprivations of “any” constitutional rights, privileges, or immunities, by “[e]very” person acting under color of state law, and to which “we have given full effect [by] recognizing that § 1983 ‘provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.’” *Dennis v. Higgins*, 498 U. S. 439, 443, 445 (1991) (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 700–701 (1978)).

SOUTER, J., concurring in judgment

In sum, while the malicious-prosecution analogy provides a useful mechanism for implementing what statutory analysis requires, congressional policy as reflected in enacted statutes must ultimately be the guide. I would thus be clear that the proper resolution of this case (involving, of course, a state prisoner) is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion. I would not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983.

## Syllabus

THOMAS JEFFERSON UNIVERSITY, DBA THOMAS  
JEFFERSON UNIVERSITY HOSPITAL *v.* SHALALA,  
SECRETARY OF HEALTH AND HUMAN SERVICESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 93–120. Argued April 18, 1994—Decided June 24, 1994

Medicare reimburses provider hospitals for the costs of certain educational activities, including the cost of graduate medical education (GME) services furnished by the hospital or its affiliated medical school, 42 CFR §§ 413.85, 413.17(a). However, reimbursement of educational activities is limited by (1) an “anti-redistribution” principle, providing that the Medicare program’s intent is to support activities that are “customarily or traditionally carried on by providers in conjunction with their operations,” but that the program should not “participate in *increased costs* resulting from *redistribution of costs* from educational institutions . . . to patient care institutions,” § 413.85(c) (emphasis added); and (2) a “community support” principle, providing that Medicare will not assume the cost for educational activities previously borne by the community, *ibid.* Petitioner teaching hospital, a qualified Medicare provider, sought no reimbursement for its nonsalary-related (administrative) GME costs before 1984, and those costs were borne by its affiliated medical college. In fiscal year 1985, the fiscal intermediary disallowed the hospital’s claim for reimbursement for such costs, but the Provider Reimbursement Review Board reversed in part, allowing reimbursement. Respondent Secretary reinstated the fiscal intermediary’s ruling, concluding that reimbursement for the nonsalary GME costs borne in prior years by the medical college would constitute an impermissible redistribution under § 413.85(c). As an independent ground, she concluded that the community support principle also barred reimbursement. The District Court and the Court of Appeals affirmed.

*Held:* The Secretary’s interpretation of the anti-redistribution principle is reasonable. Because its application suffices to deny reimbursement of the disputed costs in this case, there is no need to decide the validity of the Secretary’s interpretation of the community support language. Pp. 512–518.

(a) As petitioner’s challenge is to the Secretary’s interpretation of her own regulation, the Secretary’s interpretation must be given controlling effect unless it is plainly erroneous or inconsistent with the regulation. Broad deference is all the more warranted here because the



## Syllabus

regulation concerns a complex and highly technical program in which the identification and classification of relevant criteria require significant expertise and entail the exercise of judgment grounded in policy concerns. Pp. 512–513.

(b) The meaning of § 413.85(c)'s relevant sentence is straightforward: Its first clause defines the scope of educational activities for which reimbursement may be sought, and its second clause provides that the costs of such activities will not be reimbursed if they result from a shift of costs from an educational, to a patient care, facility. The Secretary's interpretation of the anti-redistribution principle gives full effect to both clauses, allowing reimbursement for costs of educational programs traditionally engaged in by a hospital, while denying reimbursement for costs previously incurred and paid by a medical school. It is not only a plausible interpretation, but also the most sensible interpretation the language will bear. The Secretary's reliance on a hospital's and medical school's own historical cost allocations is a simple and effective way of determining whether a prohibited redistribution has occurred. Pp. 513–514.

(c) Petitioner's argument that § 413.85(c) prohibits the redistribution of activities, not costs, ignores the second clause of the critical sentence, which refers on its face to the "redistribution of costs." Moreover, the term "costs" is used without condition. Even if the Secretary's interpretation were not far more consistent with the regulation's unqualified language, her construction is a reasonable one which must be afforded controlling weight. Petitioner has presented no persuasive evidence to support its second argument, that the Secretary has been inconsistent in applying the anti-redistribution principle. Petitioner's argument that the regulation's language is "precatory" or "aspirational" in nature, and thus lacking in operative force, is also unpersuasive, since the anti-redistribution clause lays down a bright line for distinguishing permissible from impermissible reimbursement. Pp. 514–518.

993 F. 2d 879, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, SCALIA, and SOUTER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which STEVENS, O'CONNOR, and GINSBURG, JJ., joined, *post*, p. 518.

*Ronald N. Sutter* argued the cause for petitioner. On the briefs were *James M. Gaynor, Jr.*, and *Amy E. Hancock*.

*Amy L. Wax* argued the cause for respondent. With her on the brief were *Solicitor General Days*, *Assistant Attorney*

## Opinion of the Court

*General Hunger, Deputy Solicitor General Kneedler, Robert V. Zener, Robert D. Kamenshine, Harriet S. Rabb, Darrel J. Grinstead, Henry R. Goldberg, and Thomas W. Coons.\**

JUSTICE KENNEDY delivered the opinion of the Court.

Although Medicare reimburses provider hospitals for the costs of certain educational activities, the program is forbidden by regulation from “participat[ing] in *increased costs* resulting from *redistribution of costs* from educational institutions . . . to patient care institutions.” 42 CFR § 413.85(c) (1993) (emphasis added). In denying reimbursement for the disputed costs in this case, the Secretary of Health and Human Services interpreted this provision to bar reimbursement of educational costs that were borne in prior years not by the requesting hospital, but by the hospital’s affiliated medical school. The dispositive question is whether the Secretary’s interpretation is a reasonable construction of the regulatory language. We conclude that it is.

## I

## A

Established in 1965 under Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. § 1395 *et seq.* (1988 ed. and Supp. IV), Medicare is a federally funded health insurance program for the elderly and disabled. Subject to a few exceptions, Congress authorized the Secretary

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\*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *Diane M. Signoracci*, *Catherine M. Ballard*, *Richard A. Cordray*, and *Simon B. Karas*, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *Charles M. Oberly III* of Delaware, *Richard P. Ieyoub* of Louisiana, *Hubert H. Humphrey III* of Minnesota, *John P. Arnold* of New Hampshire, *G. Oliver Koppell* of New York, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jan Graham* of Utah, and *James S. Gilmore III* of Virginia; and for the American Hospital Association et al. by *Ronald N. Sutter*, *Mary Susan Philp*, and *Joseph A. Keyes, Jr.*

## Opinion of the Court

of Health and Human Services (Secretary) to issue regulations defining reimbursable costs and otherwise giving content to the broad outlines of the Medicare statute. § 1395x(v)(1)(A). That authority encompasses the discretion to determine both the “reasonable cost” of services and the “items to be included” in the category of reimbursable services. *Ibid.* Acting under the statute, the Secretary, by regulation, permits reimbursement for the costs of “approved educational activities” conducted by hospitals. 42 CFR § 413.85(a)(1) (1993). The regulations define “approved educational activities” as “formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care.” § 413.85(b).

Graduate medical education (GME) programs are one category of approved educational activities. GME programs give interns and residents clinical training in various medical specialties. Because participants learn both by treating patients and by observing other physicians do so, GME programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom. Hospitals are entitled to recover the “net cost” of GME and other approved educational activities, a figure “determined by deducting, from a provider’s total costs of these activities, revenues it receives from tuition.” § 413.85(g). A hospital may include as a reimbursable GME cost not only the costs of services it furnishes, but also the costs of services furnished by the hospital’s affiliated medical school. § 413.17(a).

That brings us to the regulation here in question. Section 413.85(c) sets forth conditions governing the reimbursement of educational activities.<sup>1</sup> In a sentence referred to by the

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<sup>1</sup>Title 42 CFR § 413.85(c) provides in full:

*“Educational Activities.* Many providers engage in educational activities including training programs for nurses, medical students, interns and residents, and various paramedical specialties. These programs contribute to the quality of patient care within an institution and are necessary to meet the community’s needs for medical and paramedical per-

## Opinion of the Court

parties as the “anti-redistribution” principle, the regulation provides that “[a]lthough the intent of the [Medicare] program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units.” *Ibid.* In a portion of the regulation known as the “community support” principle, § 413.85(c) also states that the costs of educational activities “should be borne by the community,” but that “[u]ntil communities undertake to bear these costs, the [Medicare] program will participate appropriately in the support of these activities.” *Ibid.*

## B

Thomas Jefferson University Hospital (Hospital) is a 700-bed teaching hospital in Philadelphia, Pennsylvania. The Hospital has been a qualified Medicare provider since the program took effect in 1966. Petitioner Thomas Jefferson University (University) is a private, not-for-profit educational institution that operates the Hospital and other entities, including the Jefferson Medical College (Medical College). As a teaching facility, the Hospital provides

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sonnel. It is recognized that the costs of such educational activities should be borne by the community. However, many communities have not assumed responsibility for financing these programs and it is necessary that support be provided by those purchasing health care. Until communities undertake to bear these costs, the [Medicare] program will participate appropriately in the support of these activities. Although the intent of the program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units.”

The language in § 413.85(c) has been in effect since the beginning of the Medicare program, although it was formerly designated 42 CFR § 405.421 (1977) and 20 CFR § 405.421 (1967).

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Medicare-approved GME programs for postgraduate interns and residents in numerous medical specialties. The programs are conducted at the Hospital by Medical College faculty. Because of their common ownership by the University, the Hospital and the Medical College are considered affiliated or “related” organizations under Medicare regulations. 42 CFR §413.17(a) (1993). As a result, the Hospital is entitled to reimbursement for all eligible patient-care, educational, and administrative costs carried on the books of the Medical College. *Ibid.*

Nevertheless, for reasons not clear from the record, the Hospital did not seek reimbursement for any GME costs during the first eight years of the Medicare program’s existence. During the next 10 years, however, from 1974 through 1983, the Hospital sought and received reimbursement for three categories of salary-related GME costs: (1) salaries paid by the Hospital to Medical College faculty for services rendered to the Hospital’s Medicare patients; (2) salaries paid by the Hospital to residents and interns; and (3) funds transferred internally from the Hospital to the Medical College as payment for faculty time devoted to the Hospital’s GME program. The Hospital did not seek reimbursement during that period for its other, non-salary-related GME costs (namely, the costs of administering the Hospital’s GME programs), and those costs were borne by the Medical College.

In 1983, Congress adopted a more restrictive method of reimbursing hospitals for inpatient medical services, see 42 U. S. C. § 1395ww(d) (1988 ed. and Supp. IV), but it retained the more lenient method of reimbursement for medical education costs. 42 U. S. C. § 1395ww(a)(4) (1988 ed., Supp. IV). In 1984, when the new cost reimbursement regime was implemented, the Hospital reviewed its claim for costs associated with its GME programs to determine whether it was identifying all costs eligible for reimbursement. This review resulted in an increased claim reflecting clerical costs

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incurred by the Medical College for activities associated with its GME programs.<sup>2</sup>

The following year, in an effort to further refine its cost allocation techniques, the Hospital retained an accounting firm to compute the Hospital's total GME costs for fiscal year 1985, the year here in question. Fiscal year 1985 later became especially significant because, under a new reimbursement scheme enacted in 1986, it is considered the Hospital's base period, to which all later claims for GME cost reimbursement will be tied. See 42 U. S. C. § 1395ww(h). After completing the cost study, the accounting firm reported that the Hospital had incurred GME program costs totaling \$8.8 million, a figure that included direct and indirect administrative costs not previously claimed by the Hospital. The report was submitted to petitioner's assigned fiscal intermediary, whose function is to review petitioner's annual cost reports and to calculate the appropriate level of reimbursement under applicable statutes and regulations. See 42 CFR § 405.1803 (1993). Although petitioner sought reimbursement for the full \$8.8 million, the fiscal intermediary allowed only those salary-related costs that had been reimbursed earlier (after adjustment for inflation). The fiscal intermediary disallowed reimbursement for all nonsalary-related GME costs that the report identified (amounting to approximately \$2.9 million). App. to Pet. for Cert. 10a. Petitioner then appealed to the Provider Reimbursement Review Board, an intermediate appellate tribunal within the Department, which reversed the decision of the fiscal intermediary in part and allowed reimbursement for all of the GME costs documented in the cost study.

The Secretary, acting through the Administrator of the Health Care Financing Administration, modified the Board's decision and reinstated the fiscal intermediary's ruling. The Secretary concluded that the anti-redistribution clause of

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<sup>2</sup>The fiscal intermediary allowed these clerical costs at first, but later determined that such allowance was in error.

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§ 413.85(c) prohibits the shift of approved educational costs from an educational unit to a patient-care unit, even if the educational activities for which reimbursement is sought are the kind of activities traditionally engaged in by Medicare providers. *Id.*, at 35a. Since the nonsalary GME costs here in issue were borne in prior years by the Medical College, the Secretary ruled that reimbursement of these costs would constitute an impermissible “redistribution of costs” under § 413.85(c). *Ibid.*

The Secretary also relied on the community support language in § 413.85(c) as an independent ground for denying the requested reimbursement. According to the Secretary, this language prohibits Medicare reimbursement for educational activities that “have been historically borne by the community.” *Ibid.* That the Hospital had failed to seek reimbursement for the disputed costs in previous years was, in the Secretary’s view, “evidence of the communit[y]’s support for these activities.” *Ibid.* “To allow the community to withdraw that support and pass these costs to the Medicare program” would violate the community support principle and would “encourage the community to abdicate its commitment to education to an insurance program intended to provide care for the elderly.” *Ibid.*

Petitioner filed a petition for review in the District Court seeking reimbursement for the \$2,861,247 in GME costs that the Secretary had disallowed. *Id.*, at 10a. On cross-motions for summary judgment, the court ruled in the Secretary’s favor, accepting her interpretation of the anti-redistribution and community support clauses as a reasonable construction of § 413.85(c). *Thomas Jefferson Univ. v. Sullivan*, CCH Medicare & Medicaid Guide ¶ 40,294, p. 30,959 (ED Pa. 1992). The Third Circuit affirmed without opinion, judgment order reported at 993 F. 2d 879 (1993), thereby creating a conflict with the decision of the Sixth Circuit in *Ohio State Univ. v. Secretary, Dept. of Health and Human Services*, 996 F. 2d 122 (1993), cert. pending,

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No. 93–696, concerning the validity of the Secretary’s interpretation of the anti-redistribution clause. We granted certiorari, 510 U. S. 1039 (1994), and now affirm.

## II

Petitioner challenges the Secretary’s construction of § 413.85(c) under the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.* The APA, which is incorporated by the Social Security Act, see 42 U. S. C. § 139500(f)(1), commands reviewing courts to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U. S. C. § 706(2)(A). We must give substantial deference to an agency’s interpretation of its own regulations. *Martin v. Occupational Safety and Health Review Comm’n*, 499 U. S. 144, 150–151 (1991); *Lynng v. Payne*, 476 U. S. 926, 939 (1986); *Udall v. Tallman*, 380 U. S. 1, 16 (1965). Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency’s interpretation must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Ibid.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945)). In other words, we must defer to the Secretary’s interpretation unless an “alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.” *Gardebring v. Jenkins*, 485 U. S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns “a complex and highly technical regulatory program,” in which the identification and classification of relevant “criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Pauley v. BethEnergy Mines, Inc.*, 501 U. S. 680, 697 (1991).

Petitioner challenges the Secretary’s construction of both the anti-redistribution language and the community support



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language of § 413.85(c). Because we conclude that the Secretary's interpretation of the anti-redistribution clause is neither "plainly erroneous [n]or inconsistent with the regulation," *Tallman, supra*, at 16–17, and because its application suffices to deny reimbursement of the disputed costs in this case, we need not pass upon the Secretary's interpretation of the community support language.

The anti-redistribution clause is contained in the final sentence of § 413.85(c), which states:

"Although the intent of the [Medicare] program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in *increased costs* resulting from *redistribution of costs* from educational institutions or units to patient care institutions or units." (Emphasis added.)

The meaning of this sentence is straightforward. Its introductory clause defines the scope of educational activities for which reimbursement may be sought: To be eligible for reimbursement, the activity must be one that is "customarily or traditionally carried on by providers in conjunction with their operations." It is the language that follows, however, that imposes the relevant restriction on cost redistribution. The second clause provides that, notwithstanding the activity for which reimbursement is sought, the Medicare program will not participate in the "redistribution of costs from educational institutions or units to patient care institutions or units."

The Secretary's interpretation gives full effect to both clauses of the relevant sentence. The Secretary interprets the regulation to allow reimbursement for costs of educational programs traditionally engaged in by hospitals, but, at the same time, to deny reimbursement for "cost[s] previously incurred and paid by a medical school." Brief for

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Respondent 26 (emphasis deleted); see also § 413.85(b) (defining “approved educational activities” that are eligible for reimbursement as “programs of study usually engaged in by providers in order to enhance the quality of patient care”). The Secretary’s reading is not only a plausible interpretation of the regulation; it is the most sensible interpretation the language will bear.

The circumstance addressed by the anti-redistribution clause is a hospital’s submission of “increased costs” arising from approved educational activities. The regulation provides, in unambiguous terms, that the “costs” of these educational activities will not be reimbursed when they are the result of a “redistribution,” or shift, of costs from an “educational” facility to a “patient care” facility, even if the activities that generated the costs are the sort “customarily or traditionally carried on by providers in conjunction with their operations.” § 413.85(c). The Secretary’s reliance on a hospital’s own historical cost allocations, along with those of an affiliated medical school, is a simple and effective way of determining whether a prohibited “redistribution of costs” has occurred. Indeed, one would be hard pressed to come up with an alternative method to identify the shifting of costs from one entity to another.

Petitioner advances three separate arguments for not deferring to the Secretary’s interpretation of the anti-redistribution clause. None is persuasive.

First, petitioner asserts that the “clear meaning” of the anti-redistribution clause is to allow reimbursement for the costs of activities traditionally carried on by hospitals (*e. g.*, clinical training of residents and interns), but to deny reimbursement for costs incurred in activities traditionally carried on by educational institutions (*e. g.*, classroom training). Pet. for Cert. 14. In other words, according to petitioner, the redistribution that is prohibited is the redistribution of activities, not the redistribution of costs. Brief for Petitioner 20.

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This argument is mistaken, for it ignores the second clause of the critical sentence, which refers, on its face, to the “redistribution of costs,” not the “redistribution of activities.” The term “costs,” moreover, is used without condition. Nothing in the plain language suggests that the prohibition on “redistribution of costs” is limited to the costs of certain activities (such as classroom instruction) carried on by an educational unit. The clear inference from the language is that the shift of any reimbursable costs from an “educational institutio[n] or uni[t]” to a “patient care institutio[n] or uni[t]” is prohibited. The Secretary’s interpretation of the anti-redistribution principle is thus far more consistent with the regulation’s unqualified language than the interpretation advanced by petitioner. But even if this were not so, the Secretary’s construction is, at the very least, a reasonable one, and we are required to afford it “controlling weight.” *Bowles v. Seminole Rock & Sand Co.*, 325 U. S., at 414.

Second, petitioner argues that the Secretary has been inconsistent in her interpretation of the anti-redistribution provision. While it is true that an agency’s interpretation of a statute or regulation that conflicts with a prior interpretation is “‘entitled to considerably less deference’ than a consistently held agency view,” *INS v. Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987) (quoting *Watt v. Alaska*, 451 U. S. 259, 273 (1981)), that maxim does not apply here because petitioner fails to present persuasive evidence that the Secretary has interpreted the anti-redistribution provision in an inconsistent manner.<sup>3</sup>

In an attempt to find an inconsistency, petitioner points to a 1978 internal operating memorandum issued by the Health Care Financing Administration (HCFA) that addressed the

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<sup>3</sup>The dissent seeks to demonstrate that the Secretary has been inconsistent in her application of the community support principle. See *post*, at 520–522. We see no need to dispute that proposition; as indicated above, we express no view on the validity of the Secretary’s interpretation of the community support clause.

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reimbursement of costs incurred by medical schools affiliated with providers. Intermediary Letter No. 78-7 (Feb. 1978), App. to Pet. for Cert. 64a-66a. The intermediary letter detailed various categories and amounts of educational expenses incurred by affiliated medical schools that might be allowable to providers, but did not mention the anti-redistribution limitation. Petitioner's attempt to infer from that silence the existence of a contrary policy fails because the intermediary letter did not purport to be a comprehensive review of all conditions that might be placed on reimbursement of educational costs. By its own terms, the intermediary letter attempted to review only a "number of situations" relating to the reimbursement of educational costs—namely, "situations rais[ing] questions about the reasonableness of [medical school faculty] costs as allowable hospital costs and the appropriateness of the bases used in allocating them to the hospital." *Id.*, at 64a. It is not surprising, then, that the letter did not address the anti-redistribution principle, and the mere failure to address it here hardly establishes an inconsistent policy on the part of the Secretary.<sup>4</sup>

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<sup>4</sup>Petitioner further relies on an exchange of memoranda within HCFA in 1982 regarding the University of Oregon's health training programs. App. 22-26. In response to an internal agency memorandum identifying the antiredistribution clause and requesting additional clarification on the scope of reimbursable educational activities, the Director of HCFA's Division of Institutional Services responded, in part, that "[t]he allocation of costs to a hospital from a related medical school is governed by Intermediary Letter 78-7," and failed to discuss the redistribution issue. *Id.*, at 25. This omission likewise fails to manifest a contrary policy. Indeed, a subsequent memorandum issued in 1985 from the Director of HCFA's Division of Hospital Payment Policy stated that "[t]he fact that [the redistribution issue] is not mentioned in the subject memorandum does not change the basic policy as espoused in 42 CFR [§413.85(c),]" which provides "that where costs for items and services were previously borne by a medical school, their allocation to a university hospital represents a redistribution of costs from an educational institution to a patient care institution." *Id.*, at 27.

## Opinion of the Court

Likewise, contrary to the dissent's suggestion, *post*, at 520–522, the mere fact that in 1974 a fiscal intermediary may have allowed reimbursement to petitioner for GME costs that appear to have violated the anti-redistribution clause does not render the Secretary's interpretation of that clause invalid. For even if petitioner could show that such allowance was approved by—or even brought to the attention of—the Secretary or her designate at the time, “[t]he Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation.” *Good Samaritan Hospital v. Shalala*, 508 U. S. 402, 417 (1993). And under the circumstances of this case, “where the agency's interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.” *Id.*, at 417.

Finally, petitioner contends that we should ignore the Secretary's interpretation of the anti-redistribution clause because the language of the regulation is “precatory” and “aspirational” in nature, and thus lacking in operative force. See Brief for Petitioner 31–32. We do not lightly assume that a regulation setting forth specific limitations on the reimbursement of costs under a federal program is devoid of substantive effect. That is especially so when, as here, the language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available. Whatever vagueness may be found in the community support language that precedes it, the anti-redistribution clause lays down a bright line for distinguishing permissible from impermissible reimbursement: Educational costs will not be reimbursed if they are the result of a “redistribution of costs from educational institutions or units to patient care institutions or units.” § 413.85(c). The Secretary was well within her discretion to interpret this language as imposing a substantive limitation on reimbursement.

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In sum, the Secretary's construction of the anti-redistribution principle is faithful to the regulation's plain language, and the application of this language suffices to bar reimbursement of the costs claimed in this case. For these reasons, we affirm the judgment of the Court of Appeals.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE GINSBURG join, dissenting.

The Court's opinion reads as if this were a case of model agency action. As the Court views matters, 42 CFR §413.85(c) (1993) is "unambiguous," *ante*, at 514, and respondent Secretary of Health and Human Services (Secretary) has always been "faithful to the regulation's plain language," *ante* this page. That plain language, according to the Court, required the Secretary to disallow the reimbursement petitioner sought. The Court's account is hardly an accurate portrayal of this case. When the case is properly viewed, I cannot avoid the conclusion that the Secretary's construction of §413.85(c) runs afoul of the plain meaning of the regulation and therefore is contrary to law, in violation of the Administrative Procedure Act, 5 U. S. C. §706(2)(A). I therefore respectfully dissent.

## I

The Court holds that §413.85(c) has substantive content, reasoning that "the language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available." *Ante*, at 517. In my view, however, §413.85(c) is cast in vague aspirational terms, and it strains credulity to read the regulation as imposing any restriction on the reimbursability of the costs of graduate medical education (GME) or other approved educational expenses. On the contrary, subsection (c) appears to be nothing more than a precatory statement of purpose that imposes no substantive restrictions.

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Subsection (c), in stark contrast to the remainder of § 413.85, reads more like a preamble than a law. See *ante*, at 507–508, n. 1 (quoting § 413.85(c)).<sup>1</sup> In the community support portion of § 413.85(c), the Secretary praises the benefits of approved educational programs and expresses a belief that communities “should” pay for such programs. The subsection then announces the Secretary’s intention to support such activities “appropriately,” limited only by the vague suggestion that at some point in the future a restructuring of fiscal priorities at the “community” level may obviate the need for federal support. The anti-redistribution principle is no less precatory than the community support principle. It states two “intent[ions]”: first, to pay for the “customar[y] and traditiona[l]” educational activities of Medicare providers, and, second, to avoid reimbursing expenses that should be borne by educational institutions affiliated with teaching hospitals. I would not permit the Secretary to transform by “interpretation” what self-evidently are mere generalized expressions of intent into substantive rules of reimbursability. Cf. *Stinson v. United States*, 508 U. S. 36, 45 (1993) (an agency’s interpretation of its own regulation cannot be sustained if “plainly erroneous or inconsistent with the regulation”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945)). See also *Udall v. Tallman*, 380 U. S. 1, 16–17 (1965).

We rejected a similar attempted transformation of precatory language in *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1 (1981). There, we addressed a claim that the “bill of rights” of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U. S. C. § 6010 (1976 ed. and Supp. III), created substantive rights in favor of the mentally retarded. The bill of rights provided, in part, that such persons “have a right to appropriate treat-

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<sup>1</sup>Like the Court, *ante*, at 507–508, I refer to the last sentence of 42 CFR § 413.85(c) (1993) as the “anti-redistribution principle,” and to the remainder of the subsection as the “community support principle.”

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ment, services, and habilitation” and that state governments “have an obligation to assure that public funds are not provided to any [noncomplying] institutio[n].” §§ 6010(1), (3). We held that the bill of rights did not have substantive effect: “§ 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of ‘findings’ and, as such, is too thin a reed to support the rights and obligations read into it by the court below.” 451 U. S., at 19. Even though *Pennhurst* did not involve an agency regulation, its textual analysis suggests that it is unreasonable to give substantive effect to precatory, aspirational language—as would the Secretary’s construction of 42 CFR § 413.85(c) (1993). Cf. *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 260 (1991) (SCALIA, J., concurring in part and concurring in judgment) (explaining that “deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ”).

Interestingly enough, for the first two decades of the Medicare program’s operation, the Secretary’s fiscal intermediaries, with her acquiescence (if not approval), gave § 413.85(c) precisely the same substantive effect as I would—none. During that entire period, the Secretary *never* invoked the subsection to deny reimbursement for previously unreimbursed costs, and providers were actually reimbursed for such costs despite § 413.85(c). Indeed, contrary to the Court’s baffling assertion that “petitioner fails to present persuasive evidence that the Secretary has interpreted the anti-redistribution provision in an inconsistent manner,” *ante*, at 515, one need look no further than petitioner’s brief, see Brief for Petitioner 21–24, to find evidence of such interpretive inconsistency as to both the anti-redistribution and community support principles.

Petitioner received no Medicare reimbursement for any GME costs from 1966 to 1973. Even though the anti-



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redistribution and community support principles were in effect for that entire period, see *ante*, at 507–508, n. 1, petitioner was awarded reimbursement *for the first time* in 1974, for salary-related GME costs. Because those GME costs were not paid for by Thomas Jefferson University Hospital (Hospital) prior to 1974, even the Secretary’s opinion below finds, as a matter of fact, that they were borne, to a large extent, by Jefferson Medical College (Medical School) during that period. Cf. App. to Pet. for Cert. 32a (identifying public educational grants to the Medical School and Medical School tuition as sources for funding the Hospital’s pre-1974 GME activities). Also, the funding for those costs that came from sources other than the Medical School (namely, hospital fees from charges to non-Medicare beneficiaries, see *ibid.*) did not come from Medicare and therefore constituted “community support.” See App. to Pet. for Cert. 18a (the Secretary “views community support as any source of funding other than the Medicare program”).

Yet under the Secretary’s present interpretation of § 413.85(c), petitioner should never have received *any* GME cost reimbursement because it had not obtained such reimbursement from the beginning of the Medicare program. To the extent the Hospital’s GME costs were previously borne by the Medical School, providing petitioner reimbursement for those costs violated the anti-redistribution principle, as presently construed. See *ante*, at 513 (“The Secretary interprets the regulation . . . to deny reimbursement for ‘costs previously incurred and paid by a medical school’”) (editorial revisions omitted). Indeed, the Provider Reimbursement Review Board (PRRB) explicitly recognized this fact, finding that, on the fiscal intermediary’s interpretation of “redistribution” (adopted by the Secretary below), “[i]n 1974, the [Hospital] commenced shifting costs . . . to the Medicare program” and that “[a]dditional cost shifting occurred in 1984 when certain clerical costs of the Medical School were included in the [Hospital’s] cost report.” App.

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to Pet. for Cert. 50a.<sup>2</sup> Similarly, reimbursing petitioner for GME costs violated the community support principle, to the extent funding for such costs had been available previously from non-Medicare sources. See *ante*, at 511 (where community support has been received, §413.85(c) “prohibits Medicare reimbursement”). Thus, the Court’s statement that there is no “evidence that the Secretary has interpreted the anti-redistribution provision in an inconsistent manner,” *ante*, at 515, appears to be wishful thinking: Petitioner has been routinely granted reimbursement which it should have been denied under §413.85(c), if the Secretary’s current interpretation is correct.

I think it reasonable to conclude that in reimbursing petitioner since 1974 for GME costs not reimbursed from the inception of the Medicare program, the Secretary acted on the basis of an interpretation of §413.85(c) that attached no significance to a Medicare provider’s failure in prior years to be reimbursed for, or to carry on its books, eligible educational costs. This conclusion has significant support in the Secretary’s roughly contemporaneous pronouncements. Cf. *Lyng v. Payne*, 476 U. S. 926, 939 (1986); *M. Kraus & Bros., Inc. v. United States*, 327 U. S. 614, 622 (1946) (opinion of Murphy, J.). In 1978, for example, the Secretary advised fiscal intermediaries that reasonable GME costs incurred by a related medical school are “allowable hospital costs,” Intermediary Letter No. 78–7 (Feb. 1978), without even mentioning either the community support or the anti-redistribution principle as potential limitations on its construction. App. to Pet. for Cert. 64a. The letter’s explicit statement that the Secretary therein addressed the “appropriateness” of “allocating [educational costs] to the hospital [in question],”

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<sup>2</sup> Because the Secretary, through the Health Care Financing Administration (HCFA), only modified rather than reversed the PRRB’s decision, see App. to Pet. for Cert. 37a, the PRRB’s opinion remains in force to the extent consistent with the opinion of the HCFA. Cf. 42 U. S. C. § 1395oo(f)(1).

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*ibid.*, demonstrates the inaccuracy of the Court's suggestion that the letter addressed topics entirely unrelated to the anti-redistribution principle, *ante*, at 515–516; the “appropriateness” of allocating costs from a medical school to its affiliated hospital is precisely what the anti-redistribution principle governs, to the extent it has substantive effect at all. See 42 CFR § 413.85(c) (1993).

Moreover, in 1982, the Secretary answered a query from a fiscal intermediary concerning the relationship between the anti-redistribution principle and Intermediary Letter 78–7 with the statement that “allocation of costs to a hospital from a related medical school is governed by Intermediary Letter 78–7.” App. 25. The Court makes much of the fact that the 1982 memorandum did not explicitly mention the anti-redistribution principle. *Ante*, at 516, n. 4. In so doing, however, the Court overlooks the fact that the fiscal intermediary's inquiry presented the Secretary with a specific binary choice: Are approved educational activities previously paid for by an affiliated educational unit either allowable (*i. e.*, reimbursable) hospital costs (as Intermediary Letter No. 78–7 advised) or a prohibited redistribution of costs under § 413.85(c)? By answering the fiscal intermediary's pointed query with the statement that Intermediary Letter No. 78–7 is controlling on the reimbursability of the costs associated with such activities, see App. 25, the Secretary quite clearly (albeit implicitly) afforded the anti-redistribution principle no substantive effect whatsoever.

To be sure, in 1985 the Secretary issued a memorandum stating, without elaboration, that “[t]he fact that [the anti-redistribution principle] is not mentioned in the [1982] memorandum does not change the basic policy as espoused in [§ 413.85(c)].” *Id.*, at 27. The 1985 memorandum's bare reference to the “policy” of § 413.85(c), however, neither disavowed the Secretary's past interpretation of the regulation nor set forth any alternative interpretation. The Court thus considerably overstates matters in its suggestion that

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the 1985 memorandum specifically confirmed the continued vitality of the anti-redistribution principle. *Ante*, at 516, n. 4.<sup>3</sup>

Based on a reading of the undeniably precatory language used in §413.85(c), confirmed by two decades of consistent agency practice, I would hold that subsection (c) imposes no limit on the reimbursability of approved educational activities. Cf. *M. Kraus & Bros.*, 327 U. S., at 622 (“Not even the Administrator’s interpretations of his own regulations can . . . add certainty and definiteness to otherwise vague language”). Instead, the subsection seems intended merely to explain the remainder of the regulation, which addresses the reimbursability of approved educational costs in clear,

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<sup>3</sup> Even less satisfactory is the Secretary’s suggestion that her failure to apply §413.85(c) in prior fiscal years is of no relevance. See Brief for Respondent 37. The prior inconsistent conduct of the agency is quite relevant—not because her inconsistency “estop[s]” her from changing her view, *ante*, at 517 (internal quotation marks omitted)—but rather because agency conduct, no less than express statements, can effect a construction of statutes or regulations. Cf., e. g., *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41–42 (1983) (holding that “[a] ‘settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies [of applicable statutes or regulations]’”) (quoting *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U. S. 800, 807–808 (1973)). Two decades of providing reimbursement in contravention of what is now claimed to be the community support and anti-redistribution principles certainly constitutes a “settled course of behavior,” and I find it difficult to believe the Secretary would permit such a persistent—and costly—error in the application of her reimbursement rules. Cf. 1991 Medicare Explained ¶ 706, p. 179 (“When Medicare pays for noncovered services or it pays too much for covered services, the program will ordinarily attempt to recover the amount of the overpayment”). A settled interpretation that persists over time is presumptively to be preferred, see *Motor Vehicle Mfrs. Assn.*, 463 U. S., at 41–42, and therefore judges are properly suspect of sharp departures from past practice that are as unexplained as the Secretary’s in this case. *Id.*, at 42. See also *Wichita Bd. of Trade, supra*, at 807–808.

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unmistakably mandatory terms. Cf. *Pennhurst*, 451 U. S., at 19, n. 14.

By giving substantive effect to such a hopelessly vague regulation, the Court disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to “resol[ve] . . . ambiguity in a statutory text.” *Pauley v. BethEnergy Mines, Inc.*, 501 U. S. 680, 696 (1991). See generally *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865–866 (1984). Here, far from resolving ambiguity in the Medicare program statutes, the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law. Cf. *FTC v. Atlantic Richfield Co.*, 567 F. 2d 96, 103 (CA DC 1977) (Wilkey, J.). Cf. generally 2 K. Davis & R. Pierce, *Administrative Law* § 11.5, p. 204 (3d ed. 1994) (“An agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy”). The aspirational terms of § 413.85(c) are woefully inadequate to impart such notice.<sup>4</sup>

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<sup>4</sup> As a result of the Court’s ruling today, petitioner and other Medicare providers who, in the past, received reimbursement for GME costs in violation of the Secretary’s present interpretation of § 413.85(c) are suddenly faced with the possibility of being sued for recoupment of the millions of dollars of “overpayments” they received from Medicare. The Social Security Act, we have noted, “permits . . . retroactive action” within three years by the Secretary to make “corrective adjustments . . . where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be . . . excessive.” *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204, 209 (1988) (quoting 42 U. S. C. § 1395x(v)(1)(A)). Thus, although the Secretary per-

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## II

## A

In view of its unbelabored conclusion that §413.85(c) imposes substantive limits on the reimbursability of approved educational costs, the Court's discussion focuses primarily on what substantive import §413.85(c)'s anti-redistribution principle should be read to have. The Court finds the anti-redistribution principle "straightforward" in its meaning—any costs that, at some previous point in time, were carried on the books of an affiliated educational institution cannot subsequently be reimbursed by Medicare. *Ante*, at 513. For the reasons previously discussed, I would hold that §413.85(c) cannot reasonably be construed to impose substantive restrictions on the reimbursability of approved educational costs. Nevertheless, if I had to give the principle substantive effect, I could not agree with the Court's sweeping construction of the principle. In my view, the Court's reading is premised on a distortion of the text of the regulation enunciating the anti-redistribution principle, and it is the text, of course, which must be given controlling effect. See *Bowles*, 325 U. S., at 414 (holding that an agency's interpretation of its own regulation must comport with "the plain words of the regulation").

Under the relevant portion of §413.85(c), it is the *type* of educational activity engaged in that determines whether or not reimbursement is proper: "[T]he intent of the [Medicare] program is to share in the support of educational activities customarily or traditionally carried on by providers in

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mitted petitioner to recover reimbursement for "those medical education costs which it has traditionally claimed and been allowed prior to 1984," App. to Pet. for Cert. 37a, that act of administrative grace appears to be subject to revision at the whim of the Secretary. Cf. *Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U. S. 51 (1984) (Secretary not estopped from recouping overpayment to Medicare provider whose prior reimbursement claims were made in reliance on erroneous advice of its designated fiscal intermediary).

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conjunction with their [patient care] operations.” 42 CFR §413.85(c) (1993). The proper question under the anti-redistribution principle, therefore, is not, as the Secretary puts it, whether “[a particular provider] has traditionally claimed and been allowed” reimbursement for a particular category of reimbursable costs. App. to Pet. for Cert. 37a. Instead, the relevant question is whether the educational activities for which reimbursement is sought are of a type “customarily or traditionally” engaged in by providers. If, in a particular case, that question is answered in the negative, then it would be a forbidden “redistribution” of costs to award Medicare reimbursement for the costs associated with the activities in question. Conversely, if the costs for which a provider seeks reimbursement result from educational activities that are traditionally engaged in by Medicare providers, no redistribution of costs occurs when those costs are reimbursed.

A prohibition against shifting the costs of educational units (for example, medical or nursing schools) to patient care units was necessary because of the Medicare program’s related-organization rule, which provides that “costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider.” 42 CFR §413.17(a) (1993). In light of the related-organization rule, §413.85(a)’s recognition of educational costs as reimbursable costs created the distinct possibility that many, if not most, of the costs arising from educational unit activities could be shifted to affiliated Medicare providers (and therefore to the Medicare program) because, by definition, such units engage in educational activities. Cf. 57 Fed. Reg. 43659, 43668 (1992) (expressing the Secretary’s concern that “Medicare payment for medical education costs should not result in a redistribution of costs from the educational institution to the provider”). Since Medicare is primarily intended to fund health care for the elderly and

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disabled, not to subsidize the education of health care professionals, cf. 42 U. S. C. § 1395c, the Secretary avoided such an inadvertent “expan[sion] [in] the range of items and services for which a provider could claim payment” by barring the redistribution of costs from educational to patient care units. 57 Fed. Reg. 43668 (1992).

The Court therefore errs in reading the term “redistribution” wholly divorced from the context in which it appears. See *ante*, at 513 (suggesting the first clause of the anti-redistribution principle is not even “relevant” to an understanding of the second phrase). In my view, “redistribution” can only be properly understood in light of the remainder of the sentence in which it appears and in light of the related-organization rule, because interpreting a statute or regulation “is a holistic endeavor.” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Viewed in the proper textual context, § 413.85(c)’s anti-redistribution principle simultaneously expresses an intent to fund educational activities customarily conducted by teaching hospitals and disallows reimbursement for costs incurred by their affiliated educational units in conducting educational programs not customarily or traditionally engaged in by such hospitals. The Secretary’s contrary interpretation, in my view, is unworthy of deference. Cf., e. g., *Bowles, supra*, at 414.

There can be no question that the GME activities for which petitioner seeks reimbursement are customarily or traditionally engaged in by teaching hospitals. As the District Court cogently explained in *Ohio State Univ. v. Secretary, U. S. Dept. of Health and Human Services*, 777 F. Supp. 582 (SD Ohio 1991), *aff’d*, 996 F. 2d 122 (CA6 1993), cert. pending, No. 93–696:

“In the case of graduate medical education, it would be customary and traditional for a teaching hospital to employ qualified physicians in various medical specialties to select and supervise the interns and residents



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enrolled in the educational program. These physicians would need clerical and administrative staff, office space and supplies to carry out their function[s]. Their salaries, the salaries of their clerical and administrative staffs, and the cost of their office space and supplies would all be part of the cost of the educational activity which ultimately contributes to the quality of patient care in the hospital.” 777 F. Supp., at 587.

As a result, the anti-redistribution principle provides no basis for denying petitioner Medicare reimbursement for the full level of its GME costs, less tuition revenues. See §§ 413.85(a), (g).

I therefore wholeheartedly agree with the PRRB that “[t]he fact that [the Hospital] did not fully identify all of the costs associated with its GME programs in prior years does not prohibit the correction of this [cost accounting] error in the cost reporting period in contention.” App. to Pet. for Cert. 58a–59a. In ruling to the contrary, the Court arbitrarily subjects similarly situated Medicare providers, with identical levels of reimbursable GME costs, to disparate reimbursement, simply because one provider may have forgone reimbursement to which it was plainly entitled as a consequence of its cost accounting procedure’s failure to identify all of the provider’s reimbursable costs. Although “[m]en must turn square corners when they deal with the Government,” *Rock Island, A. & L. R. Co. v. United States*, 254 U. S. 141, 143 (1920) (Holmes, J.), the manifest injustice of the Court’s result should be apparent.

## B

Because, unlike the Court, I do not believe the anti-redistribution principle may reasonably be read to bar petitioner’s claim for reimbursement for non-salary-related GME costs, I must also address petitioner’s challenge to the Secretary’s construction of the community support principle. Petitioner argues that interpreting the term “community

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support” to include all non-Medicare sources of funding for GME costs is inconsistent with the text of §413.85(c). I agree. Not only is the community support principle merely an aspirational statement of policy, see *supra*, at 519–523, but, in my view, the other provisions of 42 CFR §413.85 (1993) plainly leave no role for the principle in the cost reimbursement calculus for approved educational activities.

Section 413.85(a) authorizes a provider to “include its net cost of approved educational activities” in its allowable Medicare costs and provides that the “net cost” of such activities is to be “calculated under paragraph (g) of this section.” Section 413.85(g), in turn, defines “[n]et cost of approved educational activities” as the provider’s “total costs of these activities,” less “revenues it receives from tuition.” Section 413.85(g) therefore clearly establishes the level of reimbursement a provider may expect for approved educational costs, and the only source of funding that is to be offset against such costs is tuition revenues. No other potential sources of funding for GME activities are included in the offset required by §413.85(g). Thus, the Secretary’s interpretation of the community support principle as requiring, in effect, all non-Medicare sources of funding to be offset against total educational cost is flatly inconsistent with §§413.85(a) and (g).

The plain implication of §413.85(g) is confirmed by its regulatory history. Cf. *Payne*, 476 U. S., at 941. In 1984, the Secretary amended the subsection’s predecessor to eliminate the requirement that “grants” and “specific donations” be offset against educational costs actually incurred. See 49 Fed. Reg. 234, 296, 313 (1984) (amending 42 CFR §405.421(g) (1983)). See also 48 Fed. Reg. 39752, 39797, 39811 (1983) (withdrawing 42 CFR §405.423 (1982) relating to offsets for certain grants and gifts). The Secretary’s construction of the community support principle essentially reintroduces grants and specific donations into the reimbursement calculus. The Secretary has thus rendered the 1984 amend-

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ment to the regulation entirely superfluous, a disfavored result that should be avoided where possible. See *Kungys v. United States*, 485 U. S. 759, 778 (1988). Cf. also *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253 (1992).

Consequently, the Secretary's construction of the community support principle to impose a substantive restriction on the reimbursability of approved educational expenses is inconsistent with the regulation. As such, the construction is unworthy of deference. See, e. g., *Stinson*, 508 U. S., at 45.

### III

For the foregoing reasons, the Secretary acted contrary to law, within the meaning of 5 U. S. C. § 706(2)(A), in construing 42 CFR § 413.85(c) (1993) as denying Medicare providers the right to receive reimbursement for otherwise eligible educational costs simply because the costs had not previously been reimbursed by Medicare. I would therefore reverse the judgment of the Court of Appeals. I respectfully dissent.

## Syllabus

CONSOLIDATED RAIL CORPORATION *v.*  
GOTTSHALLCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 92–1956. Argued February 28, 1994—Decided June 24, 1994\*

In separate suits against petitioner Conrail, their former employer, respondents Gottshall and Carlisle each asserted a claim for negligent infliction of emotional distress under the Federal Employers' Liability Act (FELA). In *Gottshall*, the District Court granted summary judgment to Conrail. In reversing and remanding for trial, the Court of Appeals observed that most States limit recovery for negligent infliction of emotional distress through the application of one or more common-law tests. The court declared, however, that there is a fundamental tension between such restrictive tests and FELA's liberal recovery policy, and stated that the tests must be discarded when they bar recovery on "meritorious" FELA claims. The court held that the facts alleged in support of a FELA claim must provide a threshold assurance that there is a likelihood of genuine and serious emotional injury, and concluded that Gottshall had satisfied this threshold "genuineness" test and adequately alleged the usual FELA elements, including conduct unreasonable in the face of a foreseeable risk of harm. In *Carlisle*, the same court sustained a jury verdict against Conrail, "uphold[ing] for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress." Although it restated its *Gottshall* holding, the court shifted its primary emphasis to the foreseeability of the alleged injury and held, *inter alia*, that Carlisle had produced sufficient evidence that his nervous breakdown had been foreseeable to Conrail.

*Held:*

1. The proper standard for evaluating FELA claims for negligent infliction of emotional distress must be derived from FELA principles and relevant common-law doctrine. Pp. 541–549.

(a) This Court's FELA jurisprudence outlines the proper analysis for determining whether, and to what extent, a new category of claims should be cognizable under the statute. First, the language, purposes, and background of the statute, along with the construction given to the statute by this Court, must be examined. Second, because FELA

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\*Together with *Consolidated Rail Corporation v. Carlisle*, also on certiorari to the same court (see this Court's Rule 12.2).

## Syllabus

jurisprudence gleans guidance from common-law developments, the common law's treatment of the asserted right of recovery must be considered. See, e. g., *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 561–562, 568–570. Pp. 541–542.

(b) Through FELA, Congress sought to compensate employee “injury” resulting from employer “negligence,” 45 U. S. C. § 51, by creating a remedy for the many deaths and maimings that were occurring on interstate railroads at the time the statute was enacted in 1908, see *Urie v. Thompson*, 337 U. S. 163, 181. Over the years, the Court has construed FELA liberally to further this remedial goal, see, e. g., *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506. Nevertheless, the federal question of what constitutes negligence for purposes of FELA turns upon common-law principles, subject to such modifications as Congress has imported into those principles in the statute itself. See *Urie, supra*, at 182. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in the Court's decision. Pp. 542–544.

(c) Although nearly all States recognize a right to recover for negligently inflicted emotional distress—that is, mental or emotional harm (such as fright or anxiety) that is caused by another's negligence and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms—three major common-law “tests” have been developed to limit that right: (1) the “physical impact test,” which had been embraced by most of the major industrial States by 1908, but has since been abandoned in all but a few jurisdictions; (2) the “zone of danger” test, which had been adopted by several States by 1908 and currently is followed in 14 jurisdictions; and (3) the “relative bystander” test, which was first enunciated in 1968 and has since been adopted by nearly half the States. Pp. 544–549.

2. The Court of Appeals applied an erroneous standard for evaluating FELA claims for negligent infliction of emotional distress. Pp. 549–558.

(a) The lower court correctly held that such claims are cognizable under the statute. As part of its duty to use reasonable care in furnishing employees a safe workplace, *Buell, supra*, at 558, a railroad has a FELA duty to avoid subjecting its workers to negligently inflicted emotional injury. A right to recover for such injury was widely recognized when FELA was enacted and is nearly universally recognized today. Moreover, given the broad remedial scope this Court has accorded FELA's “injury” term, cf. *Urie, supra*, at 181, there is no reason why that term should not encompass emotional injury. Pp. 549–550.

(b) However, the Court of Appeals' standard for delimiting this FELA duty is rejected. First, because the merit of this type of FELA claim cannot be ascertained without reference to the common law, the

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court erred in treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on “meritorious” FELA claims. Second, the viability of the court’s “genuineness” test is questionable on its own terms, since it cannot appreciably diminish the possibility of unlimited liability for *genuine* claims of emotional harm, and since it would force judges to make highly subjective determinations concerning the authenticity of particular claims. Third, the court’s reliance on foreseeability as a meaningful limitation on liability is misplaced, since *all* consequences of a negligent act, no matter how far removed, may be foreseen. Finally, the common law does not support the court’s unprecedented *Carlisle* holding, which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers’ FELA liability to cover the stresses and strains of everyday employment. Pp. 550–554.

(c) Instead, this Court adopts the zone of danger test, which limits recovery for emotional injury to those plaintiffs who either sustain a physical impact as a result of the defendant’s negligence or are placed in immediate risk of physical impact by that negligence. This is the only common-law test that exhibits both significant historical support and continuing vitality sufficient to inform the Court’s determination of the federal question of what constitutes FELA “negligence” in this context. This test is consistent with FELA’s broad remedial goals and with the statute’s purpose of alleviating the physical dangers of railroad-ing. Even if respondents are correct that the zone of danger test arbitrarily excludes some emotional injury claims, that test best reconciles the concerns motivating the common-law restrictions on recovery for negligently inflicted emotional distress—the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult to detect, and the specter of unlimited and unpredictable liability—with this Court’s FELA jurisprudence. Pp. 554–557.

3. The question whether Gottshall satisfies the zone of danger test was not adequately briefed or argued before this Court, and should be considered by the Court of Appeals on remand. In *Carlisle*, however, judgment must be entered for Conrail on remand, because Carlisle’s work-stress-related claim plainly does not fall within the common law’s conception of the zone of danger. Pp. 557–558.

988 F. 2d 355 (first case) and 990 F. 2d 90 (second case), reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O’CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 558. GINSBURG, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 559.

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*Ralph G. Wellington* argued the cause for petitioner in both cases. With him on the briefs were *Nancy Winkelman*, *Bruce B. Wilson*, and *Lucy S. L. Amerman*.

*William L. Myers, Jr.*, argued the cause and filed a brief for respondent Gottshall. *J. Michael Farrell* argued the cause for respondent Carlisle. With him on the brief was *William L. Bowe*.†

JUSTICE THOMAS delivered the opinion of the Court.

These cases require us to determine the proper standard for evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act. Because the standard adopted by the Court of Appeals is inconsistent with the principles embodied in the statute and with relevant common-law doctrine, we reverse the judgments below.

## I

Respondents James Gottshall and Alan Carlisle each brought suit under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, against their former employer, petitioner Consolidated Rail Corporation (Conrail). We set forth the facts of each case in turn.

## A

Gottshall was a member of a Conrail work crew assigned to replace a stretch of defective track on an extremely hot and humid day. The crew was under time pressure, and so the men were discouraged from taking scheduled breaks.

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†Briefs of *amici curiae* urging reversal were filed for the State of New Jersey et al. by *Fred DeVesa* and *Joseph L. Yannotti*; for the Association of American Railroads by *Charles F. Clarke* and *Robert W. Blanchette*; for the Product Liability Advisory Council, Inc., by *Robert N. Weiner*; and for the Washington Legal Foundation by *Betty Jo Christian*, *Charles G. Cole*, *David A. Price*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

*Norman Hegge* filed a brief for the Southeastern Pennsylvania Transportation Authority as *amicus curiae*.

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They were, however, allowed to obtain water as needed. Two and one-half hours into the job, a worker named Richard Johns, a longtime friend of Gottshall, collapsed. Gottshall and several others rushed to help Johns, who was pale and sweating profusely. They were able to revive him by administering a cold compress. Michael Norvick, the crew supervisor, then ordered the men to stop assisting Johns and to return to work. Five minutes later, Gottshall again went to Johns' aid after seeing his friend stand up and collapse. Realizing that Johns was having a heart attack, Gottshall began cardiopulmonary resuscitation. He continued the process for 40 minutes.

Meanwhile, Norvick attempted to summon assistance, but found that his radio was inoperative; unbeknownst to him, Conrail had temporarily taken the nearest base station off the air for repairs. Norvick drove off to get help, but by the time he returned with paramedics, Johns had died. The paramedics covered the body with a sheet, ordered that it remain undisturbed until the coroner could examine it, and directed the crew not to leave until the coroner had arrived. Norvick ordered the men back to work, within sight of Johns' covered body. The coroner, who arrived several hours later, reported that Johns had died from a heart attack brought on by the combined factors of heat, humidity, and heavy exertion.

The entire experience left Gottshall extremely agitated and distraught. Over the next several days, during which he continued to work in hot and humid weather conditions, Gottshall began to feel ill. He became preoccupied with the events surrounding Johns' death, and worried that he would die under similar circumstances. Shortly after Johns' funeral, Gottshall was admitted to a psychiatric institution, where he was diagnosed as suffering from major depression and posttraumatic stress disorder. During the three weeks he spent at the institution, Gottshall experienced nausea, insomnia, cold sweats, and repetitive nightmares concerning



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Johns' death. He lost a great deal of weight and suffered from suicidal preoccupations and anxiety. Gottshall has continued to receive psychological treatment since his discharge from the hospital.

Gottshall sued Conrail under FELA for negligent infliction of emotional distress. He alleged that Conrail's negligence had created the circumstances under which he had been forced to observe and participate in the events surrounding Johns' death. The District Court granted Conrail's motion for summary judgment, holding that FELA did not provide a remedy for Gottshall's emotional injuries.

A divided panel of the United States Court of Appeals for the Third Circuit reversed and remanded for trial. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (1993). The court observed that most States recognize a common-law cause of action for negligent infliction of emotional distress, but limit recovery to certain classes of plaintiffs or categories of claims through the application of one or more tests. *Id.*, at 361 (discussing "physical impact," "zone of danger," and "relative bystander" tests). The Third Circuit suggested that because "an emotional injury is easier to fake" than a physical injury, these tests have been "judicially developed to screen causes of action and send only the meritorious ones to juries." *Ibid.*

The court below identified what it considered to be a fundamental tension between the restrictive attitude of the common law toward claims for negligent infliction of emotional distress on the one hand, and the general policy underlying FELA on the other. According to the Third Circuit, the common law places harsh and arbitrary limits on recovery for emotional injury, while FELA has consistently been interpreted to accord liberal relief to railroad workers injured through the negligence of their employers. *Id.*, at 367-368 (discussing cases).

In the Third Circuit's view, the only way to reconcile the apparent tension was to give preference to the liberal recov-

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ery policy embodied in FELA over the common law: “[D]oc-trinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims.” *Id.*, at 369. De-termining that judges could weed out fraudulent emotional injury claims through careful scrutiny of the facts, the court held that the facts alleged in support of a claim under FELA for negligent infliction of emotional distress must “provide a threshold assurance that there is a likelihood of genuine and serious emotional injury.” *Id.*, at 371. The Third Circuit suggested that a court’s factual inquiry might include con-sideration of the plaintiff’s claim in light of the present state of the common law.

After reviewing the facts of Gottshall’s case, the Third Cir-cuit concluded that Gottshall had made a sufficient showing that his injuries were genuine and severe. *Id.*, at 374. Be-cause his claim had met the court’s threshold “genuineness” test, the court next considered whether the claim adequately alleged the usual FELA elements of breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation. The panel majority concluded that there were genuine issues of material fact concerning whether Gottshall’s injuries were foreseeable by Conrail, whether Conrail had acted unreasonably, and whether Conrail’s conduct had caused cognizable injury to Gottshall. The court therefore remanded for trial. *Id.*, at 383.

Judge Roth dissented in part because she believed that there was no triable issue regarding breach of duty. She reasoned that “outside of the interruption of the communica-tions link, the allegedly negligent conditions created by Con-rail at the time of Johns’ collapse consisted in fact of the members of the work gang performing the negotiated duties of their jobs under conditions which may indeed have been difficult but which had occurred in the past and will probably occur again in the future.” *Id.*, at 385. In her view, these

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negotiated duties could not support a finding of negligence. Judge Roth concluded that “Conrail could not reasonably have foreseen that its negligence in interrupting the work gang’s communication[s] link might cause James Gottshall’s severe emotional reaction to the death of Richard Johns.” *Id.*, at 386.

## B

Respondent Carlisle began working as a train dispatcher for Conrail in 1976. In this position, he was responsible for ensuring the safe and timely movement of passengers and cargo. Aging railstock and outdated equipment made Carlisle’s job difficult. Reductions in Conrail’s work force required Carlisle to take on additional duties and to work long hours. Carlisle and his fellow dispatchers frequently complained about safety concerns, the high level of stress in their jobs, and poor working conditions. In 1988, Carlisle became trainmaster in the South Philadelphia yards. With this promotion came added responsibilities that forced him to work erratic hours. Carlisle began to experience insomnia, headaches, depression, and weight loss. After an extended period during which he was required to work 12- to 15-hour shifts for weeks at a time, Carlisle suffered a nervous breakdown.

Carlisle sued Conrail under FELA for negligent infliction of emotional distress. He alleged that Conrail had breached its duty to provide him with a safe workplace by forcing him to work under unreasonably stressful conditions, and that this breach had resulted in foreseeable stress-related health problems. At trial, Carlisle called medical experts who testified that his breakdown and ensuing severe depression were caused at least in part by the strain of his job. The jury awarded Carlisle \$386,500 in damages.

The Third Circuit affirmed, “uphold[ing] for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress.” *Carlisle v. Con-*

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*solidated Rail Corp.*, 990 F. 2d 90, 97–98 (1993). In rejecting Conrail’s argument that Carlisle had failed to make out a claim under FELA because he had not alleged any accident or physical injury or impact, the court noted that in *Gottshall* (decided the month before), it had “upheld recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact.” 990 F. 2d, at 96. Restating its holding in *Gottshall*, the court advised that, when evaluating a claim under FELA for negligently inflicted emotional distress, district courts within the Third Circuit “should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim.” 990 F. 2d, at 98.

In the case before it, however, the court did not examine Carlisle’s suit in light of any of the various common-law tests for dealing with negligent infliction of emotional distress claims. Instead, it shifted its primary emphasis to the foreseeability of the alleged injury and held that “when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker, the employer may be held to be liable under the FELA for the employee’s resulting injuries.” *Id.*, at 97. The Third Circuit held that Carlisle had produced sufficient evidence that his injury had been foreseeable to Conrail. The court also found sufficient evidence that Conrail had breached its duty to provide Carlisle with a safe workplace by making his employment too demanding, and that this breach had caused Carlisle’s injury. *Ibid.*

Pursuant to this Court’s Rule 12.2, Conrail petitioned for review of the Third Circuit’s decisions in *Gottshall* and *Carlisle*. We granted certiorari, 510 U. S. 912 (1993), to resolve a conflict among the Courts of Appeals concerning the threshold standard that must be met by plaintiffs bringing

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claims for negligent infliction of emotional distress under FELA.<sup>1</sup>

## II

In these cases, we address questions left unanswered in *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557 (1987). That case involved a FELA complaint filed by a railroad carman who alleged that the intentional and negligent actions of his employer had caused him to suffer emotional injuries. We rejected the railroad's contention that the FELA action should be barred because the conduct complained of was subject to arbitration under the terms of the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* See 480 U. S., at 564–567. Because the record was not fully developed, however, we were unable to reach the railroad's alternative argument that purely emotional injury was not compensable under FELA. Today, we must resolve one of the questions reserved in *Buell*: whether recovery for negligent infliction of emotional distress is available under FELA.<sup>2</sup> If we conclude that it is, we must consider the proper scope of that availability. Our FELA jurisprudence outlines the analysis we must undertake when deciding whether, and to what extent, this new category of claims should be cognizable under the statute.

First, as in other cases involving the scope of the statute, we must look to FELA itself, its purposes and background, and the construction we have given it over the years. See, *e. g., id.*, at 561–562. Second, because “FELA jurisprudence gleans guidance from common-law developments,” *id.*, at 568, we must consider the common law's treatment of the right

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<sup>1</sup> Compare the decisions below with *Ray v. Consolidated Rail Corp.*, 938 F. 2d 704 (CA7 1991), cert. denied, 502 U. S. 1048 (1992); *Elliott v. Norfolk & Western R. Co.*, 910 F. 2d 1224 (CA4 1990); *Adams v. CSX Transp., Inc.*, 899 F. 2d 536 (CA6 1990); *Gaston v. Flowers Transp.*, 866 F. 2d 816 (CA5 1989).

<sup>2</sup> We are not concerned here with the separate tort of intentional infliction of emotional distress.

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of recovery asserted by respondents. See, e. g., *Monessen Southwestern R. Co. v. Morgan*, 486 U. S. 330, 336–339 (1988) (disallowing prejudgment interest under FELA in large part because such interest was unavailable at common law when FELA was enacted); *Buell*, *supra*, at 568–570. Cf. *Urie v. Thompson*, 337 U. S. 163, 174 (1949); *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958).

## A

We turn first to the statute. Section 1 of FELA provides that “[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.” 45 U. S. C. § 51. Our task today is determining under what circumstances emotional distress may constitute “injury” resulting from “negligence” for purposes of the statute. As we previously have recognized when considering § 51, when Congress enacted FELA in 1908, its “attention was focused primarily upon injuries and death resulting from accidents on interstate railroads.” *Urie*, *supra*, at 181. Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the “‘human overhead’” of doing business from employees to their employers. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 58 (1943). See also *Wilkerson v. McCarthy*, 336 U. S. 53, 68 (1949) (Douglas, J., concurring) (FELA “was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations”). In order to further FELA’s humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers. Specifically, the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negli-

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gence, and prohibited employers from exempting themselves from FELA through contract; a 1939 amendment abolished the assumption of risk defense. See 45 U. S. C. §§ 51, 53–55.

We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), that a relaxed standard of causation applies under FELA. We stated that “[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.” *Id.*, at 506. In *Kernan*, *supra*, we extended the reach of the principle of negligence *per se* to cover injuries suffered by employees as a result of their employers' statutory violations, even if the injuries sustained were not of a type that the relevant statute sought to prevent. See *id.*, at 432–436. And in *Urie*, *supra*, we held that occupational diseases such as silicosis constitute compensable physical injuries under FELA, thereby rejecting the argument that the statute covered only injuries and deaths caused by accidents. See *id.*, at 181.

That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute. We have insisted that FELA “does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.” *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653 (1947). Accord, *Inman v. Baltimore & Ohio R. Co.*, 361 U. S. 138, 140 (1959); *Wilkerson*, *supra*, at 61. And while “[w]hat constitutes negligence for the statute's purposes is a federal question,” *Urie*, 337 U. S., at 174, we have made clear that this federal question generally turns on principles of common law: “[T]he Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms,” *id.*, at 182. Those qualifications, discussed above,

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are the modification or abrogation of several common-law defenses to liability, including contributory negligence and assumption of risk. See 45 U.S.C. §§51, 53–55. Only to the extent of these explicit statutory alterations is FELA “an avowed departure from the rules of the common law.” *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958). Thus, although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Cf. *Buell*, 480 U.S., at 568. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

## B

We turn, therefore, to consider the right of recovery pursued by respondents in light of the common law. Cf. *Monesen*, *supra*, at 336–339; *Buell*, 480 U.S., at 568–570. The term “negligent infliction of emotional distress” is largely self-explanatory, but a definitional point should be clarified at the outset. The injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury, cf. *id.*, at 568, apart from the tort law concepts of pain and suffering. Although pain and suffering technically are mental harms, these terms traditionally “have been used to describe sensations stemming directly from a physical injury or condition.” Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 485, n. 45 (1982). The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.

Nearly all of the States have recognized a right to recover for negligent infliction of emotional distress, as we have de-



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fined it.<sup>3</sup> No jurisdiction, however, allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another. Indeed, significant limitations, taking the form of “tests” or “rules,” are placed by the common law on the right to recover for negligently inflicted emotional distress, and have been since the right was first recognized late in the last century.

Behind these limitations lie a variety of policy considerations, many of them based on the fundamental differences between emotional and physical injuries. “Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.” *Maloney v. Conroy*, 208 Conn. 392, 397–398, 545 A. 2d 1059, 1061 (1988). The last concern has been particularly significant. Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act.<sup>4</sup> The

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<sup>3</sup>There are a few exceptions. Negligent infliction of emotional distress is not actionable in Alabama. See *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990). It is unclear whether such a claim is cognizable in Arkansas. Compare *Mechanics Lumber Co. v. Smith*, 296 Ark. 285, 752 S. W. 2d 763 (1988), with *M. B. M. Co. v. Counce*, 268 Ark. 269, 596 S. W. 2d 681 (1980).

<sup>4</sup>See Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 507 (1982) (“The geographic risk of physical impact caused by the defendant’s negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm”).

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incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries because they depend on psychological factors that ordinarily are not apparent to potential tortfeasors.

For all of these reasons, courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable. See, e. g., *Thing v. La Chusa*, 48 Cal. 3d 644, 654, 771 P. 2d 814, 819 (1989) (“[P]olicy considerations mandat[e] that infinite liability be avoided by restrictions that . . . narrow the class of potential plaintiffs”); *Tobin v. Grossman*, 24 N. Y. 2d 609, 616, 249 N. E. 2d 419, 423 (1969).<sup>5</sup> Some courts phrase the limitations in terms of proximate causation; that is, only certain plaintiffs or injuries are reasonably foreseeable. Other courts speak of the limitations in terms of duty; the defendant owes only a certain class of plaintiffs a duty to avoid inflicting emotional harm. See, e. g., *Pearson*, *supra*, at 489, n. 72 (discussing *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928)). These formulations are functionally equivalent. We shall refer to the common-law limitations as outlining the duty of defendants with regard to negligent infliction of emotional distress.

Three major limiting tests for evaluating claims alleging negligent infliction of emotional distress have developed in the common law. The first of these has come to be known

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<sup>5</sup>See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 54, p. 366 (5th ed. 1984) (“It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends”).

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as the “physical impact” test. It originated a century ago in some of the first cases recognizing recovery for negligently inflicted emotional distress. At the time Congress enacted FELA in 1908, most of the major industrial States had embraced this test. See Throckmorton, *Damages for Fright*, 34 Harv. L. Rev. 260, 263–264, and n. 25 (1921).<sup>6</sup> Under the physical impact test, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a physical impact (no matter how slight) or injury due to the defendant’s conduct. Most jurisdictions have abandoned this test, but at least five States continue to adhere to it.<sup>7</sup>

The second test has come to be referred to as the “zone of danger” test. It came into use at roughly the same time as the physical impact test, and had been adopted by several jurisdictions at the time FELA was enacted. See Throckmorton, *supra*, at 264–265, and n. 28.<sup>8</sup> See also Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 Am. L. Reg. 141, and nn. 3–5 (1902). Perhaps based on the realization that “a near miss may be as frightening as a direct hit,” Pearson, *U. Fla. L. Rev.*, at 488, the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result

<sup>6</sup> See, e. g., *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897); *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Ewing v. Pittsburgh, C., C. & St. L. R. Co.*, 147 Pa. 40, 23 A. 340 (1892).

<sup>7</sup> See *OB-GYN Assocs. of Albany v. Littleton*, 259 Ga. 663, 386 S. E. 2d 146 (1989); *Shuamber v. Henderson*, 579 N. E. 2d 452 (Ind. 1991); *Anderson v. Scheffler*, 242 Kan. 857, 752 P. 2d 667 (1988); *Deutsch v. Shein*, 597 S. W. 2d 141 (Ky. 1980); *Hammond v. Central Lane Communications Center*, 312 Ore. 17, 816 P. 2d 593 (1991).

<sup>8</sup> See, e. g., *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 A. 202 (1907); *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 54 S. W. 944 (1900); *Mack v. South-Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1898); *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892). See also *Pankopf v. Hinkley*, 141 Wis. 146, 123 N. W. 625 (1909); *Stewart v. Arkansas Southern R. Co.*, 112 La. 764, 36 So. 676 (1904); *Watson v. Dilts*, 116 Iowa 249, 89 N. W. 1068 (1902).

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of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." *Id.*, at 489. The zone of danger test currently is followed in 14 jurisdictions.<sup>9</sup>

The third prominent limiting test is the "relative bystander" test, which was first enunciated in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P. 2d 912 (1968). In *Dillon*, the California Supreme Court rejected the zone of danger test and suggested that the availability of recovery should turn, for the most part, on whether the defendant could reasonably have foreseen the emotional injury to the plaintiff. The court offered three factors to be considered as bearing on the question of reasonable foreseeability:

"(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." *Id.*, at 740–741, 441 P. 2d, at 920.

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<sup>9</sup>See *Keck v. Jackson*, 122 Ariz. 114, 593 P. 2d 668 (1979); *Towns v. Anderson*, 195 Colo. 517, 579 P. 2d 1163 (1978); *Robb v. Pennsylvania R. Co.*, 58 Del. 454, 210 A. 2d 709 (1965); *Williams v. Baker*, 572 A. 2d 1062 (D. C. App. 1990); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N. E. 2d 1 (1983); *Resavage v. Davies*, 199 Md. 479, 86 A. 2d 879 (1952); *Stadler v. Cross*, 295 N. W. 2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S. W. 2d 595 (Mo. 1990); *Bovsun v. Sanperi*, 61 N. Y. 2d 219, 461 N. E. 2d 843 (1984); *Whetham v. Bismarck Hosp.*, 197 N. W. 2d 678 (N. D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S. W. 2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Center, A Div. of IHC Hosps., Inc.*, 850 P. 2d 1179 (Utah 1992); *Jobin v. McQuillen*, 158 Vt. 322, 609 A. 2d 990 (1992); *Garrett v. New Berlin*, 122 Wis. 2d 223, 362 N. W. 2d 137 (1985).

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The courts of nearly half the States now allow bystanders outside of the zone of danger to obtain recovery in certain circumstances for emotional distress brought on by witnessing the injury or death of a third party (who typically must be a close relative of the bystander) that is caused by the defendant's negligence.<sup>10</sup> Most of these jurisdictions have adopted the *Dillon* factors either verbatim or with variations and additions, and have held some or all of these factors to be substantive limitations on recovery.<sup>11</sup>

## III

## A

Having laid out the relevant legal framework, we turn to the questions presented. As an initial matter, we agree

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<sup>10</sup> See *Croft v. Wicker*, 737 P. 2d 789 (Alaska 1987); *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P. 2d 814 (1989); *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Fineran v. Pickett*, 465 N. W. 2d 662 (Iowa 1991); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990); *Cameron v. Pepin*, 610 A. 2d 279 (Me. 1992); *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249, 503 N. E. 2d 951 (1987); *Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N. W. 2d 148 (1992), appeal denied, 442 Mich. 929, 503 N. W. 2d 904 (1993); *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982); *Maguire v. State*, 254 Mont. 178, 835 P. 2d 755 (1992); *James v. Lieb*, 221 Neb. 47, 375 N. W. 2d 109 (1985); *Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 783 P. 2d 437 (1989); *Wilder v. Keene*, 131 N. H. 599, 557 A. 2d 636 (1989); *Frame v. Kothari*, 115 N. J. 638, 560 A. 2d 675 (1989); *Folz v. State*, 110 N. M. 457, 797 P. 2d 246 (1990); *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, 327 N. C. 283, 395 S. E. 2d 85 (1990); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N. E. 2d 759 (1983); *Sinn v. Burd*, 486 Pa. 146, 404 A. 2d 672 (1979); *Reilly v. United States*, 547 A. 2d 894 (R. I. 1988); *Kinard v. Augusta Sash & Door Co.*, 286 S. C. 579, 336 S. E. 2d 465 (1985); *Boyles v. Kerr*, 855 S. W. 2d 593 (Tex. 1993); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P. 2d 553 (1990); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S. E. 2d 157 (1992); *Contreras v. Carbon County School Dist. No. 1*, 843 P. 2d 589 (Wyo. 1992).

<sup>11</sup> Many jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover. See, e. g., *Garvis v. Employers Mut. Casualty Co.*, 497 N. W. 2d 254 (Minn. 1993).

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with the Third Circuit that claims for damages for negligent infliction of emotional distress are cognizable under FELA. A combination of many of the factors discussed above makes this conclusion an easy one. A right to recover for negligently inflicted emotional distress was recognized in some form by many American jurisdictions at the time FELA was enacted, see nn. 6 and 8, *supra*, and this right is nearly universally recognized among the States today. See *supra*, at 546–549. Moreover, we have accorded broad scope to the statutory term “injury” in the past in light of FELA’s remedial purposes. Cf. *Urie*, 337 U. S., at 181. We see no reason why emotional injury should not be held to be encompassed within that term, especially given that “severe emotional injuries can be just as debilitating as physical injuries.” *Gottshall*, 988 F. 2d, at 361. We therefore hold that, as part of its “duty to use reasonable care in furnishing its employees with a safe place to work,” *Buell*, 480 U. S., at 558, a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury. This latter duty, however, is not self-defining. Respondents defend the Third Circuit’s definition of the duty we recognize today; Conrail offers its own proposed delineation. We consider the proposals in turn.

## B

When setting out its view of the proper scope of recovery for negligently inflicted emotional distress under FELA, the Third Circuit explicitly refused to adopt any of the common-law tests described above; indeed, the court in *Gottshall* went so far as to state that “doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims.” 988 F. 2d, at 369. Instead, the court developed its own test, under which “[t]he issue is whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious emotional injury.” *Id.*, at 371. If this threshold test is satisfied, the claim should be evaluated in light of traditional tort concepts

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such as breach of duty, injury, and causation, with the focus resting on the foreseeability of the plaintiff's injury. *Id.*, at 374–375. In *Gottshall*, the Third Circuit did at least consider the plaintiff's claim in light of the common law of negligent infliction of emotional distress as part of its factual “genuineness” inquiry. By the time the court next applied the *Gottshall* genuineness test, however, the common-law aspect of its analysis had completely disappeared; Carlisle's stress-related claim was not evaluated under any of the common-law tests. In *Carlisle*, the Third Circuit refined its test to two questions—whether there was convincing evidence of the genuineness of the emotional injury claim (with “genuine” meaning authentic and serious), and if there was, whether the injury was foreseeable. If these questions could be answered affirmatively by the court, there was “no bar to recovery under the FELA.” 990 F. 2d, at 98.

The Third Circuit's standard is fatally flawed in a number of respects. First, as discussed above, because negligent infliction of emotional distress is not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid inflicting emotional injury. Cf. *Monessen*, 486 U. S., at 336–339; *Buell*, *supra*, at 568–570; *Urie*, *supra*, at 182. By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on “meritorious” FELA claims, the Third Circuit put the cart before the horse: The common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the “merit” of a FELA claim of this type cannot be ascertained without reference to the common law.

Perhaps the court below believed that its focus on the perceived genuineness of the claimed emotional injury adequately addressed the concerns of the common-law courts in dealing with emotional injury claims. But the potential for fraudulent and trivial claims—the concern identified by the

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Third Circuit—is only one of the difficulties created by allowing actions for negligently inflicted emotional distress. A more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants. The common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover. This concern underlying the common-law tests has nothing to do with the potential for fraudulent claims; on the contrary, it is based upon the recognized possibility of *genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct.

Second, we question the viability of the genuineness test on its own terms. The Third Circuit recognized that “there must be some finite limit to the railway’s potential liability” for emotional injury claims under FELA, and suggested that liability could be restricted through application of the genuineness test. *Gottshall, supra*, at 379. But as just explained, testing for the “genuineness” of an injury alone cannot appreciably diminish the possibility of infinite liability. Such a fact-specific test, moreover, would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent the genuineness test could limit potential liability, it could do so only inconsistently. Employers such as Conrail would be given no standard against which to regulate their conduct under such an ad hoc approach. In the context of claims for intangible harms brought under a negligence statute, we find such an arbitrary result unacceptable. Cf. *Stadler v. Cross*, 295 N. W. 2d 552, 554 (Minn. 1980).

Third, to the extent the Third Circuit relied on the concept of foreseeability as a meaningful limitation on liability, we



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believe that reliance to be misplaced. If one takes a broad enough view, *all* consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all. “Every injury has ramifying consequences, like the rippings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.” *Tobin*, 24 N. Y. 2d, at 619, 249 N. E. 2d, at 424. See also *Thing*, 48 Cal. 3d, at 668, 771 P. 2d, at 830 (“[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery”).

This is true as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers. If emotional injury to Gottshall was foreseeable to Conrail, such injury to the other seven members of his work crew was also foreseeable. Because one need not witness an accident to suffer emotional injury therefrom, however, the potential liability would not necessarily have to end there; any Conrail employees who heard or read about the events surrounding Johns’ death could also foreseeably have suffered emotional injury as a result. Of course, not all of these workers would have been as traumatized by the tragedy as was Gottshall, but many could have been. Under the Third Circuit’s standard, Conrail thus could face the potential of unpredictable liability to a large number of employees far removed from the scene of the allegedly negligent conduct that led to Johns’ death.<sup>12</sup>

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<sup>12</sup>The Third Circuit did require that the emotional injury be “reasonably” foreseeable, see *Carlisle v. Consolidated Rail Corp.*, 990 F. 2d 90, 97 (1993), but under the circumstances, that qualifier seems to add little. Suffice it to say that if Gottshall’s emotional injury stemming from Johns’ death was reasonably foreseeable to Conrail, nearly any injury could also be reasonably foreseeable.

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Finally, the Third Circuit in *Carlisle* erred in upholding “a claim under the FELA for negligent infliction of emotional distress arising from work-related stress.” 990 F. 2d, at 97–98. We find no support in the common law for this unprecedented holding, which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers’ FELA liability to cover the stresses and strains of everyday employment. Indeed, the Third Circuit’s ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees. We have made clear, however, that FELA is not an insurance statute. See, e. g., *Ellis*, 329 U. S., at 653. For the foregoing reasons, we reject the Third Circuit’s approach.

## C

Conrail suggests that we adopt the common-law zone of danger test as delimiting the proper scope of an employer’s duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury. We agree that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence.

As we did in *Monessen*, we begin with the state of the common law in 1908, when FELA was enacted. In determining in *Monessen* whether prejudgment interest was available under FELA, we recognized that the common law in 1908 did not allow such interest in personal injury and wrongful-death suits. Because in enacting FELA, “Congress expressly dispensed with other common-law doctrines of that era, such as the defense of contributory negligence,” but “did not deal at all with the equally well established doctrine barring the recovery of prejudgment interest,” we concluded that Congress intended to leave the common-law rule intact. 486 U. S., at 337–338. In contrast, the right to recover for negligently inflicted emotional distress was well established in many jurisdictions in 1908. Although at that time, “the weight of American authority” favored the physi-

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cal impact test, Throckmorton, 34 Harv. L. Rev., at 264, the zone of danger test had been adopted by a significant number of jurisdictions. See n. 8, *supra*. Moreover, because it was recognized as being a progressive rule of liability that was less restrictive than the physical impact test, the zone of danger test would have been more consistent than the physical impact test with FELA's broad remedial goals. See *Waube v. Warrington*, 216 Wis. 603, 608, 258 N. W. 497, 499 (1935) (discussing early emotional injury cases and referring to zone of danger test as "the liberal rule"). Considering the question "in the appropriate historical context," *Monessen, supra*, at 337, then, it is reasonable to conclude that Congress intended the scope of the duty to avoid inflicting emotional distress under FELA to be coextensive with that established under the zone of danger test. That is, an emotional injury constitutes "injury" resulting from the employer's "negligence" for purposes of FELA only if it would be compensable under the terms of the zone of danger test. See 45 U. S. C. § 51. Cf. *Urie*, 337 U. S., at 182.

Current usage only confirms this historical pedigree. The zone of danger test presently is followed by 14 jurisdictions. It therefore remains to this day a well-established "common-law concep[t] of negligence," *ibid.*, that is suitable to inform our determination of the federal question of what constitutes negligence for purposes of FELA. Cf. *Buell*, 480 U. S., at 568–570; *Kernan*, 355 U. S., at 432.

The zone of danger test also is consistent with FELA's central focus on physical perils. We have recognized that FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work by allowing employees or their estates to assert damages claims. Cf. *Urie, supra*, at 181. By imposing liability, FELA presumably also was meant to encourage employers to improve safety measures in order to avoid those claims. Cf. *Wilkerson*, 336 U. S., at 68 (Douglas, J., concurring). As the Seventh Circuit has observed, FELA was (and is) aimed

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at ensuring “the security of the person from physical invasions or menaces.” *Lancaster v. Norfolk & Western R. Co.*, 773 F. 2d 807, 813 (1985), cert. denied, 480 U. S. 945 (1987). But while the statute may have been primarily focused on physical injury, it refers simply to “injury,” which may encompass both physical and emotional injury. We believe that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries—physical and emotional—caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress’ goal in enacting the statute of alleviating the physical dangers of railroading.

The physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur. And the physical impact test has considerably less support in the current state of the common law than the zone of danger test. See *supra*, at 546–549.

As for the relative bystander test, we conclude that it is an inappropriate rule in the FELA context. As an initial matter, it was not developed until 60 years after FELA’s enactment, and therefore lacks historical support. Cf. *Monessen, supra*. Moreover, in most jurisdictions that adhere to it, this test limits recovery to persons who witness the severe injury or death of a close family member. Only railroad employees (and their estates) may bring FELA claims, however, and presumably it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member. In

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any event, we discern from FELA and its emphasis on protecting employees from physical harms no basis to extend recovery to bystanders outside the zone of danger. Cf. *Gaston v. Flowers Transp.*, 866 F. 2d 816, 820–821 (CA5 1989).

Respondents decry the zone of danger test as arbitrarily excluding valid claims for emotional injury. But “[c]haracterizing a rule limiting liability as ‘unprincipled’ or ‘arbitrary’ is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule.” *Cameron v. Pepin*, 610 A. 2d 279, 283 (Me. 1992). Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they all continue to give caution to courts. We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well founded.

Perhaps the zone of danger test is “arbitrary” in the sense that it does not allow recovery for all emotional distress. But it is fully consistent with our understanding of the statute. And for the reasons discussed above, we conclude that the policy considerations of the common law as they are embodied in the zone of danger test best accord with the concerns that have motivated our FELA jurisprudence.

## IV

Because the Third Circuit applied an erroneous standard for evaluating claims for negligent infliction of emotional

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distress brought under FELA, we reverse the judgments below. In *Gottshall*, we remand for reconsideration under the zone of danger test announced today. Gottshall asserts before this Court that he would in fact meet the requirements of the zone of danger test, while Conrail disagrees. The question was not adequately briefed or argued before us, however, and we believe it best to allow the Third Circuit to consider the question in the first instance in light of relevant common-law precedent.

In *Carlisle*, however, we remand with instructions to enter judgment for Conrail. Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger, and Carlisle makes no argument that it does. Without any support in the common law for such a claim, we will not take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment. In short, the core of Carlisle's complaint was that he "had been given too much—not too dangerous—work to do. That is not our idea of an FELA claim." *Lancaster, supra*, at 813.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

*So ordered.*

JUSTICE SOUTER, concurring.

I join the Court's opinion holding that claims for negligent infliction of emotional distress are cognizable under the Federal Employers' Liability Act (FELA), and that the zone of danger test is the appropriate rule for determining liability for such claims. I write separately to make explicit what I believe the Court's duty to be in interpreting FELA. That duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law. See *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 568–570 (1987). As we have explained:

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“[I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry’s duty toward its workers.” *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958).

Because I believe the Court’s decision today to be a faithful exercise of that duty, and because there can be no question that adoption of the zone of danger test is well within the discretion left to the federal courts under FELA, I join in its opinion.

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Federal Employers’ Liability Act (FELA or Act), 45 U. S. C. § 51 *et seq.*, instructs interstate railroads “to use reasonable care in furnishing [their] employees with a safe place to work.’” *Ante*, at 550, quoting *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 558 (1987). As the Court today recognizes, the FELA-imposed obligation encompasses “a duty . . . to avoid subjecting [railroad] workers to negligently inflicted emotional injury.” *Ante*, at 550.

The Court limits the scope of the railroad’s liability, however, by selecting one of the various “tests” state courts have applied to restrict recovery by members of the public for negligently inflicted emotional distress. The Court derives its limitation largely from a concern, often expressed in state court opinions, about the prospect of “infinite liability” to an “infinite number of persons.” See *ante*, at 552. This

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concern should not control in the context of the FELA, as I see it, for the class of potential plaintiffs under the FELA is not the public at large; the Act covers only railroad workers who sustain injuries on the job. In view of the broad language of the Act,<sup>1</sup> and this Court's repeated reminders that the FELA is to be liberally construed, I cannot regard as faithful to the legislation and our case law under it the restrictive test announced in the Court's opinion.

## I

The FELA was designed to provide a federal "statutory negligence action . . . significantly different from the ordinary common-law negligence action." *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 509–510 (1957). An "avowed departure" from prevailing common-law rules, *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326, 329 (1958), the Act advanced twin purposes: "to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell, supra*, at 561.<sup>2</sup> "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958). Relying upon "the breadth of the statutory language, [and] the Act's humanitarian purposes," this Court has accorded the FELA a notably "liberal construction in order to accom-

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<sup>1</sup>Section 1 of the FELA provides, in relevant part, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . [when such injury results] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U. S. C. § 51.

<sup>2</sup>The FELA, as enacted in 1908, abolished the employer's "fellow servant" defense and provided that an employee's negligence would not bar, but only reduce, recovery; the Act further prohibited employers from exempting themselves contractually from statutory liability. §§ 51, 53, 55. As amended in 1939, the Act also abolished the employer's assumption of risk defense. § 54.



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plish [Congress'] objects." *Urie v. Thompson*, 337 U. S. 163, 180 (1949); see *Buell*, *supra*, at 562.

In particular, the Court has given full scope to the key statutory term "injury." The Act prescribes that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U. S. C. §51. That prescription, this Court observed, is "not restrictive as to . . . the particular kind of injury." *Urie*, 337 U. S., at 181. "[W]hen the statute was enacted," it is true, "Congress' attention was focused primarily upon . . . accidents on interstate railroads," for "these were the major causes of injury and death resulting from railroad operations." *Ibid.* But "accidental injuries were not the only ones likely to occur," and Congress chose "all-inclusive wording." *Ibid.* "To read into [language as broad as could be framed] a restriction [tied] to . . . the particular sorts of harms inflicted," the Court recognized, "would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Id.*, at 181–182.

## II

Seven years ago, in *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557 (1987), the Court left unresolved the question whether emotional injury is compensable under the FELA, because the record in that case did not adequately present the issue. *Id.*, at 560–561, 570–571. In his unanimous opinion for the Court, JUSTICE STEVENS explained why the question could not be resolved on a fact-thin record:

"[W]hether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see

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*Urie v. Thompson*, 337 U. S., at 174, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity.” *Id.*, at 568.

“[T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive ‘yes’ or ‘no’ answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.” *Id.*, at 570.

In deciding the cases now under review, the Court of Appeals endeavored to “field the *Buell* pitch.” 988 F. 2d 355, 365 (CA3 1993), quoting *Plaisance v. Texaco, Inc.*, 937 F. 2d 1004, 1009 (CA5 1991).

## A

In respondent Gottshall’s case, the Court of Appeals first described the various rules state courts have applied to common-law actions for negligent infliction of emotional distress. 988 F. 2d, at 361–362. That court emphasized, however, that “[d]etermining FELA liability is distinctly a federal question.” *Id.*, at 362. State common-law decisions, the Court of Appeals observed, “do not necessarily etch the contours of the federal right,” *ibid.*, for the common law that courts develop to fill the FELA’s interstices is “federal” in character. See *id.*, at 367.

In addition to the FELA’s express abolition of traditional employer defenses, the Court of Appeals next noted, this Court’s decisions interpreting the FELA served as path-markers. The Court of Appeals referred to decisions that had relaxed “the strict requirements of causation in common law,” *id.*, at 368, citing *Rogers*, 352 U. S., at 506, broadened the conception of negligence *per se*, see 988 F. 2d, at 368, citing *Kernan*, 355 U. S., at 437–439, and generously con-

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strued the FELA's injury requirement, 988 F. 2d, at 368, citing *Urie*, 337 U. S., at 181–182. The FELA, the Court of Appeals concluded:

“imposes upon carriers a higher standard of conduct and has eliminated many of the refined distinctions and restrictions that common law imposed to bar recovery (even on meritorious claims). FELA liability and common law liability are thus different.” 988 F. 2d, at 369.

Accordingly, the Court of Appeals “refused to designate a particular common law test as *the* test” applicable in FELA cases. *Id.*, at 365. Instead, the court looked to the purposes of those tests: to distinguish “the meritorious [claim] from the feigned and frivolous,” *id.*, at 369, and to assure that liability for negligently inflicted emotional distress does not expand “into the ‘fantastic realm of infinite liability.’” *Id.*, at 372, quoting *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 315, 379 P. 2d 513, 525 (1963); see also 988 F. 2d, at 381–382.

FELA jurisprudence, the Court of Appeals reasoned, has evolved not through a “rules first” approach, but in the traditional, fact-bound, case-by-case common-law way. See *id.*, at 371. The court therefore undertook to determine “whether the factual circumstances [in Gottshall’s case] provide a threshold assurance that there is a likelihood of genuine and serious emotional injury.” *Ibid.* “[O]ne consideration” in that inquiry, the court said, “is whether plaintiff has a ‘solid basis in the present state of common law to permit him to recover.’” *Ibid.*, quoting *Outten v. National Railroad Passenger Corp.*, 928 F. 2d 74, 79 (CA3 1991).

Gottshall’s claim, the Court of Appeals held, presented the requisite “threshold assurance.” His emotional distress, diagnosed by three doctors as major depression and posttraumatic stress disorder, 988 F. 2d, at 374, was unquestionably genuine and severe: He was institutionalized for three weeks, followed by continuing outpatient care; he lost 40 pounds; and he suffered from “suicidal preoccupations, anxi-

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ety, sleep onset insomnia, cold sweats, . . . nausea, physical weakness, repetitive nightmares and a fear of leaving home.” *Ibid.*; see also *id.*, at 373 (noting that Conrail “wisely declined” to attack Gottshall’s claim as fraudulent). Gottshall’s afflictions, the Court of Appeals observed, satisfied the “physical manifestation” limitation that some States, and the Second Restatement of Torts, place on emotional distress recovery. See *id.*, at 373–374 (citing cases); Restatement (Second) of Torts § 436A (1965) (no liability for emotional distress without “bodily harm or other compensable damage”); *ibid.*, Comment *c* (“[L]ong continued nausea or headaches may amount to physical illness, which is bodily harm; . . . long continued mental disturbance . . . may be classified by the courts as illness” and thus be compensable). Cf. *Buell*, 480 U.S., at 570, n. 22 (suggesting a distinction between claims for “pure emotional injury” and those involving “physical symptoms in addition to . . . severe psychological illness”).

The Court of Appeals also inspected the facts under the “bystande[r]” test, versions of which have been adopted by nearly half the States. See *ante*, at 549. While acknowledging that Gottshall did not satisfy the more restrictive versions of the “bystander” test, the court observed that several States have allowed recovery even where, as here, the plaintiff and the victim of physical injury were unrelated by blood or marriage. See 988 F. 2d, at 371 (citing cases). Further, the court noted, given “the reality of the railway industry,” rarely will one “se[e] another family member injured while working in the railroad yard.” *Id.*, at 372. A strict version of the bystander rule, therefore, would operate not to limit recovery to the most meritorious cases, but almost to preclude bystander recovery altogether.

To adapt the bystander rule to the FELA context, the court looked to the reasons for limiting bystander recovery: to avoid compensating plaintiffs with fraudulent or trivial claims, and to prevent liability from becoming “an intolerable

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burden upon society.” *Id.*, at 369, 372. The court held that neither concern barred recovery in Gottshall’s case. The genuineness of Gottshall’s claim appeared not just in the manifestations of his distress, the court said, but also in the extraordinarily close, 15-year friendship between Gottshall and Johns, the decedent. *Id.*, at 371. Liability to bystanders, the court concluded, would be far less burdensome in the FELA context, where only close co-workers are potential plaintiffs, than in the context of a common-law rule applicable to society as a whole. *Id.*, at 372. In this regard, the Court of Appeals again recalled, this Court has constantly admonished lower courts that “recovery [under the FELA] should be liberally granted,” *ibid.*, “so that the remedial and humanitarian goals of the statute can be fully implemented,” *id.*, at 373.

Satisfied that Gottshall had crossed the “genuine and severe” injury threshold, the Court of Appeals inquired whether he had a triable case on breach of duty and causation. *Id.*, at 374. Here, the court emphasized that Gottshall’s distress was attributable not to “the ordinary stress of the job,” *id.*, at 375, but instead, to Conrail’s decision to send a crew of men, most of them 50 to 60 years old and many of them overweight, out into 97-degree heat at high noon, in a remote, sun-baked location, requiring them to replace heavy steel rails at an extraordinarily fast pace without breaks, and without maintaining radio contact or taking any other precautions to protect the men’s safety, *id.*, at 376–377.

The Court of Appeals stated, further, that even if Conrail could be said to have acted reasonably up to the time of Johns’ death, “its conduct after the death raises an issue of whether it breached a legal duty.” *Id.*, at 378. The Conrail supervisor required the crew to return to work immediately after Johns’ corpse was laid by the side of the road, covered but still in view. *Ibid.* The next day, Gottshall alleged, the supervisor “reprimanded him for administering CPR to Johns,” *id.*, at 359, then pushed the crew even harder under

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the same conditions, requiring a full day, plus three or four hours of overtime, *id.*, at 378. These circumstances, the Court of Appeals concluded, “created not only physical hazards, but constituted emotional hazards which can equally debilitate and scar an employee, particularly one who had just witnessed a friend die under the same conditions.” *Id.*, at 378.

## B

Upholding a jury verdict for plaintiff in *Carlisle*, the Court of Appeals “reaffirm[ed]” its *Gottshall* holding that “no single common law standard” governs in “weighing the genuineness of emotional injury claims.” Instead, the court said:

“[C]ourts . . . should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim.” 990 F. 2d 90, 98 (CA3 1993).

The Court of Appeals held that the evidence submitted to the jury amply established the claim’s genuineness. Carlisle testified that, after Conrail’s 1984 reduction in force, the pressure on train dispatchers in Philadelphia, already substantial, increased dramatically. As the person chiefly responsible for ensuring the safety of “trains carrying passengers, freight and hazardous materials,” Carlisle became “increasingly anxious” over the sharp reduction in staff, together with the outdated equipment and “Conrail’s repeated instructions to ignore safety concerns, such as malfunctioning equipment or poor maintenance.” *Id.*, at 92. When Carlisle was compelled to work 12- to 15-hour shifts for 15 consecutive days, the resulting additional pressures, and the difficulty of working for “an abusive, alcoholic supervisor,” led, according to Carlisle’s expert witness, to the nervous breakdown he suffered. *Ibid.*

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Other evidence confirmed Carlisle's testimony. Depositions taken from "Carlisle's co-workers and subordinates" averred that "their jobs as dispatchers and supervisors in the Philadelphia Conrail offices had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia." *Ibid.* An official report prepared by the Federal Railway Administration "criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office." *Id.*, at 93. Furthermore, the Court of Appeals pointed out, Carlisle's emotional injury was "accompanied by obvious physical manifestations": "insomnia, fatigue, headaches, . . . sleepwalking and substantial weight-loss." *Id.*, at 97, n. 11, 92. The court specifically noted: "We do not face and do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions, would be compensable under the FELA." *Id.*, at 97, n. 11.

Satisfied that the jury could indeed find Carlisle's injury genuine, and continuing to follow the path it had marked in *Gottshall*, the court next examined the negligence elements of Carlisle's claim. Emphasizing that "Conrail had ample notice of the stressful and dangerous conditions under which Carlisle was forced to work," including actual notice of physical and emotional injuries sustained by Carlisle's co-workers, 990 F. 2d, at 97, the Court of Appeals affirmed the District Court's denial of Conrail's motions for judgment *n.o.v.* or in the alternative for a new trial. Carlisle's "extended exposure to dangerous and stressful working conditions," the court concluded, constituted a breach of Conrail's duty to provide a safe workplace, and the breach caused Carlisle's injuries. *Id.*, at 97-98.

### III

The Court initially "agree[s] with the Third Circuit that claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Ante*, at 549-550.

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This conclusion, “an easy one” for the Court, *ante*, at 550, is informed by prior decisions giving full scope to the FELA’s term “injury.” The Court had explained in *Urie* that an occupational disease incurred in the course of employment—silicosis in that particular case—is as much “injury . . . as scalding from a boiler’s explosion.” 337 U. S., at 187. Rejecting a reading of the statute that would confine coverage to “accidental injury” of the kind that particularly prompted the 1908 Congress to enact the FELA, the Court said of the occupational disease at issue:

“[W]hen the employer’s negligence impairs or destroys an employee’s health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier’s negligent course pursued over an extended period of time as when it comes with the suddenness of lightning.” *Id.*, at 186–187.

Similarly, as the Court recognizes today, “severe emotional injuries can be just as debilitating as physical injuries,” hence there is “no reason why emotional injury should not be held to be encompassed within th[e] term [‘injury’].” *Ante*, at 550, quoting *Gottshall*, 988 F. 2d, at 361.

In my view, the Court of Appeals correctly determined that Gottshall’s submissions should survive Conrail’s motion for summary judgment, and that the jury’s verdict in favor of Carlisle should stand. Both workers suffered severe injury on the job, and plausibly tied their afflictions to Conrail’s negligence. Both experienced not just emotional, but also physical, distress: Gottshall lost 40 pounds and suffered from insomnia, physical weakness, and cold sweats, while Carlisle experienced “insomnia, fatigue, headaches, . . . sleepwalking and substantial weight-loss.” *Id.*, at 374; 990 F. 2d, at 92, 97, n. 11. The Court emphasizes the “significant role” that “common-law principles must play.” *Ante*, at 544. Notably



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in that regard, both *Gottshall* and *Carlisle* satisfy the “physical manifestation” test endorsed by the Restatement of Torts. See *supra*, at 564, 567; see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 364 (5th ed. 1984) (“the great majority of courts have now repudiated the requirement of ‘impact,’ regarding as sufficient the requirement that the mental distress be certified by some physical injury, illness or other objective physical manifestation”); *id.*, at 364, n. 55 (citing cases). Thus, without gainsaying that “FELA jurisprudence gleans guidance from common-law developments,” *Buell*, 480 U. S., at 568, one can readily conclude that both *Gottshall* and *Carlisle* have made sufficient showings of “injuries” compensable under the FELA.<sup>3</sup>

Notwithstanding its recognition that the word “injury,” as used in the FELA, “may encompass both physical and emotional injury,” the Court elects to render compensable only emotional distress stemming from a worker’s placement in the “zone of danger.” *Ante*, at 556. In other words, to recover for emotional distress, the railroad employee must show that negligence attributable to his employer threatened him “imminently with physical impact.” *Ibid.* Based on the “zone” test, the Court reverses the judgment for *Carlisle* outright and remands *Gottshall*’s case for reconsideration under that standard. *Ante*, at 557–558.

The Court offers three justifications for its adoption of the “zone of danger” test. First, the Court suggests that the “zone” test is most firmly rooted in “the common law.” The Court mentions that several jurisdictions had adopted the zone of danger test by 1908, *ante*, at 546, 547, n. 8 (citing cases from eight States), and that the test “currently is followed in 14 jurisdictions.” *Ante*, at 548. But that very exposition

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<sup>3</sup>The *Gottshall* and *Carlisle* cases do not call for decision of the question whether physical manifestations would be *necessary* for recovery in every case.

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tells us that the “zone” test never held sway in a majority of States.

Moreover, the Court never decides firmly on the point of reference, present or historical, from which to evaluate the relative support the different common-law rules have enjoyed. If the Court regarded as decisive the degree of support a rule currently enjoys among state courts, the Court would allow bystander recovery, permitted in some form in “nearly half the States.” *Ante*, at 549. But cf. *ante*, at 556 (bystander rule “was not developed until 60 years after FELA’s enactment, and therefore lacks historical support”). If, on the other hand, the Court decided that historical support carried the day, then the impact rule, preferred by most jurisdictions in 1908, would be the Court’s choice. But cf. *ibid.* (preferring the zone of danger test to the impact rule, because, *inter alia*, the latter “has considerably less support in the current state of the common law” than the former).

The Court further maintains that the zone of danger test is preferable because it is “consistent with FELA’s central focus on physical perils.” *Ante*, at 555. But, as already underscored, see *supra*, at 561, the FELA’s language “is as broad as could be framed . . . . On its face, every injury suffered [on the job] by any employee . . . by reason of the carrier’s negligence was made compensable.” *Urie*, 337 U. S., at 181. And the FELA’s strikingly broad language, characteristically, “has been construed even more broadly,” in line with Congress’ dominant remedial objective. *Buell*, 480 U. S., at 562; *Urie*, *supra*, at 181 (“[N]othing in either the language or the legislative history discloses expressly any intent to exclude from the Act’s coverage any injury resulting ‘in whole or in part from the negligence’ of the carrier”).

The Court’s principal reason for restricting the FELA’s coverage of emotional distress claims is its fear of “infinite liability” to an “infinite number of persons.” See *ante*, at 552; see also *ante*, at 557 (referring to “the specter of unlimited and unpredictable liability,” and stating that “the fear of unlimited liability . . . [is] well founded”). The universe

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of potential FELA plaintiffs, however, is hardly “infinite.” The statute does not govern the public at large. Only persons “suffering injury . . . while employed” by a railroad may recover under the FELA, and to do so, the complainant must show that the injury resulted from the railroad’s negligence. 45 U.S.C. §51. The Court expresses concern that the approach Gottshall and Carlisle advocate would require “[j]udges . . . to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts.” *Ante*, at 552. One solution to this problem—a solution the Court does not explore—would be to require such “objective medical proof” and to exclude, as too insubstantial to count as “injury,” claims lacking this proof.

## IV

While recognizing today that emotional distress may qualify as an “injury” compensable under the FELA, the Court rejects the Court of Appeals’ thoughtfully developed and comprehensively explained approach as “inconsistent with the principles embodied in the statute and with relevant common-law doctrine.” *Ante*, at 535. The Court’s formulation, requiring consistency with both the FELA and “common-law doctrine,” is odd, for there is no unitary common law governing claims for negligent infliction of emotional distress.<sup>4</sup> The “common law” of emotional distress

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<sup>4</sup>Throughout its opinion, the Court invokes “the common law” in the singular. See, *e. g.*, *ante*, at 551 (“The common law must inform the availability of a right to recover under FELA”); *ante*, at 552 (“The common law consistently has sought to place limits on . . . potential liability”); *ante*, at 554 (“[T]he common law in 1908 did not allow [prejudgment] interest”); *ante*, at 557 (“[T]he common law restricts recovery”); *ante*, at 558 (“Carlisle’s . . . claim plainly does not fall within the common law’s conception of the zone of danger”). But see *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It always is the law of some State . . .”).

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exists not in the singular, but emphatically in the plural; and while the rule the Court has selected is consistent with one common-law rule that some States have adopted, it is inevitably inconsistent with others.

Most critically, the Court selects a common-law rule perhaps appropriate were the task to choose a law governing the generality of federal tort claims. The “zone” rule the Court selects, however, seems to me inappropriate for a federal statute designed to govern the discrete category of on-the-job injuries sustained by railroad workers. In that domain our charge from Congress is to fashion remedies constantly “liberal,” and appropriately “enlarged to meet changing conditions and changing concepts of industry’s duty toward its workers.” *Kernan v. American Dredging Co.*, 355 U.S., at 432. The Court’s choice does not fit that bill. Instead of the restrictive “zone” test that leaves severely harmed workers remediless, however negligent their employers, the appropriate FELA claim threshold should be keyed to the genuineness and gravity of the worker’s injury.

In my view, the Court of Appeals developed the appropriate FELA common-law approach and correctly applied that approach in these cases. I would therefore affirm the Court of Appeals’ judgments.

## Syllabus

SHANNON *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 92–8346. Argued March 22, 1994—Decided June 24, 1994

In the Insanity Defense Reform Act of 1984 (IDRA or Act), Congress made insanity an affirmative defense, created a special verdict of “not guilty only by reason of insanity” (NGI), and established a comprehensive civil commitment procedure. At his trial on a federal criminal charge, petitioner Shannon raised the insanity defense and asked the District Court to instruct the jury that an NGI verdict would result in his involuntary commitment. The court refused, and the jury returned a guilty verdict. In affirming, the Court of Appeals noted that, under its pre-IDRA precedent, juries were not to be instructed concerning the consequences of an insanity acquittal. Because there was no directive in the IDRA to the contrary, the court “adhere[d] to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict.”

*Held:* A federal district court is not required to instruct the jury regarding the consequences to the defendant of an NGI verdict. Pp. 579–588.

(a) The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor between the judge as sentencer and the jury as trier of fact. Providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their responsibilities, and creates a strong possibility of confusion. Pp. 579–580.

(b) The IDRA does not require courts to depart from the foregoing principle. The text of the Act gives no indication that jurors are to be instructed regarding the consequences of an NGI verdict. The Court rejects Shannon’s contention that Congress, by modeling the IDRA on D. C. Code Ann. § 24–301, impliedly adopted a D. C. Circuit decision that endorsed the practice of giving the instruction in question in the context of § 24–301. Because Congress departed from the scheme embodied in § 24–301 in several significant ways when it passed the IDRA, the canon of construction urged by Shannon—that adoption of the wording of a statute from another legislative jurisdiction carries with it the jurisdiction’s judicial interpretations of that wording—is not applicable. The single passage in the legislative history endorsing the giving of the instruction in question is in no way anchored in the IDRA’s text and is not entitled to authoritative weight. Pp. 580–584.

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(c) The instruction in question is not required as a matter of general federal criminal practice. Even if Shannon is correct that some jurors may harbor the mistaken belief that defendants found NGI will be released into society immediately, it must be assumed that his jury followed its instructions to apply the law regardless of the consequences and not to consider or discuss punishment. See *Richardson v. Marsh*, 481 U. S. 200, 206. Also unpersuasive is Shannon's contention that the instruction would allay the fears of such misinformed jurors. Indeed, because the only mandatory period of confinement under the IDRA is a maximum of 40 days between an NGI verdict and a required commitment hearing, an instruction of the type at issue might incline jurors to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less. In any event, the instruction would draw the jury's attention to the very thing—the possible consequences of its verdict—that it should ignore. Moreover, Shannon offers no principled way to limit the availability of such instructions to cases involving NGI verdicts, as opposed to the many other aspects of the criminal sentencing process with which jurors may be unfamiliar. Given the comprehensive nature of Congress' review of the insanity defense during the enactment of the IDRA, the Court will not invoke its supervisory powers to require an instruction that Congress chose not to mandate. Pp. 584–587.

(d) This decision should not be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict. An instruction of some form may be necessary under certain limited circumstances to remedy a misstatement or error. That is not the case here, however, for there is no indication that any improper statement was made in the presence of the jury during Shannon's trial. Pp. 587–588.

981 F. 2d 759, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 588.

*Thomas R. Trout*, by appointment of the Court, 510 U. S. 943, argued the cause and filed briefs for petitioner.

*Amy L. Wax* argued the cause for the United States. With her on the brief were *Solicitor General Days*, *Assist-*

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*ant Attorney General Harris, Deputy Solicitor General Bryson, and Deborah Watson.\**

JUSTICE THOMAS delivered the opinion of the Court.

In this case, we consider whether a federal district court is required to instruct the jury regarding the consequences to the defendant of a verdict of “not guilty by reason of insanity,” either under the Insanity Defense Reform Act of 1984 or as a matter of general federal practice. We conclude that such an instruction is not required, and therefore affirm.

## I

## A

Prior to the enactment of the Insanity Defense Reform Act of 1984 (IDRA or Act), 18 U. S. C. §§ 17, 4241–4247, federal courts generally did not recognize a verdict of “not guilty by reason of insanity” (NGI). Defendants who mounted a successful insanity defense—that is, those who raised a reasonable doubt as to their sanity at the time of the offense—were simply found “not guilty.” See, *e. g.*, *United States v. McCracken*, 488 F. 2d 406, 409, 418 (CA5 1974); *Evalt v. United States*, 359 F. 2d 534, 537 (CA9 1966). In addition, there was no general federal civil commitment procedure available to ensure that an insanity acquittee would receive proper care and treatment. Only in the District of Columbia was a defendant who successfully presented an insanity defense to a federal criminal charge subject to a federal commitment process—a process governed by a 1955 congressional enactment. See 69 Stat. 609, as amended, D. C. Code Ann. § 24–301 (1981).<sup>1</sup> Elsewhere, federal authorities

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\**Peter Margulies* filed a brief for the Coalition for the Fundamental Rights of Ex-Patients urging reversal.

<sup>1</sup> See also *United States v. Brawner*, 471 F. 2d 969, 996 (CADC 1972) (en banc); *United States v. Cohen*, 733 F. 2d 128, 129–131 (CADC 1984) (en banc); *United States v. Thigpen*, 4 F. 3d 1573, 1576, and n. 1 (CA11 1993) (en banc), cert. pending, No. 93–6747.

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were forced to rely on the willingness of state authorities to institute civil commitment proceedings. Reliance on state cooperation was “at best a partial solution to a serious problem,” however, and federal courts “[t]ime and again . . . decried this gaping statutory hole.” *McCracken, supra*, at 417.

Before the IDRA was enacted, the Federal Courts of Appeals generally disapproved of instructing the jury concerning the post-trial consequences of an insanity acquittal. Thus, jurors typically were given no information with regard to what would happen to a defendant acquitted by reason of insanity. The courts in general gave two reasons for disapproving such instructions. First, they pointed out that, given the absence of a federal commitment procedure, the consequences of an insanity acquittal were far from certain. Second, they concluded that such instructions would run afoul of the well-established principle that a jury is to base its verdict on the evidence before it, without regard to the possible consequences of the verdict. See, *e. g.*, *McCracken, supra*, at 423; *Evalt, supra*, at 546; *United States v. Borum*, 464 F. 2d 896, 900–901 (CA10 1972).

The only Court of Appeals to endorse the practice of instructing the jury regarding the consequences of an insanity acquittal was the District of Columbia Circuit. See *Lyles v. United States*, 254 F. 2d 725 (1957) (en banc), cert. denied, 356 U. S. 961 (1958). In *Lyles*, the District of Columbia Circuit addressed the jury instruction question in the context of D. C. Code Ann. §24–301 (1951 ed., Supp. V), which, unlike generally applicable federal law, provided for a special verdict of NGI and, as noted above, a civil commitment procedure. The *Lyles* court recognized the “well established and sound” doctrine “that the jury has no concern with the consequences” of a verdict, but stated that the doctrine “d[id] not apply” to the situation before it. 254 F. 2d, at 728. According to the court, although jurors generally were “aware of the meanings of verdicts of guilty and not guilty,” they



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were unfamiliar with the meaning of an NGI verdict. *Ibid.* The court concluded that jurors had “a right to know” the meaning of an NGI verdict “as accurately as [they] kno[w] by common knowledge the meaning of the other two possible verdicts.” *Ibid.*

The acquittal of John Hinckley on all charges stemming from his attempt on President Reagan’s life, coupled with the ensuing public focus on the insanity defense, prompted Congress to undertake a comprehensive overhaul of the insanity defense as it operated in the federal courts. The result of this effort was the IDRA. In the IDRA, Congress made insanity an affirmative defense to be proved by the defendant by clear and convincing evidence, and created a special verdict of “not guilty only by reason of insanity.” 18 U. S. C. §§ 17 and 4242(b). In addition, Congress filled the “statutory hole” that had been identified by federal courts, see *McCracken, supra*, by creating a comprehensive civil commitment procedure. § 4243. Under that procedure, a defendant found NGI is held in custody pending a court hearing, which must occur within 40 days of the verdict. § 4243(c). At the conclusion of the hearing, the court determines whether the defendant should be hospitalized or released. §§ 4243(d), (e).

## B

At about 4 a.m. on August 25, 1990, a police officer stopped petitioner Terry Lee Shannon, a convicted felon, on a street in Tupelo, Mississippi. For reasons not explained in the record before us, the officer asked Shannon to accompany him to the station house to speak with a detective. After telling the officer that he did not want to live anymore, Shannon walked across the street, pulled a pistol from his coat, and shot himself in the chest.

Shannon survived his suicide attempt and was indicted for unlawful possession of a firearm by a felon in violation of 18 U. S. C. § 922(g)(1). At trial, he raised the insanity defense, and asked the District Court to instruct the jury that he

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would be involuntarily committed if the jury returned an NGI verdict.<sup>2</sup> The District Court refused to give Shannon's proposed charge. Instead, it instructed the jury "to apply the law as [instructed] regardless of the consequence," and that "punishment . . . should not enter your consideration or discussion." App. A-27 to A-28. The jury returned a guilty verdict.

The Court of Appeals for the Fifth Circuit affirmed Shannon's conviction. 981 F. 2d 759 (1993). The court noted that under its pre-IDRA precedent, juries were not to be instructed concerning the consequences of an insanity acquittal. *Id.*, at 761-762 (discussing *United States v. McCracken*, 488 F. 2d 406 (CA5 1974)). Turning to the text of the IDRA, the court observed that Congress had "said nothing about informing juries of the consequences" of an NGI verdict. 981 F. 2d, at 764. Because there was no "statutory requirement" to the contrary, the court "adhere[d] to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict." *Ibid.*<sup>3</sup>

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<sup>2</sup>Shannon asked the court to give either of the two following instructions: (1) "In the event it is your verdict that [Shannon] is not guilty only by reason of insanity, it is required that the Court commit [him]"; or (2) "[Y]ou should know that it is required that the Court commit [Shannon] to a suitable hospital facility until such time as [he] does not pose a substantial risk of bodily injury to another or serious damage to the property of another." App. A-22.

<sup>3</sup>In addition to the court below, the Ninth and Eleventh Circuits recently have reaffirmed their pre-IDRA holdings that juries generally should not be instructed concerning the consequences of an insanity acquittal. See *United States v. Frank*, 956 F. 2d 872, 880-882 (CA9 1991), cert. denied, 506 U. S. 932 (1992); *Thigpen*, 4 F. 3d, at 1578. The Third Circuit has held that the decision to give such an instruction should be left to "the sound discretion of the trial judge." *United States v. Fisher*, 10 F. 3d 115, 122 (1993), cert. pending, No. 93-7000. A panel of the Second Circuit recently divided three ways on the issue. See *United States v. Blume*, 967 F. 2d 45, 50 (1992) (Newman, J., concurring) ("I believe the instruction should always be given unless the defendant prefers its omission. Judge Winter believes the instruction should normally not be

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We granted certiorari, 510 U. S. 943 (1993), in order to consider whether federal district courts are required to instruct juries with regard to the consequences of an NGI verdict.

## II

It is well established that when a jury has no sentencing function,<sup>4</sup> it should be admonished to “reach its verdict without regard to what sentence might be imposed.” *Rogers v. United States*, 422 U. S. 35, 40 (1975).<sup>5</sup> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury’s task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion. See *Pope v. United States*, 298 F. 2d 507, 508 (CA5 1962); cf. *Rogers, supra*, at 40.

Despite these familiar precepts, Shannon contends that an instruction informing the jury of the consequences of an NGI

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given. Judge Lumbard believes that the decision whether to give the instruction should be left to the discretion of the trial judge”).

<sup>4</sup> Particularly in capital trials, juries may be given sentencing responsibilities. See, e. g., *Simmons v. South Carolina, ante*, p. 154. It is undisputed that the jury had no such responsibilities in Shannon’s case.

<sup>5</sup> In *Rogers*, the jury had been deliberating for almost two hours without reaching a verdict. After the trial court informed the jury that it would accept a verdict of “Guilty as charged with extreme mercy of the Court,” the jury returned such a verdict within minutes. 422 U. S., at 36–37 (internal quotation marks omitted). We concluded that, instead of giving the jurors information about sentencing (that is, that they could recommend “extreme mercy”), the trial court should have “admoni[shed] [them] that [they] had no sentencing function and should reach [their] verdict without regard to what sentence might be imposed.” *Id.*, at 40.

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verdict is required under the IDRA whenever requested by the defendant. He also argues that such an instruction is required as a matter of general federal criminal practice. We address each argument in turn.

## A

To determine whether Congress intended courts to depart from the principle that jurors are not to be informed of the consequences of their verdicts, we turn first, as always, to the text of the statute. The IDRA refers to the subject of jury instructions only once, and that reference occurs in its description of the possible verdicts a jury may return. Under the Act, “the jury shall be instructed to find . . . the defendant—(1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity.” 18 U. S. C. §4242(b). The text of the Act gives no indication that jurors are to be instructed regarding the consequences of an NGI verdict. As the court below observed, the Act “leaves the jury solely with its customary determination of guilt or innocence.” 981 F. 2d, at 763. The Act’s text thus gives no support to Shannon’s contention that an instruction informing the jury of the consequences of an NGI verdict is required.

Shannon asserts, however, that an express statutory directive is not necessary because, by modeling the IDRA on D. C. Code Ann. §24–301 (1981),<sup>6</sup> Congress impliedly adopted the District of Columbia Circuit’s decision in *Lyles* and the practice endorsed by that decision of instructing the jury as to the consequences of an NGI verdict. For this argument he relies on *Capital Traction Co. v. Hof*, 174 U. S. 1, 36 (1899), in which we stated:

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<sup>6</sup>District of Columbia Code Ann. §24–301 continued to govern the operation of the insanity defense in federal criminal prosecutions in the District of Columbia until the passage of the IDRA. Cf. *United States v. Crutchfield*, 893 F. 2d 376, 377–379 (CADDC 1990) (holding that the IDRA applies prospectively to insanity acquittees committed after its enactment).

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“By a familiar canon of interpretation, heretofore applied by this court whenever Congress . . . has borrowed from the statutes of a State provisions which had received in that State a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State.”

See also *Carolene Products Co. v. United States*, 323 U. S. 18, 26 (1944) (“[T]he general rule [is] that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording”); *Cathcart v. Robinson*, 5 Pet. 264, 280 (1831). The canon of interpretation upon which Shannon relies, however, is merely a “presumption of legislative intention” to be invoked only “under suitable conditions.” *Carolene Products*, *supra*, at 26. We believe that the “conditions” are not “suitable” in this case. Indeed, although Congress may have had the District of Columbia Code in mind when it passed the IDRA, see *United States v. Crutchfield*, 893 F. 2d 376, 378 (CADDC 1990), it did not, in the language of *Hof*, “borrow” the terms of the IDRA from the District of Columbia Code. Rather, Congress departed from the scheme embodied in D. C. Code Ann. §24–301 in several significant ways.

The IDRA, for example, requires a defendant at trial to prove insanity by clear and convincing evidence, 18 U. S. C. §17(b); the District of Columbia statute, by contrast, employs a preponderance standard, D. C. Code Ann. §24–301(j). A commitment hearing must be held under the IDRA within 40 days of an NGI verdict, 18 U. S. C. §4243(c); the period is 50 days under the District of Columbia scheme, D. C. Code Ann. §24–301(d)(2)(A). Under the IDRA, a defendant whose offense involved bodily injury to another or serious damage to another’s property, or the substantial risk thereof, must demonstrate at the hearing by clear and convincing evi-

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dence that he is entitled to release, 18 U.S.C. §4243(d); under the District of Columbia scheme, an acquittee, regardless of the character of his offense, need only meet the preponderance standard, D.C. Code Ann. §24–301(k)(3). The IDRA provides that an acquittee, once committed, may be released when he no longer presents a substantial risk of harm to others or to their property, 18 U.S.C. §4243(f); an acquittee under the District of Columbia system may be released from commitment when he “will not in the reasonable future be dangerous to himself or others,” D.C. Code Ann. §24–301(e). Finally, in the IDRA, Congress rejected the broad test for insanity that had been utilized under the District of Columbia provision,<sup>7</sup> and instead adopted a more restrictive formulation under which a person is deemed insane if he is unable “to appreciate the nature and quality or the wrongfulness of his acts.” 18 U.S.C. §17(a). We believe that these significant differences between the IDRA and D.C. Code Ann. §24–301 render the canon upon which Shannon relies inapplicable in this case.<sup>8</sup>

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<sup>7</sup> Under the District of Columbia system, the courts had defined insanity as either the lack of substantial capacity to conform one’s conduct to the requirements of the law *or* the lack of substantial capacity to appreciate the wrongfulness of one’s acts. See *Brawner*, 471 F.2d, at 973–995.

<sup>8</sup> In addition, we note that the canon upon which Shannon relies is a canon of *statutory construction*. It stems from the notion that a court, in interpreting “borrowed” statutory language, should apply the same construction to that language that was placed upon it by the courts in the jurisdiction from which it was borrowed. In this case, however, the court in the jurisdiction from which the statutory text was supposedly borrowed—that is, the *Lyles* court—did not purport to construe the language of the District of Columbia Code provision; rather, in holding that jurors should be informed of the consequences of an NGI verdict, the court appears to have relied on its supervisory power over the Federal District Courts in the District of Columbia. Cf. *infra*, at 584. Thus, we conclude that the canon is also inapplicable in this case because there was no “known and settled construction,” *Capital Traction Co. v. Hof*, 174 U.S. 1, 36 (1899), of the statute that Congress could have adopted by virtue of borrowing language from the District of Columbia statutory scheme.

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Alternatively, Shannon contends that a provision explicitly requiring the instruction is unnecessary for a different reason: namely, that Congress made its intention to adopt the *Lyles* practice crystal clear in the IDRA's legislative history. In particular, Shannon points to the following statement in the Senate Report:

“The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.” S. Rep. No. 98–225, p. 240 (1983) (footnotes omitted).

Members of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation. Compare *County of Washington v. Gunther*, 452 U. S. 161, 182 (1981) (REHNQUIST, J., dissenting) (“[I]t [is] well settled that the legislative history of a statute is a useful guide to the intent of Congress”), with *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597, 617 (1991) (SCALIA, J., concurring in judgment) (legislative history is “unreliable . . . as a genuine indicator of congressional intent”). We are not aware of any case, however (and Shannon does not bring one to our attention), in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute. On its face, the passage Shannon identifies does not purport to explain or interpret any provision of the IDRA. Rather, it merely conveys the Committee's “endorsement” of the *Lyles* “procedure”—a procedure that Congress did not include in the text of the Act. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process. We agree with the District of Columbia Circuit that

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“courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point.” *International Brotherhood of Elec. Workers, Local Union No. 474, AFL–CIO v. NLRB*, 814 F. 2d 697, 712 (1987) (emphasis deleted). We thus conclude that there is no support in the Act for the instruction Shannon seeks.<sup>9</sup>

## B

Setting the Act aside, Shannon argues that the instruction he proposes is required as a matter of general federal criminal practice. Presumably, Shannon asks us to invoke our supervisory power over the federal courts. According to Shannon, the instruction is necessary because jurors are generally unfamiliar with the consequences of an NGI verdict, and may erroneously believe that a defendant who is found NGI will be immediately released into society. Jurors who are under this mistaken impression, Shannon continues, may also fear that the defendant, if released, would pose a danger to the community. Shannon concludes that such jurors, in order to ensure that the defendant will not be released, may be tempted to return a guilty verdict in a case in which an NGI verdict would be appropriate.

Even assuming Shannon is correct that some jurors will harbor the mistaken belief that defendants found NGI will be released into society immediately—an assumption that is

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<sup>9</sup>In the court below, Shannon made the additional argument that because Congress filled the “gap” that had been identified by the Federal Courts of Appeals prior to the IDRA with a general federal civil commitment procedure, “the practice announced in *Lyles* must now be applied nationwide.” 981 F. 2d 759, 763 (CA5 1993). We find this argument (which Shannon makes only implicitly before this Court) unpersuasive. As noted above, although the lack of a federal commitment procedure before the passage of the IDRA was one reason for rejecting a *Lyles*-type instruction, courts generally, and properly, relied additionally on the principle that juries are not to be concerned with the consequences of their verdicts. This principle is not altered by the fact that Congress established a civil commitment procedure. See *Thigpen*, 4 F. 3d, at 1577.



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open to debate<sup>10</sup>—the jury in his case was instructed “to apply the law as [instructed] regardless of the consequence,” and that “punishment . . . should not enter your consideration or discussion.” App. A–27 to A–28. That an NGI verdict was an option here gives us no reason to depart from “the almost invariable assumption of the law that jurors follow their instructions.” *Richardson v. Marsh*, 481 U. S. 200, 206 (1987). Indeed, although it may take effort on a juror’s part to ignore the potential consequences of the verdict, the effort required in a case in which an NGI defense is raised is no different from that required in many other situations. For example, if the Government fails to meet its burden of proof at trial, our judicial system necessarily assumes that a juror will vote to acquit, rather than to convict, even if he is convinced the defendant is highly dangerous and should be incarcerated. We do not believe that the situation involving an NGI verdict should be treated any differently.

We also are not persuaded that the instruction Shannon proposes would allay the fears of the misinformed juror about whom Shannon is concerned. “[I]f the members of a jury are so fearful of a particular defendant’s release that they would violate their oaths by convicting [the defendant] solely in order to ensure that he is not set free, it is questionable whether they would be reassured by anything short of an instruction strongly suggesting that the defendant, if found NGI, would very likely be civilly committed for a

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<sup>10</sup>We are not convinced that jurors are as unfamiliar with the consequences of an NGI verdict as Shannon suggests. It may have been the case in 1957 that, in contrast to verdicts of guilty and not guilty, “a verdict of not guilty by reason of insanity ha[d] no . . . commonly understood meaning.” *Lyles v. United States*, 254 F. 2d 725, 728 (CA DC 1957) (en banc), cert. denied, 356 U. S. 961 (1958). Today, however, there is no reason to assume that jurors believe that defendants found NGI are immediately set free. See *Fisher*, 10 F. 3d, at 122 (“[H]ighly publicized cases, such as that involving John Hinckley, have dramatized the possibility of civil commitment following an NGI verdict”). See also *Blume*, 967 F. 2d, at 54 (Winter, J., concurring in result).

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lengthy period.” *United States v. Fisher*, 10 F. 3d 115, 122 (CA3 1993), cert. pending, No. 93–7000. An accurate instruction about the consequences of an NGI verdict, however, would give no such assurance. Under the IDRA, a postverdict hearing must be held within 40 days to determine whether the defendant should be released immediately into society or hospitalized. See 18 U. S. C. §§ 4243(c), (d). Thus, the only mandatory period of confinement for an insanity acquittee is the period between the verdict and the hearing. Instead of encouraging a juror to return an NGI verdict, as Shannon predicts, such information might have the opposite effect—that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less.<sup>11</sup> Whether the instruction works to the advantage or disadvantage of a defendant is, of course, somewhat beside the point. Our central concern here is that the inevitable result of such an instruction would be to draw the jury’s attention toward the very thing—the possible consequences of its verdict—it should ignore.

Moreover, Shannon offers us no principled way to limit the availability of instructions detailing the consequences of a verdict to cases in which an NGI defense is raised. Jurors may be as unfamiliar with other aspects of the criminal sentencing process as they are with NGI verdicts. But, as a general matter, jurors are not informed of mandatory minimum or maximum sentences, nor are they instructed regard-

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<sup>11</sup> As the court below observed, “a jury could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty.” 981 F. 2d, at 763, n. 6. Indeed, depending upon the content of the instruction, information regarding the consequences of an NGI verdict could influence a juror’s decision in countless—and unpredictable—ways. See, e. g., *Fisher, supra*, at 121–122, and n. 7 (describing various scenarios in which sentencing information could induce compromise verdicts in the NGI context).

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ing probation, parole, or the sentencing range accompanying a lesser included offense. See *United States v. Thigpen*, 4 F. 3d 1573, 1578 (CA11 1993) (en banc), cert. pending, No. 93-6747; *United States v. Frank*, 956 F. 2d 872, 879 (CA9 1991), cert. denied, 506 U. S. 932 (1992). Because it is conceivable that some jurors might harbor misunderstandings with regard to these sentencing options, a district court, under Shannon's reasoning, might be obligated to give juries information regarding these possibilities as well. In short, if we pursue the logic of Shannon's position, the rule against informing jurors of the consequences of their verdicts would soon be swallowed by the exceptions.

Finally, Congress' recent action in this area counsels hesitation in invoking our supervisory powers. As noted above, the IDRA was the product of a thorough and exhaustive review of the insanity defense as used in the federal courts. Given the comprehensive nature of the task before it, Congress certainly could have included a provision requiring the instruction Shannon seeks. For whatever reason, Congress chose not to do so. Under these circumstances, we are reluctant to depart from well-established principles of criminal practice without more explicit guidance from Congress.

## III

Although we conclude that the IDRA does not require an instruction concerning the consequences of an NGI verdict, and that such an instruction is not to be given as a matter of general practice, we recognize that an instruction of some form may be necessary under certain limited circumstances. If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would "go free" if found NGI, it may be necessary for the district court to intervene with an instruction to counter such a misstatement. The appropriate response, of course, will vary as is necessary to remedy the specific misstatement or error. We note this possibility merely so that our decision will not be

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misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict. Our observations in this regard are not applicable to Shannon's situation, however, for there is no indication that any improper statement was made in the presence of the jury during his trial.

\* \* \*

Because the District Court properly refused to give the instruction Shannon requested, we affirm.

*So ordered.*

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

A rule that has minimized the risk of injustice for almost 40 years should not be abandoned without good reason. In 1957, shortly after Congress enacted the statute providing for civil commitment of persons found not guilty by reason of insanity in trials conducted in the District of Columbia, the Court of Appeals, sitting in banc, considered whether juries should be instructed about the significance of that provision. Recognizing that an uninformed jury might erroneously find an insane defendant guilty to avoid the risk that a dangerous individual would otherwise go free, the court held that such an instruction should be given. *Lyles v. United States*, 254 F. 2d 725 (CADC 1957), cert. denied, 356 U. S. 961 (1958). In an opinion jointly authored by Judge Prettyman and then-Judge Warren Burger, the court explained that the doctrine that the jury has no concern with the consequences of a verdict "does not apply in the problem before us":

"The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reason of insanity. Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. . . . But a verdict of not guilty by reason of insanity has no such commonly understood meaning. . . . It means neither freedom nor

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punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others. We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.” *Lyles*, 254 F. 2d, at 728.

Concurring with this part of the foregoing opinion, Judge Bazelon acknowledged that “[t]he false assumption that acquittal by reason of insanity, like outright acquittal, frees the accused to walk out on the streets may lead juries to convict, despite strong evidence of insanity at the time of the crime.” *Id.*, at 734. Trial courts in the District of Columbia have used a pattern instruction—approved by prosecutors, defense counsel, and trial judges—ever since.<sup>1</sup>

Other federal courts did not give a comparable instruction prior to 1984 because no federal statute authorized civil commitment for insanity acquittees except in the District of Columbia. In those courts, an instruction advising the jury about the consequences of a verdict of not guilty by reason of insanity—often that such a defendant would, indeed, go free—would have tended to increase the risk of improper convictions. It was therefore appropriate for federal judges to adhere to the general rule that the jury should be instructed to base its decision on the evidence before it, with-

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<sup>1</sup> Instruction 5.11 in the 1978 edition of the District of Columbia Criminal Jury Instructions reads:

“If the defendant is found not guilty by reason of insanity it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.”

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out regard to the possible consequences of its verdict. That rule, of course, was primarily designed to protect defendants from the risk that jurors might otherwise improperly rely on matters such as sympathy for the victim, arguments of counsel, or inadmissible comments in the courtroom.

When Congress enacted the Insanity Defense Reform Act of 1984 (Act), 18 U. S. C. §§ 17, 4241–4247, it established a civil commitment process for the entire federal system, thus making the basis for the District of Columbia Circuit’s holding in *Lyles* applicable to all federal courts. The Act’s legislative history unmistakably demonstrates that the Act’s sponsors assumed that the *Lyles* precedent would thereafter be followed nationwide. See *ante*, at 583. That assumption does not have the force of a statutory mandate, but it verifies that thoughtful legislators familiar with the issue believed that precedent to be entirely sound. That this Court should now decide to change an established rule that Congress accepted and that protects defendants meaningfully against an obvious risk of injustice is startling—particularly when that change is for no reason other than a perceived inconsistency with another rule that is generally protective of defendants’ rights. A far wiser disposition would allow the defendant to choose between the two rules, rather than tilt the scales to favor the prosecutor in every case.

The incongruity of the Court’s holding is compounded by its selection of *Rogers v. United States*, 422 U. S. 35 (1975), as its authority for what it calls the “principle” that juries should not consider the consequences of their verdict. *Ante*, at 579. It is worth noting that the writer of the Court’s opinion in *Rogers*—Chief Justice Burger—was also one of the authors of *Lyles*. In *Rogers*, the jury had sent the judge a note asking whether he would accept a verdict of “Guilty as charged with extreme mercy of the Court”; when the court answered yes, the jury returned five minutes later with that verdict. *Rogers*, 422 U. S., at 36–37. What *Rogers* held is

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that the guilty verdict had to be set aside because the court had violated Rule 43 of the Federal Rules of Criminal Procedure by responding to an inquiry from the jury without advising defense counsel. *Id.*, at 40–41. The Court also considered the judge’s response to be misleading because it did not advise the jury that their recommendation of mercy would not be binding on the court. *Ibid.* In that context, the failure to admonish the jury that it should reach its verdict without regard to what sentence might be imposed was prejudicial to the defendant. Instead of supporting the majority’s view, the case is more relevant for its illustration of how concerned juries are about the actual consequences of their verdicts. When there is a realistic danger that jurors’ deliberations may be distorted by an incorrect assumption about those consequences, elementary notions of fairness demand that a clarifying instruction be given.

The Court suggests that the instruction might actually prejudice the defendant. *Ante*, at 585–586. That argument lacks merit, as there is no need to give the instruction unless the defendant requests it. Alternatively, the Court advances the tired argument that if we followed the practice approved in *Lyles*, “the rule against informing jurors of the consequences of their verdicts would soon be swallowed by the exceptions,” *ante*, at 587. Given that the *Lyles* rule has survived in the District since 1957 without such consequences, this concern is illusory. Some courts have assumed that the instruction would help jurors focus on issues of guilt instead of punishment. “Freed from confusion and fear as to the practical effect of a verdict of not guilty by reason of insanity, jurors should be able to decide the insanity issue solely on the evidence and law governing the defense.” *State v. Shickles*, 760 P. 2d 291, 298 (Utah 1988). Rather than relying on a totally unsubstantiated qualm belied by history, it would be far wiser for the Court simply to recognize both the seriousness of the harm that may result from

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the refusal to give the instruction and the absence of any identifiable countervailing harm that may result from giving it.

The Court also contends that jurors today are more familiar with the consequences of a verdict of not guilty by reason of insanity than they were in 1957 when *Lyles* was decided. *Ante*, at 584, n. 9. No one has suggested, however, that the level of understanding even approximates that of the conventional choice between “guilty” and “not guilty.” Indeed, one recent study concluded that “the public overestimates the extent to which insanity acquittees are released upon acquittal and underestimates the extent to which they are hospitalized as well as the length of confinement of insanity acquittees who are sent to mental hospitals.”<sup>2</sup> As long as significant numbers of potential jurors believe that an insanity acquittee will be released at once, the instruction serves a critical purpose. Yet even if, as the Court seems prepared to assume, all jurors are already knowledgeable about the issue, surely telling them what they already know can do no harm.

An increasing number of States that have considered the question endorses use of the instruction,<sup>3</sup> as has the American Bar Association.<sup>4</sup> Judge Newman’s succinct assessment

<sup>2</sup> Silver, Cirincione, and Steadman, Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 *Law and Human Behavior* 63, 68 (Feb. 1994).

<sup>3</sup> See, e. g., *Erdman v. State*, 315 Md. 46, 553 A. 2d 244 (1989); *State v. Shickles*, 760 P. 2d 291 (Utah 1988); *People v. Young*, 189 Cal. App. 3d 891, 234 Cal. Rptr. 819 (1987); *People v. Thomson*, 197 Colo. 232, 591 P. 2d 1031 (1979); *Commonwealth v. Mulgrew*, 475 Pa. 271, 380 A. 2d 349 (1977); *Roberts v. State*, 335 So. 2d 285 (Fla. 1976); *Commonwealth v. Mutina*, 366 Mass. 810, 323 N. E. 2d 294 (1975); *State v. Babin*, 319 So. 2d 367 (La. 1975). See also Fleming, Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal, 81 *A. L. R.* 4th 659, 667 (1990) (noting “an apparent trend toward requiring or authorizing a jury instruction on the legal consequences of an insanity acquittal”).

<sup>4</sup> ABA Criminal Justice Mental Health Standards § 7-6.8 (1989).



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of the pros and cons is exactly right: “There is no reason to keep this information from the jurors and every reason to make them aware of it.” *United States v. Blume*, 967 F. 2d 45, 52 (CA2 1992) (concurring opinion).

I respectfully dissent.

## Syllabus

WILLIAMSON *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

No. 93–5256. Argued April 25, 1994—Decided June 27, 1994

After Reginald Harris refused to testify at petitioner Williamson’s federal trial on cocaine possession and distribution charges, the District Court ruled that, under Federal Rule of Evidence 804(b)(3)’s hearsay exception for statements against penal interest, a Drug Enforcement Administration agent could recount two custodial interviews in which Harris had freely confessed to receiving and transporting the drugs in question, but also implicated Williamson as the drugs’ owner. Williamson was eventually convicted, and the Court of Appeals affirmed.

*Held:* The judgment is vacated, and the case is remanded.

981 F. 2d 1262, vacated and remanded.

JUSTICE O’CONNOR delivered the opinion of the Court with respect to Parts I, II–A, and II–B, concluding:

1. The most faithful reading of Rule 804(b)(3)—which renders admissible “statement[s] which . . . so far ten[d] to subject the declarant to . . . criminal liability . . . that a reasonable person . . . would not have made [them] unless believing [them] to be true”—is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. Although the statutory term “statement” can mean either an extended declaration or a single remark, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading, so that only those remarks within a confession that are individually self-inculpatory are covered. The Rule is founded on the commonsense notion that reasonable people, even those who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion does not extend to a confession’s non-self-inculpatory parts—to parts that are actually self-exculpatory, or to collateral statements, even ones that are neutral as to interest. A district court may not just assume that a statement is self-inculpatory because it is part of a fuller confession, especially when the statement implicates someone else. The policy expressed in the Rule’s text is clear enough that it outweighs whatever force lies in ambiguous statements contained in the Advisory Committee Notes to the Rule. Pp. 598–602.

2. The foregoing reading does not eviscerate the against penal interest exception. There are many circumstances in which Rule 804(b)(3)

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does allow the admission of statements that inculcate a criminal defendant. Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor. The question under the Rule is always whether the statement at issue was sufficiently against the declarant's penal interest under the Rule's language, and this question can only be answered in light of all the surrounding circumstances. Pp. 602–604.

JUSTICE O'CONNOR, joined by JUSTICE SCALIA, concluded in Part II–C that, on remand, the Court of Appeals must inquire in the first instance whether each of the statements in Harris' confession was truly self-inculpatory. Pp. 604–605.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and II–B, in which BLACKMUN, STEVENS, SCALIA, SOUTER, and GINSBURG, JJ., joined, and an opinion with respect to Part II–C, in which SCALIA, J., joined. SCALIA, J., filed a concurring opinion, *post*, p. 605. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 607. KENNEDY, J., filed an opinion concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 611.

*Benjamin S. Waxman* argued the cause and filed briefs for petitioner.

*John F. Manning* argued the cause for the United States. With him on the brief were *Solicitor General Days* and *Assistant Attorney General Harris*.\*

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\*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, and *M. Howard Wayne*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Larry EchoHawk* of Idaho, *Pamela Carter* of Indiana, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *Lee Fisher* of Ohio, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, and *James S. Gilmore III* of Virginia; and for Wayne County, Michigan, by *John D. O'Hair* and *Timothy A. Baughman*.

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JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part II–C.

In this case we clarify the scope of the hearsay exception for statements against penal interest. Fed. Rule Evid. 804(b)(3).

## I

A deputy sheriff stopped the rental car driven by Reginald Harris for weaving on the highway. Harris consented to a search of the car, which revealed 19 kilograms of cocaine in two suitcases in the trunk. Harris was promptly arrested.

Shortly after Harris' arrest, Special Agent Donald Walton of the Drug Enforcement Administration (DEA) interviewed him by telephone. During that conversation, Harris said that he got the cocaine from an unidentified Cuban in Fort Lauderdale; that the cocaine belonged to petitioner Williamson; and that it was to be delivered that night to a particular dumpster. Williamson was also connected to Harris by physical evidence: The luggage bore the initials of Williamson's sister, Williamson was listed as an additional driver on the car rental agreement, and an envelope addressed to Williamson and a receipt with Williamson's girlfriend's address were found in the glove compartment.

Several hours later, Agent Walton spoke to Harris in person. During that interview, Harris said he had rented the car a few days earlier and had driven it to Fort Lauderdale to meet Williamson. According to Harris, he had gotten the cocaine from a Cuban who was Williamson's acquaintance, and the Cuban had put the cocaine in the car with a note telling Harris how to deliver the drugs. Harris repeated that he had been instructed to leave the drugs in a certain dumpster, to return to his car, and to leave without waiting for anyone to pick up the drugs.

Agent Walton then took steps to arrange a controlled delivery of the cocaine. But as Walton was preparing to leave the interview room, Harris "got out of [his] chair . . . and . . .

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took a half step toward [Walton] . . . and . . . said, . . . ‘I can’t let you do that,’ threw his hands up and said ‘that’s not true, I can’t let you go up there for no reason.’” App. 40. Harris told Walton he had lied about the Cuban, the note, and the dumpster. The real story, Harris said, was that he was transporting the cocaine to Atlanta for Williamson, and that Williamson was traveling in front of him in another rental car. Harris added that after his car was stopped, Williamson turned around and drove past the location of the stop, where he could see Harris’ car with its trunk open. *Ibid.* Because Williamson had apparently seen the police searching the car, Harris explained that it would be impossible to make a controlled delivery. *Id.*, at 41.

Harris told Walton that he had lied about the source of the drugs because he was afraid of Williamson. *Id.*, at 61, 68; see also *id.*, at 30–31. Though Harris freely implicated himself, he did not want his story to be recorded, and he refused to sign a written version of the statement. *Id.*, at 24–25. Walton testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney. Walton said Harris was not promised any reward or other benefit for cooperating. *Id.*, at 25–26.

Williamson was eventually convicted of possessing cocaine with intent to distribute, conspiring to possess cocaine with intent to distribute, and traveling interstate to promote the distribution of cocaine, 21 U. S. C. §§ 841(a)(1), 846; 18 U. S. C. § 1952. When called to testify at Williamson’s trial, Harris refused, even though the prosecution gave him use immunity and the court ordered him to testify and eventually held him in contempt. The District Court then ruled that, under Rule 804(b)(3), Agent Walton could relate what Harris had said to him:

“The ruling of the Court is that the statements . . . are admissible under [Rule 804(b)(3)], which deals with statements against interest.

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“First, defendant Harris’ statements clearly implicated himself, and therefore, are against his penal interest.

“Second, defendant Harris, the declarant, is unavailable.

“And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under [*United States v. Harrell*, 788 F. 2d 1524 (CA11 1986)], these statements by defendant Harris implicating [Williamson] are admissible.” App. 51–52.

Williamson appealed his conviction, claiming that the admission of Harris’ statements violated Rule 804(b)(3) and the Confrontation Clause of the Sixth Amendment. The Court of Appeals for the Eleventh Circuit affirmed without opinion, *judgt. order* reported at 981 F. 2d 1262 (1992), and we granted certiorari. 510 U. S. 1039 (1994).

## II

## A

The hearsay rule, Fed. Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness’ awareness of the gravity of the proceedings, the jury’s ability to observe the witness’ demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.

Nonetheless, the Federal Rules of Evidence also recognize that some kinds of out-of-court statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible. One such cat-

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egory covers statements that are against the declarant's interest:

“statement[s] which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true.” Fed. Rule Evid. 804(b)(3).

To decide whether Harris' confession is made admissible by Rule 804(b)(3), we must first determine what the Rule means by “statement,” which Federal Rule of Evidence 801(a)(1) defines as “an oral or written assertion.” One possible meaning, “a report or narrative,” Webster's Third New International Dictionary 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession—even if it contains both self-inculpatory and non-self-inculpatory parts—would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of “statement,” “a single declaration or remark,” *ibid.*, defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory. See also *id.*, at 131 (defining “assertion” as a “declaration”); *id.*, at 586 (defining “declaration” as a “statement”).

Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of “statement.” The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie

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is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

In this respect, it is telling that the non-self-inculpatory things Harris said in his first statement actually proved to be false, as Harris himself admitted during the second interrogation. And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

We therefore cannot agree with JUSTICE KENNEDY's suggestion that the Rule can be read as expressing a policy that collateral statements—even ones that are not in any way against the declarant's interest—are admissible, *post*, at 614. Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest, *post*, at 617–619 (KENNEDY, J., concurring in judgment), should be treated any differently from other hearsay statements that are generally excluded.

Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements. But we will not lightly assume that the ambiguous language means anything so inconsistent with the Rule's underlying theory. See *Cooter & Gell v. Hartmarx Corp.*, 496 U. S. 384, 394–395, 408–409 (1990). In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a



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broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. “[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.” *Lee v. Illinois*, 476 U. S. 530, 541 (1986) (internal quotation marks omitted); see also *Bruton v. United States*, 391 U. S. 123, 136 (1968); *Dutton v. Evans*, 400 U. S. 74, 98 (1970) (Harlan, J., concurring in result).

JUSTICE KENNEDY suggests that the Advisory Committee’s Notes to Rule 804(b)(3) should be read as endorsing the position we reject—that an entire narrative, including non-self-inculpatory parts (but excluding the clearly self-serving parts, *post*, at 620), may be admissible if it is in the aggregate self-inculpatory. See *post*, at 614–615. The Notes read, in relevant part:

“[T]he third-party confession . . . may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements. . . . [*Douglas v. Alabama*, 380 U. S. 415 (1965), and *Bruton v. United States*, 391 U. S. 123 (1968),] . . . by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . On the other hand, the same

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words spoken under different circumstances, *e. g.*, to an acquaintance, would have no difficulty in qualifying. . . .

“The balancing of self-serving against dissenting [*sic*] aspects of a declaration is discussed in McCormick §256.” 28 U. S. C. App., p. 790.

This language, however, is not particularly clear, and some of it—especially the Advisory Committee’s endorsement of the position taken by Dean McCormick’s treatise—points the other way:

“A certain latitude as to contextual statements, neutral as to interest, giving meaning to the declaration against interest seems defensible, but bringing in self-serving statements contextually seems questionable.

“. . . [A]dmit[ting] the disserving parts of the declaration, and exclud[ing] the self-serving parts . . . seems the most realistic method of adjusting admissibility to trustworthiness, where the serving and disserving parts can be severed.” See C. McCormick, *Law of Evidence* §256, pp. 552–553 (1954) (footnotes omitted).

Without deciding exactly how much weight to give the Notes in this particular situation, compare *Schiavone v. Fortune*, 477 U. S. 21, 31 (1986) (Notes are to be given some weight), with *Green v. Bock Laundry Machine Co.*, 490 U. S. 504, 528 (1989) (SCALIA, J., concurring in judgment) (Notes ought to be given no weight), we conclude that the policy expressed in the Rule’s text points clearly enough in one direction that it outweighs whatever force the Notes may have. And though JUSTICE KENNEDY believes that the text can fairly be read as expressing a policy of admitting collateral statements, *post*, at 614, for the reasons given above we disagree.

## B

We also do not share JUSTICE KENNEDY’s fears that our reading of the Rule “eviscerate[s] the against penal interest

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exception,” *post*, at 616 (internal quotation marks omitted), or makes it lack “meaningful effect,” *ibid*. There are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculcate a criminal defendant. Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.

For instance, a declarant’s squarely self-inculpatory confession—“yes, I killed X”—will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. See *Pinkerton v. United States*, 328 U. S. 640, 647 (1946). Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice’s self-inculpatory statement can inculcate the defendant directly: “I was robbing the bank on Friday morning,” coupled with someone’s testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.

Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant’s interest. “I hid the gun in Joe’s apartment” may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. “Sam and I went to Joe’s house” might be against the declarant’s interest if a reasonable person in the declarant’s shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam’s conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant’s interest. The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest “that a rea-

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sonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.\*

C

In this case, however, we cannot conclude that all that Harris said was properly admitted. Some of Harris' confession would clearly have been admissible under Rule 804(b)(3); for instance, when he said he knew there was cocaine in the suitcase, he essentially forfeited his only possible defense to a charge of cocaine possession, lack of knowledge. But other parts of his confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than people who are running the whole show, see, *e.g.*, United States Sentencing Commission, Guidelines Manual §3B1.2 (Nov. 1993), especially if the small fish are willing to help the authorities catch the big ones, see, *e.g., id.*, §5K1.1.

Nothing in the record shows that the District Court or the Court of Appeals inquired whether each of the statements in Harris' confession was truly self-inculpatory. As we explained above, this can be a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; we therefore remand to the Court of Appeals to conduct this inquiry in the first instance.

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\*Of course, an accomplice's statements may also be admissible under other provisions of Rules 801–804. For instance, statements made in furtherance of the conspiracy may be admissible under Rule 801(d)(2)(E), and other statements that bear circumstantial guarantees of trustworthiness may be admissible under Rule 804(b)(5), the catchall hearsay exception.

SCALIA, J., concurring

In light of this disposition, we need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause, see generally *White v. Illinois*, 502 U. S. 346 (1992), and in particular we need not decide whether the hearsay exception for declarations against interest is "firmly rooted" for Confrontation Clause purposes. Compare, *e. g.*, *United States v. Seeley*, 892 F. 2d 1, 2 (CA1 1989) (holding that the exception is firmly rooted), with *United States v. Flores*, 985 F. 2d 770 (CA5 1993) (holding the contrary). We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the "particularized guarantees of trustworthiness" that makes a statement admissible under the Confrontation Clause. See *Lee v. Illinois*, 476 U. S. 530, 543–545 (1986). We also need not decide whether, as some Courts of Appeals have held, the second sentence of Rule 804(b)(3)—"A statement tending to expose the declarant to criminal liability *and offered to exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement" (emphasis added)—also requires that statements inculcating the accused be supported by corroborating circumstances. See, *e. g.*, *United States v. Alvarez*, 584 F. 2d 694, 701 (CA5 1978); *United States v. Taggart*, 944 F. 2d 837, 840 (CA11 1991). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings.

*So ordered.*

JUSTICE SCALIA, concurring.

I join the Court's opinion, which I do not understand to require the simplistic view of statements against penal interest that JUSTICE KENNEDY attributes to it.

When analyzing whether evidence can be admitted under the statement-against-penal-interest exception to the hearsay rules, the relevant inquiry must always be, as the text directs, whether the statement "at the time of its making . . .

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so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. Rule Evid. 804(b)(3). I quite agree with the Court that a reading of the term "statement" to connote an extended declaration (and which would thereby allow both self-inculpatory and non-self-inculpatory parts of a declaration to be admitted so long as the declaration in the aggregate was sufficiently inculpatory) is unsupportable. See *ante*, at 599–600.

Employing the narrower definition of "statement," so that Rule 804(b)(3) allows admission of only those remarks that are individually self-inculpatory, does not, as JUSTICE KENNEDY states, "eviscerate the against penal interest exception." *Post*, at 616 (internal quotation marks and citation omitted). A statement obviously can be self-inculpatory (in the sense of having so much of a tendency to subject one to criminal liability that a reasonable person would not make it without believing it to be true) without consisting of the confession "I committed X element of crime Y." Consider, for example, a declarant who stated: "On Friday morning, I went into a gunshop and (lawfully) bought a particular type of handgun and particular type of ammunition. I then drove in my 1958 blue Edsel and parked in front of the First City Bank with the keys in the ignition and the driver's door ajar. I then went inside, robbed the bank, and shot the security guard." Although the declarant has not confessed to any element of a crime in the first two sentences, those statements in context are obviously against his penal interest, and I have no doubt that a trial judge could properly admit them.

Moreover, a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant. For example, if a lieutenant in an organized crime operation described the inner workings of an extortion and protection racket, naming

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some of the other actors and thereby inculcating himself on racketeering and/or conspiracy charges, I have no doubt that some of those remarks could be admitted as statements against penal interest. Of course, naming another person, if done, for example, in a context where the declarant is minimizing culpability or criminal exposure, can bear on whether the statement meets the Rule 804(b)(3) standard. The relevant inquiry, however—and one that is not furthered by clouding the waters with manufactured categories such as “collateral neutral” and “collateral self-serving,” see, *e. g.*, *post*, at 612, 618 (KENNEDY, J., concurring in judgment)—must always be whether the particular remark at issue (and *not* the extended narrative) meets the standard set forth in the Rule.

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

I join Parts I, II–A, and II–B of the Court’s opinion. I agree with the Court that Federal Rule of Evidence 804(b)(3) excepts from the general rule that hearsay statements are inadmissible only “those declarations or remarks within [a narrative] that are individually self-inculpatory.” *Ante*, at 599. As the Court explains, the exception for statements against penal interest “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory,” *ante*, at 600–601; the exception applies only to statements that are “sufficiently against the declarant’s penal interest ‘that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.’” *Ante*, at 603–604, quoting Fed. Rule Evid. 804(b)(3).

Further, the Court recognizes the untrustworthiness of statements implicating another person. *Ante*, at 601. A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in compari-

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son with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation. For this reason, hearsay accounts of a suspect's statements implicating another person have been held inadmissible under the Confrontation Clause. See *Lee v. Illinois*, 476 U. S. 530, 541 (1986) ("when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination"); *ibid.* ("[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.") (quoting *Bruton v. United States*, 391 U. S. 123, 141 (1968) (White, J., dissenting)).

Unlike JUSTICE O'CONNOR, however, I conclude that Reginald Harris' statements, as recounted by Drug Enforcement Administration (DEA) Special Agent Donald E. Walton, do not fit, even in part, within the exception described in Rule 804(b)(3), for Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy. Harris was caught redhanded with 19 kilos of cocaine—enough to subject even a first-time offender to a minimum of 12½ years' imprisonment. See United States Sentencing Commission, Guidelines Manual §2D1.1(c) (1993); *id.*, ch. 5, pt. A (sentencing table). He could have denied knowing the drugs were in the car's trunk, but that strategy would have brought little prospect of thwarting a criminal prosecution. He therefore admitted involvement, but did so in a way that minimized his own role and shifted blame to petitioner Fredel Williamson (and a Cuban man named Shawn).

Most of Harris' statements to DEA Agent Walton focused on Williamson's, rather than Harris', conduct. Agent Walton testified to the following: During a brief telephone con-



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versation shortly after he was apprehended, Harris said he had obtained 19 kilos of cocaine for Williamson from a Cuban man in Fort Lauderdale, Florida; he stated that the cocaine belonged to Williamson, and was to be delivered to a dumpster in the Atlanta area that evening. App. 37. Harris repeated this story to Agent Walton when the two spoke in person later in the day. Harris also said that he had rented the car a few days earlier and had included Williamson's name on the rental contract because Williamson was going to be in the Fort Lauderdale area with him. *Id.*, at 38–39. After Agent Walton sought to arrange a controlled delivery, Harris retracted the story about the dumpster, saying it was false.

Harris' second account differed as to collateral details, but he continued to paint Williamson as the "big fish." Harris reported that he was transporting the cocaine to Atlanta for Williamson. When the police stopped Harris' car, Williamson was driving in front of him in another rented car. After Harris was stopped, Williamson turned around and pulled over to the side of the road; from that vantage point, he observed the police officer inspecting the contents of Harris' trunk. *Id.*, at 40–41. And, Harris repeated, "the arrangements for the acquisition and the transportation had been made by Mr. Williamson." *Id.*, at 41.

To the extent some of these statements tended to incriminate Harris, they provided only marginal or cumulative evidence of his guilt. They project an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else. See *United States v. Sarmiento-Perez*, 633 F. 2d 1092, 1102 (CA5 1981) ("[The declarant] might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement[s] as a whole—including the ostensibly disserving portions—to be *in* his interest rather than against it.").

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For these reasons, I would hold that none of Harris' hearsay statements were admissible under Rule 804(b)(3).<sup>\*</sup> The trial judge characterized Agent Walton's testimony as "very damning." App. 50. The prosecutor considered it so prejudicial that she offered to join defense counsel's motion for a mistrial should the trial court determine that the hearsay statements had been erroneously admitted. *Id.*, at 51 ("If the [trial] Court determines that it has been improper for [Agent Walton] to say those statements, then the Court must of necessity declare a mistrial, because there is no way they can remove what . . . they have heard that Reginald Harris said about Fredel Williamson, and the Government will join in the [defense counsel's] motion [for a mistrial], because I think that would be a burden no one could overcome in the 11th Circuit."). I concur in the Court's decision to vacate the Court of Appeals' judgment, however, because I have not examined the entire trial court record; I therefore cannot say the Government should be denied an opportunity to argue that the erroneous admission of the hearsay statements, in light of the other evidence introduced at trial, constituted harmless error. See Fed. Rule Crim. Proc. 52(a); *Kotteakos v. United States*, 328 U. S. 750, 776 (1946) (error requires reversal of criminal conviction if it is "highly probable that the error had substantial

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<sup>\*</sup>Nor could any of Harris' hearsay statements be admitted under Rule 801(d)(2)(E), which provides that statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. The trial judge initially appeared to base his ruling admitting the statements on the co-conspirator rule. See App. 34–36; *id.*, at 47 ("I let it in as a co-conspirator statement."). The prosecutor, however, "agree[d] with [defense counsel] totally" that "[they are] not . . . statement[s] in furtherance of the conspiracy"; Agent Walton's testimony, she explained, was "not offered under [the co-conspirator] exception," but under Rule 804(b)(3). App. 47. I do not read the Court's opinion, *ante*, at 604, n., to suggest that the hearsay statements *in this case* could have been admitted under Rule 801(d)(2)(E).

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and injurious effect or influence in determining the jury's verdict").

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

## I

Federal Rule of Evidence 802 states the general rule that hearsay evidence is inadmissible in federal court proceedings, but there are numerous exceptions. At issue here is the exception contained in Rule 804(b)(3), which allows admission of

“[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

The rationale of the hearsay exception for statements against interest is that people seldom “make statements which are damaging to themselves unless satisfied for good reason that they are true.” Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 789. Of course, the declarant may make his statement against interest (such as “I shot the bank teller”) together with collateral but related declarations (such as “John Doe drove the getaway car”). The admissibility of those collateral statements under Rule 804(b)(3) is the issue we must decide here.

There has been a long-running debate among commentators over the admissibility of collateral statements. Dean Wigmore took the strongest position in favor of admissibility,

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arguing that “the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement.” 5 J. Wigmore, *Evidence* § 1465, p. 271 (3d ed. 1940) (emphasis deleted); see also 5 J. Wigmore, *Evidence* § 1465, p. 339 (J. Chadbourne rev. 1974); *Higham v. Ridgway*, 10 East. 109, 103 Eng. Rep. 717 (K. B. 1808). According to Wigmore, because “the statement is made under circumstances fairly indicating the declarant’s sincerity and accuracy,” the entire statement should be admitted. 5 J. Wigmore § 1465, p. 271 (3d ed. 1940). Dean McCormick’s approach regarding collateral statements was more guarded. He argued for the admissibility of collateral statements of a neutral character, and for the exclusion of collateral statements of a self-serving character. For example, in the statement “John and I robbed the bank,” the words “John and” are neutral (save for the possibility of conspiracy charges). On the other hand, the statement “John, not I, shot the bank teller” is to some extent self-serving and therefore might be inadmissible. See C. McCormick, *Law of Evidence* § 256, pp. 552–553 (1954) (hereinafter McCormick). Professor Jefferson took the narrowest approach, arguing that the reliability of a statement against interest stems only from the disserving fact stated and so should be confined “to the proof of the fact which is against interest.” Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 62–63 (1944). Under the Jefferson approach, neither collateral neutral nor collateral self-serving statements would be admissible.

Enacted by Congress in 1975, Rule 804(b)(3) establishes a hearsay exception for statements against penal, proprietary, pecuniary, and legal interest (and does not distinguish among those interests). The text of the Rule does not tell us whether collateral statements are admissible, however. See *ante*, at 599; see also Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Calif. L. Rev. 1189, 1202 (1978) (“The text of Rule

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804(b)(3) by itself provides little guidance and would accommodate comfortably either a doctrine excluding or one admitting collateral statements”). The Court resolves the issue, as I understand its opinion, by adopting the extreme position that no collateral statements are admissible under Rule 804(b)(3). See *ante*, at 599 (adopting “narrower reading” that “Rule 804(b)(3) cover[s] only those declarations or remarks within the confession that are individually self-inculpatory”); *ante*, at 607 (GINSBURG, J., concurring in part and concurring in judgment); but cf. *ante*, p. 605 (SCALIA, J., concurring). The Court reaches that conclusion by relying on the “principle behind the Rule” that reasonable people do not make statements against their interest unless they are telling the truth, *ante*, at 599, and reasons that this policy “expressed in the Rule’s text,” *ante*, at 602, “simply does not extend” to collateral statements, *ante*, at 599. Though conceding that Congress can “make statements admissible based on their proximity to self-inculpatory statements,” the Court says that it cannot “lightly assume that the ambiguous language means anything so inconsistent with the Rule’s underlying theory.” *Ante*, at 600.

With respect, I must disagree with this analysis. All agree that the justification for admission of hearsay statements against interest was, as it still is, that reasonable people do not make those statements unless believing them to be true, but that has not resolved the long-running debate over the admissibility of collateral statements, as to which there is no clear consensus in the authorities. Indeed, to the extent the authorities come close to any consensus, they support admission of some collateral statements. See *supra*, at 611–612. Given that the underlying principle for the hearsay exception has not resolved the debate over collateral statements one way or the other, I submit that we should not assume that the text of Rule 804(b)(3), which is silent about collateral statements, in fact incorporates one of the competing positions. The Rule’s silence no more incor-

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porates Jefferson's position respecting collateral statements than it does McCormick's or Wigmore's.

## II

Because the text of Rule 804(b)(3) expresses no position regarding the admissibility of collateral statements, we must determine whether there are other authoritative guides on the question. In my view, three sources demonstrate that Rule 804(b)(3) allows the admission of some collateral statements: the Advisory Committee's Note, the common law of the hearsay exception for statements against interest, and the general presumption that Congress does not enact statutes that have almost no effect.

First, the Advisory Committee's Note establishes that some collateral statements are admissible. In fact, it refers in specific terms to the issue we here confront: "Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements." 28 U. S. C. App., p. 790. This language seems a forthright statement that collateral statements are admissible under Rule 804(b)(3), but the Court reasons that "the policy expressed in the Rule's text points clearly enough in one direction that it outweighs whatever force the Notes may have." *Ante*, at 602. Again, however, that reasoning begs the question: What is the policy expressed in the text on the admissibility of collateral statements? As stated above, the text of the Rule does not answer the question whether collateral statements are admissible. When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee's Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee's Note. We have referred often to those Notes in in-

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interpreting the Rules of Evidence, and I see no reason to jettison that well-established practice here. See *Huddleston v. United States*, 485 U. S. 681, 688 (1988); *United States v. Owens*, 484 U. S. 554, 562 (1988); *Bourjaily v. United States*, 483 U. S. 171, 179, n. 2 (1987); *United States v. Abel*, 469 U. S. 45, 51 (1984).

Second, even if the Advisory Committee's Note were silent about collateral statements, I would not adopt a rule excluding all statements collateral or related to the specific words against penal interest. Absent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 588 (1993); *Green v. Bock Laundry Machine Co.*, 490 U. S. 504, 521–522 (1989); *United States v. Abel*, *supra*, at 51–52; see also *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986) (“[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific”). Application of that interpretive principle indicates that collateral statements should be admissible. “From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.” Jefferson, 58 Harv. L. Rev., at 57; see also McCormick § 256; 5 J. Wigmore, Evidence § 1465 (3d ed. 1940). Indeed, the Advisory Committee's Note itself, in stating that collateral statements would be admissible, referred to the “general theory” that related statements are admissible, an indication of the state of the law at the time the Rule was enacted. Rule 804(b)(3) does not address the issue, but Congress legislated against the common-law background allowing admission of some collateral statements, and I would not assume that Congress gave the common-law rule a silent burial in Rule 804(b)(3).

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There is yet a third reason weighing against the Court's interpretation, one specific to statements against penal interest that inculcate the accused. There is no dispute that the text of Rule 804(b)(3) contemplates the admission of those particular statements. Absent a textual direction to the contrary, therefore, we should assume that Congress intended the penal interest exception for inculpatory statements to have some meaningful effect. See *American Paper Institute, Inc. v. American Elec. Power Service Corp.*, 461 U. S. 402, 421 (1983) (court should not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other") (internal quotation marks omitted). That counsels against adopting a rule excluding collateral statements. As commentators have recognized, "the exclusion of collateral statements would cause the exclusion of almost all inculpatory statements." Comment, 66 Calif. L. Rev., at 1207; see also Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Colum. L. Rev. 159, 163 (1983) ("[M]ost statements inculcating a defendant are only collateral to the portion of the declarant's statement that is against his own penal interest. The portion of the statement that specifically implicates the defendant is rarely directly counter to the declarant's penal interest") (footnote omitted); Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1396 (1972) ("[T]he naming of another as a compatriot will almost never be against the declarant's own interest"). Indeed, as one commentator indicated, the conclusion that no collateral statements are admissible—the conclusion reached by the Court today—would "eviscerate the against penal interest exception." Comment, 66 Calif. L. Rev., at 1213.

To be sure, under the approach adopted by the Court, there are some situations where the Rule would still apply. For example, if the declarant said that he stole certain goods, the statement could be admitted in a prosecution of the ac-



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cused for receipt of stolen goods in order to show that the goods were stolen. See 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 804(b)(3)[04], p. 804–164 (1993); see also *ante*, at 603. But as the commentators have recognized, it is likely to be the rare case where the precise self-inculpatory words of the declarant, without more, also inculcate the defendant. I would not presume that Congress intended the penal interest exception to the Rule to have so little effect with respect to statements that inculcate the accused.

I note finally that the Court's decision applies to statements against penal interest that exculpate the accused as well as to those that inculcate the accused. Thus, if the declarant said, "I robbed the store alone," only the portion of the statement in which the declarant said "I robbed the store" could be introduced by a criminal defendant on trial for the robbery. See Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B. U. L. Rev. 148, 165, n. 95 (1976). That seems extraordinary. The Court gives no justification for such a rule and no explanation that Congress intended the exception for exculpatory statements to have this limited effect. See *id.*, at 166 ("A strict application of a rule excluding all collateral statements can lead to the arbitrary rejection of valuable evidence").

### III

Though I would conclude that Rule 804(b)(3) allows admission of statements collateral to the precise words against interest, that conclusion of course does not answer the remaining question whether all collateral statements related to the statement against interest are admissible; and if not, what limiting principles should apply. The Advisory Committee's Note suggests that not all collateral statements are admissible. The Note refers, for example, to McCormick's treatise, not to Wigmore's, for guidance as to the "balancing of self-serving against dis[serving] aspects of a declaration." 28

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U. S. C. App., p. 790. As noted *supra*, at 611–612, Wigmore’s approach would allow the admission of “every fact contained in the same statement,” but McCormick’s approach is not so expansive. McCormick stated that “[a] certain latitude as to contextual [*i. e.*, collateral] statements, neutral as to interest, giving meaning to the declaration against interest seems defensible, but bringing in self-serving statements contextually seems questionable.” McCormick § 256, p. 552. McCormick further stated that, within a declaration containing self-serving and dis-serving facts, he would “admit the dis-serving parts of the declaration, and exclude the self-serving parts” at least “where the serving and dis-serving parts can be severed.” *Id.*, § 256, at 553. It thus appears that the Advisory Committee’s Note, by its reference to (and apparent incorporation of) McCormick, contemplates exclusion of a collateral self-serving statement, but admission of a collateral neutral statement.

In the criminal context, a self-serving statement is one that tends to reduce the charges or mitigate the punishment for which the declarant might be liable. See M. Graham, *Federal Practice and Procedure* § 6795, p. 810, n. 10 (1992). For example, if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible. See *ibid.* (collateral self-serving statement is “John used the gun”). (The Government concedes that such a statement may be inadmissible. See Brief for United States 12.) By contrast, when two or more people are capable of committing a crime and the declarant simply names the involved parties, that statement often is considered neutral, not self-serving. See Graham, *supra*, at 810, n. 10 (“[T]he statement ‘John and I robbed the bank’ is collateral neutral”); Note, 56 B. U. L. Rev., at 166, n. 96 (“An examination of the decisions reveals that, with very few exceptions, collateral facts offered as part of a declaration against penal interest are neutral rather

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than self-serving”); see generally *United States v. York*, 933 F. 2d 1343, 1362–1364 (CA7 1991); *United States v. Casamento*, 887 F. 2d 1141, 1171 (CA2 1989).

Apart from that limit on the admission of collateral, self-serving statements, there is a separate limit applicable to cases in which the declarant made his statement to authorities; this limit applies not only to collateral statements but also to the precise words against penal interest. A declarant may believe that a statement of guilt to authorities is in his interest to some extent, for example as a way to obtain more lenient treatment, or simply to clear his conscience. The Note takes account of that potentiality and states that courts should examine the circumstances of the statement to determine whether the statement was “motivated by a desire to curry favor with the authorities.” 28 U. S. C. App., p. 790. That appears consistent with McCormick’s recognition that “even though a declaration may be against interest in one respect, if it appears that the declarant had some other motive whether of self-interest or otherwise, which was likely to lead him to misrepresent the facts, the declaration will be excluded.” McCormick §256, p. 553.

Of course, because the declarant is by definition unavailable, see Fed. Rule Evid. 804(a), and therefore cannot be questioned to determine the exact motivation for his statement, courts have been forced to devise categories to determine when this concern is sufficient to justify exclusion of a statement as unreliable. It has been held, for example, that a statement to authorities admitting guilt, made after an explicit promise of dropped charges or of a reduction in prison time in exchange for the admission of guilt, may be so unreliable as to be inadmissible. See, e. g., *United States v. Magana-Olvera*, 917 F. 2d 401, 407–409 (CA9 1990); *United States v. Scopo*, 861 F. 2d 339, 348 (CA2 1988) (“If . . . a pleading defendant had an agreement with the government or with the court that he would not be punished for the crimes to which he allocuted, then that allocution would not

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subject him to criminal liability and would not constitute a statement against his penal interest”). At the other extreme, when there was no promise of leniency by the government and the declarant was told that he had a right to remain silent and that any statements he made could be used against him, the courts have not required exclusion of the declarant’s statement against interest. See *id.*, at 348–349; *United States v. Garcia*, 897 F. 2d 1413, 1421 (CA7 1990) (declarant not motivated by desire to curry favor; “voluntarily made his statement after being advised of his *Miranda* rights and did not enter into any plea agreements with the government”). This kind of line-drawing is appropriate and necessary, lest the limiting principle regarding the declarant’s possible desire to obtain leniency lead to the exclusion of all statements against penal interest made to police, a result the Rule and Note do not contemplate.

In sum, I would adhere to the following approach with respect to statements against penal interest that inculcate the accused. A court first should determine whether the declarant made a statement that contained a fact against penal interest. See *ante*, at 604 (opinion of O’CONNOR, J.) (“Some of Harris’ confession would clearly have been admissible under Rule 804(b)(3)”). If so, the court should admit all statements related to the precise statement against penal interest, subject to two limits. Consistent with the Advisory Committee’s Note, the court should exclude a collateral statement that is so self-serving as to render it unreliable (if, for example, it shifts blame to someone else for a crime the defendant could have committed). In addition, in cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant’s admission of guilt, the entire statement should be inadmissible.

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A ruling on the admissibility of evidence under Rule 804(b)(3) is a preliminary question to be determined by the district judge under Rule 104(a). That determination of necessity calls for an inquiry that depends to a large extent on the circumstances of a particular case. For this reason, application of the general principles here outlined to a particular narrative statement often will require a difficult, fact-bound determination. District judges, who are close to the facts and far better able to evaluate the various circumstances than an appellate court, therefore must be given wide discretion to examine a particular statement to determine whether all or part of it should be admitted. Like the Court, then, I would remand this case, but for application of the analysis set forth in this opinion.

## Syllabus

TURNER BROADCASTING SYSTEM, INC., ET AL. *v.*  
FEDERAL COMMUNICATIONS COMMISSION ET AL.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

No. 93–44. Argued January 12, 1994—Decided June 27, 1994

Concerned that a competitive imbalance between cable television and over-the-air broadcasters was endangering the broadcasters' ability to compete for a viewing audience and thus for necessary operating revenues, Congress passed the Cable Television Consumer Protection and Competition Act of 1992. Sections 4 and 5 of the Act require cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations. Soon after the Act became law, appellants, numerous cable programmers and operators, challenged the constitutionality of the must-carry provisions. The District Court granted the United States and intervenor-defendants summary judgment, ruling that the provisions are consistent with the First Amendment. The court rejected appellants' argument that the provisions warrant strict scrutiny as a content-based regulation and sustained them under the intermediate standard of scrutiny set forth in *United States v. O'Brien*, 391 U. S. 367, concluding that they are sufficiently tailored to serve the important governmental interest in the preservation of local broadcasting.

*Held:* The judgment is vacated, and the case is remanded.

819 F. Supp. 32, vacated and remanded.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding that the appropriate standard by which to evaluate the constitutionality of the must-carry provisions is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. Pp. 636–664.

(a) Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, heightened First Amendment scrutiny is demanded. The less rigorous standard of scrutiny now reserved for broadcast regulation, see *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, should not be extended to cable regulation, since the rationale for such review—the dual problems of spectrum scarcity and signal interference—does not apply in the context of cable. Nor is the mere assertion of dysfunction or failure in the cable market, without more, sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.

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Moreover, while enforcement of a generally applicable law against members of the press may sometimes warrant only rational-basis scrutiny, laws that single out the press for special treatment pose a particular danger of abuse by the State and are always subject to some degree of heightened scrutiny. Pp. 636–641.

(b) The must-carry rules are content neutral, and thus are not subject to strict scrutiny. They are neutral on their face because they distinguish between speakers in the television programming market based only upon the manner in which programmers transmit their messages to viewers, not the messages they carry. The purposes underlying the must-carry rules are also unrelated to content. Congress' overriding objective was not to favor programming of a particular content, but rather to preserve access to free television programming for the 40 percent of Americans without cable. The challenged provisions' design and operation confirm this purpose. Congress' acknowledgment that broadcast television stations make a valuable contribution to the Nation's communications structure does not indicate that Congress regarded broadcast programming to be more valuable than cable programming; rather, it reflects only the recognition that the services provided by broadcast television have some intrinsic value and are worth preserving against the threats posed by cable. It is also incorrect to suggest that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television, given the minimal extent to which the Federal Communications Commission and Congress influence the programming offered by broadcast stations. Pp. 641–652.

(c) None of appellants' additional arguments suffices to require strict scrutiny in this case. The provisions do not intrude on the editorial control of cable operators. They are content neutral in application, and they do not force cable operators to alter their own messages to respond to the broadcast programming they must carry. In addition, the physical connection between the television set and the cable network gives cable operators bottleneck, or gatekeeper, control over most programming delivered into subscribers' homes. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, and *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, distinguished. Strict scrutiny is also not triggered by Congress' preference for broadcasters over cable operators, since it is based not on the content of the programming each group offers, but on the belief that broadcast television is in economic peril. Nor is such scrutiny warranted by the fact that the provisions single out certain members of the press—here, cable operators—for disfavored treatment. Such differential treatment is justified by the special characteristics of the cable medium—namely, the cable operators' bottleneck

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monopoly and the dangers this power poses to the viability of broadcast television—and because the must-carry provisions are not structured in a manner that carries the inherent risk of undermining First Amendment interests. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221, and *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U. S. 575, distinguished. Pp. 653–661.

(d) Under *O'Brien*, a content-neutral regulation will be sustained if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Viewed in the abstract, each of the governmental interests asserted—preserving the benefits of free, over-the-air local broadcast stations, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming—is important. Pp. 661–664.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE SOUTER, concluded in Part III–B that the fact that the asserted interests are important in the abstract does not mean that the must-carry provisions will in fact advance those interests. The Government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. Thus, the Government must adequately show that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer, the Government still bears the burden of showing that the remedy adopted does not burden substantially more speech than is necessary to further such interests. On the state of the record developed, and in the absence of findings of fact from the District Court, it is not possible to conclude that the Government has satisfied either inquiry. Because there are genuine issues of material fact still to be resolved on this record, the District Court erred in granting summary judgment for the Government. Pp. 664–668.

JUSTICE STEVENS, though favoring affirmance, concurred in the judgment because otherwise no disposition of the case would be supported by five Justices and because he is in substantial agreement with JUSTICE KENNEDY's analysis of this case. P. 674.

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Parts II–A and II–B, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Parts II–C, II–D, and III–A, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, and SOUTER,



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JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C. J., and BLACKMUN and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 669. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 669. O’CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and GINSBURG, JJ., joined, and in Parts I and III of which THOMAS, J., joined, *post*, p. 674. GINSBURG, J., filed an opinion concurring in part and dissenting in part, *post*, p. 685.

*H. Bartow Farr III* argued the cause for appellants. With him on the briefs for appellant National Cable Television Association, Inc., were *Joel I. Klein* and *Richard G. Taranto*. *Bruce D. Sokler*, *Peter Kimm, Jr.*, *Gregory A. Lewis*, *Mary Ann Zimmer*, *Christopher Fager*, *Bruce D. Collins*, and *Neal S. Grabell* filed a brief for appellants Turner Broadcasting System, Inc., et al. *John P. Cole, Jr.*, and *Kenneth Farabee* filed a brief for appellant Daniels Cablevision, Inc. *Albert G. Lauber, Jr.*, *Peter Van N. Lockwood*, *Dorothy L. Foley*, *Judith A. McHale*, and *Barbara S. Wellbery* filed a brief for appellants Discovery Communications, Inc., et al. *Robert D. Joffe*, *Stuart W. Gold*, *Edward J. Weiss*, *Brian Conboy*, and *Theodore Case Whitehouse* filed a brief for appellant Time Warner Entertainment Co.

*Solicitor General Days* argued the cause for appellees. With him on the brief for the federal appellees were *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *Christopher J. Wright*, *Douglas N. Letter*, *Bruce G. Forrest*, and *Jonathan R. Siegel*. *Mark H. Lynch*, *Richard W. Buchanan*, *Marilyn Mohrman-Gillis*, *Paula A. Jameson*, and *Nancy Howell Hendry* filed a brief for appellees Association of America’s Public Television Stations et al. *Rex E. Lee*, *Carter G. Phillips*, *Robert A. Beizer*, *Mark D. Hopson*, and *James J. Popham* filed a brief for appellee Association of Independent Television Stations, Inc. *Angela J. Campbell*, *Elliot M. Minberg*, *Andrew Jay Schwartzman*, and *Gigi B. Sohn* filed a brief for appellees Consumer Federation of America et al. *Bruce J. Ennis, Jr.*, *David W. Ogden*, *Donald B. Verrilli, Jr.*, *Ann M. Kappler*, *Nory*

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*Miller, Benjamin F. P. Ivins, Jack N. Goodman, and Kathleen M. Sullivan* filed a brief for appellee National Association of Broadcasters.\*

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court, except as to Part III-B.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment.

The United States District Court for the District of Columbia granted summary judgment for the United States,

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\*Briefs of *amici curiae* urging reversal were filed for the Courtroom Television Network by *Floyd Abrams*; for the Media Institute by *Sol Schildhause*; for the New Inspirational Network by *James S. Blitz*; and for the United States Telephone Association et al. by *Laurence H. Tribe, Jonathan S. Massey, Michael W. McConnell, Kenneth S. Geller, Kenneth W. Starr, Paul T. Cappuccio, Michael K. Kellogg, Mark L. Evans, James R. Young, John Thorne, Robert A. Levetown, Gerald E. Murray, Liam S. Coonan, Thomas P. Hester, Walter H. Alford, William B. Barfield, and Richard W. Odgers*.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut by *Richard Blumenthal*, Attorney General, *William B. Gundling*, Associate Attorney General, and *Phillip Rosario*, Assistant Attorney General; for the City of Los Angeles et al. by *Larrine S. Holbrooke, Teresa D. Baer, James K. Hahn, and Edward J. Perez*; for the National Association of Telecommunications Officers and Advisors et al. by *Robert Alan Garrett* and *David Frohlich*; and for Telemundo Group, Inc., by *William S. Reyner, Jr., and Marvin J. Diamond*.

Briefs of *amici curiae* were filed for the American Civil Liberties Union by *Burt Neuborne, Steven R. Shapiro, Marjorie Heins, and Arthur N. Eisenberg*; for the California Cable Television Association by *Frank W. Lloyd III*; for the Citizens for a Sound Economy Foundation by *Mark R. Paoletta*; and for DirecTV, Inc., et al. by *Lawrence R. Sidman* and *John B. Richards*.

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holding that the challenged provisions are consistent with the First Amendment. Because issues of material fact remain unresolved in the record as developed thus far, we vacate the District Court's judgment and remand the case for further proceedings.

## I

## A

The role of cable television in the Nation's communications system has undergone dramatic change over the past 45 years. Given the pace of technological advancement and the increasing convergence between cable and other electronic media, the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.

The earliest cable systems were built in the late 1940's to bring clear broadcast television signals to remote or mountainous communities. The purpose was not to replace broadcast television but to enhance it. See *United States v. Southwestern Cable Co.*, 392 U. S. 157, 161–164 (1968); D. Brenner, M. Price, & M. Meyerson, *Cable Television and Other Nonbroadcast Video* §1.02 (1992); M. Hamburg, *All About Cable*, ch. 1 (1979). Modern cable systems do much more than enhance the reception of nearby broadcast television stations. With the capacity to carry dozens of channels and import distant programming signals via satellite or microwave relay, today's cable systems are in direct competition with over-the-air broadcasters as an independent source of television programming.

Broadcast and cable television are distinguished by the different technologies through which they reach viewers. Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range. Cable systems, by contrast, rely upon a physical, point-to-

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point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend for its very existence upon express permission from local governing authorities. See generally *Community Communications Co. v. Boulder*, 660 F. 2d 1370, 1377–1378 (CA10 1981).

Cable technology affords two principal benefits over broadcast. First, it eliminates the signal interference sometimes encountered in over-the-air broadcasting and thus gives viewers undistorted reception of broadcast stations. Second, it is capable of transmitting many more channels than are available through broadcasting, giving subscribers access to far greater programming variety. More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels. *Television and Cable Factbook, Services Vol. No. 62*, p. I–69 (1994). And about 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels. *Ibid.* Newer systems can carry hundreds of channels, and many older systems are being upgraded with fiber optic rebuilds and digital compression technology to increase channel capacity. See, *e.g.*, *Cablevision Systems Adds to Rapid Fiber Growth in Cable Systems*, *Communications Daily* 6–7 (Feb. 26, 1993).

The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators). In some cases, cable operators have acquired ownership of cable programmers, and vice versa. Although cable operators may create some of their own pro-

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gramming, most of their programming is drawn from outside sources. These outside sources include not only local or distant broadcast stations, but also the many national and regional cable programming networks that have emerged in recent years, such as CNN, MTV, ESPN, TNT, C-SPAN, The Family Channel, Nickelodeon, Arts and Entertainment, Black Entertainment Television, CourtTV, The Discovery Channel, American Movie Classics, Comedy Central, The Learning Channel, and The Weather Channel. Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers. See Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L. J. 329, 339 (“For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over program services provided by others”).

In contrast to commercial broadcast stations, which transmit signals at no charge to viewers and generate revenues by selling time to advertisers, cable systems charge subscribers a monthly fee for the right to receive cable programming and rely to a lesser extent on advertising. In most instances, cable subscribers choose the stations they will receive by selecting among various plans, or “tiers,” of cable service. In a typical offering, the basic tier consists of local broadcast stations plus a number of cable programming networks selected by the cable operator. For an additional cost, subscribers can obtain channels devoted to particular subjects or interests, such as recent-release feature movies, sports, children’s programming, sexually explicit programming, and the like. Many cable systems also offer pay-per-view service, which allows an individual subscriber to order and pay a one-time fee to see a single movie or program at a set time of the day. See J. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* § 5.05[2] (1989); Brenner, *supra*, at 334, n. 22.

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## B

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1460 (1992 Cable Act or Act). Among other things, the Act subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. At issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

Section 4 requires carriage of “local commercial television stations,” defined to include all full power television broadcasters, other than those qualifying as “noncommercial educational” stations under §5, that operate within the same television market as the cable system. §4, 47 U.S.C. §§534(b)(1)(B), (h)(1)(A) (1988 ed., Supp. IV).<sup>1</sup> Cable systems with more than 12 active channels, and more than 300 subscribers, are required to set aside up to one-third of their channels for commercial broadcast stations that request carriage. §534(b)(1)(B). Cable systems with more than 300 subscribers, but only 12 or fewer active channels, must

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<sup>1</sup> Although a cable system’s local television market is defined by regulation, see 47 CFR §73.3555(d)(3)(i) (1993), the FCC is authorized to make special market determinations upon request to better effectuate the purposes of the Act. See 1992 Cable Act §4, 47 U.S.C. §534(h)(1)(C) (1988 ed., Supp. IV).

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carry the signals of three commercial broadcast stations. § 534(b)(1)(A).<sup>2</sup>

If there are fewer broadcasters requesting carriage than slots made available under the Act, the cable operator is obligated to carry only those broadcasters who make the request. If, however, there are more requesting broadcast stations than slots available, the cable operator is permitted to choose which of these stations it will carry. § 534(b)(2).<sup>3</sup> The broadcast signals carried under this provision must be transmitted on a continuous, uninterrupted basis, § 534(b)(3), and must be placed in the same numerical channel position as when broadcast over the air, § 534(b)(6). Further, subject to a few exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of its must-carry obligations. § 534(b)(10).

Section 5 of the Act imposes similar requirements regarding the carriage of local public broadcast television stations,

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<sup>2</sup> If there are not enough local full power commercial broadcast stations to fill the one-third allotment, a cable system with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two of them. See § 534(c)(1); see also § 534(h)(2) (defining “qualified low power station”). Low power television stations are small broadcast entities that transmit over a limited geographic range. They are licensed on a secondary basis and are permitted to operate only if they do not interfere with the signals of full power broadcast stations.

<sup>3</sup> Cable systems are not required to carry the signal of any local commercial television station that “substantially duplicates” the signal of any other broadcast station carried on the system. § 534(b)(5); see also *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (Broadcast Signal Carriage Issues), No. 92–259, Mar. 29, 1993, ¶ 19 (defining “substantial duplication” as a 50 percent overlap in programming). Nor are they required to carry the signals of more than one station affiliated with each national broadcast network. If the cable operator does choose to carry broadcast stations with duplicative programming, however, the system is credited with those stations for purposes of its must-carry obligations. § 534(b)(5).

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referred to in the Act as local “noncommercial educational television stations.” 47 U.S.C. § 535(a) (1988 ed., Supp. IV).<sup>4</sup> A cable system with 12 or fewer channels must carry one of these stations; a system of between 13 and 36 channels must carry between one and three; and a system with more than 36 channels must carry each local public broadcast station requesting carriage. §§ 535(b)(2)(A), (b)(3)(A), (b)(3)(D). The Act requires a cable operator to import distant signals in certain circumstances but provides protection against substantial duplication of local noncommercial educational stations. See §§ 535(b)(3)(B), (e). As with commercial broadcast stations, § 5 requires cable system operators to carry the program schedule of the public broadcast station in its entirety and at its same over-the-air channel position. §§ 535(g)(1), (g)(5).

Taken together, therefore, §§ 4 and 5 subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system.

## C

Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. See S. Rep. No. 102–92, pp. 3–4 (1991) (describing hearings); H. R. Rep. No. 102–628, p. 74 (1992) (same). The conclusions Congress drew from its fact-finding process are recited in the text of the Act itself. See §§ 2(a)(1)–(21). In brief, Congress found that the physical characteristics of cable transmission, compounded by the in-

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<sup>4</sup>“Noncommercial educational television station[s]” are defined to include broadcast stations that are either (1) licensed by the FCC as a “non-commercial educational television broadcast station” and have, as licensees, entities which are eligible to receive grants from the Corporation for Public Broadcasting; or (2) owned and operated by a municipality and transmit “predominantly noncommercial programs for educational purposes.” §§ 535(l)(1)(A)–(B).



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creasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, §2(a)(3), and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming, §2(a)(17). This is so, Congress found, because “[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.” *Ibid.* In addition, Congress concluded that due to “local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,” the overwhelming majority of cable operators exercise a monopoly over cable service. §2(a)(2). “The result,” Congress determined, “is undue market power for the cable operator as compared to that of consumers and video programmers.” *Ibid.*

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator’s ability, as owner of the transmission facility, to “terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.” §2(a)(15). The incentive derives from the economic reality that “[c]able television systems and broadcast television stations increasingly compete for television advertising revenues.” §2(a)(14). By refusing carriage of broadcasters’ signals, cable operators, as a practical matter, can reduce the number of households that have

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access to the broadcasters' programming, and thereby capture advertising dollars that would otherwise go to broadcast stations. §2(a)(15).

Congress found, in addition, that increased vertical integration in the cable industry is making it even harder for broadcasters to secure carriage on cable systems, because cable operators have a financial incentive to favor their affiliated programmers. §2(a)(5). Congress also determined that the cable industry is characterized by horizontal concentration, with many cable operators sharing common ownership. This has resulted in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." §2(a)(4).

In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, "[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried," §2(a)(15); the "marked shift in market share" from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§2(a)(13)–(14); and that, as a consequence, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," §2(a)(16).

## D

Soon after the Act became law, appellants filed these five consolidated actions in the United States District Court for the District of Columbia against the United States and the Federal Communications Commission (hereinafter referred to collectively as the Government), challenging the constitutionality of the must-carry provisions. Appellants, plaintiffs below, are numerous cable programmers and cable operators. After additional parties intervened, a three-judge District Court convened under 28 U. S. C. §2284 to hear the actions. 1992 Cable Act §23, 47 U. S. C. §555(c)(1) (1988 ed., Supp.

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IV). Each of the plaintiffs filed a motion for summary judgment; several intervenor-defendants filed cross-motions for summary judgment; and the Government filed a cross-motion to dismiss. Although the Government had not asked for summary judgment, the District Court, in a divided opinion, granted summary judgment in favor of the Government and the other intervenor-defendants, ruling that the must-carry provisions are consistent with the First Amendment. 819 F. Supp. 32 (1993).

The court found that in enacting the must-carry provisions, Congress employed “its regulatory powers over the economy to impose order upon a market in dysfunction.” *Id.*, at 40. The court characterized the 1992 Cable Act as “simply industry-specific antitrust and fair trade practice regulatory legislation,” *ibid.*, and said that the must-carry requirements “are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators’ anti-competitive practices,” *ibid.* The court rejected appellants’ contention that the must-carry requirements warrant strict scrutiny as a content-based regulation, concluding that both the commercial and public broadcast provisions “are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that [the] cable operators, broadcasters, and programmers have in contemplation to deliver.” *Ibid.* The court proceeded to sustain the must-carry provisions under the intermediate standard of scrutiny set forth in *United States v. O’Brien*, 391 U. S. 367 (1968), concluding that the preservation of local broadcasting is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that interest. 819 F. Supp., at 45–47.

Judge Williams dissented. He acknowledged the “very real problem” that “cable systems control access ‘bottle-necks’ to an important communications medium,” *id.*, at 57, but concluded that Congress may not address that problem

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by extending access rights only to broadcast television stations. In his view, the must-carry rules are content based, and thus subject to strict scrutiny, because they require cable operators to carry speech they might otherwise choose to exclude, and because Congress' decision to grant favorable access to broadcast programmers rested "in part, but quite explicitly, on a finding about their content." *Id.*, at 58. Applying strict scrutiny, Judge Williams determined that the interests advanced in support of the law are inadequate to justify it. While assuming "as an abstract matter" that the interest in preserving access to free television is compelling, he found "no evidence that this access is in jeopardy." *Id.*, at 62. Likewise, he concluded that the rules are insufficiently tailored to the asserted interest in programming diversity because cable operators "now carry the vast majority of local stations," and thus to the extent the rules have any effect at all, "it will be only to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." *Id.*, at 61.

This direct appeal followed, see § 23, 47 U. S. C. § 555(c)(1) (1988 ed., Supp. IV), and we noted probable jurisdiction. 509 U. S. 952 (1993).

## II

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. *Leathers v. Medlock*, 499 U. S. 439, 444 (1991). Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." *Los Angeles v. Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986). By requiring cable systems to set aside a portion of their channels for local broadcasters,

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the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions.

## A

We address first the Government's contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1969) (television), and *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974) (print), and *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988) (personal solicitation). But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. See *FCC v. League of Women Voters of Cal.*, 468 U. S. 364, 377 (1984); *Red Lion*, *supra*, at 388–389, 396–399; *National Broadcasting Co.*, 319 U. S., at 226. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. *Id.*, at 212. The scarcity of broadcast frequencies thus re-

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quired the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. See *FCC v. League of Women Voters*, *supra*, at 377 (“The fundamental distinguishing characteristic of the new medium of broadcasting . . . is that [b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants”) (internal quotation marks omitted); *FCC v. National Citizens Comm. for Broadcasting*, 436 U. S. 775, 799 (1978). In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. *Red Lion*, 395 U. S., at 390. As we said in *Red Lion*, “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Id.*, at 388; see also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 101 (1973).

Although courts and commentators have criticized the scarcity rationale since its inception,<sup>5</sup> we have declined to question its continuing validity as support for our broadcast jurisprudence, see *FCC v. League of Women Voters*, *supra*, at 376, n. 11, and see no reason to do so here. The broadcast

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<sup>5</sup> See, e. g., *Telecommunications Research and Action Center v. FCC*, 801 F. 2d 501, 508–509 (CA DC 1986), cert. denied, 482 U. S. 919 (1987); L. Bollinger, *Images of a Free Press* 87–90 (1991); L. Powe, *American Broadcasting and the First Amendment* 197–209 (1987); M. Spitzer, *Seven Dirty Words and Six Other Stories* 7–18 (1986); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 *Harv. L. Rev.* 1062, 1072–1074 (1994); Winer, *The Signal Cable Sends—Part I: Why Can’t Cable Be More Like Broadcasting?*, 46 *Md. L. Rev.* 212, 218–240 (1987); Coase, *The Federal Communications Commission*, 2 *J. Law & Econ.* 1, 12–27 (1959).

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cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation. See *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983) (“Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication”) (footnote omitted).

This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not. See *infra*, at 656. But whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.

Although the Government acknowledges the substantial technological differences between broadcast and cable, see Brief for Federal Appellees 22, it advances a second argument for application of the *Red Lion* framework to cable regulation. It asserts that the foundation of our broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the “market dysfunction” that characterizes the broadcast market. Because the cable market is beset by a similar dysfunction, the Government maintains, the *Red Lion* standard of review should also apply to

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cable. While we agree that the cable market suffers certain structural impediments, the Government's argument is flawed in two respects. First, as discussed above, the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence. See *League of Women Voters*, 468 U. S., at 377; *National Citizens Comm. for Broadcasting*, *supra*, at 799; *Red Lion*, *supra*, at 390. Second, the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media. See, e. g., *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652, 657–658 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256–259 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S., at 248–258.

By a related course of reasoning, the Government and some appellees maintain that the must-carry provisions are nothing more than industry-specific antitrust legislation, and thus warrant rational-basis scrutiny under this Court's "precedents governing legislative efforts to correct market failure in a market whose commodity is speech," such as *Associated Press v. United States*, 326 U. S. 1 (1945), and *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951). See Brief for Federal Appellees 17. This contention is unavailing. *Associated Press* and *Lorain Journal* both involved actions against members of the press brought under the Sherman Antitrust Act, a law of general application. But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, compare *Cohen v. Cowles Media Co.*, 501 U. S. 663, 670 (1991), with *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 566–567 (1991), laws that single out the press, or certain elements thereof, for special treatment "pose a particular danger of abuse by the State," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221, 228 (1987), and so are always



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subject to at least some degree of heightened First Amendment scrutiny. See *Preferred Communications*, 476 U. S., at 496 (“Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force”). Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded. See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U. S. 575, 583 (1983).

## B

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. See *Leathers v. Medlock*, 499 U. S., at 449 (citing *Cohen v. California*, 403 U. S. 15, 24 (1971)); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638, 640–642 (1943). Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions “rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991).

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. *R. A. V. v. St. Paul*, 505 U. S. 377, 382–383 (1992); *Texas v. Johnson*, 491 U. S. 397,

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414 (1989). Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. See *Simon & Schuster*, 502 U. S., at 115; *id.*, at 125–126 (KENNEDY, J., concurring in judgment); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. See *Riley v. National Federation for Blind of N. C., Inc.*, 487 U. S., at 798; *West Virginia Bd. of Ed. v. Barnette*, *supra*. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, see *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984), because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). See *R. A. V.*, *supra*, at 386 (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed”). The purpose, or justification, of a regulation will often be evident on its face. See *Frisby v. Schultz*, 487 U. S. 474, 481 (1988). But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Cf. *Simon & Schuster*, *supra*, at 117 (“[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment”) (quoting *Minneapolis Star & Tribune*, *supra*, at 592). Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates

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based on content. *Arkansas Writers' Project*, 481 U. S., at 231–232; *Carey v. Brown*, 447 U. S. 455, 464–469 (1980).

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. See, e. g., *Burson v. Freeman*, 504 U. S. 191, 197 (1992) (“Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign”); *Boos v. Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (whether municipal ordinance permits individuals to “picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”). By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. See, e. g., *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property “is neutral—indeed it is silent—concerning any speaker’s point of view”); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations “applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds”).

## C

Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech.<sup>6</sup> Although the provisions interfere with cable oper-

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<sup>6</sup>The must-carry rules also require carriage, under certain limited circumstances, of low-power broadcast stations. 47 U. S. C. § 534(c); see n. 2, *supra*. Under the Act, a low-power station may become eligible for carriage only if, among other things, the FCC determines that the station’s programming “would address local news and informational needs which are not being adequately served by full power television broadcast sta-

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ators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select. The number of channels a cable operator must set aside depends only on the operator's channel capacity, see 47 U. S. C. §§ 534(b)(1), 535(b)(2)–(3) (1988 ed., Supp. IV); hence, an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers. Cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S., at 256–257 (newspaper may avoid access obligations by refraining from speech critical of political candidates).

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tions because of the geographic distance of such full power stations from the low power station's community of license." § 534(h)(2)(B). We recognize that this aspect of § 4 appears to single out certain low-power broadcasters for special benefits on the basis of content. Because the District Court did not address whether these particular provisions are content based, and because the parties make only the most glancing reference to the operation of, and justifications for, the low-power broadcast provisions, we think it prudent to allow the District Court to consider the content-neutral or content-based character of this provision in the first instance on remand.

In a similar vein, although a broadcast station's eligibility for must-carry is based upon its geographic proximity to a qualifying cable system, § 534(h)(1)(C)(i), the Act permits the FCC to grant must-carry privileges upon request to otherwise ineligible broadcast stations. In acting upon these requests, the FCC is directed to give "attention to the value of localism" and, in particular, to whether the requesting station "provides news coverage of issues of concern to such community . . . or coverage of sporting and other events of interest to the community." § 534(h)(1)(C)(ii). Again, the District Court did not address this provision, but may do so on remand.

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The must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete. But, again, this burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers. Cf. *Boos, supra*, at 319 (individuals may picket in front of a foreign embassy so long as their picket signs are not critical of the foreign government). And finally, the privileges conferred by the must-carry provisions are also unrelated to content. The rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular. The aggregate effect of the rules is thus to make every full power commercial and noncommercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system.

It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

That the must-carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys. *United States v. Eichman*, 496 U. S. 310, 315 (1990) (“Although the Flag Protection Act contains no explicit content-

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based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression") (emphasis in original) (internal quotation marks omitted); see also *Ward*, 491 U.S., at 791–792; *Clark v. Community for Creative Non-Violence*, 468 U.S., at 293; cf. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534–535 (1993).

Appellants contend, in this regard, that the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content. We do not agree. Our review of the Act and its various findings persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.

In unusually detailed statutory findings, *supra*, at 632–634, Congress explained that because cable systems and broadcast stations compete for local advertising revenue, §§2(a)(14)–(15), and because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations, §2(a)(5), cable operators have a built-in “economic incentive . . . to delete, reposition, or not carry local broadcast signals,” §2(a)(16). Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened. *Ibid.* Congress sought to avoid the elimination of broadcast television because, in its words, “[s]uch programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast television signals,” §2(a)(12), and because “[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming,” *ibid.*

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By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue—or, in the case of noncommercial broadcasters, sufficient viewer contributions, see §2(a)(8)(B)—to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.

This overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers. Indeed, our precedents have held that “protecting noncable households from loss of regular television broadcasting service due to competition from cable systems,” is not only a permissible governmental justification, but an “important and substantial federal interest.” *Capital Cities Cable, Inc. v. Crisp*, 467 U. S. 691, 714 (1984); see also *United States v. Midwest Video Corp.*, 406 U. S. 649, 661–662, 664 (1972) (plurality opinion).

The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech. The rules, as mentioned, confer must-carry rights on all full power broadcasters, irrespective of the content of their programming. They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.

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Appellants and JUSTICE O'CONNOR make much of the fact that, in the course of describing the purposes behind the Act, Congress referred to the value of broadcast programming. In particular, Congress noted that broadcast television is "an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate," §2(a)(11); see also §2(a)(10), and that noncommercial television "provides educational and informational programming to the Nation's citizens," §2(a)(8). We do not think, however, that such references cast any material doubt on the content-neutral character of must-carry. That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as *more* valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable. See 819 F. Supp., at 44 ("Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience").

The operation of the Act further undermines the suggestion that Congress' purpose in enacting must-carry was to force programming of a "local" or "educational" content on cable subscribers. The provisions, as we have stated, benefit all full power broadcasters irrespective of the nature of their programming. In fact, if a cable system were required to bump a cable programmer to make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local- or education-oriented programming with a broadcaster that provides very little. Appellants do not even contend, moreover, that broadcast programming is any more "local" or "educational" than cable programming. Cf. *Leathers v. Medlock*, 499 U. S., at 449



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(state law imposing tax upon cable television, but exempting other media, is not content based, in part due to lack of evidence that cable programming “differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines”).

In short, Congress’ acknowledgment that broadcast television stations make a valuable contribution to the Nation’s communications system does not render the must-carry scheme content based. The scope and operation of the challenged provisions make clear, in our view, that Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.

We likewise reject the suggestion, advanced by appellants and by Judge Williams in dissent, that the must-carry rules are content based because the preference for broadcast stations “*automatically* entails content requirements.” 819 F. Supp., at 58. It is true that broadcast programming, unlike cable programming, is subject to certain limited content restraints imposed by statute and FCC regulation.<sup>7</sup> But it does not follow that Congress mandated cable carriage of broadcast television stations as a means of ensuring that par-

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<sup>7</sup> See, e. g., 47 U. S. C. § 303b (1988 ed., Supp. IV) (directing FCC to consider extent to which license renewal applicant has “served the educational and informational needs of children”); Pub. L. 102–356, § 16(a), 106 Stat. 954, note following 47 U. S. C. § 303 (1988 ed., Supp. IV) (restrictions on indecent programming); 47 U. S. C. § 312(a)(7) (allowing FCC to revoke broadcast license for willful or repeated failure to allow reasonable access to broadcast airtime for candidates seeking federal elective office); 47 CFR § 73.1920 (1993) (requiring broadcaster to notify victims of on-air personal attacks and to provide victims with opportunity to respond over the air); *En Banc Programming Inquiry*, 44 F. C. C. 2d 2303, 2312 (1960) (requiring broadcasters to air programming that serves “the public interest, convenience or necessity”).

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particular programs will be shown, or not shown, on cable systems.

As an initial matter, the argument exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute to engage in “censorship” or to promulgate any regulation “which shall interfere with the [broadcasters’] right of free speech.” 47 U.S.C. § 326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it “has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment.” *Hubbard Broadcasting, Inc.*, 48 F. C. C. 2d 517, 520 (1974). In particular, the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although “the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.” Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960); see also *Commercial TV Stations*, 98 F. C. C. 2d 1076, 1091–1092 (1984), modified, 104 F. C. C. 2d 358 (1986), remanded in part on other grounds *sub nom. Action for Children’s Television v. FCC*, 821 F. 2d 741 (CA DC 1987).

Stations licensed to broadcast over the special frequencies reserved for “noncommercial educational” stations are subject to no more intrusive content regulation than their commercial counterparts. Noncommercial licensees must operate on a nonprofit basis, may not accept financial consideration in exchange for particular programming, and may not broadcast promotional announcements or advertisements on behalf of for-profit entities. 47 CFR §§ 73.621(d)–(e) (1993); see generally *Public Broadcasting*, 98 F. C. C. 2d 746, 751 (1984); *Educational Broadcast Stations*, 90 F. C. C. 2d 895

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(1982), modified, 97 F. C. C. 2d 255 (1984). What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of “educational” programming or any particular “educational” programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve “the public interest, convenience or necessity.” *En Banc Programming Inquiry*, 44 F. C. C. 2d 2303, 2312 (1960). The FCC itself has recognized that “a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.” *Public Broadcasting, supra*, at 751; see also *Public Radio and TV Programming*, 87 F. C. C. 2d 716, 728–729, 732, ¶¶ 29–30, 37 (1981); *Georgia State Bd. of Ed.*, 70 F. C. C. 2d 948 (1979).

In addition, although federal funding provided through the Corporation for Public Broadcasting (CPB) supports programming on noncommercial stations, the Government is foreclosed from using its financial support to gain leverage over any programming decisions. See 47 U. S. C. § 396(g) (1)(D) (directing CPB to “carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities”), § 398(a) (CPB operates without interference from any department, agency, or officer of the Federal Government, including the FCC).

Indeed, our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices. See *FCC v. League of Women Voters of Cal.*, 468 U. S., at 378–380, 386–392 (invalidating under the First Amendment statute forbidding any noncommercial educational station that receives a grant

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from the CPB to “engage in editorializing”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S., at 126 (describing “the risk of an enlargement of Government control over the content of broadcast discussion of public issues” as being of “critical importance” to the First Amendment). Thus, given the minimal extent to which the FCC and Congress actually influence the programming offered by broadcast stations, it would be difficult to conclude that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television. In a regime where Congress or the FCC exercised more intrusive control over the content of broadcast programming, an argument similar to appellants’ might carry greater weight. But in the present regulatory system, those concerns are without foundation.

In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable. Appellants’ ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry. Cf. *Arizona v. California*, 283 U. S. 423, 455–457 (1931). Indeed, “[i]t is a familiar principle 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., at 383 (citing *McCray v. United States*, 195 U. S. 27, 56 (1904)).

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## D

Appellants advance three additional arguments to support their view that the must-carry provisions warrant strict scrutiny. In brief, appellants contend that the provisions (1) compel speech by cable operators, (2) favor broadcast programmers over cable programmers, and (3) single out certain members of the press for disfavored treatment. None of these arguments suffices to require strict scrutiny in the present case.

## 1

Appellants maintain that the must-carry provisions trigger strict scrutiny because they compel cable operators to transmit speech not of their choosing. Relying principally on *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), appellants say this intrusion on the editorial control of cable operators amounts to forced speech which, if not *per se* invalid, can be justified only if narrowly tailored to a compelling government interest.

*Tornillo* affirmed an essential proposition: The First Amendment protects the editorial independence of the press. The right-of-reply statute at issue in *Tornillo* required any newspaper that assailed a political candidate's character to print, upon request by the candidate and without cost, the candidate's reply in equal space and prominence. Although the statute did not censor speech in the traditional sense—it only required newspapers to grant access to the messages of others—we found that it imposed an impermissible content-based burden on newspaper speech. Because the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it “exact[ed] a penalty on the basis of . . . content.” *Id.*, at 256. We found, and continue to recognize, that right-of-reply statutes of this sort are an impermissible intrusion on newspapers’ “editorial control and judgment.” *Id.*, at 258.

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We explained that, in practical effect, Florida's right-of-reply statute would deter newspapers from speaking in unfavorable terms about political candidates:

“Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.” *Id.*, at 257.

Moreover, by affording mandatory access to speakers with which the newspaper disagreed, the law induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion).

The same principles led us to invalidate a similar content-based access regulation in *Pacific Gas & Electric*. At issue was a rule requiring a privately owned utility, on a quarterly basis, to include with its monthly bills an editorial newsletter published by a consumer group critical of the utility's rate-making practices. Although the access requirement applicable to the utility, unlike the statutory mechanism in *Tornillo*, was not triggered by speech of any particular content, the plurality held that the same strict First Amendment scrutiny applied. Like the statute in *Tornillo*, the regulation conferred benefits to speakers based on viewpoint, giving access only to a consumer group opposing the utility's practices. 475 U.S., at 13, 15. The plurality observed that in order to avoid the appearance that it agreed with the group's views, the utility would “feel compelled to respond to arguments and allegations made by [the group] in its messages to [the utility's] customers.” *Id.*, at 16. This “kind of forced response,” the plurality explained, “is antithetical to

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the free discussion that the First Amendment seeks to foster.” *Ibid.*

*Tornillo* and *Pacific Gas & Electric* do not control this case for the following reasons. First, unlike the access rules struck down in those cases, the must-carry rules are content neutral in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty. Cf. *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S., at 795 (solicitation of funds triggers requirement to express government-favored message). Likewise, they do not grant access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators. Instead, they confer benefits upon all full-power, local broadcasters, whatever the content of their programming. Cf. *Pacific Gas & Electric, supra*, at 14 (access “awarded only to those who disagree with appellant’s views and who are hostile to appellant’s interests”).

Second, appellants do not suggest, nor do we think it the case, that must-carry will force cable operators to alter their own messages to respond to the broadcast programming they are required to carry. See Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L. J., at 379 (“Other than adding new ideas—offensive, insightful or tedious—the [speaker granted access to cable] does not influence an operator’s agenda”). Given cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator. Indeed, broadcasters are required by federal regulation to identify themselves at least once every hour, 47 CFR § 73.1201 (1993), and it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility. Cf. *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 87 (1980) (noting that the views ex-

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pressed by speakers who are granted a right of access to a shopping center would “not likely be identified with those of the owner”). Moreover, in contrast to the statute at issue in *Tornillo*, no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that “the safe course is to avoid controversy,” *Tornillo*, 418 U. S., at 257, and by so doing diminish the free flow of information and ideas.

Finally, the asserted analogy to *Tornillo* ignores an important technological difference between newspapers and cable television. Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.

The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.<sup>8</sup>

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<sup>8</sup> As one commentator has observed: “The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. . . . If the cable system is itself a publisher, it may



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The potential for abuse of this private power over a central avenue of communication cannot be overlooked. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 557 (1975) (“Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems”). The First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas. See *Associated Press v. United States*, 326 U. S., at 20. We thus reject appellants’ contention that *Tornillo* and *Pacific Gas & Electric* require strict scrutiny of the access rules in question here.

## 2

Second, appellants urge us to apply strict scrutiny because the must-carry provisions favor one set of speakers (broadcast programmers) over another (cable programmers). Appellants maintain that as a consequence of this speaker preference, some cable programmers who would have secured carriage in the absence of must-carry may now be dropped. Relying on language in *Buckley v. Valeo*, 424 U. S. 1 (1976), appellants contend that such a regulation is presumed invalid under the First Amendment because the government may not “restrict the speech of some elements of our society in order to enhance the relative voice of others.” *Id.*, at 48–49.

To the extent appellants’ argument rests on the view that all regulations distinguishing between speakers warrant strict scrutiny, see Brief for Appellants Turner Broadcasting System, Inc., et al. 29, it is mistaken. At issue in *Buckley* was a federal law prohibiting individuals from spending more than \$1,000 per year to support or oppose a particular political candidate. The Government justified the law as a means

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restrict the circumstances under which it allows others also to use its system.” I. de Sola Pool, *Technologies of Freedom* 168 (1983).

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of “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Buckley*, 424 U. S., at 48. We rejected that argument with the observation that Congress may not “abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.” *Id.*, at 49, n. 55.

Our holding in *Buckley* does not support appellants’ broad assertion that all speaker-partial laws are presumed invalid. Rather, it stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say). See *Regan v. Taxation with Representation of Wash.*, 461 U. S. 540, 548 (1983) (rejecting First Amendment challenge to differential tax treatment of veterans groups and other charitable organizations, but noting that the case would be different were there any “indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect”). Because the expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech. See *Buckley, supra*, at 17 (“[I]t is beyond dispute that the interest in regulating the . . . giving or spending [of] money ‘arises in some measure because the communication . . . is itself thought to be harmful’”) (quoting *United States v. O’Brien*, 391 U. S., at 382). Indeed, were the expenditure limitation unrelated to the content of expression, there would have been no perceived need for Congress to “equaliz[e] the relative ability” of interested individuals to influence elections. 424 U. S., at 48. *Buckley* thus stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.

The question here is whether Congress preferred broadcasters over cable programmers based on the content of pro-

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gramming each group offers. The answer, as we explained, *supra*, at 643–652, is no. Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry. Thus, the fact that the provisions benefit broadcasters and not cable programmers does not call for strict scrutiny under our precedents.

## 3

Finally, appellants maintain that strict scrutiny applies because the must-carry provisions single out certain members of the press—here, cable operators—for disfavored treatment. See, *e. g.*, Brief for Appellant Time Warner Entertainment Co. 28–30. In support, appellants point out that Congress has required cable operators to provide carriage to broadcast stations, but has not imposed like burdens on analogous video delivery systems, such as multichannel multipoint distribution (MMDS) systems and satellite master antenna television (SMATV) systems. Relying upon our precedents invalidating discriminatory taxation of the press, see, *e. g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), appellants contend that this sort of differential treatment poses a particular danger of abuse by the Government and should be presumed invalid.

Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns. *Minneapolis Star*, for example, considered a use tax imposed on the paper and ink used in the production of newspapers. We subjected the tax to strict scrutiny for two reasons: first, because it applied only to the press; and, second, because in practical application it fell upon only a small number of newspapers. *Minne-*

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*apolis Star*, *supra*, at 585, 591–592; see also *Grosjean*, *supra* (invalidating Louisiana tax on publications with weekly circulations above 20,000, which fell on 13 of the approximately 135 newspapers distributed in the State). The sales tax at issue in *Arkansas Writers' Project*, which applied to general interest magazines but exempted religious, professional, trade, and sports magazines, along with all newspapers, suffered the second of these infirmities. In operation, the tax was levied upon a limited number of publishers and also discriminated on the basis of subject matter. *Arkansas Writers' Project*, *supra*, at 229–230. Relying in part on *Minneapolis Star*, we held that this selective taxation of the press warranted strict scrutiny. 481 U. S., at 231.

It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others. In *Leathers v. Medlock*, 499 U. S. 439 (1991), for example, we upheld against First Amendment challenge the application of a general state tax to cable television services, even though the print media and scrambled satellite broadcast television services were exempted from taxation. As *Leathers* illustrates, the fact that a law singles out a certain medium, or even the press as a whole, “is insufficient by itself to raise First Amendment concerns.” *Id.*, at 452. Rather, laws of this nature are “constitutionally suspect only in certain circumstances.” *Id.*, at 444. The taxes invalidated in *Minneapolis Star* and *Arkansas Writers' Project*, for example, targeted a small number of speakers, and thus threatened to “distort the market for ideas.” 499 U. S., at 448. Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas. See *Arkansas Writers' Project*, *supra*, at 228–229; *Minneapolis Star*, 460 U. S., at 585. But such heightened scrutiny is unwarranted when the differential treatment is “justified by some special

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characteristic of” the particular medium being regulated. *Ibid.*

The must-carry provisions, as we have explained above, are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television. Appellants do not argue, nor does it appear, that other media—in particular, media that transmit video programming such as MMDS and SMATV—are subject to bottleneck monopoly control, or pose a demonstrable threat to the survival of broadcast television. It should come as no surprise, then, that Congress decided to impose the must-carry obligations upon cable operators only.

In addition, the must-carry provisions are not structured in a manner that carries the inherent risk of undermining First Amendment interests. The regulations are broad based, applying to almost all cable systems in the country, rather than just a select few. See 47 U. S. C. § 534(b)(1) (1988 ed., Supp. IV) (only cable systems with fewer than 300 subscribers exempted from must-carry). As a result, the provisions do not pose the same dangers of suppression and manipulation that were posed by the more narrowly targeted regulations in *Minneapolis Star* and *Arkansas Writers’ Project*. For these reasons, the must-carry rules do not call for strict scrutiny. See *Leathers, supra*, at 449, 453 (upholding state sales tax which applied to about 100 cable systems “offering a wide variety of programming” because the tax was not “likely to stifle the free exchange of ideas” and posed no “danger of suppress[ion]”).

## III

## A

In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny. We agree

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with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. See *Ward v. Rock Against Racism*, 491 U. S. 781 (1989); *United States v. O'Brien*, 391 U. S. 367 (1968).

Under *O'Brien*, a content-neutral regulation will be sustained if

“it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*, at 377.

To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government’s interests. “Rather, the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Ward, supra*, at 799 (quoting *United States v. Albertini*, 472 U. S. 675, 689 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward, supra*, at 799.

Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming. S. Rep. No. 102–92, p. 58 (1991); H. R. Rep. No. 102–628, p. 63 (1992); 1992 Cable Act, §§ 2(a)(8), (9), and (10). None of these interests is related to the “suppression of free expression,” *O'Brien*, 391 U. S., at 377, or to the content of any speakers’ messages. And

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viewed in the abstract, we have no difficulty concluding that each of them is an important governmental interest. *Ibid.*

In the Communications Act of 1934, Congress created a system of free broadcast service and directed that communications facilities be licensed across the country in a “fair, efficient, and equitable” manner. Communications Act of 1934, § 307(b), 48 Stat. 1083, 47 U. S. C. § 307(b). Congress designed this system of allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern. *United States v. Southwestern Cable Co.*, 392 U. S. 157, 173–174 (1968); Wollenberg, *The FCC as Arbiter of “The Public Interest, Convenience, and Necessity,”* in *A Legislative History of the Communications Act of 1934*, pp. 61, 62–70 (M. Paglin ed. 1989). As we recognized in *Southwestern Cable*, *supra*, the importance of local broadcasting outlets “can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.” *Id.*, at 177. The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene. Although cable and other technologies have ushered in alternatives to broadcast television, nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming. And as we said in *Capital Cities Cable, Inc. v. Crisp*, “protecting noncable households from loss of regular television broadcasting service due to competition from cable systems” is an important federal interest. 467 U. S., at 714.

Likewise, assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, “it has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” ” *United*

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*States v. Midwest Video Corp.*, 406 U. S., at 668, n. 27 (plurality opinion) (quoting *Associated Press v. United States*, 326 U. S., at 20); see also *FCC v. WNCN Listeners Guild*, 450 U. S. 582, 594 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U. S. 775, 795 (1978). Finally, the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment. See *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951); *Associated Press v. United States*, *supra*; cf. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 431–432 (1990).

## B

That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434, 1455 (CA DC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. See *Edenfield v. Fane*, 507 U. S. 761, 770–771 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U. S., at 496 ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, 36 (CA DC 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'" (citation omitted)).

Thus, in applying *O'Brien* scrutiny we must ask first whether the Government has adequately shown that the eco-



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conomic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U. S., at 799. On the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied either inquiry.

In defending the factual necessity for must-carry, the Government relies in principal part on Congress’ legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be “seriously jeopardized.” §2(a)(16). See Brief for Federal Appellees 31–32. The Government contends that this finding, though predictive in nature, must be accorded great weight in the First Amendment inquiry, especially when, as here, Congress has sought to “address the relationship between two technical, rapidly changing, and closely interdependent industries—broadcasting and cable.” *Id.*, at 30.

We agree that courts must accord substantial deference to the predictive judgments of Congress. See, e. g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S., at 103 (The “judgment of the Legislative Branch” should not be ignored “simply because [appellants] cas[t] [their] claims under the umbrella of the First Amendment”). Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. See *FCC v. National Citizens Comm. for Broadcasting*, *supra*, at 814; *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 29 (1961). As an institution, moreover, Congress is far better equipped than the judiciary to “amass and evaluate the vast amounts of data” bearing upon an issue as complex and

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dynamic as that presented here. *Walters v. National Assn. of Radiation Survivors*, 473 U. S. 305, 331, n. 12 (1985). And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.

That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 129 (1989); see also *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829, 843 (1978). This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. See *Century Communications Corp. v. FCC*, 835 F. 2d 292, 304 (CA DC 1987) ("[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures").

The Government's assertion that the must-carry rules are necessary to protect the viability of broadcast television rests on two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.

As support for the first proposition, the Government relies upon a 1988 FCC study showing, at a time when no must-carry rules were in effect, that approximately 20 percent of cable systems reported dropping or refusing carriage to one

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or more local broadcast stations on at least one occasion. See Cable System Broadcast Signal Carriage Survey, Staff Report by the Policy and Rules Division, Mass Media Bureau, p. 10 (Sept. 1, 1988) (Table 2), cited in S. Rep. No. 102-92, at 42-43. The record does not indicate, however, the time frame within which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage. The same FCC study indicates that about 23 percent of the cable operators reported shifting the channel positions of one or more local broadcast stations, and that, in most cases, the repositioning was done for "marketing" rather than "technical" reasons. *Id.*, at 44 (citing Signal Carriage Survey, *supra*, at 19, 22 (Tables 10 and 13)).

The parties disagree about the significance of these statistics. But even if one accepts them as evidence that a large number of broadcast stations would be dropped or repositioned in the absence of must-carry, the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result. Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants. We think it significant, for instance, that the parties have not presented any evidence that local broadcast stations have fallen into bankruptcy, turned in their broadcast licenses, curtailed their broadcast operations, or suffered a serious reduction in operating revenues as a result of their being dropped from, or otherwise disadvantaged by, cable systems.

The paucity of evidence indicating that broadcast television is in jeopardy is not the only deficiency in this record. Also lacking are any findings concerning the actual effects of

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must-carry on the speech of cable operators and cable programmers—*i. e.*, the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters. The answers to these and perhaps other questions are critical to the narrow tailoring step of the *O'Brien* analysis, for unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress “substantially more speech than . . . necessary” to ensure the viability of broadcast television. *Ward*, 491 U.S., at 799. Finally, the record fails to provide any judicial findings concerning the availability and efficacy of “constitutionally acceptable less restrictive means” of achieving the Government’s asserted interests. See *Sable Communications*, *supra*, at 129.

In sum, because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

The judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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JUSTICE BLACKMUN, concurring.

I join JUSTICE KENNEDY's opinion, which aptly identifies and analyzes the First Amendment concerns and principles that should guide consideration of free speech issues in the expanding cable industry. I write to emphasize the paramount importance of according substantial deference to the predictive judgments of Congress, see, *e. g.*, *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 103 (1973), particularly where, as here, that legislative body has compiled an extensive record in the course of reaching its judgment. Nonetheless, the standard for summary judgment is high, and no less so when First Amendment values are at stake and the issue is of far-reaching importance. Because in this case there remain a few unresolved issues of material fact, a remand is appropriate. The Government had occasion to submit to the District Court only portions of the record developed by Congress. In light of the Court's opinion today, those portions, which were submitted to defeat a motion for summary judgment, are not adequate to support one. The record before the District Court no doubt will benefit from any additional evidence the Government and the other parties now see fit to present.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

As JUSTICE KENNEDY has ably explained, the "overriding congressional purpose" of the challenged must-carry provisions of the 1992 Cable Act is to "guarantee the survival of a medium that has become a vital part of the Nation's communication system," a purpose that is "unrelated to the content of expression." *Ante*, at 647. The public interests in protecting access to television for the millions of homes without cable and in assuring the availability of "a multiplicity of information sources" are unquestionably substantial. *Ante*, at 663. The must-carry provisions are amply "justi-

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fied by special characteristics of the cable medium,” namely, “the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.” *Ante*, at 661. Cable operators’ control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media.

While I agree with most of JUSTICE KENNEDY’s reasoning, and join Parts I, II–C, II–D, and III–A of his opinion, I part ways with him on the appropriate disposition of this case. In my view the District Court’s judgment sustaining the must-carry provisions should be affirmed. The District Court majority evaluated §§ 4 and 5 as content-neutral regulations of protected speech according to the same standard that JUSTICE KENNEDY’s opinion instructs it to apply on remand. In my view, the District Court reached the correct result the first time around. Economic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effect of legal rules in complex conditions. Whether Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the pro-*tean* communications industry; and indeed whether must-carry is actually imprudent as a matter of policy will remain matters of debate long after the 1992 Act has been repealed or replaced by successor legislation. But the question for us is merely whether *Congress* could fairly conclude that cable operators’ monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk.<sup>1</sup>

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<sup>1</sup> I have no quarrel with JUSTICE KENNEDY’s general statement that the question for the reviewing court in a case of this kind is merely whether “Congress has drawn reasonable inferences based on substantial evidence,” given his caveat that Congress need not compile or restrict itself to a formal record in the manner required of a judicial or administrative

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As JUSTICE KENNEDY recognizes, *ante*, at 665–666, findings by the Congress, particularly those emerging from such sustained deliberations, merit special respect from this Court.<sup>2</sup> Accorded proper deference, the findings in §2 are sufficient to sustain the must-carry provisions against facial attack. Congress’ conclusion, for example, that broadcasters who are denied carriage on cable systems will suffer serious and potentially terminal economic harm, see §2(a)(16), requires no “further demonstration.” See *ante*, at 667. Because 60% of American households have cable, and because most cable subscribers rely solely on that medium to receive video signals, it is a practical certainty that a broadcaster dropped from the local cable system would suffer substantial economic harm. It is also clear that cable operators—particularly (but not exclusively) those affiliated with cable programmers—have both the ability and the economic incentive to exploit their gatekeeper status to the detriment of broadcasters. Thus, even if Congress had had before it no historical evidence that terminations or refusals of carriage had already occurred,<sup>3</sup> it could reasonably infer that cable operators’ bottleneck control, together with the already high degree of vertical integration in the industry, would motivate

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factfinder. *Ante*, at 666. In my view, however, application of that standard would require affirmance here.

<sup>2</sup> As JUSTICE KENNEDY observes, *ibid.*, we cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech, see *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829, 843 (1978) (both cited *ante*, at 666), or restrictions imposed by administrative agencies, see, e. g., *Century Communications Corp. v. FCC*, 835 F. 2d 292, 304 (CA DC 1987) (cited *ante*, at 666).

<sup>3</sup> But see H. R. Rep. No. 102–628, pp. 50–57 (1992); S. Rep. No. 102–92, pp. 43–44 (1991).

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such conduct in the near future.<sup>4</sup> Indeed, the main thrust of the most pertinent congressional findings is not that cable carriers have already eliminated broadcast competition on a grand scale, but that given their market power they may soon do so.<sup>5</sup>

An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly. The mandatory access mechanism that Congress fashioned in §§4 and 5 of the 1992 Act is a simple and direct means of dealing with the dangers posed by cable operators' exclusive control of what is fast becoming the preeminent means of transferring video signals to homes. The must-carry mechanism is analogous to the relief that might be appropriate for a threatened violation of the antitrust laws; one need only refer to undisputed facts concerning the structure of the cable and broadcast industries to agree that that threat is at least plausible. Moreover, Congress did not have to find that all broadcasters were at risk before acting to protect vulnerable ones, for the interest in preserving ac-

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<sup>4</sup> As Judge Jackson put it in his opinion for the District Court:

"[E]ven if the state of the broadcasting industry is not now as parlous as the defendants contend, the Court finds it to be indisputable on this record that cable operators have attained a position of dominance in the video signal distribution market, and can henceforth exercise the attendant market power. The Court does not find improbable Congress' conclusion that this market power provides cable operators with both incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy. In light of the considerable body of evidence amassed by Congress, and the deference this Court should accord to the factfinding abilities of the nation's legislature, the Court must conclude that the danger perceived by Congress is real and substantial." 819 F. Supp. 32, 46 (DC 1993) (citations omitted).

<sup>5</sup> See §2(a)(16) ("As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, . . . the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized"); see also §§2(a)(15), 2(a)(17).



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cess to free television is valid throughout the Nation. Indeed, the Act is well tailored to assist those broadcasters who are most in jeopardy. Because thriving commercial broadcasters will likely avail themselves of the remunerative “retransmission consent” procedure of § 6, those broadcasters who gain access via the § 4 must-carry route are apt to be the most economically vulnerable ones. Precisely how often broadcasters will secure carriage through § 6 rather than § 4 will depend upon future developments; the very unpredictability of this and other effects of the new regulatory scheme militates in favor of allowing the scheme to proceed rather than requiring a perfectly documented or entirely complete *ex ante* justification.

JUSTICE KENNEDY asks the three-judge panel to take additional evidence on such matters as whether the must-carry provisions really respond to threatened harms to broadcasters, whether §§ 4–5 “will in fact alleviate these harms in a direct and material way,” *ante*, at 664, and “the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections,” *ante*, at 668. While additional evidence might cast further light on the efficacy and wisdom of the must-carry provisions, additional evidence is not necessary to resolve the question of their facial constitutionality.<sup>6</sup>

To predicate the facial validity of the must-carry provisions upon forecasts of the ultimate consequences of their implementation is to ask the District Court to address questions that are not at present susceptible of reliable answers. Some of the matters the lead opinion singles out for further

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<sup>6</sup>The must-carry obligations may be broader than necessary to protect vulnerable broadcasters, but that would not alone be enough to demonstrate that they violate the First Amendment. Thus, for instance, to the extent that §§ 4 and 5 obligate cable operators to carry broadcasters they would have carried even in the absence of a statutory obligation, any impairment of operators’ freedom of choice, or on cable programmers’ ability to secure carriage, would be negligible.

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review—for example, “the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters,” *ibid.*—depend upon predictions about the future voluntary actions of entities who are parties to this case. At best, a remand for consideration of such factors will require the District Court to engage in speculation; it may actually invite the parties to adjust their conduct in an effort to affect the result of this litigation (perhaps by opting to drop cable programs rather than seeking to increase total channel capacity). The must-carry provisions may ultimately prove an ineffective or needlessly meddling means of achieving Congress’ legitimate goals. However, such a conclusion could be confidently drawn, if ever, only after the must-carry scheme has been tested by experience. On its face, that scheme is rationally calculated to redress the dangers that Congress discerned after its lengthy investigation of the relationship between the cable and broadcasting industries.

It is thus my view that we should affirm the judgment of the District Court. Were I to vote to affirm, however, no disposition of this appeal would command the support of a majority of the Court. An accommodation is therefore necessary. See *Screws v. United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). Accordingly, because I am in substantial agreement with JUSTICE KENNEDY’s analysis of the case, I concur in the judgment vacating and remanding for further proceedings.

JUSTICE O’CONNOR, with whom JUSTICE SCALIA and JUSTICE GINSBURG join, and with whom JUSTICE THOMAS joins as to Parts I and III, concurring in part and dissenting in part.

There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must-carry provisions of the Cable

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Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1460, Congress made a choice: By reserving a little over one-third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.

## I

## A

The 1992 Cable Act implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must carry, and keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. *Ante*, at 636. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Second, the Act deprives a certain class of video programmers—those who operate cable channels rather than broadcast stations—of access to over one-third of an entire medium. Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the Government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to non-profit publishers. As the Court explains in Parts I, II–A, and II–B of its opinion, which I join, cable programmers and

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operators stand in the same position under the First Amendment as do the more traditional media.

Under the First Amendment, it is normally not within the government's power to decide who may speak and who may not, at least on private property or in traditional public fora. The government does have the power to impose content-neutral time, place, and manner restrictions, but this is in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions. See, e. g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U. S. 575, 584, 591–592 (1983); see also *Leathers v. Medlock*, 499 U. S. 439, 447 (1991).

I agree with the Court that some speaker-based restrictions—those genuinely justified without reference to content—need not be subject to strict scrutiny. But looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as §2 of the Act, and which I must assume state the justifications for the law, make this clear. “There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.” §2(a)(6). “[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens.” §2(a)(8)(A). “A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.” §2(a)(10). “Broadcast television stations continue to be an important source of local news and

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public affairs programming and other local broadcast services critical to an informed electorate.” § 2(a)(11).

Similar justifications are reflected in the operative provisions of the Act. In determining whether a broadcast station should be eligible for must-carry in a particular market, the Federal Communications Commission (FCC) must “afford particular attention to the value of localism by taking into account such factors as . . . whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.” § 4, 47 U. S. C. § 534(h)(1)(C)(ii) (1988 ed., Supp. IV). In determining whether a low-power station is eligible for must-carry, the FCC must ask whether the station “would address local news and informational needs which are not being adequately served by full power television broadcast stations.” § 4, 47 U. S. C. § 534(h)(2)(B) (1988 ed., Supp. IV). Moreover, the Act distinguishes between commercial television stations and noncommercial educational television stations, giving special benefits to the latter. Compare § 4 with § 5. These provisions may all be technically severable from the statute, but they are still strong evidence of the statute’s justifications.

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 117 (1991); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 228 (1987). The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally

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prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable. See, *e. g.*, *id.*, at 231–232; *Regan v. Time, Inc.*, 468 U. S. 641, 648–649 (1984); *Metromedia, Inc. v. San Diego*, 453 U. S. 490, 514–515 (1981) (plurality opinion); *Carey v. Brown*, 447 U. S. 455, 466–468 (1980); *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972); *Cox v. Louisiana*, 379 U. S. 536, 581 (1965) (Black, J., concurring); see also *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992) (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed”).

This is why the Court is mistaken in concluding that the interest in diversity—in “access to a multiplicity” of “diverse and antagonistic sources,” *ante*, at 663 (internal quotation marks omitted)—is content neutral. Indeed, the interest is not “related to the *suppression* of free expression,” *ante*, at 662 (emphasis added and internal quotation marks omitted), but that is not enough for content neutrality. The interest in giving a tax break to religious, sports, or professional magazines, see *Arkansas Writers' Project, supra*, is not related to the suppression of speech; the interest in giving labor picketers an exemption from a general picketing ban, see *Carey* and *Mosley, supra*, is not related to the suppression of speech. But they are both related to the *content* of speech—to its communicative impact. The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.

## B

The Court dismisses the findings quoted above by speculating that they do not reveal a preference for certain kinds of content; rather, the Court suggests, the findings show “nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by

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cable.” *Ante*, at 648. I cannot agree. It is rare enough that Congress states, in the body of the statute itself, the findings underlying its decision. When it does, it is fair to assume that those findings reflect the basis for the legislative decision, especially when the thrust of the findings is further reflected in the rest of the statute. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 534–535 (1993) (relying on recitals in a city council resolution as evidence of the justifications for an ordinance).

Moreover, it does not seem likely that Congress would make extensive findings merely to show that broadcast television is valuable. The controversial judgment at the heart of the statute is not that broadcast television has some value—obviously it does—but that broadcasters should be preferred over cable programmers. The best explanation for the findings, it seems to me, is that they represent Congress’ reasons for adopting this preference; and, according to the findings, these reasons rest in part on the content of broadcasters’ speech. To say in the face of the findings that the must-carry rules “impose burdens and confer benefits without reference to the content of speech,” *ante*, at 643, cannot be correct, especially in light of the care with which we must normally approach speaker-based restrictions. See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U. S. 575 (1983).

It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral. See *Arkansas Writers’ Project, Inc.*, *supra* (striking down content-based exemptions in a general revenue measure); *Regan v. Time, Inc.*, *supra* (striking down content-based exemptions in a general anticounterfeiting statute);

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*Metromedia, Inc. v. San Diego, supra* (plurality opinion) (striking down on content discrimination grounds a general urban beautification ordinance); *Carey v. Brown, supra*, at 466–468 (striking down on content discrimination grounds an ordinance aimed at preserving residential privacy). Of course, the mere possibility that a statute might be justified with reference to content is not enough to make the statute content based, and neither is evidence that some legislators voted for the statute for content-based reasons. But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.

## C

Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988). This is an exacting test. It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.

The interest in localism, either in the dissemination of opinions held by the listeners' neighbors or in the reporting of events that have to do with the local community, cannot be described as "compelling" for the purposes of the compelling state interest test. It is a legitimate interest, perhaps even an important one—certainly the government can foster it by, for instance, providing subsidies from the public fisc—but it does not rise to the level necessary to justify content-based speech restrictions. It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict



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other speakers on the theory that what they say is more conventional. Cf. *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 612–613 (1990) (O'CONNOR, J., dissenting); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 20 (1986) (plurality opinion).

The interests in public affairs programming and educational programming seem somewhat weightier, though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech. We have never held that the Government could impose educational content requirements on, say, newsstands, bookstores, or movie theaters; and it is not clear that such requirements would in any event appreciably further the goals of public education.

But even assuming, *arguendo*, that the Government could set some channels aside for educational or news programming, the Act is insufficiently tailored to this goal. To benefit the educational broadcasters, the Act burdens more than just the cable entertainment programmers. It equally burdens CNN, C-SPAN, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs.

Even if the Government can restrict entertainment in order to benefit supposedly more valuable speech, I do not think the restriction can extend to other speech that is as valuable as the speech being benefited. In the rare circumstances where the government may draw content-based distinctions to serve its goals, the restrictions must serve the goals a good deal more precisely than this. See *Arkansas Writers' Project, Inc.*, 481 U. S., at 231–232; *Erznoznik v. Jacksonville*, 422 U. S. 205, 214–215 (1975).

Finally, my conclusion that the must-carry rules are content based leads me to conclude that they are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech. For reasons related to the content of speech, the rules restrict the ability of cable operators to put on the programming they prefer,

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and require them to include programming they would rather avoid. This, it seems to me, puts this case squarely within the rule of *Pacific Gas & Elec. Co.*, 475 U. S., at 14–15 (plurality opinion); *id.*, at 23–24 (Marshall, J., concurring in judgment); see also *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 257–258 (1974).

## II

Even if I am mistaken about the must-carry provisions being content based, however, in my view they fail content-neutral scrutiny as well. Assuming, *arguendo*, that the provisions are justified with reference to the content-neutral interests in fair competition and preservation of free television, they nonetheless restrict too much speech that does not implicate these interests.

Sometimes, a cable system's choice to carry a cable programmer rather than a broadcaster may be motivated by anticompetitive impulses, or might lead to the broadcaster going out of business. See *ante*, at 661–668. That some speech within a broad category causes harm, however, does not justify restricting the whole category. If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that. But it may not, in the course of advancing these interests, restrict cable operators and programmers in circumstances where neither of these interests is threatened.

“A regulation is not ‘narrowly tailored’—even under the more lenient [standard applicable to content-neutral restrictions]—where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals.” *Simon & Schuster*, 502 U. S., at 122, n. (internal quotation marks omitted). If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. *Schneider v. State (Town of Irvington)*, 308 U. S. 147 (1939). If the government wants to avoid fraudulent po-

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litical fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980); see also *Edenfield v. Fane*, 507 U. S. 761, 776–777 (1993). If the government wants to protect householders from unwanted solicitors, it may enforce “No Soliciting” signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say. *Martin v. City of Struthers*, 319 U. S. 141 (1943). “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . .” *NAACP v. Button*, 371 U. S. 415, 438 (1963) (citations omitted).

The must-carry provisions are fatally overbroad, even under a content-neutral analysis: They disadvantage cable programmers even if the operator has no anticompetitive motives, and even if the broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access. None of the factfinding that the District Court is asked to do on remand will change this. The Court does not suggest that either the antitrust interest or the loss of free television interest are implicated in all, or even most, of the situations in which must-carry makes a difference. Perhaps on remand the District Court will find out just how many broadcasters will be jeopardized, but the remedy for this jeopardy will remain the same: Protect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event.

### III

Having said all this, it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the question is who will have this control. Under the FCC’s view, the answer is Congress, acting within relatively broad limits. Under my

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view, the answer is the cable operator. Most of the time, the cable operator's decision will be largely dictated by the preferences of the viewers; but because many cable operators are indeed monopolists, the viewers' preferences will not always prevail. Our recognition that cable operators are speakers is bottomed in large part on the very fact that the cable operator has editorial discretion. *Ante*, at 636–637.

I have no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch. And I have no doubt that Congress can act to relieve this danger. In other provisions of the Act, Congress has already taken steps to foster competition among cable systems. §3(a), 47 U. S. C. §543(a)(2) (1988 ed., Supp. IV). Congress can encourage the creation of new media, such as inexpensive satellite broadcasting, or fiber-optic networks with virtually unlimited channels, or even simple devices that would let people easily switch from cable to over-the-air broadcasting. And of course Congress can subsidize broadcasters that it thinks provide especially valuable programming.

Congress may also be able to act in more mandatory ways. If Congress finds that cable operators are leaving some channels empty—perhaps for ease of future expansion—it can compel the operators to make the free channels available to programmers who otherwise would not get carriage. See *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 88 (1980) (upholding a compelled access scheme because it did not burden others' speech). Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or time-sharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.

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But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals. Perhaps Congress can to some extent restrict, even in a content-based manner, the speech of cable operators and cable programmers. But it must do so in compliance with the constitutional requirements, requirements that were not complied with here. Accordingly, I would reverse the judgment below.

JUSTICE GINSBURG, concurring in part and dissenting in part.

Substantially for the reasons stated by Circuit Judge Williams in his opinion dissenting from the three-judge District Court's judgment, 819 F. Supp. 32, 57 (DC 1993), I conclude that Congress' "must-carry" regime, which requires cable operators to set aside just over one-third of their channels for local broadcast stations, reflects an unwarranted content-based preference and hypothesizes a risk to local stations that remains imaginary. I therefore concur in Parts I, II-A, and II-B of the Court's opinion, and join JUSTICE O'CONNOR's opinion concurring in part and dissenting in part.

The "must-carry" rules Congress has ordered do not differentiate on the basis of "viewpoint," and therefore do not fall in the category of speech regulation that Government must avoid most assiduously. See *R. A. V. v. St. Paul*, 505 U. S. 377, 430 (1992) (STEVENS, J., concurring in judgment) ("[W]e have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious."). The rules, however, do reflect a content preference, and on that account demand close scrutiny.

The Court has identified as Congress' "overriding objective in enacting must-carry," the preservation of over-the-air

## Opinion of GINSBURG, J.

television service for those unwilling or unable to subscribe to cable, and has remanded the case for further airing centered on that allegedly overriding, content-neutral purpose. *Ante*, at 646–648, 666–668. But an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress’ evident plan to advance local programming. See *ante*, at 676–677, 679–680 (O’CONNOR, J., concurring in part and dissenting in part).

As Circuit Judge Williams stated:

“Congress rested its decision to promote [local broadcast] stations in part, but quite explicitly, on a finding about their content—that they were ‘an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.’” 819 F. Supp., at 58, quoting Cable Television Consumer Protection and Competition Act of 1992, §2(a)(11).

Moreover, as Judge Williams persuasively explained, “[the] facts do not support an inference that over-the-air TV is at risk,” 819 F. Supp., at 63, see *id.*, at 62–65; “[w]hatever risk there may be in the abstract has completely failed to materialize.” *Id.*, at 63. “The paucity of evidence indicating that broadcast television is in jeopardy,” see *ante*, at 667, if it persists on remand, should impel an ultimate judgment for the appellants.

## Syllabus

BOARD OF EDUCATION OF KIRYAS JOEL VIL-  
LAGE SCHOOL DISTRICT *v.* GRUMET

## CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 93–517. Argued March 30, 1994—Decided June 27, 1994\*

The New York village of Kiryas Joel is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. Its incorporators intentionally drew its boundaries under the State's general village incorporation law to exclude all but Satmars. The village fell within the Monroe-Woodbury Central School District until a special state statute, 1989 N. Y. Laws, ch. 748, carved out a separate district that follows village lines. Although the statute gives a locally elected school board plenary authority over primary and secondary education in the village, the board currently runs only a special education program for handicapped children; other village children attend private religious schools, which do not offer special educational services. Shortly before the new district began operations, respondents and others brought this action claiming, *inter alia*, that Chapter 748 violates the Establishment Clause of the First Amendment. The state trial court granted summary judgment for respondents, and both the intermediate appellate court and the New York Court of Appeals affirmed, ruling that Chapter 748's primary effect was impermissibly to advance religion.

*Held:* The judgment is affirmed.

81 N. Y. 2d 518, 618 N. E. 2d 94, affirmed.

JUSTICE SOUTER delivered the opinion of the Court with respect to Parts II–B, II–C, and III, concluding that Chapter 748 violates the Establishment Clause. Pp. 702–710.

(a) Because the Kiryas Joel Village School District did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, there is no assurance that the next religious community seeking a school district of its own will receive one. The anomalously case-specific creation of this district for a religious community leaves the Court without any way to review such state action for the purpose of safeguarding the principle that government should not prefer one religion to another, or religion to irreligion. Nor can the historical context furnish any reason to suppose that the Sat-

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\*Together with No. 93–527, *Board of Education of Monroe-Woodbury Central School District v. Grumet et al.*, and No. 93–539, *Attorney General of New York v. Grumet et al.*, also on certiorari to the same court.

## Syllabus

mars are merely one in a series of similarly benefited communities, the special Act in these cases being entirely at odds with New York's historical trend. Pp. 702–705.

(b) Although the Constitution allows the State to accommodate religious needs by alleviating special burdens, Chapter 748 crosses the line from permissible accommodation to impermissible establishment. There are, however, several alternatives for providing bilingual and bicultural special education to Satmar children that do not implicate the Establishment Clause. The Monroe-Woodbury school district could offer an educationally appropriate program at one of its public schools or at a neutral site near one of the village's parochial schools, and if the state legislature should remain dissatisfied with the local district's responsiveness, it could enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings. Pp. 705–708.

JUSTICE SOUTER, joined by JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG, concluded in Part II–A that by delegating the State's discretionary authority over public schools to a group defined by its common religion, Chapter 748 brings about an impermissible “fusion” of governmental and religious functions. See *Larkin v. Grendel's Den, Inc.*, 459 U. S. 116, 126, 127. That a religious criterion was the defining test is shown by the legislature's undisputed knowledge that the village was exclusively Satmar when the statute was adopted; by the fact that the creation of such a small and specialized school district ran uniquely counter to customary districting practices in the State; and by the district's origin in a special and unusual legislative Act rather than the State's general laws for school district organization. The result is that the legislature has delegated civic authority on the basis of religious belief rather than on neutral principles. Pp. 696–702.

JUSTICE KENNEDY, agreeing that the Kiryas Joel Village School District violates the Establishment Clause, concluded that the school district's real vice is that New York created it by drawing political boundaries on the basis of religion. See, *e. g.*, *Shaw v. Reno*, 509 U. S. 630, 648–649. There is more than a fine line between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith. In creating the district in question, New York crossed that line. Pp. 728–730.

SOUTER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, II–C, and III, in which BLACKMUN, STEVENS, O'CONNOR, and GINSBURG, JJ., joined, and an opin-



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ion with respect to Parts II (introduction) and II–A, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 710. STEVENS, J., filed a concurring opinion, in which BLACKMUN and GINSBURG, JJ., joined, *post*, p. 711. O’CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 712. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 722. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 732.

*Nathan Lewin* argued the cause for petitioners in Nos. 93–517 and 93–527. With him on the briefs was *Lisa D. Burget*.

*Julie S. Mereson*, Assistant Attorney General of New York, argued the cause for petitioners in No. 93–539. With her on the briefs were *G. Oliver Koppell*, Attorney General, *Jerry Boone*, Solicitor General, and *Peter H. Schiff*, Deputy Solicitor General. *Lawrence W. Reich* and *John H. Gross* filed briefs for petitioner Board of Education of the Monroe-Woodbury Central School District.

*Jay Worona* argued the cause for respondents in all cases. With him on the brief was *Pilar Sokol*.†

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†Briefs of *amici curiae* urging reversal in No. 93–517 were filed for the Archdiocese of New York by *Richard J. Concannon*; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *James Matthew Henderson, Sr.*, *Mark N. Troobnick*, *Keith A. Fournier*, *Nancy J. Gannon*, and *Robert A. Destro*; for the Christian Legal Society et al. by *Michael W. McConnell*, *Thomas C. Berg*, and *Steven T. McFarland*; and for the Knights of Columbus by *William P. Barr*, *Michael A. Carvin*, and *Carl A. Anderson*.

Briefs of *amici curiae* urging reversal in all cases were filed for Agudath Israel of America by *David Zwiebel*; for the Institute for Religion and Polity by *Ronald D. Maines*; for the National Jewish Commission on Law and Public Affairs (COLPA) by *Julius Berman* and *Dennis Rapps*; for the Southern Baptist Convention by *Michael K. Whitehead*; and for the United States Catholic Conference by *Mark E. Chopko* and *Phillip H. Harris*.

Briefs of *amici curiae* urging affirmance in all cases were filed for the American Jewish Congress et al. by *Norman Redlich*, *Marc D. Stern*, and *Elliot Minberg*; for Americans United for Separation of Church and State et al. by *Steven K. Green*, *Steven R. Shapiro*, *Jeffrey P. Sinensky*, *Steven*

JUSTICE SOUTER delivered the opinion of the Court, except as to Parts II (introduction) and II-A.

The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. The village fell within the Monroe-Woodbury Central School District until a special state statute passed in 1989 carved out a separate district, following village lines, to serve this distinctive population. 1989 N. Y. Laws, ch. 748. The question is whether the Act creating the separate school district violates the Establishment Clause of the First Amendment, binding on the States through the Fourteenth Amendment. Because this unusual Act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment.

## I

The Satmar Hasidic sect takes its name from the town near the Hungarian and Romanian border where, in the early years of this century, Grand Rebbe Joel Teitelbaum molded the group into a distinct community. After World War II and the destruction of much of European Jewry, the Grand

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*M. Freeman*, and *Samuel Rabinove*; for the Committee for the Well-Being of Kiryas Joel by *Joan E. Goldberg* and *Michael H. Sussman*; for the General Council on Finance and Administration of the United Methodist Church by *Samuel W. Witwer, Jr.*; for the National Coalition for Public Education and Religious Liberty et al. by *David B. Isbell*; for the National Council of Churches of Christ in the U. S. A. et al. by *Douglas Laycock*; for the National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*; for the New York State United Teachers et al. by *Bernard F. Ashe* and *Gerard John De Wolf*; and for the Council on Religious Freedom by *Lee Boothby*, *Walter E. Carson*, and *Robert W. Nixon*.

Briefs of *amici curiae* in all cases were filed for the New York Committee for Public Education and Religious Liberty by *Stanley Geller*; and for the Rutherford Institute by *John W. Whitehead* and *James J. Knicely*.

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Rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York. Then, 20 years ago, the Satmars purchased an approved but undeveloped subdivision in the town of Monroe and began assembling the community that has since become the village of Kiryas Joel. When a zoning dispute arose in the course of settlement, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties. See N. Y. Village Law, Art. 2 (McKinney 1973 and Supp. 1994). Neighbors who did not wish to secede with the Satmars objected strenuously, and after arduous negotiations the proposed boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today. Rabbi Aaron Teitelbaum, eldest son of the current Grand Rebbe, serves as the village rov (chief rabbi) and rosh yeshivah (chief authority in the parochial schools).

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers. See generally W. Kephart & W. Zellner, *Extraordinary Groups* (4th ed. 1991); I. Rubin, *Satmar, An Island in the City* (1972).

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. Individuals with Disabilities Education Act, 20 U. S. C. § 1400 *et seq.* (1988 ed. and Supp. IV); N. Y. Educ. Law, Art. 89 (McKinney 1981 and Supp. 1994). Starting in 1984 the Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to our decisions in *Aguilar v. Felton*, 473 U. S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373 (1985). Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing “the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different,” and some sought administrative review of the public-school placements. *Board of Ed. of Monroe-Woodbury Central School Dist. v. Wieder*, 72 N. Y. 2d 174, 180–181, 527 N. E. 2d 767, 770 (1988).

Monroe-Woodbury, for its part, sought a declaratory judgment in state court that New York law barred the district from providing special education services outside the district’s regular public schools. *Id.*, at 180, 527 N. E. 2d, at 770. The New York Court of Appeals disagreed, holding that state law left Monroe-Woodbury free to establish a separate school in the village because it gives educational authorities broad discretion in fashioning an appropriate program. *Id.*, at 186–187, 527 N. E. 2d, at 773. The court added, however, that the Satmars’ constitutional right to exercise their religion freely did not require a separate school, since the parents had alleged emotional trauma, not inconsistency

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with religious practice or doctrine, as the reason for seeking separate treatment. *Id.*, at 189, 527 N. E. 2d, at 775.

By 1989, only one child from Kiryas Joel was attending Monroe-Woodbury's public schools; the village's other handicapped children received privately funded special services or went without. It was then that the New York Legislature passed the statute at issue in this litigation, which provided that the village of Kiryas Joel "is constituted a separate school district, . . . and shall have and enjoy all the powers and duties of a union free school district . . . ." 1989 N. Y. Laws, ch. 748.<sup>1</sup> The statute thus empowered a locally elected board of education to take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations. N. Y. Educ. Law § 1709 (McKinney 1988). In signing the bill into law, Governor Cuomo recognized that the residents of the new school district were "all members of the same religious sect," but said that the bill was "a good faith effort to solve th[e] unique problem" associated with providing special education services to handicapped children in the village. Memorandum filed with Assembly Bill Number 8747 (July 24, 1989), App. 40–41.

Although it enjoys plenary legal authority over the elementary and secondary education of all school-aged children

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<sup>1</sup>The statute provides in full:

"Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

"§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

"§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law."

in the village, N. Y. Educ. Law § 3202 (McKinney 1981 and Supp. 1994), the Kiryas Joel Village School District currently runs only a special education program for handicapped children. The other village children have stayed in their parochial schools, relying on the new school district only for transportation, remedial education, and health and welfare services. If any child without a handicap in Kiryas Joel were to seek a public-school education, the district would pay tuition to send the child into Monroe-Woodbury or another school district nearby. Under like arrangements, several of the neighboring districts send their handicapped Hasidic children into Kiryas Joel, so that two thirds of the full-time students in the village's public school come from outside. In all, the new district serves just over 40 full-time students, and two or three times that many parochial school students on a part-time basis.

Several months before the new district began operations, the New York State School Boards Association and respondents Grumet and Hawk brought this action against the State Education Department and various state officials, challenging Chapter 748 under the National and State Constitutions as an unconstitutional establishment of religion.<sup>2</sup> The State Supreme Court for Albany County allowed the Kiryas Joel Village School District and the Monroe-Woodbury Central School District to intervene as parties defendant and accepted the parties' stipulation discontinuing the action against the original state defendants, although the attorney general of New York continued to appear to defend the constitutionality of the statute. See N. Y. Exec. Law § 71 (Mc-

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<sup>2</sup> Messrs. Grumet and Hawk sued in both their individual capacities and as officers of the State School Boards Association, but New York's Appellate Division ruled that the Association and its officers lacked standing to challenge the constitutionality of Chapter 748. 187 App. Div. 2d 16, 19, 592 N. Y. S. 2d 123, 126 (1992). Thus, as the case comes to us, respondents are simply citizen taxpayers. See N. Y. State Fin. Law § 123 (McKinney 1989).

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Kinney 1993). On cross-motions for summary judgment, the trial court ruled for the plaintiffs (respondents here), finding that the statute failed all three prongs of the test in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and was thus unconstitutional under both the National and State Constitutions. *Grumet v. New York State Ed. Dept.*, 151 Misc. 2d 60, 579 N. Y. S. 2d 1004 (1992).

A divided Appellate Division affirmed on the ground that Chapter 748 had the primary effect of advancing religion, in violation of both constitutions, 187 App. Div. 2d 16, 592 N. Y. S. 2d 123 (1992), and the State Court of Appeals affirmed on the federal question, while expressly reserving the state constitutional issue, 81 N. Y. 2d 518, 618 N. E. 2d 94 (1993). Judge Smith wrote for the court in concluding that because both the district's public-school population and its school board would be exclusively Hasidic, the statute created a "symbolic union of church and State" that was "likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval" of their own. *Id.*, at 529, 618 N. E. 2d, at 100. As a result, said the majority, the statute's primary effect was an impermissible advancement of religious belief. In a concurring opinion, Judge Hancock found the effect purposeful, so that the statute violated the first as well as the second prong of *Lemon*. 81 N. Y. 2d, at 540, 618 N. E. 2d, at 107. Chief Judge Kaye took a different tack, applying the strict scrutiny we have prescribed for statutes singling out a particular religion for special privileges or burdens; she found Chapter 748 invalid as an unnecessarily broad response to a narrow problem, since it creates a full school district instead of simply prescribing a local school for the village's handicapped children. *Id.*, at 532, 618 N. E. 2d, at 102 (concurring opinion). In dissent, Judge Bellacosa objected that the new district was created to enable the village's handicapped children to receive a secular, public-school education; that this was, indeed, its primary effect; and that any attenuated ben-

efit to religion was a reasonable accommodation of both religious and cultural differences. *Id.*, at 550–551, 618 N. E. 2d, at 113.

We stayed the mandate of the Court of Appeals, 509 U. S. 938 (1993), and granted certiorari, 510 U. S. 989 (1993).

## II

“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion,” *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U. S. 756, 792–793 (1973), favoring neither one religion over others nor religious adherents collectively over nonadherents. See *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968). Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.

*Larkin v. Grendel’s Den, Inc.*, 459 U. S. 116 (1982), provides an instructive comparison with the litigation before us. There, the Court was requested to strike down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses. Under the statute, the governing body of any church, synagogue, or school located within 500 feet of an applicant’s premises could, simply by submitting written objection, prevent the Alcohol Beverage Control Commission from issuing a license. *Id.*, at 117. In spite of the State’s valid interest in protecting churches, schools, and like institutions from “‘the hurly-burly’ associated with liquor outlets,” *id.*, at 123 (internal quotation marks omitted), the Court found that in two respects the statute violated “[t]he wholesome ‘neutrality’ of which this Court’s cases speak,” *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 222 (1963). The Act brought about a “‘fusion of



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governmental and religious functions’” by delegating “important, discretionary governmental powers” to religious bodies, thus impermissibly entangling government and religion. 459 U. S., at 126, 127 (quoting *School Dist. of Abington Township v. Schempp*, *supra*, at 222); see also *Lemon v. Kurtzman*, *supra*, at 613. And it lacked “any ‘effective means of guaranteeing’ that the delegated power ‘[would] be used exclusively for secular, neutral, and nonideological purposes,’” 459 U. S., at 125 (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, *supra*, at 780); this, along with the “significant symbolic benefit to religion” associated with “the mere appearance of a joint exercise of legislative authority by Church and State,” led the Court to conclude that the statute had a “‘primary’ and ‘principal’ effect of advancing religion,” 459 U. S., at 125–126; see also *Lemon v. Kurtzman*, *supra*, at 612. Comparable constitutional problems inhere in the statute before us.

## A

*Larkin* presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America, cf. *Wolman v. Walter*, 433 U. S. 229, 263 (1977) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part), and a violation of “the core rationale underlying the Establishment Clause,” 459 U. S., at 126. See also *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 590–591 (1989) (Establishment Clause prevents delegating governmental power to religious group); *id.*, at 660 (KENNEDY, J., concurring in judgment in part and dissenting in part) (same); *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947) (Establishment Clause prevents State from “participat[ing] in the affairs of any religious organizations or groups and *vice versa*”); *Torcaso v. Watkins*, 367 U. S. 488, 493–494 (1961) (same).

The Establishment Clause problem presented by Chapter 748 is more subtle, but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State, N. Y. Const., Art. XI, § 1, and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group. What makes this litigation different from *Larkin* is the delegation here of civic power to the “qualified voters of the village of Kiryas Joel,” 1989 N. Y. Laws, ch. 748, as distinct from a religious leader such as the village rov, or an institution of religious government like the formally constituted parish council in *Larkin*. In light of the circumstances of these cases, however, this distinction turns out to lack constitutional significance.

It is, first, not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group’s leaders or officers. Although some school district franchise is common to all voters, the State’s manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision. In the circumstances of these cases, the difference between thus vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance. It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise, see *McDaniel v. Paty*, 435 U. S. 618 (1978), which the First Amendment guarantees as certainly as it bars any establishment. But *McDaniel*, which held that a religious individual could not, because of his religious activities, be denied the right to hold political office, is not in point here. That individuals who happen to be religious

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may hold public office does not mean that a State may deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity. If New York were to delegate civic authority to “the Grand Rebbe,” *Larkin* would obviously require invalidation (even though under *McDaniel* the Grand Rebbe may run for, and serve on, his local school board), and the same is true if New York delegates political authority by reference to religious belief. Where “fusion” is an issue, the difference lies in the distinction between a government’s purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.

Of course, Chapter 748 delegates power not by express reference to the religious belief of the Satmar community, but to residents of the “territory of the village of Kiryas Joel.” 1989 N. Y. Laws, ch. 748. Thus the second (and arguably more important) distinction between these cases and *Larkin* is the identification here of the group to exercise civil authority in terms not expressly religious. But our analysis does not end with the text of the statute at issue, see *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 534 (1993); *Wallace v. Jaffree*, 472 U. S. 38, 56–61 (1985); *Gomillion v. Lightfoot*, 364 U. S. 339, 341–342 (1960), and the context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly. We find this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative Act.

It is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it adopted Chap-

ter 748. See Brief for Petitioner in No. 93-517, p. 20; Brief for Respondents 11. The significance of this fact to the state legislature is indicated by the further fact that carving out the village school district ran counter to customary districting practices in the State. Indeed, the trend in New York is not toward dividing school districts but toward consolidating them. The thousands of small common school districts laid out in the early 19th century have been combined and recombined, first into union free school districts and then into larger central school districts, until only a tenth as many remain today. Univ. of State of N. Y. and State Education Dept., *School District Reorganization*, Law Pamphlet 14, pp. 8-12 (1962) (hereinafter *Law Pamphlet*); Woodward, N. Y. State Education Dept., *Legal and Organizational History of School District Reorganization in New York State* 10-11 (Aug. 1986). Most of these cover several towns, many of them cross county boundaries, and only one remains precisely coterminous with an incorporated village. *Law Pamphlet*, at 24. The object of the State's practice of consolidation is the creation of districts large enough to provide a comprehensive education at affordable cost, which is thought to require at least 500 pupils for a combined junior-senior high school. Univ. of State of N. Y. and State Education Dept., *Master Plan for School District Reorganization in New York State* 10-11 (rev. ed. 1958).<sup>3</sup> The Kiryas Joel Village School District, in contrast, has only 13 local, full-time students in all (even including out-of-area and part-time students leaves the number under 200), and in offering only special education and remedial programs it makes no pretense to be a full-service district.

The origin of the district in a special Act of the legislature, rather than the State's general laws governing school district

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<sup>3</sup>The Commissioner of Education updates this Master Plan as school districts consolidate, see N. Y. Educ. Law §314 (McKinney 1988), but has not published a superseding version.

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reorganization,<sup>4</sup> is likewise anomalous. Although the legislature has established some 20 existing school districts by special Act, all but one of these are districts in name only, having been designed to be run by private organizations serving institutionalized children. They have neither tax bases nor student populations of their own but serve children placed by other school districts or public agencies. See N. Y. Educ. Law § 3601-a (Statutory Notes), §§ 4001 and 4005 (McKinney Supp. 1994); Law Pamphlet, at 18 (“These districts are school districts only by way of a legal fiction”). The one school district petitioners point to that was formed by special Act of the legislature to serve a whole community, as this one was, is a district formed for a new town, much larger and more heterogeneous than this village, being built on land that straddled two existing districts. See 1972 N. Y. Laws, ch. 928 (authorizing Gananda School District). Thus the Kiryas Joel Village School District is exceptional to the point of singularity, as the only district coming to our notice that the legislature carved from a single existing district to serve local residents. Clearly this district “cannot be seen as the fulfillment of [a village’s] destiny as an independent governmental entity,” *United States v. Scotland Neck City Bd. of Ed.*, 407 U. S. 484, 492 (1972) (Burger, C. J., concurring in result).<sup>5</sup>

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<sup>4</sup> State law allows consolidation on the initiative of a district superintendent, N. Y. Educ. Law § 1504 (McKinney 1988), local voters, §§ 1510–1513, 1522–1524, 1902, or the Commissioner of Education, §§ 1526, 1801–1803-a, depending on the circumstances. It also authorizes the district superintendent to “organize a new school district,” § 1504, which may allow secession from an existing district, but this general law played no part in the creation of the Kiryas Joel Village School District.

<sup>5</sup> Although not dispositive in this facial challenge, the pattern of interdistrict transfers, proposed and presently occurring, tends to confirm that religion rather than geography is the organizing principle for this district. Cf. *United States v. Scotland Neck City Bd. of Ed.*, 407 U. S., at 490 (Burger, C. J., concurring in result). When Chapter 748 was passed, the

Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of the children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause, as we explain in some detail further on. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of governmental and religious functions." *Larkin v. Grendel's Den*, 459 U. S., at 126 (internal quotation marks and citation omitted).<sup>6</sup>

## B

The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups. This is the second malady

understanding was that if a non-Hasidic child were to move into the village, the district would pay tuition to send the child to one of the neighboring school districts, since Kiryas Joel would have no regular education program. Although the need for such a transfer has not yet arisen, there are 20 Hasidic children with handicapping conditions who transfer into Kiryas Joel's school district from the nearby East Ramapo and Monroe-Woodbury school districts.

<sup>6</sup> Because it is the unusual circumstances of this district's creation that persuade us the State has employed a religious criterion for delegating political power, this conclusion does not imply that any political subdivision that is coterminous with the boundaries of a religiously homogeneous community suffers the same constitutional infirmity. The district in these cases is distinguishable from one whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists.

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the *Larkin* Court identified in the law before it, the absence of an “effective means of guaranteeing” that governmental power will be and has been neutrally employed. *Id.*, at 125 (internal quotation marks and citation omitted). But whereas in *Larkin* it was religious groups the Court thought might exercise civic power to advance the interests of religion (or religious adherents), here the threat to neutrality occurs at an antecedent stage.

The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion. See *Wallace v. Jaffree*, 472 U. S., at 52–54; *Epperson v. Arkansas*, 393 U. S., at 104; *School Dist. of Abington Township v. Schempp*, 374 U. S., at 216–217. Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law,<sup>7</sup> we have no assurance that the next similarly situated group seeking a school district of its own will receive one; unlike an administrative agency’s denial of an exemption from a generally applicable law, which “would be entitled to a judicial audience,” *Olsen v. Drug Enforcement Admin.*, 878 F. 2d 1458, 1461 (CA DC 1989) (R. B. Ginsburg, J.), a legislature’s failure to enact a special law is itself unreviewable. Nor can the historical context in these cases furnish us with any reason to suppose that the Satmars are merely one in a series of communities

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<sup>7</sup>This contrasts with the process by which the village of Kiryas Joel itself was created, involving, as it did, the application of a neutral state law designed to give almost any group of residents the right to incorporate. See *supra*, at 691.

receiving the benefit of special school district laws. Early on in the development of public education in New York, the State rejected highly localized school districts for New York City when they were promoted as a way to allow separate schooling for Roman Catholic children. R. Church & M. Sedlak, *Education in the United States* 162, 167–169 (1976). And in more recent history, the special Act in these cases stands alone. See *supra*, at 701.

The general principle that civil power must be exercised in a manner neutral to religion is one the *Larkin* Court recognized, although it did not discuss the specific possibility of legislative favoritism along religious lines because the statute before it delegated state authority to any religious group assembled near the premises of an applicant for a liquor license, see 459 U. S., at 120–121, n. 3, as well as to a further category of institutions not identified by religion. But the principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges. In *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 673 (1970), for example, the Court sustained a property tax exemption for religious properties in part because the State had “not singled out one particular church or religious group or even churches as such,” but had exempted “a broad class of property owned by nonprofit, quasi-public corporations.” Accord, *id.*, at 696–697 (opinion of Harlan, J.). And *Bowen v. Kendrick*, 487 U. S. 589, 608 (1988), upheld a statute enlisting a “wide spectrum of organizations” in addressing adolescent sexuality because the law was “neutral with respect to the grantee’s status as a sectarian or purely secular institution.”<sup>8</sup> See also *Texas Monthly, Inc. v. Bullock*, 489 U. S.

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<sup>8</sup>The Court used “sectarian” to refer to organizations akin to this school district in that they were operated in a secular manner but had a religious affiliation; it recognized that government aid may not flow to an institution “in which religion is so pervasive that a substantial portion of its func-



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1 (1989) (striking down sales tax exemption exclusively for religious publications); *id.*, at 14–15 (plurality opinion); *id.*, at 27–28 (BLACKMUN, J., concurring in judgment); *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703, 711 (1985) (O’CONNOR, J., concurring in judgment) (statute impermissibly “singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees”); cf. *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481, 492 (1986) (Powell, J., concurring). Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole, see *Larson v. Valente*, 456 U. S. 228, 244–246 (1982), and we are forced to conclude that the State of New York has violated the Establishment Clause.

## C

In finding that Chapter 748 violates the requirement of governmental neutrality by extending the benefit of a special franchise, we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is “ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference,’” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 334 (1987) (quoting *Walz v. Tax Comm’n, supra*, at 673); “government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment

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tions are subsumed in the religious mission,” 487 U. S., at 610 (quoting *Hunt v. McNair*, 413 U. S. 734, 743 (1973)).

Clause.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U. S. 136, 144–145 (1987). The fact that Chapter 748 facilitates the practice of religion is not what renders it an unconstitutional establishment. Cf. *Lee v. Weisman*, 505 U. S. 577, 627 (1992) (SOUTER, J., concurring) (“That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account”); *School Dist. of Abington Township v. Schempp*, 374 U. S., at 299 (Brennan, J., concurring) (“[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion”).

But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars’ religiously grounded preferences<sup>9</sup> that our cases do not countenance. Prior decisions have allowed religious communities and institutions to pursue their own interests free from governmental interference, see *Corporation of Presiding Bishop v. Amos*, *supra*, at 336–337 (government may allow religious organizations to favor their own adherents in hiring, even for secular employment); *Zorach v. Clauson*, 343 U. S. 306 (1952) (government may allow public schools to release students during the schoolday to receive off-site religious education), but we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation. Petitioners’ proposed accommodation singles out a particular religious sect for special treatment,<sup>10</sup> and whatever the limits of permissible legislative accommodations may be, compare

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<sup>9</sup>The Board of Education of the Kiryas Joel Village School District explains that the Satmars prefer to live together “to facilitate individual religious observance and maintain social, cultural and religious values,” but that it is not “‘against their religion’ to interact with others.” Brief for Petitioner in No. 93–517, p. 4, n. 1.

<sup>10</sup>In this respect, it goes beyond even *Larkin*, transferring political authority to a single religious group rather than to any church or school.

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*Texas Monthly, Inc. v. Bullock*, *supra* (striking down law exempting only religious publications from taxation), with *Corporation of Presiding Bishop v. Amos*, *supra* (upholding law exempting religious employers from Title VII), it is clear that neutrality as among religions must be honored. See *Larson v. Valente*, *supra*, at 244–246.

This conclusion does not, however, bring the Satmar parents, the Monroe-Woodbury school district, or the State of New York to the end of the road in seeking ways to respond to the parents' concerns. Just as the Court in *Larkin* observed that the State's interest in protecting religious meeting places could be "readily accomplished by other means," 459 U. S., at 124, there are several alternatives here for providing bilingual and bicultural special education to Satmar children. Such services can perfectly well be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe-Woodbury district. Or if the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars. See *Wolman v. Walter*, 433 U. S., at 247–248.

To be sure, the parties disagree on whether the services Monroe-Woodbury actually provided in the late 1980's were appropriately tailored to the needs of Satmar children, but this dispute is of only limited relevance to the question whether such services could have been provided, had adjustments been made. As we understand New York law, parents who are dissatisfied with their handicapped child's program have recourse through administrative review pro-

ceedings (a process that appears not to have run its course prior to resort to Chapter 748, see *Board of Ed. of Monroe-Woodbury Central School Dist. v. Wieder*, 72 N. Y. 2d, at 180, 527 N. E. 2d, at 770), and if the New York Legislature should remain dissatisfied with the responsiveness of the local school district, it could certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings.

### III

Justice Cardozo once cast the dissenter as “the gladiator making a last stand against the lions.” B. Cardozo, *Law and Literature* 34 (1931). JUSTICE SCALIA’s dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining. We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion. Cf. *post*, at 735–736. Unlike the States of Utah and New Mexico (which were laid out according to traditional political methodologies taking account of lines of latitude and longitude and topographical features, see U. S. Dept. of Interior, F. Van Zandt, *Boundaries of the United States and the Several States* 250–257 (Geological Survey Bulletin 1212, 1966)), the reference line chosen for the Kiryas Joel Village School District was one purposely drawn to separate Satmars from non-Satmars. Nor do we impugn the motives of the New York Legislature, cf. *post*, at 737–740, which no doubt intended to accommodate the Satmar community without violating the Establishment Clause; we simply refuse to ignore that the method it chose is one that aids a particular religious community, as such, see App. 19–20 (Assembly sponsor thrice describes the Act’s beneficiaries as the “Hasidic” children or community), rather than all groups similarly interested in separate schooling. The dissent protests it is novel to insist “‘up front’” that a statute not tailor its benefits to apply only to one religious group, *post*, at 747–748, but if this were so, *Texas Monthly, Inc.*, would have

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turned out differently, see 489 U. S., at 14–15 (opinion of Brennan, J.); *id.*, at 28 (BLACKMUN, J., concurring in judgment), and language in *Walz v. Tax Comm'n of New York City*, 397 U. S., at 673, and *Bowen v. Kendrick*, 487 U. S., at 608, purporting to rely on the breadth of the statutory schemes would have been mere surplusage. Indeed, under the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law. Cf. *Everson v. Board of Ed. of Ewing*, 330 U. S., at 17 (upholding school bus service provided all pupils). And to end on the point with which JUSTICE SCALIA begins, the license he takes in suggesting that the Court holds the Satmar sect to be New York's established church, see *post*, at 732, is only one symptom of his inability to accept the fact that this Court has long held that the First Amendment reaches more than classic, 18th-century establishments. See *Torcaso v. Watkins*, 367 U. S., at 492–495.

Our job, of course, would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment Clause diminished to the dimensions acceptable to JUSTICE SCALIA could be enforced by a few simple rules, and our docket would never see cases requiring the application of a principle like neutrality toward religion as well as among religious sects. But that would be as blind to history as to precedent, and the difference between JUSTICE SCALIA and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates courts to exercise the judgment necessary to apply it.

In these cases we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said "ranks at the very apex of

the function of a State,” *Wisconsin v. Yoder*, 406 U. S. 205, 213 (1972), to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment. The judgment of the Court of Appeals of the State of New York is accordingly

*Affirmed.*

JUSTICE BLACKMUN, concurring.

For the reasons stated by JUSTICE SOUTER and JUSTICE STEVENS, whose opinions I join, I agree that the New York statute under review violates the Establishment Clause of the First Amendment. I write separately only to note my disagreement with any suggestion that today’s decision signals a departure from the principles described in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The opinion of the Court (and of the plurality with respect to Part II–A) relies upon several decisions, including *Larkin v. Grendel’s Den, Inc.*, 459 U. S. 116 (1982), that explicitly rested on the criteria set forth in *Lemon*. Indeed, the two principles on which the opinion bases its conclusion that the legislative Act is constitutionally invalid essentially are the second and third *Lemon* criteria. See *ante*, at 697; *Larkin*, 459 U. S., at 126–127 (finding “a fusion of governmental and religious functions” under *Lemon*’s “entanglement” prong); 459 U. S., at 125–126 (finding a lack of any “effective means of guaranteeing” that governmental power will be neutrally employed under *Lemon*’s “principal’ or ‘primary effect’” prong).

I have no quarrel with the observation of JUSTICE O’CONNOR, *post*, at 718–719, that the application of constitutional principles, including those articulated in *Lemon*, must be sensitive to particular contexts. But I remain convinced of the general validity of the basic principles stated in *Lemon*, which have guided this Court’s Establishment Clause deci-

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sions in over 30 cases. See *Lee v. Weisman*, 505 U. S. 577, 603, n. 4 (1992) (BLACKMUN, J., concurring).

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE GINSBURG join, concurring.

New York created a special school district for the members of the Satmar religious sect in response to parental concern that children suffered “‘panic, fear and trauma’” when “‘leaving their own community and being with people whose ways were so different.’” *Ante*, at 692. To meet those concerns, the State could have taken steps to alleviate the children’s fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools.

Instead, the State responded with a solution that affirmatively supports a religious sect’s interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from “panic, fear and trauma,” also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith. By creating a school district that is specifically intended to shield children from contact with others who have “different ways,” the State provided official support to cement the attachment of young adherents to a particular faith. It is telling, in this regard, that two-thirds of the school’s full-time students are Hasidic handicapped children from *outside* the village; the Kiryas Joel school thus serves a population far wider than the village—one defined less by geography than by religion. See *ante*, at 694, 701–702, n. 5.

Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, a “release time” program for public school students involving no public premises or funds, or a decision to

grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion. For this reason, as well as the reasons set out in JUSTICE SOUTER's opinion, I am persuaded that the New York law at issue in these cases violates the Establishment Clause of the First Amendment.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

### I

The question at the heart of these cases is: What may the government do, consistently with the Establishment Clause, to accommodate people's religious beliefs? The history of the Satmars in Orange County is especially instructive on this, because they have been involved in at least three accommodation problems, of which these cases are only the most recent.

The first problem related to zoning law, and arose shortly after the Satmars moved to the town of Monroe in the early 1970's. Though the area in which they lived was zoned for single-family homes, the Satmars subdivided their houses into several apartments, apparently in part because of their traditionally close-knit extended family groups. The Satmars also used basements of some of their buildings as schools and synagogues, which according to the town was also a zoning violation. See *N. Y. Times*, Oct. 17, 1976, section 1, p. 53, col. 1; App. 10-14.

Fortunately for the Satmars, New York state law had a way of accommodating their concerns. New York allows virtually any group of residents to incorporate their own village, with broad powers of self-government. The Satmars followed this course, incorporating their community as the village of Kiryas Joel, and their zoning problems, at least, were solved. *Ante*, at 691.

The Satmars' next need for accommodation arose in the mid-1980's. Satmar education is pervasively religious, and



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is provided through entirely private schooling. But though the Satmars could afford to educate most of their children, educating the handicapped is a difficult and expensive business. Moreover, it is a business that the government generally funds, with tax moneys that come from the Satmars as well as from everyone else. In 1984, therefore, the Monroe-Woodbury Central School District began providing handicapped education services to the Satmar children at an annex to the Satmar religious school. The curriculum and the environment of the services were entirely secular. They were the same sort of services available to handicapped students at secular public and private schools throughout the country.

In 1985, however, we held that publicly funded classes on religious school premises violate the Establishment Clause. *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373; *Aguilar v. Felton*, 473 U. S. 402. Based on these decisions, the Monroe-Woodbury Central School District stopped providing services at the Kiryas Joel site, and required the Satmar children to attend public schools outside the village. This, however, was not a satisfactory arrangement for the Satmars, in part because the Satmar children had a hard time dealing with immersion in the non-Satmar world. By 1989, only one handicapped Kiryas Joel child was going to the public school—the others were getting either privately funded services or no special education at all. Though the Satmars tried to reach some other arrangement with the Monroe-Woodbury Central School District, the problem was not resolved.

In response to these difficulties came the third accommodation. In 1989, the New York Legislature passed a statute to create a special school district covering only the village of Kiryas Joel. This school district could, of course, only operate secular schools, and the Satmars therefore wanted to use it only to provide education for the handicapped. But because the district provides this education in the village, Satmar children could take advantage of the district's serv-

ices without encountering the problems they faced when they were sent out to Monroe-Woodbury schools. It is the constitutionality of the law creating this district that we are now called on to decide.

## II

The three situations outlined above shed light on an important aspect of accommodation under the First Amendment: Religious needs can be accommodated through laws that are neutral with regard to religion. The Satmars' living arrangements were accommodated by their right—a right shared with all other communities, religious or not, throughout New York—to incorporate themselves as a village. From 1984 to 1985, the Satmar handicapped children's educational needs were accommodated by special education programs like those available to all handicapped children, religious or not. Other examples of such accommodations abound: The Constitution itself, for instance, accommodates the religious desires of those who were opposed to oaths by allowing any officeholder—of any religion, or none—to take either an oath of office or an affirmation. Art. II, § 1, cl. 8; Art. VI, cl. 3; see also Amdt. 4. Likewise, the selective service laws provide exemptions for conscientious objectors whether or not the objection is based on religious beliefs. *Welsh v. United States*, 398 U. S. 333, 356 (1970) (Harlan, J., concurring in result).

We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U. S. 228, 244 (1982). “Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion.” *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 886, n. 3 (1990). “[T]he Establishment Clause prohibits

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government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization.” *Gillette v. United States*, 401 U. S. 437, 450 (1971). “Neither [the State nor the Federal Governments] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins*, 367 U. S. 488, 495 (1961) (footnote omitted). See also *Texas Monthly, Inc. v. Bullock*, 489 U. S. 1, 8–9 (1989) (plurality opinion); *id.*, at 26, 28–29 (BLACKMUN, J., concurring in judgment); *Welsh, supra*, at 356 (Harlan, J., concurring); *Walz v. Tax Comm’n of City of New York*, 397 U. S. 664, 696–697 (1970) (opinion of Harlan, J.).

This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits. As I have previously noted, “the Establishment Clause is infringed when the government makes adherence to religion relevant to a person’s standing in the political community.” *Wallace v. Jaffree*, 472 U. S. 38, 69 (1985) (opinion concurring in judgment).

That the government is acting to accommodate religion should generally not change this analysis. What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect. A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may

not exempt sacramental wine use by Catholics but not by Jews. A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief. See *Welsh*, 398 U. S., at 356 (Harlan, J., concurring in result); see also *id.*, at 335–344 (reaching this result on statutory interpretation grounds); *United States v. Seeger*, 380 U. S. 163 (1965) (same). The Constitution permits “*nondiscriminatory* religious-practice exemption[s],” *Smith*, *supra*, at 890 (emphasis added), not sectarian ones.

### III

I join Parts I, II–B, II–C, and III of the Court’s opinion because I think this law, rather than being a general accommodation, singles out a particular religious group for favorable treatment. The Court’s analysis of the history of this law and of the surrounding statutory scheme, *ante*, at 699–701, persuades me of this.

On its face, this statute benefits one group—the residents of Kiryas Joel. Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification. I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation. The legislature may well be acting without any favoritism, so that if another group came to ask for a similar district, the group might get it on the same terms as the Satmars. But the nature of the legislative process makes it impossible to be sure of this. A legislature, unlike the judiciary or many administrative decisionmakers, has no obligation to respond to any group’s requests. A group petitioning for a law may never get a definite response, or may get a “no” based not on the merits but on the press of other business or the lack of an influential sponsor. Such a legislative refusal to act would not normally be reviewable by a court. Under these

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circumstances, it seems dangerous to validate what appears to me a clear religious preference.

Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group. I do not think the Court's opinion holds the contrary.

I also think there is one other accommodation that would be entirely permissible: the 1984 scheme, which was discontinued because of our decision in *Aguilar*. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government-funded special education. See, *e. g.*, Individuals with Disabilities Education Act, 20 U. S. C. § 1400 *et seq.* If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

I thought this to be true in *Aguilar*, see 473 U. S., at 421–431 (dissenting opinion), and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. Cf. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993). It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause juris-

prudence back to what I think is the proper track—government impartiality, not animosity, toward religion.

#### IV

One aspect of the Court's opinion in these cases is worth noting: Like the opinions in two recent cases, *Lee v. Weisman*, 505 U. S. 577 (1992); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993), and the case I think is most relevant to these, *Larson v. Valente*, 456 U. S. 228 (1982), the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. See *Craig v. Boren*, 429 U. S. 190, 211 (1976) (STEVENS, J., concurring).

But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.

And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is “a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners,” but this would hardly be a serviceable formulation. Similarly,

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*Lemon* has, with some justification, been criticized on this score.

Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like “primary effect . . . that neither advances nor inhibits religion” and “‘entanglement,’” *Lemon, supra*, at 612–613, acquire more and more complicated definitions which stray ever further from their literal meaning. Distinctions are drawn between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion. See, e. g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 336–337 (1987); *id.*, at 347 (O'CONNOR, J., concurring in judgment) (discussing this point). Assertions are made that authorizing churches to veto liquor sales in surrounding areas “can be seen as having a ‘primary’ and ‘principal’ effect of advancing religion.” *Larkin v. Grendel’s Den, Inc.*, 459 U. S. 116, 125–126 (1982). “[E]ntanglement” is discovered in public employers monitoring the performance of public employees—surely a proper enough function—on parochial school premises, and in the public employees cooperating with the school on class scheduling and other administrative details. *Aguilar v. Felton*, 473 U. S., at 413. Alternatives to *Lemon* suffer from a similar failing when they lead us to find “coercive pressure” to pray when a school asks listeners—with no threat of legal sanctions—to stand or remain silent during a graduation prayer. *Lee v. Weisman, supra*, at 592. Some of the results and perhaps even some of the reasoning in these cases may have been right. I joined two of the cases cited above, *Larkin* and *Lee*, and continue to believe they were correctly decided. But I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like these, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics, see, e.g., *Lee v. Weisman*, *supra*; *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); *Lynch v. Donnelly*, 465 U. S. 668 (1984); *Stone v. Graham*, 449 U. S. 39 (1980), seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. See *Allegheny County*, *supra*, at 623–637 (O'CONNOR, J., concurring in part and concurring in judgment).

Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law. See *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696 (1976) (which also did not apply *Lemon*). These cases, which often arise in the application of otherwise neutral property or contract principles to religious institutions, involve complicated questions not present in other situations. See, e.g., 426 U. S., at 721 (looking at some aspects of religious law to determine the structure of the church, but refusing to look further into religious law to resolve the ultimate dispute). Government delegations of power to religious bodies may make up yet another category. As *Larkin* itself



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suggested, government impartiality towards religion may not be enough in such situations: A law that bars all alcohol sales within some distance of a church, school, or hospital may be valid, but an equally evenhanded law that gives each institution discretionary power over the sales may not be. *Larkin, supra*, at 123–124. Of course, there may well be additional categories, or more opportune places to draw the lines between the categories.

As the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test. And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

Perhaps eventually under this structure we may indeed distill a unified, or at least a more unified, Establishment Clause test from the cases. Cf. *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 298–299 (1984) (uniting two strands of Free Speech Clause doctrine). But it seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

\* \* \*

For the reasons stated, I would affirm the judgment of the Court of Appeals of the State of New York.

JUSTICE KENNEDY, concurring in the judgment.

The Court's ruling that the Kiryas Joel Village School District violates the Establishment Clause is in my view correct, but my reservations about what the Court's reasoning implies for religious accommodations in general are sufficient to require a separate writing. As the Court recognizes, a legislative accommodation that discriminates among religions may become an establishment of religion. But the Court's opinion can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group. The real vice of the school district, in my estimation, is that New York created it by drawing political boundaries on the basis of religion. I would decide the issue we confront upon this narrower theory, though in accord with many of the Court's general observations about the State's actions in this litigation.

## I

This is not an action in which the government has granted a benefit to a general class of recipients of which religious groups are just one part. See *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993); *Bowen v. Kendrick*, 487 U. S. 589 (1988); *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986); *Mueller v. Allen*, 463 U. S. 388 (1983). It is rather an action in which the government seeks to alleviate a specific burden on the religious practices of a particular religious group. I agree that a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment. I disagree, however, with the suggestion that the Kiryas Joel Village School District contravenes these basic constitutional commands. But for the

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forbidden manner in which the New York Legislature sought to go about it, the State's attempt to accommodate the special needs of the handicapped Satmar children would have been valid.

“Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.” *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part). Before the Revolution, colonial governments made a frequent practice of exempting religious objectors from general laws. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466–1473 (1990) (recounting colonial exemptions from oath requirements, compulsory military service, religious assessments, and other general legislation). As early as 1691, for instance, New York allowed Quakers to testify by affirmation rather than oath in civil court cases. T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 64 (1986). Later, during the American Revolution, the Continental Congress exempted religious objectors from military conscription. Resolution of July 18, 1775, reprinted in 2 *Journals of the Continental Congress* 187, 189 (Library of Congress ed. 1905) (“As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences . . .”). And since the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices. See, e. g., *Selective Draft Law Cases*, 245 U. S. 366, 389–390 (1918) (military draft exemption for religious objectors); *Zorach v. Clauson*, 343 U. S. 306 (1952) (New York City program permitting public school children to leave school for one hour a week for religious observance and instruction); *Gillette v. United States*, 401 U. S. 437 (1971) (military draft exemption for religious objectors); *Corporation of Presiding Bishop of*

*Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327 (1987) (exemption of religious organizations from Title VII's prohibition of religious discrimination); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 890 (1990) (exemption from drug laws for sacramental peyote use) (dicta).

New York's object in creating the Kiryas Joel Village School District—to accommodate the religious practices of the handicapped Satmar children—is validated by the principles that emerge from these precedents. First, by creating the district, New York sought to alleviate a specific and identifiable burden on the Satmars' religious practice. The Satmars' way of life, which springs out of their strict religious beliefs, conflicts in many respects with mainstream American culture. They do not watch television or listen to radio; they speak Yiddish in their homes and do not read English-language publications; and they have a distinctive hairstyle and dress. Attending the Monroe-Woodbury public schools, where they were exposed to much different ways of life, caused the handicapped Satmar children understandable anxiety and distress. New York was entitled to relieve these significant burdens, even though mainstream public schooling does not conflict with any specific tenet of the Satmars' religious faith. The Title VII exemption upheld in *Corporation of Presiding Bishop, supra*, for example, covers religious groups who may not believe themselves obliged to employ coreligionists in every instance. See also *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 673 (1970) (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause”); accord, *Smith, supra*, at 890 (legislatures may grant accommodations even when courts may not).

Second, by creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the dis-

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trict as a genuine accommodation. In *Gillette, supra*, the Court upheld a military draft exemption, even though the burden on those without religious objection to war (the increased chance of being drafted and forced to risk one's life in battle) was substantial. And in *Corporation of Presiding Bishop*, the Court upheld the Title VII exemption even though it permitted employment discrimination against non-practitioners of the religious organization's faith. There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment. See, e. g., *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703, 709–710 (1985) (invalidating mandatory Sabbath day off because it provided “no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers”). This action has not been argued, however, on the theory that non-Satmars suffer any special burdens from the existence of the Kiryas Joel Village School District.

Third, the creation of the school district to alleviate the special burdens born by the handicapped Satmar children cannot be said, for that reason alone, to favor the Satmar religion to the exclusion of any other. “The clearest command of the Establishment Clause,” of course, “is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U. S. 228, 244 (1982); accord, *Smith, supra*, at 886, n. 3. I disagree, however, with the Court's conclusion that the school district breaches this command. The Court insists that religious favoritism is a danger here, because the “anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action” to ensure interdenominational neutrality. *Ante*, at 703. “Because the religious community of Kiryas Joel did not receive its new gov-

ernmental authority simply as one of many communities eligible for equal treatment under a general law,” the Court maintains, “we have no assurance that the next similarly situated group seeking a school district of its own will receive one; . . . a legislature’s failure to enact a special law is itself unreviewable.” *Ibid.* (footnote omitted).

This reasoning reverses the usual presumption that a statute is constitutional and, in essence, adjudges the New York Legislature guilty until it proves itself innocent. No party has adduced any evidence that the legislature has denied another religious community like the Satmars its own school district under analogous circumstances. The legislature, like the judiciary, is sworn to uphold the Constitution, and we have no reason to presume that the New York Legislature would not grant the same accommodation in a similar future case. The fact that New York singled out the Satmars for this special treatment indicates nothing other than the uniqueness of the handicapped Satmar children’s plight. It is normal for legislatures to respond to problems as they arise—no less so when the issue is religious accommodation. Most accommodations cover particular religious practices. See, *e. g.*, 21 CFR § 1307.31 (1993) (“The listing of peyote as a controlled substance . . . does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church”); 25 CFR § 11.87H (1993) (“[I]t shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church”); Dept. of Air Force, Reg. 35–10, ¶ 2–28(b)(2) (Apr. 1989) (“Religious head coverings are authorized for wear while in uniform when military headgear is not authorized. . . . Religious head coverings may be worn underneath military headgear if they do not interfere with the proper wearing, functioning, or appearance of the prescribed headgear. . . .

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For example, Jewish yarmulkes meet this requirement if they do not exceed 6 inches in diameter"); National Prohibition Act, § 3, 41 Stat. 308 ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed"), repealed by Liquor Law Repeal and Enforcement Act, § 1, 49 Stat. 872. They do not thereby become invalid.

Nor is it true that New York's failure to accommodate another religious community facing similar burdens would be insulated from challenge in the courts. The burdened community could sue the State of New York, contending that New York's discriminatory treatment of the two religious communities violated the Establishment Clause. To resolve this claim, the court would have only to determine whether the community does indeed bear the same burden on its religious practice as did the Satmars in Kiryas Joel. See *Olsen v. Drug Enforcement Admin.*, 878 F. 2d 1458, 1463–1465 (CA DC 1989) (R. B. Ginsburg, J.) (rejecting claim that the members of the Ethiopian Zion Coptic Church were entitled to an exemption from the marijuana laws on the same terms as the peyote exemption for the Native American Church); *Olsen v. Iowa*, 808 F. 2d 652 (CA8 1986) (same). While a finding of discrimination would then raise a difficult question of relief, compare *Olsen*, 878 F. 2d, at 1464 ("Faced with the choice between invalidation and extension of any controlled-substances religious exemption, which would the political branches choose? It would take a court bolder than this one to predict . . . that extension, not invalidation, would be the probable choice"), with *Califano v. Westcott*, 443 U. S. 76, 89–93 (1979) (curing gender discrimination in the Aid to Families with Dependent Children program by extending benefits to children of unemployed mothers instead of denying benefits to children of unemployed fathers), the discrimination itself would not be beyond judicial remedy.

## II

The Kiryas Joel Village School District thus does not suffer any of the typical infirmities that might invalidate an attempted legislative accommodation. In the ordinary case, the fact that New York has chosen to accommodate the burdens unique to one religious group would raise no constitutional problems. Without further evidence that New York has denied the same accommodation to religious groups bearing similar burdens, we could not presume from the particularity of the accommodation that the New York Legislature acted with discriminatory intent.

This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries. “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause,” *Lee v. Weisman*, 505 U. S. 577, 587 (1992), and in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial. Justice Douglas put it well in a statement this Court quoted with approval just last Term:

“When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion



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rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.” *Wright v. Rockefeller*, 376 U. S. 52, 67 (1964) (Douglas, J., dissenting) (quoted in *Shaw v. Reno*, 509 U. S. 630, 648–649 (1993)).

I agree with the Court insofar as it invalidates the school district for being drawn along religious lines. As the plurality observes, *ante*, at 699–700, the New York Legislature knew that everyone within the village was Satmar when it drew the school district along the village lines, and it determined who was to be included in the district by imposing, in effect, a religious test. There is no serious question that the legislature configured the school district, with purpose and precision, along a religious line. This explicit religious gerrymandering violates the First Amendment Establishment Clause.

It is important to recognize the limits of this principle. We do not confront the constitutionality of the Kiryas Joel village itself, and the formation of the village appears to differ from the formation of the school district in one critical respect. As the Court notes, *ante*, at 703, n. 7, the village was formed pursuant to a religion-neutral self-incorporation scheme. Under New York law, a territory with at least 500 residents and not more than five square miles may be incorporated upon petition by at least 20 percent of the voting residents of that territory or by the owners of more than 50 percent of the territory’s real property. N. Y. Village Law §§ 2–200, 2–202 (McKinney 1973 and Supp. 1994). Aside from ensuring that the petition complies with certain procedural requirements, the supervisor of the town in which the territory is located has no discretion to reject the petition. § 2–206; see Decision on Sufficiency of Petition, in App. 8, 14 (“[T]he hollow provisions of the Village Law . . . allow me only to review the procedural niceties of the petition itself”).

The residents of the town then vote upon the incorporation petition in a special election. N. Y. Village Law §2-212 (McKinney 1973). By contrast, the Kiryas Joel Village School District was created by state legislation. The State of New York had complete discretion not to enact it. The State thus had a direct hand in accomplishing the religious segregation.

As the plurality indicates, the Establishment Clause does not invalidate a town or a State “whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists.” *Ante*, at 702, n. 6. People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy, so long as they do not use those rights to establish their religious faith. Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights. There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples’ faith. In creating the Kiryas Joel Village School District, New York crossed that line, and so we must hold the district invalid.

### III

This is an unusual action, for it is rare to see a State exert such documented care to carve out territory for people of a particular religious faith. It is also unusual in that the problem to which the Kiryas Joel Village School District was addressed is attributable in no small measure to what I believe were unfortunate rulings by this Court.

Before 1985, the handicapped Satmar children of Kiryas Joel attended the private religious schools within the village

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that the other Satmar children attended. Because their handicaps were in some cases acute (ranging from mental retardation and deafness to spina bifida and cerebral palsy), the State of New York provided public funds for special education of these children at annexes to the religious schools. Then came the companion cases of *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373 (1985), and *Aguilar v. Felton*, 473 U. S. 402 (1985). In *Grand Rapids*, the Court invalidated a program in which public school teachers would offer supplemental classes at private schools, including religious schools, at the end of the regular schoolday. And in *Aguilar*, the Court invalidated New York City's use of Title I funding to pay the salaries of public school teachers who taught educationally deprived children of low-income families at parochial schools in the city. After these cases, the Monroe-Woodbury Central School District suspended its special education program at the Kiryas Joel religious schools, and the Kiryas Joel parents were forced to enroll their handicapped children at the Monroe-Woodbury public schools in order for the children to receive special education. The ensuing difficulties, as the Court recounts, *ante*, at 692–693, led to the creation of the Kiryas Joel Village School District.

The decisions in *Grand Rapids* and *Aguilar* may have been erroneous. In light of the action before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a later date. A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered. See *Witters*, 474 U. S., at 490–492 (Powell, J., concurring). But for *Grand Rapids* and *Aguilar*, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described.

One misjudgment is no excuse, however, for compounding it with another. We must confront this litigation as it comes be-

fore us, without bending rules to free the Satmars from a predicament into which we put them. The Establishment Clause forbids the government to draw political boundaries on the basis of religious faith. For this reason, I concur in the judgment of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an “establishment” of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,” *Zorach v. Clauson*, 343 U. S. 306, 319 (1952) (Black, J., dissenting)—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.

## I

Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular

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education to handicapped students. The superintendent of the school, who is not Hasidic, is a 20-year veteran of the New York City public school system, with expertise in the area of bilingual, bicultural, special education. The teachers and therapists at the school all live outside the village of Kiryas Joel. While the village's private schools are profoundly religious and strictly segregated by sex, classes at the public school are co-ed and the curriculum secular. The school building has the bland appearance of a public school, unadorned by religious symbols or markings; and the school complies with the laws and regulations governing all other New York State public schools. There is no suggestion, moreover, that this public school has gone too far in making special adjustments to the religious needs of its students. Cf. *id.*, at 312–315 (approving a program permitting early release of public school students to attend religious instruction). In sum, these cases involve only public aid to a school that is public as can be. The only thing distinctive about the school is that all the students share the same religion.

None of our cases has ever suggested that there is anything wrong with that. In fact, the Court has specifically *approved* the education of students of a single religion on a neutral site adjacent to a private religious school. See *Wolman v. Walter*, 433 U. S. 229, 247–248 (1977). In that case, the Court rejected the argument that “any program that isolates the sectarian pupils is impermissible,” *id.*, at 246, and held that, “[t]he fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke [constitutional] concerns,” *id.*, at 247. And just last Term, the Court held that the State could permit public employees to assist students in a Catholic school. See *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1, 13–14 (1993) (sign-language translator for deaf student). If a State can furnish services to a group of sectarian students on a neutral site adjacent to a private religious school, or even *within* such a school, how can there be any defect in educating those same students in

a public school? As the Court noted in *Wolman*, the constitutional dangers of establishment arise “from the nature of the institution, not from the nature of the pupils,” 433 U. S., at 248. There is no danger in educating religious students in a public school.

For these very good reasons, JUSTICE SOUTER’s opinion does not focus upon the school, but rather upon the school district and the New York Legislature that created it. His arguments, though sometimes intermingled, are two: that reposing governmental power in the Kiryas Joel school district is the same as reposing governmental power in a religious group; and that in enacting the statute creating the district, the New York State Legislature was discriminating on the basis of religion, *i. e.*, favoring the Satmar Hasidim over others. I shall discuss these arguments in turn.

## II

For his thesis that New York has unconstitutionally conferred governmental authority upon the Satmar sect, JUSTICE SOUTER relies extensively, and virtually exclusively, upon *Larkin v. Grendel’s Den, Inc.*, 459 U. S. 116 (1982). JUSTICE SOUTER believes that the present litigation “resembles” *Grendel’s Den* because that case “teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion,” *ante*, at 698 (emphasis added). That misdescribes both what that case taught (which is that a State may not delegate its civil authority to a church), and what these cases involve (which is a group chosen according to cultural characteristics). The statute at issue there gave churches veto power over the State’s authority to grant a liquor license to establishments in the vicinity of the church. The Court had little difficulty finding the statute unconstitutional. “The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.” 459 U. S., at 127.

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JUSTICE SOUTER concedes that *Grendel's Den* “presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America.” *Ante*, at 697. The uniqueness of the case stemmed from the grant of governmental power directly to a religious institution, and the Court’s opinion focused on that fact, remarking that the transfer of authority was to “churches” (10 times), the “governing body of churches” (twice), “religious institutions” (twice), and “religious bodies” (once). Astonishingly, however, JUSTICE SOUTER dismisses the difference between a transfer of government power to citizens who share a common religion as opposed to “the officers of its sectarian organization”—the critical factor that made *Grendel's Den* unique and “rar[e]”—as being “one of form, not substance.” *Ante*, at 698.

JUSTICE SOUTER’s steamrolling of the difference between civil authority held by a church and civil authority held by members of a church is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional, and that much more of it than merely the Kiryas Joel school district is unconstitutional today. The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities. See, *e. g.*, W. Sweet, *The Story of Religion in America* 9 (1950). It is preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect. And if they were, surely JUSTICE SOUTER cannot mean that the inclusion of one or two nonbelievers in the community would have been enough to eliminate the constitutional vice. If the conferral of governmental power upon a religious institution *as such* (rather than upon American citizens who belong to the religious institution) is not the test of *Grendel's Den* invalidity, there is no reason why giving power to a body that is overwhelmingly dominated

by the members of one sect would not suffice to invoke the Establishment Clause. That might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union,<sup>1</sup> and would undoubtedly make many units of local government unconstitutional today.<sup>2</sup>

JUSTICE SOUTER's position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion. Of course such *disfavoring* of religion is positively antagonistic to the purposes of the Religion Clauses, and we have rejected it before. In *McDaniel v. Paty*, 435 U. S. 618 (1978), we invalidated a state constitutional amendment that would have permitted all persons to participate in political conventions, except ministers. We adopted James Madison's view that the State could not "punis[h] a religious profession with the privation of a civil right.'" *Id.*, at 626 (opinion of Burger, C. J.), quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904). Or as Justice

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<sup>1</sup> A census taken in 1906, 10 years after statehood was granted to Utah, and 6 years before it was granted to New Mexico, showed that in Utah 87.7% of all church members were Mormon, and in New Mexico 88.7% of all church members were Roman Catholic. See Bureau of the Census, Special Reports, Religious Bodies, Part I, p. 55 (1910).

<sup>2</sup> At the county level, the smallest unit for which comprehensive data is available, there are a number of counties in which the overwhelming majority of churchgoers are of a single religion: Rich County, Utah (100% Mormon); Kennedy County, Texas (100% Roman Catholic); Emery County, Utah (99.2% Mormon); Franklin and Madison Counties, Idaho (99% or more Mormon); Graham County, North Carolina (93.7% Southern Baptist); Mora County, New Mexico (92.6% Roman Catholic). M. Bradley, N. Green, D. Jones, M. Lynn, & L. McNeil, Churches and Church Membership in the United States 1990, pp. 46, 112-113, 246, 265, 283, 365, 380, 393 (1992). In all of these counties the adherents of the indicated religion constitute a substantial majority, in some cases over a 95% majority, of the *total* population. If data were available for smaller units of government than counties, I have no doubt I could point to hundreds of towns placed in jeopardy by today's opinion.



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Brennan put it in his opinion concurring in judgment: “Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.” 435 U.S., at 641; see also *Widmar v. Vincent*, 454 U.S. 263 (1981). I see no reason why it is any less pernicious to deprive a group rather than an individual of its rights simply because of its religious beliefs.

Perhaps appreciating the startling implications for our constitutional jurisprudence of collapsing the distinction between religious institutions and their members, JUSTICE SOUTER tries to limit his “unconstitutional conferral of civil authority” holding by pointing out several features supposedly unique to the present cases: that the “boundary lines of the school district divide residents *according to* religious affiliation,” *ante*, at 699 (emphasis added); that the school district was created by “a special Act of the legislature,” *ante*, at 700; and that the formation of the school district ran counter to the legislature’s trend of consolidating districts in recent years, *ibid.* Assuming all these points to be true (and they are not), they would certainly bear upon whether the legislature had an impermissible religious motivation in creating the district (which is JUSTICE SOUTER’s *next* point, in the discussion of which I shall reply to these arguments). But they have nothing to do with whether conferral of power upon a group of citizens can be the conferral of power upon a religious institution. It cannot. Or if it can, our Establishment Clause jurisprudence has been transformed.

### III

I turn, next, to JUSTICE SOUTER’s second justification for finding an establishment of religion: his facile conclusion that the New York Legislature’s creation of the Kiryas Joel school district was religiously motivated. But in the Land of the Free, democratically adopted laws are not so easily impeached by unelected judges. To establish the unconstitu-

tionality of a facially neutral law on the mere basis of its asserted religiously preferential (or discriminatory) effects—or at least to establish it in conformity with our precedents—JUSTICE SOUTER “must be able to show the absence of a neutral, secular basis” for the law. *Gillette v. United States*, 401 U. S. 437, 452 (1971); see also *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977) (facially race-neutral laws can be invalidated on the basis of their effects only if “unexplainable on grounds other than race”).

There is of course no possible doubt of a secular basis here. The New York Legislature faced a unique problem in Kiryas Joel: a community in which all the nonhandicapped children attend private schools, and the physically and mentally disabled children who attend public school suffer the additional handicap of cultural distinctiveness. It would be troublesome enough if these peculiarly dressed, handicapped students were sent to the next town, accompanied by their similarly clad but unimpaired classmates. But all the unimpaired children of Kiryas Joel attend private school. The handicapped children suffered sufficient emotional trauma from their predicament that their parents kept them home from school. Surely the legislature could target this problem, and provide a public education for these students, in the same way it addressed, *by a similar law*, the unique needs of children institutionalized in a hospital. See, *e. g.*, 1970 N. Y. Laws, ch. 843 (authorizing a union free school district for the area owned by Blythedale Children’s Hospital).

Since the obvious presence of a neutral, secular basis renders the asserted preferential effect of this law inadequate to invalidate it, JUSTICE SOUTER is required to come forward with direct evidence that religious preference was the objective. His case could scarcely be weaker. It consists, briefly, of this: The People of New York created the Kiryas Joel Village School District in order to further the Satmar religion, rather than for any proper secular purpose, because

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(1) they created the district in an extraordinary manner—by special Act of the legislature, rather than under the State’s general laws governing school-district reorganization; (2) the creation of the district ran counter to a state trend toward consolidation of school districts; and (3) the district includes only adherents of the Satmar religion. On this indictment, no jury would convict.

One difficulty with the first point is that it is not true. There was really nothing so “special” about the formation of a school district by an Act of the New York Legislature. The State has created both large school districts, see, *e. g.*, 1972 N. Y. Laws, ch. 928 (creating the Gananda School District out of land previously in two other districts), and small specialized school districts for institutionalized children, see, *e. g.*, 1972 N. Y. Laws, ch. 559 (creating a union free school district for the area owned by Abbott House), through these special Acts. But in any event all that the first point proves, and the second point as well (countering the trend toward consolidation),<sup>3</sup> is that New York regarded Kiryas Joel as a

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<sup>3</sup>The Court says that “[e]arly on in the development of public education in New York, the State rejected highly localized school districts for New York City when they were promoted as a way to allow separate schooling for Roman Catholic children.” *Ante*, at 704. Both the implication that this rejection of localism was general state policy, and the implication that (like the Court’s prohibition of localism today) it had the purpose and effect of religious neutrality, are simply not faithful to the cited source. The 1841 proposal was not to treat New York City schools *differently*, in order to favor Roman Catholics; it was “that the state’s school code, which promoted a district system structure with local taxing authority, be extended to New York City.” R. Church & M. Sedlak, *Education in the United States* 167 (1976). And the rejection of that proposal was not a triumph for keeping sectarian religion out of some public schools; it was a triumph for keeping the King James version of the Bible in all public schools. The Court’s selected source concludes: “[T]he Whigs swept the city elections that year [1842] and made Bible reading—the King James version—mandatory in any schools sharing these monies. There was nothing left for the Catholics to do but to build their own parochial system with their own money.” *Id.*, at 168–169.

special case, requiring special measures. I should think it *obvious* that it did, and obvious that it *should have*. But even if the New York Legislature had never before created a school district by special statute (which is not true), and even if it had done nothing but consolidate school districts for over a century (which is not true), how could the departure from those past practices possibly demonstrate that the legislature had religious favoritism in mind? It could not. To be sure, when there is no special treatment there is no possibility of religious favoritism; but it is not logical to suggest that when there *is* special treatment there is *proof* of religious favoritism.

JUSTICE SOUTER's case against the statute comes down to nothing more, therefore, than his third point: the fact that all the residents of the Kiryas Joel Village School District are Satmars. But all its residents also wear unusual dress, have unusual civic customs, and have not much to do with people who are culturally different from them. (The Court recognizes that "the Satmars prefer to live together 'to facilitate individual religious observance and maintain social, cultural and religious values,' but that it is not "against their religion" to interact with others.'" *Ante*, at 706, n. 9, quoting Brief for Petitioners in No. 93-517, p. 4, n. 1.) On what basis does JUSTICE SOUTER conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision? The normal assumption would be that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children. JUSTICE SOUTER not only does not adopt the logical assumption, he does not even give the New York Legislature the benefit of the doubt. The following is the level of his analysis:

"Not even the special needs of the children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents [by other means]." *Ante*, at 702.

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In other words, we know the legislature must have been motivated by the desire to favor the Satmar Hasidim religion, because it *could* have met the needs of these children by a method that did not place the Satmar Hasidim in a separate school district. This is not a rational argument proving religious favoritism; it is rather a novel Establishment Clause principle to the effect that no secular objective may be pursued by a means that might also be used for religious favoritism if some other means is available.

I have little doubt that JUSTICE SOUTER would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that *are* accompanied by religious belief. “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as . . . subject to unique disabilities.” *McDaniel v. Paty*, 435 U. S., at 641 (Brennan, J., concurring in judgment).

Even if JUSTICE SOUTER could successfully establish that the cultural distinctiveness of the Kiryas Joel students (which is the problem the New York Legislature addressed) was an *essential part* of their religious belief rather than merely an *accompaniment* of their religious belief, that would not discharge his heavy burden. In order to invalidate a facially neutral law, JUSTICE SOUTER would have to show not only that legislators were aware that religion caused the problems addressed, but also that the legislature’s proposed solution was motivated by a desire to disadvantage or benefit a religious group (*i. e.*, to disadvantage or benefit them *because of their religion*). For example, if the city of Hialeah, knowing of the potential health problems raised by

the Santeria religious practice of animal sacrifice, were to provide by ordinance a special, more frequent, municipal garbage collection for the carcasses of dead animals, we would not strike the ordinance down just because the city council was aware that a religious practice produced the problem the ordinance addressed. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 543–545 (1993). Here a facially neutral statute extends an educational benefit to the one area where it was not effectively distributed. Whether or not the reason for the ineffective distribution had anything to do with religion, it is a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group. The proper analogy to Chapter 748 is not the Court’s hypothetical law providing school buses only to Christian students, see *ante*, at 709, but a law providing extra buses to rural school districts (which happen to be predominantly Southern Baptist).

At various times JUSTICE SOUTER intimates, though he does not precisely say, that the boundaries of the school district were intentionally drawn on the basis of religion. He refers, for example, to “the State’s manipulation of the franchise for this district . . . , giving the sect exclusive control of the political subdivision,” *ante*, at 698—implying that the “giving” of political power to the religious sect was the object of the “manipulation.” There is no evidence of that. The special district was created to meet the special educational needs of distinctive handicapped children, and the geographical boundaries selected for that district were (quite logically) those that already existed for the village. It sometimes appears as though the shady “manipulation” JUSTICE SOUTER has in mind is that which occurred when the village was formed, so that the drawing of its boundaries infected the coterminous boundaries of the district. He says, for example, that “[i]t is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude

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all but Satmars.” *Ante*, at 699. It is indeed. But non-Satmars were excluded, not (as he intimates) because of their religion, but—as JUSTICE O’CONNOR clearly describes, see *ante*, at 712—because of their lack of desire for the high-density zoning that Satmars favored. It was a classic drawing of lines on the basis of communality of *secular governmental desires*, not communality of religion. What happened in the creation of the village is in fact precisely what happened in the creation of the school district, so that the former cannot possibly infect the latter, as JUSTICE SOUTER tries to suggest. Entirely secular reasons (zoning for the village, cultural alienation of students for the school district) produced a political unit whose members happened to share the same religion. There is *no* evidence (indeed, no plausible suspicion) of the legislature’s desire to favor the Satmar religion, as opposed to meeting distinctive secular needs or desires of citizens who happened to be Satmars. If there were, JUSTICE SOUTER would say so; instead, he must merely insinuate.

## IV

But even if Chapter 748 were intended to create a special arrangement for the Satmars *because of* their religion (not including, as I have shown in Part I, any conferral of governmental power upon a religious entity), it would be a permissible accommodation. “This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U. S. 136, 144–145 (1987). Moreover, “there is ample room for accommodation of religion under the Establishment Clause,” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 338 (1987), and for “play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference,” *Walz v. Tax Comm’n of City of New York*, 397

U. S. 664, 669 (1970). Accommodation is permissible, moreover, even when the statute deals specifically with religion, see, *e. g.*, *Zorach v. Clauson*, 343 U. S., at 312–315, and even when accommodation is not commanded by the Free Exercise Clause, see, *e. g.*, *Walz, supra*, at 673.

When a legislature acts to accommodate religion, particularly a minority sect, “it follows the best of our traditions.” *Zorach, supra*, at 314. The Constitution itself contains an accommodation of sorts. Article VI, cl. 3, prescribes that executive, legislative, and judicial officers of the Federal and State Governments shall bind themselves to support the Constitution “by Oath or Affirmation.” Although members of the most populous religions found no difficulty in swearing an oath to God, Quakers, Moravians, and Mennonites refused to take oaths based on Matthew 5:34’s injunction “swear not at all.” The option of affirmation was added to accommodate these minority religions and enable their members to serve in government. See 1 A. Stokes, *Church and State in The United States* 524–527 (1950). Congress, from its earliest sessions, passed laws accommodating religion by refunding duties paid by specific churches upon the importation of plates for the printing of Bibles, see 6 Stat. 116 (1813), vestments, 6 Stat. 346 (1816), and bells, 6 Stat. 675 (1836). Congress also exempted church property from the tax assessments it levied on residents of the District of Columbia; and all 50 States have had similar laws. See *Walz, supra*, at 676–678.

This Court has also long acknowledged the permissibility of legislative accommodation. In one of our early Establishment Clause cases, we upheld New York City’s early release program, which allowed students to be released from public school during school hours to attend religious instruction or devotional exercises. See *Zorach, supra*, at 312–315. We determined that the early release program “accommodates the public service to . . . spiritual needs,” and noted that finding it unconstitutional would “show a callous indifference



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to religious groups.” 343 U. S., at 314. In *Walz, supra*, we upheld a property tax exemption for religious organizations, observing that it was part of a salutary tradition of “permissible state accommodation to religion.” *Id.*, at 672–673. And in *Presiding Bishop, supra*, we upheld a section of the Civil Rights Act of 1964 exempting religious groups from the antidiscrimination provisions of Title VII. We concluded that it was “a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Id.*, at 335.

In today’s opinion, however, the Court seems uncomfortable with this aspect of our constitutional tradition. Although it acknowledges the concept of accommodation, it quickly points out that it is “not a principle without limits,” *ante*, at 706, and then gives reasons why the present case exceeds those limits, reasons which simply do not hold water. “[W]e have never hinted,” the Court says, “that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation.” *Ibid.* Putting aside the circularity inherent in referring to a delegation as “otherwise unconstitutional” when its constitutionality turns on whether there is an accommodation, if this statement is true, it is only because we have never hinted that delegation of political power to citizens who share a particular religion could be unconstitutional. This is simply a replay of the argument we rejected in Part II, *supra*.

The second and last reason the Court finds accommodation impermissible is, astoundingly, the mere risk that the State will not offer accommodation to a similar group in the future, and that neutrality will therefore not be preserved. Returning to the ill fitted crutch of *Grendel’s Den*, the Court suggests that by acting through this special statute the New York Legislature has eliminated any “‘effective means of guaranteeing’ that governmental power will be and has been neutrally employed.” *Ante*, at 703, quoting *Grendel’s*

*Den*, 459 U. S., at 125. How misleading. That language in *Grendel's Den* was an expression of concern *not* (as the context in which it is quoted suggests) about the courts' ability to assure the legislature's future neutrality, but about the legislature's ability to assure the neutrality of the churches to which it had transferred legislative power. That concern is inapposite here; there is no doubt about the legislature's capacity to control what transpires in a public school.

At bottom, the Court's "no guarantee of neutrality" argument is an assertion of *this Court's* inability to control the New York Legislature's future denial of comparable accommodation. We have "no assurance," the Court says, "that the next similarly situated group seeking a school district of its own will receive one," since "a legislature's failure to enact a special law is . . . unreviewable." *Ante*, at 703; see also *ante*, at 716 (O'CONNOR, J., concurring in part and concurring in judgment).<sup>4</sup> That is true only in the technical (and irrelevant) sense that the later group denied an accommodation may need to challenge the grant of the first accommodation in light of the later denial, rather than challenging the denial directly. But one way or another, "even if [an administrative agency is] not empowered or obliged to act, [a litigant] would be entitled to a judicial audience. Ultimately, the courts cannot escape the obligation to address [a] plea that the exemption [sought] is mandated by the first amendment's religion clauses." *Olsen v. Drug Enforcement Admin.*, 878 F. 2d 1458, 1461 (CA DC 1989) (R. B. Ginsburg, J.).

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<sup>4</sup>The Court hints, *ante*, at 703, that its fears would have been allayed if the New York Legislature had previously created similar school districts for other minority religions. But had it done so, each of *them* would have been attacked (and invalidated) for the same reason as this one: because it had no antecedents. I am sure the Court has in mind some way around this chicken-and-egg problem. Perhaps the legislature could name the first four school districts *in pectore*.

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The Court's demand for "up front" assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role. As we have described, *supra*, at 744, Congress's earliest accommodations exempted duties paid by specific churches on particular items. See, *e. g.*, 6 Stat. 346 (1826) (exempting vestments imported by "bishop of Bardstown"). Moreover, most efforts at accommodation seek to solve a problem that applies to members of only one or a few religions. Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine use impermissible, accord, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S., at 561, n. 2 (SOUTER, J., concurring in judgment), nor does it require the State granting such an exemption to explain in advance how it will treat every other claim for dispensation from its controlled-substances laws. Likewise, not every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 890 (1990), without any suggestion that some "up front" legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, *by the courts*. See, *e. g.*, *Olsen v. Drug Enforcement Admin.*, *supra* (rejecting claim that peyote exemption requires marijuana exemption for Ethiopian Zion Coptic Church); *Olsen v. Iowa*, 808 F. 2d 652 (CA8 1986) (same); *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F. 2d 415 (CA9 1972) (accepting claim that peyote exemption for Native American Church requires peyote exemption for other religions that use that substance in their sacraments).<sup>5</sup>

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<sup>5</sup>The Court likens its demand for "up front" assurances to the Court's focus on the narrowness of the statute it struck down in *Texas Monthly, Inc. v. Bullock*, 489 U. S. 1 (1989). See *ante*, at 708. *Texas Monthly*

Contrary to the Court's suggestion, *ante*, at 708–709, I do not think that the Establishment Clause prohibits formally established “state” churches and nothing more. I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others. In this respect, it is the Court that attacks lions of straw. What I attack is the Court's imposition of novel “up front” procedural requirements on state legislatures. Making law (and making exceptions) one case at a time, whether through adjudication or through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of. If it did, the manner of proceeding of this Court itself would be unconstitutional. It is presumptuous for this Court to impose—*out of nowhere*—an unheard-of prohibition against proceeding in this manner upon the Legislature of New York State. I never heard of such a principle, nor has anyone else, nor will it ever be heard of again. Unlike what the New York Legislature has done, this *is* a special rule to govern only the Satmar Hasidim.

## V

A few words in response to the separate concurrences: JUSTICE STEVENS adopts, for these cases, a rationale that is

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bears no resemblance to today's opinion, except that it also was wrong and it also misinterpreted *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664 (1970), see 489 U. S., at 33–40 (SCALIA, J., dissenting). The tax treatment of publishing companies in Texas was governed by an across-the-board rule. There was never any question whether nonreligious publishers would get the tax exemption accorded to religious publishers; by rule they did not, and the Court struck down that rule because it discriminated in favor of religion. By contrast, adjustments to existing school districts in New York are done case by case. No decision, including *Texas Monthly*, remotely suggests that approaching accommodations in a case-specific manner automatically violates the Establishment Clause.

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almost without limit. The separate Kiryas Joel school district is problematic in his view because “[t]he isolation of these children, while it may protect them from ‘panic, fear and trauma,’ also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith.” *Ante*, at 711. So much for family values. If the Constitution forbids any state action that incidentally helps parents to raise their children in their own religious faith, it would invalidate a release program permitting public school children to attend the religious-instruction program of their parents’ choice, of the sort we approved in *Zorach*;<sup>6</sup> indeed, it would invalidate state laws according parents physical control over their children, at least insofar as that is used to take the little fellows to church or synagogue. JUSTICE STEVENS’ statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the State must not assist parents in transmitting to their offspring.

JUSTICE KENNEDY’S “political-line-drawing” approach founders on its own terms. He concedes that the Constitution does not prevent people who share a faith from forming their own villages and towns, and suggests that the formation of the village of Kiryas Joel was free from defect. *Ante*, at 729–730. He also notes that States are free to draw political lines on the basis of history and geography. *Ante*, at 730. I do not see, then, how a school district drawn to mirror the boundaries of an existing village (an existing geographic line), which itself is not infirm, can violate the Constitution. Thus, while JUSTICE KENNEDY purports to share my criticism (Part IV, *supra*) of the Court’s unprecedented insistence that the New York Legislature make its accommo-

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<sup>6</sup>JUSTICE STEVENS’ bald statement that such a program would be permissible, see *ante*, at 711–712, can exclude it from the reach of his opinion, but not from the reach of his logic.

dations only by general legislation, see *ante*, at 722, 726, his own approach is little different. He says the village is constitutional because it was formed (albeit by members of a single religious sect) under a general New York law; but he finds the school district unconstitutional because it was the product of a specific enactment. In the end, his analysis is no different from the Court's.

JUSTICE KENNEDY expresses the view that *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373 (1985), and *Aguilar v. Felton*, 473 U. S. 402 (1985)—the cases that created the need for the Kiryas Joel legislation by holding unconstitutional state provision of supplemental educational services in sectarian schools—“may have been erroneous,” and he suggests that “it may be necessary for us to reconsider them at a later date.” *Ante*, at 731. JUSTICE O'CONNOR goes even further and expresses the view that *Aguilar* should be overruled. *Ante*, at 717–718. I heartily agree that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity; but meanwhile, today's opinion causes us to lose still further ground, and in the same antiaccommodationist direction.

Finally, JUSTICE O'CONNOR observes that the Court's opinion does not focus on the so-called *Lemon* test, see *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and she urges that that test be abandoned, at least as a “unitary approach” to all Establishment Clause claims, *ante*, at 721. I have previously documented the Court's convenient relationship with *Lemon*, which it cites only when useful, see *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 397–401 (1993) (SCALIA, J., concurring in judgment), and I no longer take any comfort in the Court's failure to rely on it in any particular case, as I once mistakenly did, see *Lee v. Weisman*, 505 U. S. 577, 644 (1992) (SCALIA, J., dissenting). But the Court's snub of *Lemon* today (it receives only two “see also” citations, in the course of the opinion's description of

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*Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to the other sound reasons for abandoning *Lemon*, see, e. g., *Edwards v. Aguillard*, 482 U. S. 578, 636–640 (1987) (SCALIA, J., dissenting); *Wallace v. Jaffree*, 472 U. S. 38, 108–112 (1985) (REHNQUIST, J., dissenting), it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test. Compare *ante*, p. 687 (ignoring *Lemon* despite lower courts' reliance), with *Lamb's Chapel, supra* (applying *Lemon* despite failure of lower court to mention it).

Unlike JUSTICE O'CONNOR, however, I would not replace *Lemon* with nothing, and let the case law “evolve” into a series of situation-specific rules (government speech on religious topics, government benefits to particular groups, etc.) unconstrained by any “rigid influence,” *ante*, at 721. The problem with (and the allure of) *Lemon* has not been that it is “rigid,” but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire. See *Lamb's Chapel, supra*, at 399 (SCALIA, J., concurring in judgment); *Wallace, supra*, at 110–111 (REHNQUIST, J., dissenting). To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle. The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that JUSTICE O'CONNOR seeks, but do not leave us to our own devices.

\* \* \*

The Court's decision today is astounding. Chapter 748 involves no public aid to private schools and does not mention religion. In order to invalidate it, the Court casts aside, on the flimsiest of evidence, the strong presumption of validity that attaches to facially neutral laws, and invalidates the present accommodation because it does not trust New York to be as accommodating toward other religions (presumably those less powerful than the Satmar Hasidim) in the future. This is unprecedented—except that it continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration. I dissent.



## Syllabus

MADSEN ET AL. *v.* WOMEN'S HEALTH CENTER,  
INC., ET AL.

## CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 93–880. Argued April 28, 1994—Decided June 30, 1994

After petitioners and other antiabortion protesters threatened to picket and demonstrate around a Florida abortion clinic, a state court permanently enjoined petitioners from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving it. Later, when respondent clinic operators sought to broaden the injunction, the court found that access to the clinic was still being impeded, that petitioners' activities were having deleterious physical effects on patients and discouraging some potential patients from entering the clinic, and that doctors and clinic workers were being subjected to protests at their homes. Accordingly, the court issued an amended injunction, which applies to petitioners and persons acting "in concert" with them, and which, *inter alia*, excludes demonstrators from a 36-foot buffer zone around the clinic entrances and driveway and the private property to the north and west of the clinic; restricts excessive noise-making within the earshot of, and the use of "images observable" by, patients inside the clinic; prohibits protesters within a 300-foot zone around the clinic from approaching patients and potential patients who do not consent to talk; and creates a 300-foot buffer zone around the residences of clinic staff. In upholding the amended injunction against petitioners' claim that it violated their First Amendment right to freedom of speech, the Florida Supreme Court recognized that the forum at issue is a traditional public forum; refused to apply the heightened scrutiny dictated by *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, because the injunction's restrictions are content neutral; and concluded that the restrictions were narrowly tailored to serve a significant government interest and left open ample alternative channels of communication, see *ibid.*

*Held:*

1. The injunction at issue is not subject to heightened scrutiny as content or viewpoint based simply because it restricts only the speech of antiabortion protesters. To accept petitioners' claim to the contrary would be to classify virtually every injunction as content based. An injunction, by its very nature, does not address the general public, but applies only to particular parties, regulating their activities, and perhaps their speech, because of their past actions in the context of a spe-

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cific dispute. The fact that this injunction did not prohibit activities by persons demonstrating in favor of abortion is justly attributable to the lack of such demonstrations and of any consequent request for relief. Moreover, none of the restrictions at issue were directed at the content of petitioners' antiabortion message. The principal inquiry in determining content neutrality is whether the government has regulated speech without reference to its content. See, *e. g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791. The government's purpose is therefore the threshold consideration. Here, the injunction imposed incidental restrictions on petitioners' message because they repeatedly violated the original injunction. That the injunction covers people who all share the same viewpoint suggests only that those in the group *whose conduct* violated the court's order happen to share that viewpoint. Pp. 762–764.

2. In evaluating a content-neutral injunction, the governing standard is whether the injunction's challenged provisions burden no more speech than necessary to serve a significant government interest. See, *e. g.*, *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 184. Thus, the injunction must be couched in the narrowest terms that will accomplish its pinpointed objective. See *id.*, at 183. Although the forum around the clinic is a traditional public forum, the obvious differences between a generally applicable ordinance—which represents a legislative choice to promote particular societal interests—and an injunction—which remedies an actual or threatened violation of a legislative or judicial decree, and carries greater risks of censorship and discriminatory application than an ordinance, but can be tailored to afford greater relief where a violation of law has already occurred—require a somewhat more stringent application of general First Amendment principles in this context than traditional time, place, and manner analysis allows. The combination of the governmental interests identified by the Florida Supreme Court—protecting a pregnant woman's freedom to seek lawful medical or counseling services, ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, protecting citizens' property rights, and assuring residential privacy—is quite sufficient to justify an appropriately tailored injunction. Pp. 764–768.

3. Given the focus of the picketing on patients and clinic staff, the narrowness of the confines around the clinic, the fact that protesters could still be seen and heard from the clinic parking lots, and the failure of the first injunction to accomplish its purpose, the 36-foot buffer zone around the clinic entrances and driveway, on balance, burdens no more speech than necessary to accomplish the governmental interests in protecting access to the clinic and facilitating an orderly traffic flow on the

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street. The need for a complete buffer zone may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute even under heightened review. Petitioners argued against including the factual record as an appendix in the Florida Supreme Court, and never certified a full record. This Court must therefore judge the case on the assumption that the evidence and testimony presented to the state court supported its findings that the protesters' activities near the clinic's entrance interfered with access despite the earlier injunction. Pp. 768–771.

4. However, the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic. Patients and staff wishing to reach the clinic do not have to cross that property. Moreover, nothing in the record indicates that petitioners' activities on the property have obstructed clinic access, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation. P. 771.

5. The limited noise restrictions imposed by the injunction burden no more speech than necessary to ensure the health and well-being of the clinic's patients. Noise control is particularly important around medical facilities during surgery and recovery periods. The First Amendment does not demand that patients at such a facility undertake Herculean efforts to escape the cacophony of political protests. Pp. 772–773.

6. The blanket ban on "images observable" sweeps more broadly than necessary to accomplish the goals of limiting threats to clinic patients or their families and reducing the patients' level of anxiety and hypertension inside the clinic. Prohibiting the display of signs that could be interpreted as threats or veiled threats would satisfy the first goal, while a clinic could simply pull its curtains to protect a patient bothered by a disagreeable placard. P. 773.

7. Absent evidence that the protesters' speech is independently proscribable (*i. e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, the 300-foot no-approach zone around the clinic—and particularly its consent requirement—burdens more speech than is necessary to accomplish the goals of preventing intimidation and ensuring access to the clinic. Pp. 773–774.

8. The 300-foot buffer zone around staff residences sweeps more broadly than is necessary to protect the tranquility and privacy of the home. The record does not contain sufficient justification for so broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired results. As to the use of sound amplification equipment within the zone, however, the government may demand that

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petitioners turn down the volume if the protests overwhelm the neighborhood. Pp. 774–775.

9. Petitioners, as named parties in the injunction, lack standing to challenge its “in concert” provision as applied to persons who are not parties. Moreover, that phrase is not subject, at petitioners’ behest, to a challenge for “overbreadth.” See *Regal Knitwear Co. v. NLRB*, 324 U. S. 9, 14–15. Nor does the “in concert” provision impermissibly burden their freedom of association. They are not enjoined from associating with others or from joining with them to express a particular viewpoint, and the First Amendment does not protect joining with others to deprive third parties of their lawful rights. Pp. 775–776.

626 So. 2d 664, affirmed in part and reversed in part.

REHNQUIST, C. J., delivered the opinion of the Court, in which BLACKMUN, O’CONNOR, SOUTER, and GINSBURG, JJ., joined, and in which STEVENS, J., joined as to Parts I, II, III–E, and IV. SOUTER, J., filed a concurring opinion, *post*, p. 776. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 777. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 784.

*Mathew D. Staver* argued the cause for petitioners. With him on the briefs were *Jeffery T. Kipi* and *Christopher J. Weiss*.

*Talbot D’Alemberte* argued the cause for respondents. With him on the brief was *Susan England*.

*Solicitor General Days* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Hunger*, *Deputy Solicitor General Bender*, *Beth S. Brinkmann*, *Anthony J. Steinmeyer*, and *Jonathan R. Siegel*.\*

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\*Briefs of *amici curiae* urging reversal were filed for the American Family Association by *Scott L. Thomas*; for the Christian Legal Society et al. by *Edward McGlynn Gaffney, Jr.*, *Steven T. McFarland*, and *Victor G. Rosenblum*; for Defendants Operation Rescue et al. by *Jay Alan Sekulow*, *Walter M. Weber*, *Mark N. Troobnick*, *James M. Henderson, Sr.*, *Thomas Patrick Monaghan*, *Keith A. Fournier*, and *John Stepanovich*; for the National Right to Life Committee, Inc., by *James Bopp, Jr.*, and *Richard E. Coleson*; and for the Rutherford Institute by *John W. Whitehead* and *Alexis I. Crow*.

Briefs of *amici curiae* urging affirmance were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, *Ger-*

## Opinion of the Court

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners challenge the constitutionality of an injunction entered by a Florida state court which prohibits antiabortion protesters from demonstrating in certain places and in various ways outside of a health clinic that performs abortions. We hold that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment, but that several other provisions of the injunction do not.

## I

Respondents operate abortion clinics throughout central Florida. Petitioners and other groups and individuals are

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*ald B. Curington and Gypsy Bailey, Assistant Attorneys General, Eleni M. Constantine, and Richard Cordray, and by the Attorneys General for their respective States as follows: Grant Woods of Arizona, Gale A. Norton of Colorado, Richard Blumenthal of Connecticut, Robert A. Marks of Hawaii, Roland W. Burris of Illinois, Pamela Carter of Indiana, Michael E. Carpenter of Maine, J. Joseph Curran, Jr., of Maryland, Scott Harshbarger of Massachusetts, Hubert H. Humphrey III of Minnesota, Joseph P. Mazurek of Montana, Deborah T. Poritz of New Jersey, Frankie Sue Del Papa of Nevada, Tom Udall of New Mexico, G. Oliver Koppell of New York, Michael F. Easley of North Carolina, Lee Fisher of Ohio, Theodore E. Kulongoski of Oregon, Jeffrey B. Pine of Rhode Island, Charles W. Burson of Tennessee, Dan Morales of Texas, Jeffrey L. Amestoy of Vermont, Darrell V. McGraw, Jr., of West Virginia, and James E. Doyle of Wisconsin; for the American College of Obstetricians and Gynecologists et al. by Carter G. Phillips, Joseph R. Guerra, Ann E. Allen, and Paul M. Smith; for the Center for Reproductive Law & Policy et al. by Lenora M. Lapidus; for the National Abortion Federation et al. by Elaine Metlin, Lynn I. Miller, Roger K. Evans, and Eve W. Paul; for the NOW Legal Defense and Education Fund et al. by Martha F. Davis, Deborah A. Ellis, Sally F. Goldfarb, and Burt Neuborne; and for People for the American Way et al. by Joseph N. Onek, Richard McMillan, Jr., Elliot M. Minberg, Lawrence S. Ottinger, Steven M. Freeman, Marc D. Stern, Lois C. Waldman, Richard F. Wolfson, Ronald Lindsay, Elaine R. Jones, Theodore M. Shaw, and Charles Stephen Ralston.*

*Laurence Gold and Walter Kamiat filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae.*

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engaged in activities near the site of one such clinic in Melbourne, Florida. They picketed and demonstrated where the public street gives access to the clinic. In September 1992, a Florida state court permanently enjoined petitioners from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic. Six months later, respondents sought to broaden the injunction, complaining that access to the clinic was still impeded by petitioners' activities and that such activities had also discouraged some potential patients from entering the clinic, and had deleterious physical effects on others. The trial court thereupon issued a broader injunction, which is challenged here.

The court found that, despite the initial injunction, protesters continued to impede access to the clinic by congregating on the paved portion of the street—Dixie Way—leading up to the clinic, and by marching in front of the clinic's driveways. It found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, "sidewalk counselors" would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.

The protests, the court found, took their toll on the clinic's patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures." App. 54. The noise produced by the protesters could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a

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later date, the doctor testified, increased their health risks by reason of the delay.

Doctors and clinic workers, in turn, were not immune even in their homes. Petitioners picketed in front of clinic employees' residences; shouted at passersby; rang the doorbells of neighbors and provided literature identifying the particular clinic employee as a "baby killer." Occasionally, the protesters would confront minor children of clinic employees who were home alone.

This and similar testimony led the state court to conclude that its original injunction had proved insufficient "to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to [medical and counseling] services." *Id.*, at 5. The state court therefore amended its prior order, enjoining a broader array of activities. The amended injunction prohibits petitioners<sup>1</sup> from engaging in the following acts:

"(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice [the Melbourne clinic] . . . .

"(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

"(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The [petitioners] . . . must remain at least [5] feet from the Clinic's east line.

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<sup>1</sup>In addition to petitioners, the state court's order was directed at "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry, . . . and all persons acting in concert or participation with them, or on their behalf." App. 56.

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Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zones does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the [petitioners]. . . .

“(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

“(5) At all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. . . .

“(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [respondents'] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [respondents'] employees, staff, owners or agents. The [petitioners] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

“(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or



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leaving, working at or using services at the [respondents'] Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic . . . .

“(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the [respondents'] Clinic.

“(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.” *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 679–680 (Fla. 1993).

The Florida Supreme Court upheld the constitutionality of the trial court's amended injunction. 626 So. 2d 664. That court recognized that the forum at issue, which consists of public streets, sidewalks, and rights-of-way, is a traditional public forum. *Id.*, at 671, citing *Frisby v. Schultz*, 487 U. S. 474, 480 (1988). It then determined that the restrictions are content neutral, and it accordingly refused to apply the heightened scrutiny dictated by *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983) (To enforce a content-based exclusion the State must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end). Instead, the court analyzed the injunction to determine whether the restrictions are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Ibid.* It concluded that they were.

Shortly before the Florida Supreme Court's opinion was announced, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction. The Court of Appeals struck down the injunction, characterizing the dispute as a clash “between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights.” *Cheffer v. McGregor*, 6 F. 3d 705,

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711 (1993). It stated that the asserted interests in public safety and order were already protected by other applicable laws and that these interests could be protected adequately without infringing upon the First Amendment rights of others. *Ibid.* The Court of Appeals found the injunction to be content based and neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end. *Ibid.*, citing *Carey v. Brown*, 447 U. S. 455, 461–462 (1980). We granted certiorari, 510 U. S. 1084 (1994), to resolve the conflict between the Florida Supreme Court and the Court of Appeals over the constitutionality of the state court's injunction.

## II

We begin by addressing petitioners' contention that the state court's order, because it is an injunction that restricts only the speech of antiabortion protesters, is necessarily content or viewpoint based. Accordingly, they argue, we should examine the entire injunction under the strictest standard of scrutiny. See *Perry Ed. Assn.*, *supra*, at 45. We disagree. To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law

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would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.

Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989) (internal quotation marks omitted) (upholding noise regulations); *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed"); see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221, 230 (1987); *Regan v. Time, Inc.*, 468 U. S. 641, 648–649 (1984); *Metromedia, Inc. v. San Diego*, 453 U. S. 490, 514–515 (1981) (plurality opinion); *Carey v. Brown*, *supra*, at 466–468. We thus look to the government's purpose as the threshold consideration. Here, the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based. See *Boos v. Barry*, 485 U. S. 312 (1988).<sup>2</sup> Accordingly, the injunction issued in

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<sup>2</sup> We also decline to adopt the prior restraint analysis urged by petitioners. Prior restraints do often take the form of injunctions. See, e. g., *New York Times Co. v. United States*, 403 U. S. 713 (1971) (refusing to enjoin publications of the "Pentagon Papers"); *Vance v. Universal Amusement Co.*, 445 U. S. 308 (1980) (*per curiam*) (holding that Texas public nuisance statute which authorized state judges, on the basis of a showing

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this case does not demand the level of heightened scrutiny set forth in *Perry Ed. Assn.*, 460 U. S., at 45. And we proceed to discuss the standard which does govern.

## III

If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*, *supra*, at 791, and similar cases. Given that the forum around the clinic is a traditional public forum, see *Frisby v. Schultz*, 487 U. S., at 480, we would determine whether the time, place, and manner regulations were “narrowly tailored to serve a significant governmental interest.” *Ward*, *supra*, at 791. See also *Perry Ed. Assn.*, *supra*, at 45.

There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. See *United States v. W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953). Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. “[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” *Railway Express Agency, Inc. v. New York*, 336

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that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint). Not all injunctions that may incidentally affect expression, however, are “prior restraints” in the sense that that term was used in *New York Times Co.*, *supra*, or *Vance*, *supra*. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners’ expression, as was the case in *New York Times Co.* and *Vance*, but because of their prior unlawful conduct.

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U. S. 106, 112–113 (1949). Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. *United States v. Paradise*, 480 U. S. 149 (1987).

We believe that these differences require a somewhat more stringent application of general First Amendment principles in this context.<sup>3</sup> In past cases evaluating injunctions restricting speech, see, e. g., *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886 (1982), *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941), we have relied upon such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. See *Carroll v. President and Comm'rs of Princess Anne*, 393 U. S. 175 (1968); *Claiborne Hardware, supra*, at 912, n. 47. Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, “that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979). See also *Dayton Bd. of Ed. v. Brinkman*, 433 U. S. 406, 418–420 (1977). Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. See, e. g., *Claiborne Hardware, supra*, at 916 (when sanctionable “conduct occurs in the context of constitutionally protected activity . . . ‘precision of regulation’ is

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<sup>3</sup> Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a “cognizable danger of recurrent violation.” *United States v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

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demanded”) (quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963)); 458 U. S., at 916, n. 52 (citing *Carroll*, *supra*, and *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 604 (1967)); *Carroll*, *supra*, at 183–184.

Both JUSTICE STEVENS and JUSTICE SCALIA disagree with the standard we announce, for policy reasons. See *post*, at 778 (STEVENS, J.); *post*, at 792–794 (SCALIA, J.). JUSTICE STEVENS believes that “injunctive relief should be judged by a more lenient standard than legislation,” because injunctions are imposed on individuals or groups who have engaged in illegal activity. *Post*, at 778. JUSTICE SCALIA, by contrast, believes that content-neutral injunctions are “at least as deserving of strict scrutiny as a statutory, content-based restriction.” *Post*, at 792. JUSTICE SCALIA bases his belief on the danger that injunctions, even though they might not “attack content *as content*,” may be used to suppress particular ideas; that individual judges should not be trusted to impose injunctions in this context; and that an injunction is procedurally more difficult to challenge than a statute. *Post*, at 793–794. We believe that consideration of *all* of the differences and similarities between statutes and injunctions supports, as a matter of policy, the standard we apply here.

JUSTICE SCALIA further contends that precedent compels the application of strict scrutiny in this case. Under that standard, we ask whether a restriction is “‘necessary to serve a compelling state interest and [is] narrowly drawn to achieve that end.’” *Post*, at 790 (quoting *Perry Ed. Assn.*, *supra*, at 45). JUSTICE SCALIA fails to cite a single case, and we are aware of none, in which we have applied this standard to a content-neutral injunction. He cites a number of cases in which we have struck down, with little or no elaboration, prior restraints on free expression. See *post*, at 798 (citing cases). As we have explained, however, we do not believe that this injunction constitutes a prior restraint, and we therefore believe that the “heavy presumption” against its constitutionality does not obtain here. See n. 2, *supra*.

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JUSTICE SCALIA also relies on *Claiborne Hardware* and *Carroll* for support of his contention that our precedent requires the application of strict scrutiny in this context. In *Claiborne Hardware*, we stated simply that “precision of regulation” is demanded. 458 U. S., at 916 (internal quotation marks omitted). JUSTICE SCALIA reads this case to require “surgical precision” of regulation, *post*, at 798, but that was not the adjective chosen by the author of the Court’s opinion, JUSTICE STEVENS. We think a standard requiring that an injunction “burden no more speech than necessary” exemplifies “precision of regulation.”<sup>4</sup>

As for *Carroll*, JUSTICE SCALIA believes that the “standard” adopted in that case “is strict scrutiny,” which “does not remotely resemble the Court’s new proposal.” *Post*, at 799. Comparison of the language used in *Carroll* and the wording of the standard we adopt, however, belies JUSTICE SCALIA’s exaggerated contention. *Carroll*, for example, requires that an injunction be “couched in the narrowest terms that will accomplish the pin-pointed objective” of the injunction. 393 U. S., at 183. We require that the injunction “burden no more speech than necessary” to accomplish its objective. We fail to see a difference between the two standards.

The Florida Supreme Court concluded that numerous significant government interests are protected by the injunction. It noted that the State has a strong interest in protecting a woman’s freedom to seek lawful medical or counseling services in connection with her pregnancy. See

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<sup>4</sup> In stating that “precision of regulation” is required in *Claiborne Hardware*, moreover, we cited both to *Carroll v. President and Comm’rs of Princess Anne*, 393 U. S. 175 (1968), a case involving an injunction, and to *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967), a case involving a state statute and regulations. If our precedent demanded the different treatment of statutes and injunctions, as JUSTICE SCALIA claims, it is difficult to explain our reliance on *Keyishian* in *Claiborne*.

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*Roe v. Wade*, 410 U. S. 113 (1973); *In re T. W.*, 551 So. 2d 1186, 1193 (Fla. 1989). The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens. 626 So. 2d, at 672. In addition, the court believed that the State's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, 487 U. S. 474 (1988), applied by analogy to medical privacy. 626 So. 2d, at 672. The court observed that while targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held "captive" by medical circumstance. *Id.*, at 673. We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them. We now examine each contested provision of the injunction to see if it burdens more speech than necessary to accomplish its goal.<sup>5</sup>

## A

## 1

We begin with the 36-foot buffer zone. The state court prohibited petitioners from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic. This speech-free buffer zone requires that petitioners move

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<sup>5</sup> Petitioners do not challenge the first two provisions of the state court's 1993 order. Brief for Petitioners 9. The provisions composed what had been the state court's 1992 permanent injunction and they chiefly addressed blocking, impeding, and inhibiting access to the clinic and its parking lot. Nor do petitioners challenge the restrictions in paragraphs 7, 8, and 9, which prohibit them from harassing and physically abusing clinic doctors, staff, and patients trying to gain access to the clinic or their homes.



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to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the free access of patients and staff. App. to Pet. for Cert. B-2, B-3. See *Cameron v. Johnson*, 390 U. S. 611 (1968) (upholding statute that prohibited picketing that obstructed or unreasonably interfered with ingress or egress to or from public buildings, including courthouses, and with traffic on the adjacent street sidewalks). The buffer zone also applies to private property to the north and west of the clinic property. We examine each portion of the buffer zone separately.

We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. See *Frisby, supra*, at 486 (“The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]”). Here the picketing is directed primarily at patients and staff of the clinic.

The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way. The state court seems to have had few other options to protect access given the narrow confines around the clinic. As the Florida Supreme Court noted, Dixie Way is only 21 feet wide in the area of the clinic. App. 260, 305. The state court was convinced that allowing petitioners to remain on the clinic’s sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access. And allowing the petitioners to stand in the middle of Dixie Way would obviously block vehicular traffic.

The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference

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must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review. *Milk Wagon Drivers*, 312 U. S., at 294. Moreover, one of petitioners' witnesses during the evidentiary hearing before the state court conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. App. 486. Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots. *Id.*, at 260, 305. We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order. *National Soc. of Professional Engineers v. United States*, 435 U. S. 679, 697–698 (1978). On balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.

JUSTICE SCALIA's dissent argues that a videotape made of demonstrations at the clinic represents "what one must presume to be the worst of the activity justifying the injunction." *Post*, at 785–786. This seems to us a gratuitous assumption. The videotape was indeed introduced by respondents, presumably because they thought it supported their request for the second injunction. But witnesses also testified as to relevant facts in a 3-day evidentiary hearing, and the state court was therefore not limited to JUSTICE SCALIA's rendition of what he saw on the videotape to make its findings in support of the second injunction. Indeed, petitioners themselves studiously refrained from challenging the factual basis for the injunction both in the state courts and here. Before the Florida Supreme Court, petitioners stated that "the Amended Permanent Injunction contains fundamental error on its face. The sole question presented

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by this appeal is a question of law, and for purposes of this appeal [petitioners] are assuming, *arguendo*, that a factual basis exists to grant injunctive relief.” Appellants’ Motion in Response to Appellees’ Motion to Require Full Transcript and Record of Proceedings in No. 93–00969 (Dist. Ct. App. Fla.), p. 2. Petitioners argued against including the factual record as an appendix in the Florida Supreme Court, and never certified a full record. We must therefore judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic’s entrance interfered with ingress to and egress from the clinic despite the issuance of the earlier injunction.

## 2

The inclusion of private property on the back and side of the clinic in the 36-foot buffer zone raises different concerns. The accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way. Patients and staff wishing to reach the clinic do not have to cross the private property abutting the clinic property on the north and west, and nothing in the record indicates that petitioners’ activities on the private property have obstructed access to the clinic. Nor was evidence presented that protestors located on the private property blocked vehicular traffic on Dixie Way. Absent evidence that petitioners standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic’s operation, this portion of the buffer zone fails to serve the significant government interests relied on by the Florida Supreme Court. We hold that on the record before us the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic.

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## B

In response to high noise levels outside the clinic, the state court restrained the petitioners from “singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the [c]linic” during the hours of 7:30 a.m. through noon on Mondays through Saturdays. We must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary. We have upheld similar noise restrictions in the past, and as we noted in upholding a local noise ordinance around public schools, “the nature of a place, ‘the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.’” *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). Noise control is particularly important around hospitals and medical facilities during surgery and recovery periods, and in evaluating another injunction involving a medical facility, we stated:

“Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.” *NLRB v. Baptist Hospital, Inc.*, 442 U. S. 773, 783–784, n. 12 (1979), quoting *Beth Israel Hospital v. NLRB*, 437 U. S. 483, 509 (1978) (BLACKMUN, J., concurring in judgment).

We hold that the limited noise restrictions imposed by the state court order burden no more speech than necessary to ensure the health and well-being of the patients at the clinic. The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the

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cacophony of political protests. “If overamplified loudspeakers assault the citizenry, government may turn them down.” *Grayned, supra*, at 116. That is what the state court did here, and we hold that its action was proper.

## C

The same, however, cannot be said for the “images observable” provision of the state court’s order. Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all “images observable.” This broad prohibition on all “images observable” burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families. Similarly, if the blanket ban on “images observable” was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by “images observable” inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

## D

The state court ordered that petitioners refrain from physically approaching any person seeking services of the clinic “unless such person indicates a desire to communicate” in an area within 300 feet of the clinic. The state court was attempting to prevent clinic patients and staff from being “stalked” or “shadowed” by the petitioners as they approached the clinic. See *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U. S. 672, 684 (1992) (“[F]ace-to-face solicitation presents risks of duress that are an appro-

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priate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation”).

But it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (*i. e.*, “fighting words” or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, see *Milk Wagon Drivers*, 312 U. S., at 292–293, this provision cannot stand. “As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Boos v. Barry*, 485 U. S., at 322 (internal quotation marks omitted). The “consent” requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.<sup>6</sup>

## E

The final substantive regulation challenged by petitioners relates to a prohibition against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. The prohibition also covers impeding access to streets that provide the sole access to streets on which those residences are located. The same analysis applies to the use of sound amplification equipment here as that discussed above: the government may simply demand that petitioners turn down the volume if the protests overwhelm the neighborhood. *Grayned*, 408 U. S., at 116.

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<sup>6</sup>We need not decide whether the “images observable” and “no-approach” provisions are content based.

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As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as “the last citadel of the tired, the weary, and the sick.” *Frisby*, 487 U. S., at 484. We stated that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” *Ibid.*

But the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. The ordinance at issue there made it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual.” *Id.*, at 477. The prohibition was limited to “focused picketing taking place solely in front of a particular residence.” *Id.*, at 483. By contrast, the 300-foot zone would ban “[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.” *Ibid.* The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

## IV

Petitioners also challenge the state court’s order as being vague and overbroad. They object to the portion of the injunction making it applicable to those acting “in concert” with the named parties. But petitioners themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties. Nor is that phrase subject, at the behest of petitioners, to a challenge for “overbreadth”; the phrase itself does not prohibit any conduct, but is simply directed at unnamed parties who might later be found to be acting “in concert” with the named parties. As such, the case is governed by our holding in *Regal Knitwear Co. v. NLRB*, 324 U. S. 9, 14 (1945). There a party subject to an injunction

SOUTER, J., concurring

argued that the order was invalid because of a provision that it applied to “successors and assigns” of the enjoined party. Noting that the party pressing the claim was not a successor or assign, we characterized the matter as “an abstract controversy over the use of these words.” *Id.*, at 15.

Petitioners also contend that the “in concert” provision of the injunction impermissibly limits their freedom of association guaranteed by the First Amendment. See, e. g., *Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley*, 454 U. S. 290 (1981). But petitioners are not enjoined from associating with others or from joining with them to express a particular viewpoint. The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.

V

In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court’s injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the “images observable” provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction. Accordingly, the judgment of the Florida Supreme Court is

*Affirmed in part and reversed in part.*

JUSTICE SOUTER, concurring.

I join the Court’s opinion and write separately only to clarify two matters in the record. First, the trial judge made reasonably clear that the issue of who was acting “in concert” with the named defendants was a matter to be taken up in



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individual cases, and not to be decided on the basis of protesters' viewpoints. See Tr. 40, 43, 93, 115, 119–120 (Apr. 12, 1993, Hearing). Second, petitioners themselves acknowledge that the governmental interests in protection of public safety and order, of the free flow of traffic, and of property rights are reflected in Florida law. See Brief for Petitioners 17, and n. 7 (citing, *e. g.*, Fla. Stat. §§ 870.041–870.047 (1991) (public peace); § 316.2045 (obstruction of public streets, highways, and roads)).

JUSTICE STEVENS, concurring in part and dissenting in part.

The certiorari petition presented three questions, corresponding to petitioners' three major challenges to the trial court's injunction.<sup>1</sup> The Court correctly and unequivocally rejects petitioners' argument that the injunction is a "content-based restriction on free speech," *ante*, at 762–764, as well as their challenge to the injunction on the basis that it applies to persons acting "in concert" with them, *ante*, at 775–776. I therefore join Parts II and IV of the Court's opinion, which properly dispose of the first and third questions presented. I part company with the Court, however, on its treatment of the second question presented, including its enunciation of the applicable standard of review.

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<sup>1</sup>“QUESTIONS PRESENTED FOR REVIEW

“1. Whether a state court injunction placing a thirty-six-foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

“2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred-foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

“3. Whether a state court injunction prohibiting named demonstrators and those acting ‘in concert’ from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association.” Pet. for Cert. i.

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## I

I agree with the Court that a different standard governs First Amendment challenges to generally applicable legislation than the standard that measures such challenges to judicial remedies for proven wrongdoing. See *ante*, at 764–765. Unlike the Court, however, I believe that injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community, *ibid.*, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity.<sup>2</sup> Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

The standard governing injunctions has two obvious dimensions. On the one hand, the injunction should be no more burdensome than necessary to provide complete relief, *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979). In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.

On the other hand, even when an injunction impinges on constitutional rights, more than “a simple proscription

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<sup>2</sup> Contrary to JUSTICE SCALIA's assumption, see *post*, at 794, n. 1, the deprivation of liberty caused by an injunction is not a form of punishment. Moreover, there is nothing unusual about injunctive relief that includes some restriction on speech as a remedy for prior misconduct. *National Soc. of Professional Engineers v. United States*, 435 U. S. 679, 697–698 (1978).

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against the precise conduct previously pursued” may be required; the remedy must include appropriate restraints on “future activities both to avoid a recurrence of the violation and to eliminate its consequences.” *National Soc. of Professional Engineers v. United States*, 435 U. S. 679, 697–698 (1978). Moreover, “[t]he judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large.” *Teachers v. Hudson*, 475 U. S. 292, 309–310, n. 22 (1986). As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature. See *United States v. Paradise*, 480 U. S. 149 (1987).

In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge’s unique familiarity with the facts.

## II

The second question presented by the certiorari petition asks whether the “consent requirement before speech is permitted” within a 300-foot buffer zone around the clinic unconstitutionally infringes on free speech.<sup>3</sup> Petitioners contend that these restrictions create a “no speech” zone in which they cannot speak unless the listener indicates a positive

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<sup>3</sup>See n. 1, *supra*. This question also encompasses the separate but related question whether the 300-foot buffer zone in residential areas is a reasonable time, place, and manner restriction, but incorrectly refers to that zone as containing a consent requirement. For the reasons stated in Part III–E of the Court’s opinion, which I join, I agree that the findings do not justify such a broad ban on picketing. I also agree with the Court’s rejection of petitioners’ prior restraint challenge to the 300-foot zones. See *ante*, at 763, n. 2.

## Opinion of STEVENS, J.

interest in their speech. And, in Part III–D of its opinion, the Court seems to suggest that, even in a more narrowly defined zone, such a consent requirement is constitutionally impermissible. *Ante*, at 773–774. Petitioners' argument and the Court's conclusion, however, are based on a misreading of ¶ (5) of the injunction.<sup>4</sup>

That paragraph does not purport to prohibit speech; it prohibits a species of conduct. Specifically, it prohibits petitioners “from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring” of petitioners. App. 59. The meaning of the term “physically approaching” is explained by the detailed prohibition that applies when the patient refuses to converse with, or accept delivery of literature from, petitioners. Absent such consent, the petitioners “shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.” *Ibid*. As long as petitioners do not physically approach patients in this manner, they remain free not only to communicate with the public but also to offer verbal or written advice on an individual basis to the clinic's patients through their “sidewalk counseling.”

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<sup>4</sup>The full text of ¶ (5) reads as follows:

“At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. In the event of such invitation, the [petitioners] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as ‘sidewalk counseling’, that person shall have the absolute right to leave or walk away and the [petitioners] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.” App. 59.

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Petitioners' "counseling" of the clinic's patients is a form of expression analogous to labor picketing. It is a mixture of conduct and communication. "In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *NLRB v. Retail Store Employees*, 447 U. S. 607, 619 (1980) (STEVENS, J., concurring in part and concurring in result). As with picketing, the principal reason why handbills containing the same message are so much less effective than "counseling" is that "the former depend entirely on the persuasive force of the idea." *Ibid.* Just as it protects picketing, the First Amendment protects the speaker's right to offer "sidewalk counseling" to all passers-by. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case. One may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers, *Cohen v. California*, 403 U. S. 15, 21-22 (1971). Nevertheless, that does not mean that he has an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services. Cf. *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972).

The "physically approaching" prohibition entered by the trial court is no broader than the protection necessary to provide relief for the violations it found. The trial judge entered this portion of the injunction only after concluding that the injunction was necessary to protect the clinic's patients and staff from "uninvited contacts, shadowing and stalking" by petitioners. App. 56. The protection is especially appropriate for the clinic patients given that the trial judge found that petitioners' prior conduct caused higher levels of "anxiety and hypertension" in the patients, increasing the risks associated with the procedures that the patients

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seek.<sup>5</sup> Whatever the proper limits on a court's power to restrict a speaker's ability to physically approach or follow an unwilling listener, surely the First Amendment does not prevent a trial court from imposing such a restriction given the unchallenged findings in this case.

The Florida Supreme Court correctly concluded:

“While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.” *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 675 (1993).

I thus conclude that, under the circumstances of this case, the prohibition against “physically approaching” in the 300-foot zone around the clinic withstands petitioners' First Amendment challenge. I therefore dissent from Part III–D.

### III

Because I have joined Parts I, II, III–E, and IV of the Court's opinion and have dissented as to Part III–D after concluding that the 300-foot zone around the clinic is a reasonable time, place, and manner restriction, no further discussion is necessary. See n. 1, *supra*. The Court, however, proceeds to address challenges to the injunction that, al-

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<sup>5</sup>Specifically, in its findings of fact, the trial court noted that:

“This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures.” *Id.*, at 54.

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though arguably raised by petitioners' briefs, are not properly before the Court.

After correctly rejecting the content-based challenge to the 36-foot buffer zone raised by the first question in the certiorari petition, the Court nevertheless decides to modify the portion of that zone that it believes does not protect ingress to the clinic. Petitioners, however, presented only a content-based challenge to the 36-foot zone; they did not present a time, place, and manner challenge. See n. 1, *supra*. They challenged only the 300-foot zones on this ground. *Ibid*. The scope of the 36-foot zone is thus not properly before us.<sup>6</sup> *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Phillips Corp.*, 510 U. S. 27 (1993) (*per curiam*).<sup>7</sup>

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<sup>6</sup> Indeed, it is unclear whether these challenges were presented to the Florida Supreme Court. In their appeal to that court, petitioners did not even file the transcript of the evidentiary hearings, contending that the "sole question presented by this appeal is a question of law." See Appellants' Motion in Response to Appellees' Motion to Require Full Transcript and Record of Proceedings in No. 93-00969 (Dist. Ct. App. Fla.), p. 2. Because petitioners argued that the entire decree was invalid as a matter of law, without making any contention that particular provisions should be modified, it appears there was no argument in that court about the size or the shape of the buffer zones.

Even if the question were properly presented here, I fully agree with the Florida Supreme Court's refusal to quibble over a few feet one way or the other when the parties have not directed their arguments at a narrow factual issue of this kind. *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 673 (1993). Moreover, respect for the highest court of the State strongly counsels against this sort of error correction in this Court.

<sup>7</sup> Even assuming that a time, place, and manner challenge to the 36-foot zone is fairly included within the first question presented, petitioners' brief challenges the *entire* 36-foot zone as overbroad and seeks to have it invalidated in its entirety. Nowhere in their briefs do they argue that the portion of the zone on the north and west sides of the clinic should be struck down in the event the Court upholds the restrictions on the front and east. As such, we do not have the benefit of respondents' arguments why those portions, if considered severally from the other portions of the zone, should be upheld. Moreover, the existence in the record of facts found by the

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The same is true of the noise restrictions and the “images observable” provision of ¶ (4).<sup>8</sup> That paragraph does not refer to the 36-foot or the 300-foot buffer zones, nor does it relate to the constitutionality of the “in concert” provision. As such, although I am inclined to agree with the Court’s resolution respecting the noise and images restrictions, I believe the Court should refrain from deciding their constitutionality because they are not challenged by the questions on which certiorari was granted.

## IV

For the reasons stated, I concur in Parts I, II, III–E, and IV of the Court’s opinion, and respectfully dissent from the remaining portions.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

The judgment in today’s case has an appearance of moderation and Solomonic wisdom, upholding as it does some

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trial court respecting petitioners’ conduct—independent of petitioners’ obstruction of ingress and egress—that support the entire 36-foot zone makes the Court’s micromanagement of the injunction particularly inappropriate. See, *e. g.*, App. 53 (“The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic”); *id.*, at 54 (“[T]he doctor was followed as he left the clinic by a person associated with the [petitioners] who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle”); *id.*, at 54–55 (noting that “a physician similarly employed was killed by an antiabortionist at a clinic in North Florida”).

<sup>8</sup> Paragraph (4) provides in full:

“During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.” *Id.*, at 59.



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portions of the injunction while disallowing others. That appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.

But the context here is abortion. A long time ago, in dissent from another abortion-related case, JUSTICE O'CONNOR, joined by then-JUSTICE REHNQUIST, wrote:

“This Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence. Today’s decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747, 814 (1986) (citations omitted).

Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.

Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions, I dissent.

## I

The record of this case contains a videotape, with running caption of time and date, displaying what one must presume

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to be the worst of the activity justifying the injunction issued by Judge McGregor and partially approved today by this Court. The tape was shot by employees of, or volunteers at, the Aware Woman Clinic on three Saturdays in February and March 1993; the camera location, for the first and third segments, appears to have been an upper floor of the clinic. The tape was edited down (from approximately 6 to 8 hours of footage to ½ hour) by Ruth Arick, a management consultant employed by the clinic and by the Feminist Majority Foundation. App. 527, 529, 533.

Anyone seriously interested in what this case was about must view that tape. And anyone doing so who is familiar with run-of-the-mine labor picketing, not to mention some other social protests, will be aghast at what it shows we have today permitted an individual judge to do. I will do my best to describe it.

On Saturday, March 6, 1993, a group of antiabortion protesters is gathered in front of the clinic, arrayed from east (camera-left) to west (camera-right) on the clinic side of Dixie Way, a small, nonartery street. Men, women, and children are also visible across the street, on the south side of Dixie Way; some hold signs and appear to be protesters, others may be just interested onlookers.

On the clinic side of the street, two groups confront each other across the line marking the south border of the clinic property—although they are so close together it is often impossible to tell them apart. On the clinic property (and with their backs to the camera) are a line of clinic and abortion-rights supporters, stretching the length of the property. Opposite them, and on the public right-of-way between the clinic property and Dixie Way itself, is a group of abortion opponents, some standing in place, others walking a picket line in an elongated oval pattern running the length of the property's south border. Melbourne police officers are visible at various times walking about in front of the

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clinic, and individuals can be seen crossing Dixie Way at various times.

Clinic supporters are more or less steadily chanting the following slogans: “Our right, our right, our right, to decide”; “Right to life is a lie, you don’t care if women die.” Then abortion opponents can be heard to sing: “Jesus loves the little children, all the children of the world, red and yellow, black and white, they are precious in His sight, Jesus loves the little children of the world.” Clinic supporters respond with: Q: “What do we want?” A: “Choice.” Q: “When do we want it?” A: “Now.” (“Louder!”) And that call and response is repeated. Later in the tape, clinic supporters chant “1–2–3–4, we won’t take it anymore; 5–6–7–8, Separate the Church and State.” On placards held by picketers and by stationary protesters on both sides of the line, the following slogans are visible: “Abortionists lie to women.” “Choose Life: Abortion Kills.” “N.O.W. Violence.” “The God of Israel is Pro-life.” “RU 486 Now.” “She Is a Child, Not a Choice.” “Abortion Kills Children.” “Keep Abortion Legal.” “Abortion: God Calls It Murder.” Some abortion opponents wear T-shirts bearing the phrase “Choose Life.”

As the abortion opponents walk the picket line, they traverse portions of the public right-of-way that are crossed by paved driveways, on each side of the clinic, connecting the clinic’s parking lot to the street. At one point an automobile moves west on Dixie Way and slows to turn into the westernmost driveway. There is a 3-to-4-second delay as the picketers, and then the clinic supporters, part to allow the car to enter. The camera cuts to a shot of another, parked car with a potato jammed onto the tailpipe. There is no footage of any person putting the potato on to the tailpipe.

Later, at a point when the crowd appears to be larger and the picketers more numerous, a red car is delayed approximately 10 seconds as the picketers (and clinic supporters) move out of the driveway. Police are visible helping to clear

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a path for the vehicle to enter. As the car waits, two persons appearing to bear leaflets approach, respectively, the driver and front passenger doors. They appear to elicit no response from the car's occupants and the car passes safely onto clinic property. Later, a blue minivan enters the driveway and is also subject to the same delay. Still later a jeep-type vehicle leaves the clinic property and slows down slightly where the driveway crosses the public right-of-way. At no time is there any apparent effort to prevent entry or exit, or even to delay it, except for the time needed for the picketers to get out of the way. There is no sitting down, packing en masse, linking of hands, or any other effort to blockade the clinic property.

The persons standing but not walking the picket line include a woman with a child in a stroller and a man shouting the Book of Daniel's account of Meshach, Shadrach, and Abednego. A woman on a stepladder holds up a sign in the direction of the clinic; a clinic supporter counters with a larger sign held up between the other and the clinic. A brief shot reveals an older man in a baseball cap—head, shoulders, and chest visible above the clinic fence—who appears to be reading silently from a small book. A man on clinic property holds a boom box out in the direction of the abortion opponents. As the crowd grows it appears at various points to have spilled over into the north-side, west-bound lane of Dixie Way.

At one point, Randall Terry arrives and the press converge upon him, apparently in Dixie Way itself. A sign is held near his head reading "Randall Terry Sucks." Terry appears to be speaking to the press and at one point tears pages from a notebook of some kind. Through all of this, abortion opponents and abortion-rights supporters appear to be inches from one another on each side of the south border of the property. They exchange words, but at no time is there any violence or even any discernible jostling or physical contact between these political opponents.

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The scene shifts to early afternoon of the same day. Most of the press and most of the abortion opponents appear to have departed. The camera focuses on a woman who faces the clinic and, hands cupped over her mouth, shouts the following: “Be not deceived; God is not mocked. . . . Ed Windle, God’s judgment is on you, and if you don’t repent, He will strike you dead. The baby’s blood flowed over your hands, Ed Windle. . . . You will burn in hell, Ed Windle, if you don’t repent. There were arms and legs pulled off today. . . . An innocent little child, a little boy, a little girl, is being destroyed right now.” Cheering is audible from the clinic grounds. A second person shouts “You are responsible for the deaths of children. . . . You are a murderer. Shame on you.” From the clinic grounds someone shouts “Why don’t you go join the wacko in Waco?” The first woman says “You are applauding the death of your children. We will be everywhere. . . . There will be no peace and no rest for the wicked. . . . I pray that you will give them dreams and nightmares, God.”

The second segment of the videotape displays a group of approximately 40 to 50 persons walking along the side of a major highway. It is Saturday, March 13, 1993, at 9:56 a.m. The demonstrators walk in an oval pattern, carrying no signs or other visible indicators of their purpose. According to Ruth Arick, this second portion was filmed in front of the condominium where clinic owner Ed Windle lived.

A third segment begins. The date-time register indicates that it is the morning of Saturday, February 20, 1993. A teenage girl faces the clinic and exclaims: “Please don’t let them kill me, Mommy. Help me, Daddy, please.” Clinic supporters chant, “We won’t go back.” A second woman, the one who spoke at greatest length in the first segment, calls, “If you [inaudible], help her through it.” Off camera, a group sings “Roe, Roe, Roe v. Wade, we will never quit, Freedom of choice is the law of the land, better get used to it.” The woman from the first segment appears to address

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specific persons on clinic property: “Do you ever wonder what your baby would have looked like? Do you wonder how old it would have been? Because I did the same thing . . . .” Then a police officer is visible writing someone a citation. The videotape ends with a shot of an automobile moving eastbound on Dixie Way. As it slows to a stop at the intersection of U. S. 1, two leafletters approach the car and then pull back as it passes on.

The videotape and the rest of the record, including the trial court’s findings, show that a great many forms of expression and conduct occurred in the vicinity of the clinic. These include singing, chanting, praying, shouting, the playing of music both from the clinic and from handheld boom boxes, speeches, peaceful picketing, communication of familiar political messages, handbilling, persuasive speech directed at opposing groups on the issue of abortion, efforts to persuade individuals not to have abortions, personal testimony, interviews with the press, and media efforts to report on the protest. What the videotape, the rest of the record, and the trial court’s findings do not contain is any suggestion of violence near the clinic, nor do they establish any attempt to prevent entry or exit.

## II

## A

Under this Court’s jurisprudence, there is no question that this public sidewalk area is a “public forum,” where citizens generally have a First Amendment right to speak. *United States v. Grace*, 461 U. S. 171, 177 (1983). The parties to this case invited the Court to employ one or the other of the two well-established standards applied to restrictions upon this First Amendment right. Petitioners claimed the benefit of so-called “strict scrutiny,” the standard applied to content-based restrictions: The restriction must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” *Perry Ed. Assn. v. Perry Local Educa-*

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*tors' Assn.*, 460 U.S. 37, 45 (1983). Respondents, on the other hand, contended for what has come to be known as “intermediate scrutiny” (midway between the “strict scrutiny” demanded for content-based regulation of speech and the “rational basis” standard that is applied—under the Equal Protection Clause—to government regulation of non-speech activities). See, e.g., *Turner Broadcasting System, Inc. v. FCC*, *ante*, at 642. That standard, applicable to so-called “time, place, and manner regulations” of speech, provides that the regulations are permissible so long as they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Perry, supra*, at 45. The Court adopts neither of these, but creates, brand new for this abortion-related case, an additional standard that is (supposedly) “somewhat more stringent,” *ante*, at 765, than intermediate scrutiny, yet not as “rigorous,” *ibid.*, as strict scrutiny. The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe, so I must simply recite it: Whereas intermediate scrutiny requires that the restriction be “narrowly tailored to serve a significant government interest,” the new standard requires that the restriction “burden no more speech than necessary to serve a significant government interest.” *Ibid.*

I shall discuss the Court’s mode of applying this supposedly new standard presently, but first I must remark upon the peculiar manner in which the standard was devised. The Court begins, in Part II of the opinion, by considering petitioners’ contention that, since the restriction is content based, strict scrutiny should govern. It rejects the premise, and hence rejects the conclusion. It then proceeds, in Part III, to examination of respondents’ contention that plain old

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intermediate scrutiny should apply. It says no to that, too, because of the distinctive characteristics of injunctions that it discusses, *ante*, at 764–765, and hence decides to supplement intermediate scrutiny with intermediate-intermediate scrutiny. But this neatly staged progression overlooks an obvious option. The real question in this case is not whether intermediate scrutiny, which the Court assumes to be some kind of default standard, should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good a reason as “content basis” for demanding strict scrutiny. That possibility is simply not considered. Instead, the Court begins Part III with the following optical illusion: “If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the [intermediate scrutiny] standard,” *ante*, at 764—and then proceeds to discuss whether petitioners can sustain the burden of departing from that presumed disposition.

But this is *not* a statute, and it *is* an injunctive order. The Court might just as logically (or illogically) have begun Part III: “If this were a content-based injunction, rather than a non-content-based injunction, its constitutionality would be assessed under the strict scrutiny standard”—and have then proceeded to discuss whether *respondents* can sustain the burden of departing from *that* presumed disposition. The question should be approached, it seems to me, without any such artificial loading of the dice. And the central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is *at least* as deserving of strict scrutiny as a statutory, content-based restriction.

That is so for several reasons: The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim.



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But that same danger exists with injunctions. Although a speech-restricting injunction may not attack content *as content* (in the present case, as I shall discuss, even that is not true), it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably. The proceedings before us here illustrate well enough what I mean. The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view.

The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: They are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman. And the third reason is that the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards. Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule of *Walker v. Birmingham*, 388 U. S. 307 (1967), eliminates the defense that the injunction itself was unconstitutional. Accord, *Dade County Classroom Teachers' Assn. v. Rubin*, 238 So. 2d 284, 288 (Fla. 1970). Thus, persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent

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contempt proceedings. This is good reason to require the strictest standard for issuance of such orders.<sup>1</sup>

The Court seeks to minimize the similarity between speech-restricting injunctions and content-based statutory proscriptions by observing that the fact that “petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order,” but rather “suggests only that those in the group *whose conduct* violated the court’s order happen to share the same opinion regarding abortions,” *ante*, at 763. But the Court errs in thinking that the vice of content-based statutes is that they necessarily have the invidious purpose of suppressing particular ideas. “[O]ur cases have consistently held that ‘[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.’” *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U. S. 575, 592 (1983)). The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoid-

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<sup>1</sup>JUSTICE STEVENS believes that speech-restricting injunctions “should be judged by a more lenient standard than legislation” because “injunctions apply solely to [those] who, by engaging in illegal conduct, have been judicially deprived of some liberty.” *Ante*, at 778. Punishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct. The supposed prior violation of a judicial order was the only thing that rendered petitioners *subject* to a personally tailored restriction on speech in the first place—not in order to punish them, but to protect the public order. To say that their prior violation not only subjects them to being singled out in this fashion, but also loosens the standards for protecting the public order through speech restrictions, is double counting.

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able “targeting” discussed above, precisely the same is true of the speech-restricting injunction.

Finally, though I believe speech-restricting injunctions are dangerous enough to warrant strict scrutiny even when they are not technically content based, I think the injunction in the present case was content based (indeed, viewpoint based) to boot. The Court claims that it was directed, not at those who *spoke* certain things (antiabortion sentiments), but at those who *did* certain things (violated the earlier injunction). If that were true, then the injunction’s residual coverage of “all persons acting in concert or participation with [the named individuals and organizations], or on their behalf,” would not include those who merely entertained the same beliefs and wished to express the same views as the named defendants. But the construction given to the injunction by the issuing judge, which is entitled to great weight, cf. *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 132–133 (1992); *NLRB v. Donnelly Garment Co.*, 330 U. S. 219, 227 (1947), is to the contrary: All those who wish to express the same views as the named defendants are deemed to be “acting in concert or participation.” Following issuance of the amended injunction, a number of persons were arrested for walking within the 36-foot speech-free zone. At an April 12, 1993, hearing before the trial judge who issued the injunction, the following exchanges occurred:

Mr. Lacy: “I was wondering how we can—why we were arrested and confined as being in concert with these people that we don’t know, when other people weren’t, that were in that same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction.”

The Court: “Mr. Lacy, I understand that those on the other side of the issue [abortion-rights supporters] were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the

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issue, because *the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. . . .*" Tr. 104–105 (Appearance Hearings Held Before Judge McGregor, Eighteenth Judicial Circuit, Seminole County, Florida (emphasis added)).

And:

John Doe No. 16: "This was the first time that I was in this area myself and I had not attempted to block an entrance to a clinic in that town or anywhere else in the State of Florida in the last year or ever.

"I also understand that the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life. I guess the question that I'm asking is were the beliefs in ideologies of the people that were present, were those taken into consideration when we were arrested?

. . . .  
". . . When you issued the Injunction did you determine that it would only apply to—that it would apply only to people that were demonstrating that were pro-life?"

The Court: "*In effect, yes.*" *Id.*, at 113–116 (emphasis added).

And finally:

John Doe No. 31: ". . . How did the police determine that I was acting in concert with some organization that was named on this injunction? I again am a person who haven't seen this injunction. So how did the police determine that I was acting in concert?"

The Court: "They observed your activities and determined in their minds *whether or not what you were*

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*doing was in concert with the—I gather the pro-life position of the other, of the named Defendants.”* *Id.*, at 148 (emphasis added).

These colloquies leave no doubt that the revised injunction here is tailored to restrain persons distinguished, not by proscribable *conduct*, but by proscribable *views*.<sup>2</sup>

## B

I have discussed, in the prior subsection, the policy reasons for giving speech-restricting injunctions, even content-neutral ones, strict scrutiny. There are reasons of precedent as well, which are essentially ignored by the Court.

To begin with, an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint. As THE CHIEF JUSTICE wrote for the Court last Term: “The term prior restraint is used ‘to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.’ . . . [P]ermanent injunctions, *i. e.*,—court orders that actually forbid speech activities—are classic examples of prior restraints.” *Alexander v. United States*, 509 U. S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* §4.03, p. 4–14 (1984) (emphasis added in *Alexander*)).<sup>3</sup> See also 509 U. S., at 572 (“[T]he

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<sup>2</sup>JUSTICE SOUTER seeks to contradict this, saying that “the trial judge made reasonably clear that the issue of who was acting ‘in concert’ with the named defendants was . . . not to be decided on the basis of protesters’ viewpoints. See Tr. 40, 43, 93, 115, 119–120 (Apr. 12, 1993, Hearing).” *Ante*, at 776–777. The only way to respond to this scattershot assertion is to refer the reader to the cited pages, plus one more (page 116) which clarifies what might have been ambiguous on page 115. These pages are reproduced verbatim in the Appendix to this opinion. As the reader will observe, they do not remotely support JUSTICE SOUTER’s assertion that the injunction does not distinguish on the basis of viewpoint.

<sup>3</sup>This statement should be compared with today’s opinion, which says, *ante*, at 763, n. 2, that injunctions are not prior restraints (or at least not the nasty kind) if they only restrain speech in a certain area, or if the

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[prior restraint] doctrine . . . encompasses injunctive systems which threaten or bar future speech based on some past infraction”) (KENNEDY, J., dissenting). We have said that a “prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity,” *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419 (1971) (quoting *Carroll v. President and Comm’rs of Princess Anne*, 393 U. S. 175, 181 (1968)), and have repeatedly struck down speech-restricting injunctions. See, e. g., *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957); *Keefe*, *supra*; *New York Times Co. v. United States*, 403 U. S. 713 (1971); *Nebraska Press Assn. v. Stuart*, 427 U. S. 539 (1976); *National Socialist Party of America v. Skokie*, 432 U. S. 43 (1977); *Vance v. Universal Amusement Co.*, 445 U. S. 308 (1980) (statute authorizing injunctions); *CBS Inc. v. Davis*, 510 U. S. 1315 (1994) (BLACKMUN, J., in chambers) (setting aside state-court preliminary injunction against a scheduled broadcast).

At oral argument neither respondents nor the Solicitor General, appearing as *amicus* for respondents, could identify a single speech-injunction case applying mere intermediate scrutiny (which differs little if at all from the Court’s intermediate-intermediate scrutiny). We have, in our speech-injunction cases, affirmed both requirements that characterize strict scrutiny: compelling public need and surgical precision of restraint. Even when (unlike in the present case) the First Amendment activity is intermixed with *violent* conduct, “‘precision of regulation’ is demanded.” *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 916 (1982) (quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963)). In *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1941), we upheld an injunction prohibiting peaceful picketing, but only because the picketing had been accompanied by 50 instances of window smashing, bombings, stench

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basis for their issuance is not content but prior unlawful conduct. This distinction has no antecedent in our cases.

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bombings, destruction of trucks, beatings of drivers, arson, and armed violence. We noted that the “picketing . . . was set in a background of violence,” *id.*, at 294, which was “neither episodic nor isolated,” *id.*, at 295, and we allowed the ban on picketing “to prevent future coercion,” *id.*, at 296, as part of a state court’s power “to deal with coercion due to extensive violence,” *id.*, at 299. We expressly distinguished the case from those in which there was no “[e]ntanglement with violence.” *Id.*, at 297. In *Youngdahl v. Rainfair, Inc.*, *supra*, we refused to allow a blanket ban on picketing when, even though there had been scattered violence, it could not be shown that “a pattern of violence was established which would inevitably reappear in the event picketing were later resumed.” *Id.*, at 139.

The utter lack of support for the Court’s test in our jurisprudence is demonstrated by the two cases the opinion relies upon. For the proposition that a speech restriction is valid when it “burden[s] no more speech than necessary to accomplish a significant government interest,” the Court cites *NAACP v. Claiborne Hardware Co.*, *supra*, and *Carroll v. President and Comm’rs of Princess Anne*, *supra*, at 184. But as I shall demonstrate in some detail below, *Claiborne* applied a much more stringent test; and the very text of *Carroll* contradicts the Court. In the passage cited, *Carroll* says this: “An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.” 393 U. S., at 183. That, of course, is strict scrutiny; and it does not remotely resemble the Court’s new proposal, for which it is cited as precedential support. “Significant government interest[s]” (referred to in the Court’s test) are general, innumerable, and omnipresent—at least one of them will be implicated by any activity set in a public forum. “Essential needs of the public order,” on the other hand, are factors of *exceptional* application. And that an injunction

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“burden no more than necessary” is not nearly as demanding as the requirement that it be couched in the “narrowest terms that will accomplish [a] pin-pointed objective.” That the Court should cite this case as its principal authority is an admission that what it announces rests upon no precedent at all.

### III

#### A

I turn now from the Court's selection of a constitutional test to its actual application of that test to the facts of the present case. Before doing that, however, it will be helpful—in order to demonstrate how far the Court has departed from past practice—to consider how we proceeded in a relatively recent case that did not involve the disfavored class of abortion protesters. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886 (1982), involved, like this case, protest demonstrations against private citizens mingling political speech with (what I will assume for the time being existed here) significant illegal behavior.<sup>4</sup>

Writing for the Court, JUSTICE STEVENS summarized the events giving rise to the *Claiborne* litigation (*id.*, at 898–906): A local chapter of the NAACP, rebuffed by public officials of Port Gibson and Claiborne County in its request for redress of various forms of racial discrimination, began a boycott of local businesses. During the boycott, a young black man was shot and killed in an encounter with Port Gibson police and “sporadic acts of violence ensued.” *Id.*, at 902. The following day, boycott leader Charles Evers told a group that boycott violators would be disciplined by their own people and warned that the sheriff “could not sleep with boycott violators at night.” *Ibid.* He stated at a second

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<sup>4</sup> *Claiborne Hardware* involved both monetary damages and an injunction, but that is of no consequence for purposes of the point I am making here: that we have been careful to insulate all elements of speech not infected with illegality.



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gathering that “[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn neck.” *Ibid.* In connection with the boycott, there were marches and picketing (often by small children). “Store watchers” were posted outside boycotted stores to identify those who traded, and their names were read aloud at meetings of the Claiborne County NAACP and published in a mimeographed paper. The chancellor found that those persons were branded traitors, called demeaning names, and socially ostracized. Some had shots fired at their houses, a brick was thrown through a windshield, and a garden damaged. Other evidence showed that persons refusing to observe the boycott were beaten, robbed, and publicly humiliated (by spanking).

The merchants brought suit against two groups involved in organizing the boycott and numerous individuals. The trial court found tort violations, violations of a state statute prohibiting secondary boycotts, and state antitrust violations. It issued a broad permanent injunction against the boycotters, enjoining them from stationing “store watchers” at the plaintiffs’ business premises; from persuading any person to withhold patronage; from using demeaning and obscene language to or about any person because of his patronage; from picketing or patrolling the premises of any of the respondents; and from using violence against any person or inflicting damage upon any real or personal property. *Id.*, at 893. The Mississippi Supreme Court upheld the assessment of liability and the injunction, but solely on the tort theory, saying that “[i]f any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other.” *Id.*, at 895.

The legal analysis of this Court proceeded along the following lines:

“[T]he boycott . . . took many forms. [It] was launched at a meeting of the local branch of the NAACP.

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[It was] attended by several hundred persons. Its acknowledged purpose was to secure compliance . . . with a lengthy list of demands for racial equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join its cause.

“Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. . . . ‘[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.’ We recognize that ‘by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.’” *Id.*, at 907–908 (quoting *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U. S. 290, 294 (1981)).

We went on to say that “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected,” 458 U. S., at 908, and held that the nonviolent elements of the protesters’ activities were entitled to the protection of the First Amendment, *id.*, at 915.

Because we recognized that the boycott involved elements of protected First Amendment speech and other elements not so protected, we took upon ourselves a highly particularized burden of review, recognizing a “special obligation on this Court to examine critically the basis on which liability was imposed.” *Ibid.* “The First Amendment,” we noted, “does not protect violence,” but when conduct sanctionable by tort liability “occurs in the context of constitutionally protected activity . . . ‘precision of regulation’ is demanded.” *Id.*, at 916 (quoting *NAACP v. Button*, 371 U. S., at 438). Then, criticizing the Mississippi Supreme Court for “broadly assert[ing]—without differentiation—that [i]ntimi-

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dation, threats, social ostracism, vilification, and traduction were devices used by the defendants to effectuate the boycott,” 458 U. S., at 921 (internal quotation marks omitted), we carefully examined the record for factual support of the findings of liability. While affirming that a “judgment tailored to the consequences of [individuals’] unlawful conduct may be sustained,” we said that “mere association with [a] group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability.” *Id.*, at 925–926. We said in conclusion that any characterization of a political protest movement as a violent conspiracy “must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.” *Id.*, at 933–934. Because this careful procedure had not been followed by the Mississippi courts, we set aside the entire judgment, including the injunction. *Id.*, at 924, n. 67, 934.

## B

I turn now to the Court’s performance in the present case. I am content to evaluate it under the lax (intermediate-intermediate scrutiny) standard that the Court has adopted, because even by that distorted light it is inadequate.

The first step under the Court’s standard would be, one should think, to identify the “significant government interest” that justifies the portions of the injunction it upheld, namely, the enjoining of speech in the 36-foot zone, and the making (during certain times) of “‘sounds . . . within earshot of the patients inside the [c]linic.’” *Ante*, at 772. At one point in its opinion, the Court identifies a number of government interests: the “interest in protecting a woman’s freedom to seek lawful medical or counseling services,” the “interest in ensuring the public safety and order, in promoting

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the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens,” the “interest in . . . medical privacy,” and the interest in “the psychological [and] physical well-being of the patient held ‘captive’ by medical circumstance.” *Ante*, at 767, 768. The Court says, *ante*, at 768, that “these governmental interests [are] quite sufficient to justify an appropriately tailored injunction to protect them.” Unless, however, the Court has destroyed even more First Amendment law than I fear, this last statement must be read in conjunction with the Court’s earlier acknowledgment that “[u]nder general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a ‘cognizable danger of recurrent violation.’” *Ante*, at 765, n. 3 (quoting *United States v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953)). It is too much to believe, even of today’s opinion, that it approves issuance of an injunction against speech “to promote the free flow of traffic” *even when there has been found no violation, or threatened violation, of a law relating to that interest*.

Assuming then that the “significant interests” the Court mentioned must in fact be significant enough to be protected by state law (a concept that includes a prior court order), which law has been, or is about to be, violated, the question arises: What state law is involved here? The only one even mentioned is the original September 30, 1992, injunction,<sup>5</sup> which had been issued (quite rightly, in my judgment) in re-

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<sup>5</sup> JUSTICE SOUTER points out that “petitioners themselves acknowledge that the governmental interests in protection of public safety and order, of the free flow of traffic, and of property rights are reflected in Florida law. See Brief for Petitioners 17, and n. 7 (citing [various Florida statutes]).” *Ante*, at 777. This is true but quite irrelevant. As the preceding sentence of text shows, we are concerned here not with state laws in general, but with state laws that these respondents had been found to have violated. There is *no* finding of violation of any of these cited Florida statutes.

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sponse to threats by the originally named parties (including petitioners here) that they would “[p]hysically close down abortion mills,” “bloc[k] access to clinics,” “ignore the law of the State,” and “shut down a clinic.” Permanent Injunction Findings of Fact ¶¶ 2, 5, 7, 8, App. 6–7. That original injunction prohibited petitioners from:

“1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County Florida;

“2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and

“3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.” *Id.*, at 9.

According to the Court, the state court imposed the later injunction’s “restrictions on petitioner[s] . . . antiabortion message because they repeatedly violated the court’s original order.” *Ante*, at 763. Surprisingly, the Court accepts this reason as valid, without asking whether the court’s findings of fact support it—whether, that is, the acts of which petitioners stood convicted *were* violations of the original injunction.

The Court simply takes this on faith—even though violation of the original injunction is an essential part of the reasoning whereby it approves portions of the amended injunction, even though petitioners denied any violation of the original injunction, even though the utter lack of proper basis for the other challenged portions of the injunction hardly inspires confidence that the lower courts knew what they were doing, and even though close examination of the factual basis for essential conclusions is the usual practice in First Amendment cases, see *Claiborne Hardware*, 458 U. S.,

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at 915–916, n. 50; *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963); *Fiske v. Kansas*, 274 U. S. 380, 385–386 (1927); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485, 517 (1984) (REHNQUIST, J., dissenting). Let us proceed, then, to the inquiry the Court neglected. In the amended permanent injunction the trial court found that

“despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners’ facility . . . [in] the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. . . . Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.” Amended Permanent Injunction ¶ A.

“As traffic slowed on Dixie Way and began its turn into the clinic’s driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles’ occupants to give them anti-abortion literature and to urge them not to use the clinic’s services. Such so-called sidewalk counselors were assisted in ac-

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complishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.” *Id.*, ¶ E.

“The . . . staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others *took their time to get out of the way . . . .* This physician also testified that he witnessed the demonstrators running along side of and in front of patients’ vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. . . .” *Id.*, ¶ I (emphasis added).

On the basis of these findings Judge McGregor concluded that “the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of traffic.” *Id.*, Conclusions, ¶ A.<sup>6</sup>

These are the only findings and conclusions of the court that could conceivably be considered to relate to a violation of the original injunction. They all concern behavior by the protesters causing traffic on the street in front of the abortion clinic to slow down, and causing vehicles crossing the

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<sup>6</sup>In my subsequent discussion, I shall give the Florida trial court the benefit of the doubt, and assume that the phrase “continue to impede and obstruct” expresses the conclusion that petitioners had violated those provisions of the original injunction which prohibited “impeding or obstructing.” It is not entirely clear, however, that the Florida court was in fact asserting a violation of the original injunction. As far as the record shows, it assessed no penalty for any such violation; and “impeding and obstructing” can embrace many different things, not all of which (as I shall discuss presently) come within the meaning of the original injunction.

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pedestrian right-of-way, between the street and the clinic's parking lot, to slow down or even, occasionally, to stop momentarily while pedestrians got out of the way. As far as appears from the court's findings, all of these results were produced, not by anyone intentionally seeking to block oncoming traffic, but as the incidental effect of persons engaged in the activities of walking a picket line and leafletting on public property in front of the clinic. There is no factual finding that petitioners engaged in *any* intentional or purposeful obstruction.

Now let us compare these activities with the earlier injunction, violation of which is the asserted justification for the speech-free zone. Walking the return leg of the picket line on the paved portion of Dixie Way (instead of on the sidewalk), and congregating on the unpaved portion of that street, may, for all we know, violate some municipal ordinance (though that was not alleged, and the municipal police evidently did not seek to prevent it); but it assuredly did not violate the earlier injunction, which made no mention of such a prohibition. Causing the traffic along Dixie Way to slow down "in response to the congestion" is also irrelevant; the injunction said nothing about slowing down traffic on public rights-of-way. It prohibited the doing (or urging) of *only three things*: (1) "physically abusing persons entering, leaving, working or using any services" of the abortion clinic (there is no allegation of that); (2) "trespassing on [or] sitting in" the abortion clinic (there is no allegation of that); and (3) "blocking, impeding or obstructing ingress into or egress from" the abortion clinic.

Only the last of these has any conceivable application here, and it seems to me that it must reasonably be read to refer to *intentionally* blocking, impeding, or obstructing, and *not* to such temporary obstruction as may be the normal and incidental consequence of other protest activity. That is obvious, first of all, from the context in which the original injunction was issued—as a response to petitioners' threatened



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actions of trespass and blockade, *i. e.*, the physical shutting down of the local clinics. Secondly, if that narrow meaning of intentional blockade, impediment, or obstruction was not intended, and if it covered everything up to and including the incidental and “momentary” stopping of entering vehicles by persons leafletting and picketing, the original injunction would have failed the axiomatic requirement that its terms be drawn with precision. See, *e. g.*, *Milk Wagon Drivers*, 312 U. S., at 296; 1 D. Dobbs, *Law of Remedies* § 2.8(7), p. 219 (2d ed. 1993); 7 J. Moore, J. Lucas, & K. Sinclair, *Moore’s Federal Practice* ¶ 65.11 (2d ed. 1994); cf. Fed. Rule Civ. Proc. 65(d) (“Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail . . . the act or acts sought to be restrained”). And finally, if the original injunction did not have that narrow meaning it would assuredly have been unconstitutional, since it would have prevented speech-related activities that were, insofar as this record shows, neither criminally or civilly unlawful nor inextricably intertwined with unlawful conduct. See *Milk Wagon Drivers*, *supra*, at 292, 297; *Carroll*, 393 U. S., at 183–184.

If the original injunction is read as it must be, there is nothing in the trial court’s findings to suggest that it was violated. The Court today speaks of “the failure of the first injunction to protect access.” *Ante*, at 769. But the first injunction did not broadly “protect access.” It forbade particular acts that impeded access, to wit, intentionally “blocking, impeding or obstructing.” The trial court’s findings identify none of these acts, but only a mild interference with access that is the incidental by-product of leafletting and picketing. There was no sitting down, no linking of arms, no packing en masse in the driveway; the most that can be alleged (and the trial court did not even make this a finding) is that on one occasion protesters “took their time to get out of the way.” If that is enough to support this one-man proscription of free speech, the First Amendment is in grave peril.

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I almost forgot to address the facts showing prior violation of law (including judicial order) with respect to the other portion of the injunction the Court upholds: the no-noise-within-earshot-of-patients provision. That is perhaps because, amazingly, neither the Florida courts *nor this Court* makes the slightest attempt to link that provision to prior violations of law. The relevant portion of the Court's opinion, Part II–B, simply reasons that hospital patients should not have to be bothered with noise, from political protests or anything else (which is certainly true), and that therefore the noise restrictions could be imposed *by injunction* (which is certainly false). Since such a law is reasonable, in other words, it can be enacted by a single man to bind only a single class of social protesters. The pro-abortion demonstrators who were often making (if respondents' videotape is accurate) *more* noise than the petitioners, can continue to shout their chants at their opponents exiled across the street to their hearts' content. The Court says that “[w]e have upheld similar noise restrictions in the past,” *ante*, at 772, citing *Grayned v. City of Rockford*, 408 U. S. 104 (1972). But *Grayned* involved an *ordinance*, and not an *injunction*; it applied to *everyone*. The only other authority the Court invokes is *NLRB v. Baptist Hospital, Inc.*, 442 U. S. 773 (1979), which it describes as “evaluating another injunction involving a medical facility,” *ante*, at 772, but which evaluated no such thing. *Baptist Hospital*, like *Grayned*, involved a restriction of general application, adopted by the hospital itself—and the case in any event dealt not with whether the government had violated the First Amendment by restricting noise, but with whether the hospital had violated the National Labor Relations Act by restricting solicitation (including solicitation of union membership).

Perhaps there is a local ordinance in Melbourne, Florida, prohibiting loud noise in the vicinity of hospitals and abortion clinics. Or perhaps even a Florida common-law prohibition applies, rendering such noisemaking tortious. But the

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record in this case shows (and, alas, the Court's opinion today demands) neither indication of the existence of any such law nor a finding that it had been violated. The fact that such a law would be reasonable is enough, according to the Court, to justify a single judge in imposing it upon these protesters alone. The First Amendment (and even the common law of injunctions, see the Court's own footnote 3) reels in disbelief.

The Court does not even attempt a response to the point I have made in this section, insofar as the injunction against noise is concerned. That portion of its opinion, *ante*, at 772–773, does not even allege any violation of the prior injunction to support this judge-crafted abridgment of speech. With respect to the 36-foot speech-free zone, the Court attempts a response, which displays either a misunderstanding of the point I have made or an effort to recast it into an answerable one. My point does not rely, as the Court's response suggests, *ante*, at 770, upon my earlier description of the videotape. That was set forth just for context, to show the reader what suppression of normal and peaceful social protest is afoot here. Nor is it relevant to my point that “petitioners themselves studiously refrained from challenging the factual basis for the injunction,” *ibid.* I accept the facts as the Florida court found them; I deny that those facts support its *conclusion* (set forth as such in a separate portion of its opinion, as quoted above) that the original injunction had been violated. The Court concludes its response as follows:

“We must therefore judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic despite the issuance of the earlier injunction.” *Ante*, at 771.

But a finding that they “interfered with ingress and egress . . . *despite* the . . . earlier injunction” is not enough. The

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earlier injunction did not, and could not, prohibit all “interference”—for example, the minor interference incidentally produced by lawful picketing and leafletting. What the Court needs, and cannot come up with, is a finding that the petitioners interfered *in a manner prohibited by the earlier injunction*. A conclusion that they “block[ed], imped[ed] or obstruct[ed] ingress . . . or egress” (the terminology of the original injunction) within the only fair, and indeed the only permissible, meaning of that phrase cannot be supported by the facts found.

To sum up: The interests assertedly protected by the supplementary injunction did not include any interest whose impairment was a violation of Florida law or of a Florida court injunction. Unless the Court intends today to overturn long-settled jurisprudence, that means that the interests cannot possibly qualify as “significant interests” under the Court’s new standard.

C

Finally, I turn to the Court’s application of the second part of its test: whether the provisions of the injunction “burden no more speech than necessary” to serve the significant interest protected.

This test seems to me amply and obviously satisfied with regard to the noise restriction that the Court approves: It is only such noise as would reach the patients in the abortion clinic that is forbidden—and not even at all times, but only during certain fixed hours and “during surgical procedures and recovery periods.” (The latter limitation may raise vagueness and notice problems, but that does not concern us here. Moreover, as I have noted earlier, the noise restriction is invalid on other grounds.) With regard to the 36-foot speech-free zone, however, it seems to me just as obvious that the test which the Court sets for itself has not been met.

Assuming a “significant state interest” of the sort cognizable for injunction purposes (*i. e.*, one protected by a law that has been or is threatened to be violated) in both (1) keeping

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pedestrians off the paved portion of Dixie Way, and (2) enabling cars to cross the public sidewalk at the clinic's driveways without having to slow down or come to even a "momentary" stop, there are surely a number of ways to protect those interests short of banishing the entire protest demonstration from the 36-foot zone. For starters, the Court could have (for the first time) ordered the demonstrators to stay out of the street (the original injunction did not remotely require that). It could have limited the number of demonstrators permitted on the clinic side of Dixie Way. And it could have forbidden the pickets to walk on the driveways. The Court's only response to these options is that "[t]he state court was convinced that [they would not work] in view of the failure of the first injunction to protect access." *Ante*, at 769. But must we accept that conclusion as valid—when the original injunction contained no command (or at the very least no *clear* command) that had been disobeyed, and contained nothing even *related* to staying out of the street? If the "burden no more speech than necessary" requirement can be avoided by merely opining that (for some reason) no lesser restriction than *this* one will be obeyed, it is not much of a requirement at all.

But I need not engage in such precise analysis, since the Court itself admits that the requirement is not to be taken seriously. "The need for a complete buffer zone," it says, "*may be debatable*, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Ante*, at 769–770 (emphasis added). In application, in other words, the "burden no more speech than is necessary" test has become an "arguably burden no more speech than is necessary" test. This renders the Court's intermediate-intermediate scrutiny not only no *more* stringent than plain old intermediate scrutiny, but considerably *less* stringent.

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Another disturbing part of the Court's analysis is its reliance upon the fact that "witnesses . . . conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic," and that "[p]rotesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots." *Ante*, at 770. This consideration of whether the injunction leaves open effective, alternative channels of communication is classic, time-place-and-manner-regulation, "intermediate scrutiny" review, see *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). And in that context it is reasonable. But since in this case a general regulation establishing time, place, and manner restrictions for *all* citizens is not at issue, these petitioners have a right, not merely to demonstrate and protest at some reasonably effective place, but to demonstrate and protest *where they want to and where all other Floridians can*, namely, right there on the public sidewalk in front of the clinic. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 163 (1939). "Whether petitioner might have used some other [forum] . . . is of no consequence. . . . Even if [another] forum had been available, that fact alone would not justify an otherwise impermissible prior restraint." *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 556 (1975).

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In his dissent in *Korematsu v. United States*, 323 U. S. 214 (1944), the case in which this Court permitted the wartime military internment of Japanese-Americans, Justice Jackson wrote the following:

"A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . rationalizes the Constitution to

## Appendix to opinion of SCALIA, J.

show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” *Id.*, at 246.

What was true of a misguided military order is true of a misguided trial-court injunction. And the Court has left a powerful loaded weapon lying about today.

What we have decided seems to be, and will be reported by the media as, an abortion case. But it will go down in the lawbooks, it will be cited, as a free-speech injunction case—and the damage its novel principles produce will be considerable. The proposition that injunctions against speech are subject to a standard indistinguishable from (unless perhaps more lenient in its application than) the “intermediate scrutiny” standard we have used for “time, place, and manner” legislative restrictions; the notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial-court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact—these latest by-products of our abortion jurisprudence ought to give all friends of liberty great concern.

For these reasons, I dissent from that portion of the judgment upholding parts of the injunction.

## APPENDIX TO OPINION OF JUSTICE SCALIA

Portions of April 12, 1993, Appearance Hearings Held Before Judge McGregor, Eighteenth Judicial Circuit, Seminole County, Florida:

Page 40:

JANE DOE NO. 6: “Yes, sir. When I heard this injunction, everything in there, as an American—”

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THE COURT: "I'm Sorry. I'm not the judge trying it. Those are matters that perhaps you'll want to present at trial."

JANE DOE NO. 6: "I do have a question, too. I'm confused as to why the people who were blockading the clinic who had pro-choice signs were not arrested along with me. They—it appeared to me they were violating the same injunction I was, you know—"

THE COURT: "The Injunction is directed only against certain named Defendants, certain named organizations and those acting in concert with them. Presumably, as you say, the other side would not have been acting in concert with the named Defendants."

JANE DOE NO. 6: "But I was in concert with nobody. I was just an American citizen, defending the right to assemble and to demonstrate."

THE COURT: "Again, perhaps, that would be a matter of defense that you would present at the time of trial."

JANE DOE NO. 6: "So the Injunction only . . . ."

Page 43:

JANE DOE NO. 6: "But I was not in concert with anybody."

THE COURT: "Again, I say that at the time of your trial, perhaps, that would be a defensive matter. Although, I'm told by the Melbourne Police Department that everyone was put on notice that the thirty-six-foot area was a restricted area and when—if you presumably had notice of that and chose to enter, then, you chose to violate the Court's Injunction. That's why you were arrested."

JANE DOE NO. 6: "I don't mean this disrespectfully, but does not the constitutional freedom to be on public sidewalk and to—"

THE COURT: "There is nothing in the constitution that says that anyone is entitled to walk on any sidewalk."



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JANE DOE NO. 6: “But I have the right to demonstrate, the right to assembly, the right to religion and its practice and I was praying on the sidewalk. I don’t understand—”

THE COURT: “And that will not be denied you, but it is subject to regulation. The Court provided the south shoulder of Dixie Way as an area for that to be done.”

Page 93:

MR. QUINTERO: “And who are these Defendants? I have no idea.”

THE COURT: “They’re set out in the Injunction.”

MR. QUINTERO: “Because I’m not working in conjunction with anybody. I don’t know anything. I don’t belong to any group that is doing absolutely anything like this. I am just a normal Christian that went to pray on the sidewalk.”

THE COURT: “Again, those may be defensive matters. I’m saying that you should bring them up first with your lawyer and then at the time of trial.”

MR. QUINTERO: “Okay, I would like to formally request to have this injunction so I can look at it while I’m incarcerated and that I can make arrangements to talk to counsel about it.”

THE COURT: “Your lawyer knows how to obtain a copy. Copies are available at, again, the branch courthouses in Melbourne and Melbourne City Hall. Copies are available at the Clerk’s Office here in Seminole County.”

MR. QUINTERO: “At this time I do not have a lawyer and I see it very difficult for me to go to the Melbourne Courthouse being incarcerated.”

Page 115–116:

[JOHN DOE NO. 16]: “. . . do with the determination in the Injunctive Order or in the arrest?”

THE COURT: “You know, I wasn’t there. I don’t know. All I know is that the officer used his perceptions, his eyes, his ears, took note of the activities that were going on and

## Appendix to opinion of SCALIA, J.

for reasons, you know, he believed that you were in concert with those that had been enjoined and the Injunctive Order is expanded to include those so that you were subject then to the Injunction.”

JOHN DOE NO. 16: “When you issued the Injunctive Court Order did you include what someone might believe about abortion or about their right to assemble there, or let’s just say about abortion as a basis for arrest?”

THE COURT: “I considered all of the evidence before me.”

JOHN DOE NO. 16: “And would one of those things be, would one of the reasons that I was arrested be because I opposed abortion in that clinic?”

THE COURT: “No.”

JOHN DOE NO. 16: “Okay. If I was to stand here, if I was to testify that I did not oppose abortion would that make any difference in my arrest?”

THE COURT: “You can’t be unarrested. You have been arrested.”

JOHN DOE NO. 16: “What about being charged with violating the Court Order?”

THE COURT: “It will be up to the prosecutor, the State Attorney, to make a charge decision. And sometimes lawyers in representing clients will go to a prosecutor in advance of his charge decision and ask that he, you know, consider additional matters that might cause him to not make such a charge decision. Those are matters lawyers best know how to do.”

JOHN DOE NO. 16: “When you issued the Injunction did you determine that it would only apply to—that it would apply only to people that were demonstrating that were pro-life?”

THE COURT: “In effect, yes.”

JOHN DOE NO. 16: “Okay, thank you.”

THE COURT: “Any other questions?”

JOHN DOE NO. 16: “No.”

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THE COURT: “Thank you. Did we give him a court date?”

“John Doe Number Eighteen.”

JOHN DOE NO. 18: “Were there any numbers . . . .”

Pages 119–120:

MR. MACLEAN: “Yes, please, Your Honor.”

THE COURT: “Okay. Court will then direct pre-trial release officer to interview and provide the results of the interview to Judge Eaton after 1:00 o’clock today and he will consider that release. Do you wish to be considered for court-appointed counsel?”

MR. MACLEAN: “No thank you.”

THE COURT: “Do you have any questions?”

MR. MACLEAN: “Yes, please. Would you extend your gracious offer to reduce the bond for myself also?”

THE COURT: “Surely. Reduce bond to a hundred dollars.”

THE CLERK: “Total?”

THE COURT: “Hmm?”

THE CLERK: “Total?”

THE COURT: “No. I can’t deal with the—”

THE CLERK: “Eleven hundred?”

THE COURT: “Eleven hundred, yes.”

MR. MACLEAN: “Respectfully, sir, where on my arrest report does it allege that I was acting in concert with anyone?”

THE COURT: “It is embodied in the phrase violation of the Injunctive Court Order. But again, this is an arrest report. It is not a formal charge. Presumably within the formal charge there will be that reference, sir.”

MR. MACLEAN: “I’m finished with questions, sir, but may I make a statement which I promise you I won’t—”

THE COURT: “I can’t deal with the statement. In other words, I’ve got a lot of people to see and the statement may be defensive in nature and it is a matter that should be brought to the trial of the matter.”

Appendix to opinion of SCALIA, J.

MR. MACLEAN: "I only wish to thank the Melbourne Police Department and the Sharpes Correctional facility and the people here in Seminole for their gracious and professional treatment of us."

THE COURT: "Thank you in their behalf."

MR. MACLEAN: "Okay, sir."

THE COURT: "John Doe Number Eighteen. This is out of order now."

THE CLERK: "Yes, sir."

THE COURT: "You've been designated as John Doe Number Eighteen. Do you wish to maintain that designation for these proceedings?"

## Syllabus

INTERNATIONAL UNION, UNITED MINE  
WORKERS OF AMERICA, ET AL.  
*v.* BAGWELL ET AL.

## CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 92–1625. Argued November 29, 1993—Decided June 30, 1994

A month after enjoining petitioners (collectively, the union) from conducting unlawful strike-related activities against certain mining companies, a Virginia trial court held a contempt hearing, fined the union for its disobedience, and announced that the union would be fined for any future breach of the injunction. In subsequent contempt hearings, the court levied against the union over \$64 million in what it termed coercive, civil fines, ordering most of the money to be paid to the Commonwealth and the counties affected by the unlawful activities. After the strike was settled, the court refused to vacate the fines owed to the Commonwealth and counties, concluding that they were payable in effect to the public. Ultimately, it appointed respondent Bagwell to act as Special Commissioner to collect the unpaid fines. The Virginia Court of Appeals reversed and ordered that the fines be vacated. The Virginia Supreme Court, reversing in its turn, rejected petitioners' contention that the fines were criminal and could not be imposed absent a criminal trial.

*Held:* The serious contempt fines imposed here were criminal and constitutionally could be imposed only through a jury trial. Pp. 826–839.

(a) A criminal contempt fine is punitive and can be imposed only through criminal proceedings, including the right to jury trial. A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order or compensates the complainant for losses sustained. *United States v. Mine Workers*, 330 U. S. 258, 303–304. Where a fine is not compensatory, it is civil only if the contemnor has an opportunity to purge, such as with per diem fines and fixed, suspended fines. Pp. 826–830.

(b) Most contempt sanctions share punitive and coercive characteristics, and the fundamental question underlying the distinction between civil and criminal contempts is what process is due for the imposition of any particular contempt sanction. Direct contempts can be penalized summarily in light of the court's substantial interest in maintaining order and because the need for extensive factfinding and the likelihood of an erroneous deprivation are reduced. Greater procedural protections are afforded for sanctions of indirect contempts. Certain indirect

## Syllabus

contempts are particularly appropriate for imposition through civil proceedings, including contempts impeding the court's ability to adjudicate the proceedings before it and those contempts involving discrete, readily ascertainable acts. For contempts of more complex injunctions, however, criminal procedures may be required. Pp. 830–834.

(c) The mere fact that the contempt fines here were announced in advance did not render them civil. Criminal laws generally provide notice of the sanction to be imposed, and the union's ability to avoid the contempt fines was indistinguishable from the ability of any citizen to avoid a criminal sanction. Other considerations confirm that the fines challenged here are criminal. Neither the parties nor the Commonwealth's courts have suggested that the fines are compensatory. The union's sanctionable conduct did not occur in the court's presence or otherwise implicate the core of the judicial contempt power, where lesser protections may be appropriate. Nor did the union's contumacy involve simple, affirmative acts, where the sanctions' force is primarily coercive and elaborate factfinding is not required. Instead the court levied fines for widespread, ongoing, out-of-court violations of a complex injunction, effectively policing the union's compliance with an entire code of conduct the court itself imposed. The contumacy lasted many months and spanned several counties, and the fines assessed were serious. Under these circumstances, disinterested factfinding and evenhanded adjudication were essential, and the union was entitled to a criminal jury trial. Pp. 834–838.

244 Va. 463, 423 S. E. 2d 349, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II–A, II–C, and III, and the opinion of the Court with respect to Part II–B, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 839. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., joined, *post*, p. 844.

*Laurence Gold* argued the cause for petitioners. With him on the briefs were *Robert H. Stropp, Jr.*, *Walter Kamiat*, *Andrew P. Miller*, *Virginia A. Seitz*, and *David L. Shapiro*.

*John G. Roberts, Jr.*, argued the cause for respondents. With him on the briefs were *William B. Poff*, *Clinton S. Morse*, *Frank K. Friedman*, and *David G. Leitch*.

*Deputy Solicitor General Bender* argued the cause for the United States urging affirmance. With him on the brief

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were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, and *Miguel A. Estrada*.\*

JUSTICE BLACKMUN delivered the opinion of the Court.

We are called upon once again to consider the distinction between civil and criminal contempt. Specifically, we address whether contempt fines levied against a union for violations of a labor injunction are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial. We conclude that the fines are criminal and, accordingly, we reverse the judgment of the Supreme Court of Virginia.

## I

Petitioners, the International Union, United Mine Workers of America, and United Mine Workers of America, District 28 (collectively, the union), engaged in a protracted labor dispute with the Clinchfield Coal Company and Sea “B” Mining Company (collectively, the companies) over alleged unfair labor practices. In April 1989, the companies filed suit in the Circuit Court of Russell County, Virginia, to enjoin the union from conducting unlawful strike-related activities. The trial court entered an injunction which, as later amended, prohibited the union and its members from, among other things, obstructing ingress and egress to company facilities, throwing objects at and physically threatening company employees, placing tire-damaging “jackrocks” on roads used by company vehicles, and picketing with more than a specified number of people at designated sites. The court additionally ordered the union to take all steps necessary to ensure compliance with the injunction, to place su-

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\**Bertram R. Gelfand* and *Jeffrey C. Dannenberg* filed a brief for the Allied Educational Foundation as *amicus curiae* urging reversal.

*Michael E. Avakian* filed a brief for the Center on National Labor Policy, Inc., as *amicus curiae* urging affirmance.

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pervisors at picket sites, and to report all violations to the court. App. to Pet. for Cert. 114a–116a.

On May 18, 1989, the trial court held a contempt hearing and found that petitioners had committed 72 violations of the injunction. After fining the union \$642,000 for its disobedience,<sup>1</sup> the court announced that it would fine the union \$100,000 for any future violent breach of the injunction and \$20,000 for any future nonviolent infraction, “such as exceeding picket numbers, [or] blocking entrances or exits.” *Id.*, at 111a. The court early stated that its purpose was to “impos[e] prospective civil fines[,] the payment of which would only be required if it were shown the defendants disobeyed the Court’s orders.” *Id.*, at 40a.

In seven subsequent contempt hearings held between June and December 1989, the court found the union in contempt for more than 400 separate violations of the injunction, many of them violent. Based on the court’s stated “intention that these fines are civil and coercive,” *id.*, at 104a, each contempt hearing was conducted as a civil proceeding before the trial judge, in which the parties conducted discovery, introduced evidence, and called and cross-examined witnesses. The trial court required that contumacious acts be proved beyond a reasonable doubt, but did not afford the union a right to jury trial.

As a result of these contempt proceedings, the court levied over \$64 million in fines against the union, approximately \$12 million of which was ordered payable to the companies. Because the union objected to payment of any fines to the companies and in light of the law enforcement burdens posed by the strike, the court ordered that the remaining roughly \$52 million in fines be paid to the Commonwealth of Virginia and Russell and Dickenson Counties, “the two counties most heavily affected by the unlawful activity.” *Id.*, at 44a–45a.

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<sup>1</sup> A portion of these fines was suspended conditioned on the union’s future compliance. The court later vacated these fines, concluding that they were “‘criminal in nature.’” App. to Pet. for Cert. 4a, n. 2.



## Opinion of the Court

While appeals from the contempt orders were pending, the union and the companies settled the underlying labor dispute, agreed to vacate the contempt fines, and jointly moved to dismiss the case. A special mediator representing the Secretary of Labor, App. 48–49, and the governments of Russell and Dickenson Counties, *id.*, at 48 and 54, supported the parties’ motion to vacate the outstanding fines. The trial court granted the motion to dismiss, dissolved the injunction, and vacated the \$12 million in fines payable to the companies. After reiterating its belief that the remaining \$52 million owed to the counties and the Commonwealth were coercive, civil fines, the trial court refused to vacate these fines, concluding they were “payable in effect to the public.” App. to Pet. for Cert. 47a.

The companies withdrew as parties in light of the settlement and declined to seek further enforcement of the outstanding contempt fines. Because the Commonwealth Attorneys of Russell and Dickenson Counties also had asked to be disqualified from the case, the court appointed respondent John L. Bagwell to act as Special Commissioner to collect the unpaid contempt fines on behalf of the counties and the Commonwealth. *Id.*, at 48a.

The Court of Appeals of Virginia reversed and ordered that the contempt fines be vacated pursuant to the settlement agreement. Assuming for the purposes of argument that the fines were civil, the court concluded that “civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines.” *Mine Workers v. Clinchfield Coal Co.*, 12 Va. App. 123, 133, 402 S. E. 2d 899, 905 (1991).

On consolidated appeals, the Supreme Court of Virginia reversed. The court held that whether coercive, civil contempt sanctions could be settled by private parties was a question of state law, and that Virginia public policy disfa-

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vored such a rule, “if the dignity of the law and public respect for the judiciary are to be maintained.” 244 Va. 463, 478, 423 S. E. 2d 349, 358 (1992). The court also rejected petitioners’ contention that the outstanding fines were criminal and could not be imposed absent a criminal trial. Because the trial court’s prospective fine schedule was intended to coerce compliance with the injunction and the union could avoid the fines through obedience, the court reasoned, the fines were civil and coercive and properly imposed in civil proceedings:

“When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control of his destiny. The same is true with respect to the court’s orders in the present case. A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate.” *Id.*, at 477, 423 S. E. 2d, at 357.

This Court granted certiorari. 508 U. S. 949 (1993).

## II

## A

“Criminal contempt is a crime in the ordinary sense,” *Bloom v. Illinois*, 391 U. S. 194, 201 (1968), and “criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,” *Hicks v. Feiock*, 485 U. S. 624, 632 (1988). See *In re Bradley*, 318 U. S. 50 (1943) (double jeopardy); *Cooke v. United States*, 267 U. S. 517, 537 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444 (1911) (privilege against self-incrimination, right to proof beyond a reasonable doubt). For “serious” criminal contempts involving impris-

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onment of more than six months, these protections include the right to jury trial. *Bloom*, 391 U. S., at 199; see also *Taylor v. Hayes*, 418 U. S. 488, 495 (1974). In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.<sup>2</sup>

Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear.<sup>3</sup> In the leading early case addressing this issue in the context of imprisonment, *Gompers v. Bucks Stove & Range Co.*, 221 U. S., at 441, the Court emphasized that whether a contempt is civil or criminal turns on the “character and purpose” of the sanction involved. Thus, a contempt sanction is considered civil if it “is remedial, and for the benefit of the com-

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<sup>2</sup>We address only the procedures required for adjudication of indirect contempts, *i. e.*, those occurring out of court. Direct contempts that occur in the court’s presence may be immediately adjudged and sanctioned summarily, see, *e. g.*, *Ex parte Terry*, 128 U. S. 289 (1888), and, except for serious criminal contempts in which a jury trial is required, *Bloom v. Illinois*, 391 U. S. 194, 209–210 (1968), the traditional distinction between civil and criminal contempt proceedings does not pertain, cf. *United States v. Wilson*, 421 U. S. 309, 316 (1975).

<sup>3</sup>Numerous scholars have criticized as unworkable the traditional distinction between civil and criminal contempt. See, *e. g.*, Dudley, Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 Va. L. Rev. 1025, 1033 (1993) (describing the distinction between civil and criminal contempt as “conceptually unclear and exceedingly difficult to apply”); Martineau, Contempt of Court: Eliminating the Confusion between Civil and Criminal Contempt, 50 U. Cin. L. Rev. 677 (1981) (“Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court”); Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780 (1943); R. Goldfarb, The Contempt Power 58 (1963) (describing “the tangle of procedure and practice” resulting from this “unsatisfactory fiction”).

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plainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.” *Ibid.*

As *Gompers* recognized, however, the stated purposes of a contempt sanction alone cannot be determinative. *Id.*, at 443. “[W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law’s purpose of modifying the contemnor’s behavior to conform to the terms required in the order.” *Hicks*, 485 U. S., at 635. Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender’s future obedience. The *Hicks* Court accordingly held that conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from “the subjective intent of a State’s laws and its courts,” *ibid.*, but “from an examination of the character of the relief itself,” *id.*, at 636.

The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order “to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.” 221 U. S., at 442; see also *McCrone v. United States*, 307 U. S. 61, 64 (1939) (failure to testify). Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. *Shillitani v. United States*, 384 U. S. 364, 370, n. 6 (1966) (upholding as civil “a determinate [2-year] sentence which includes a purge clause”). In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus “‘carries the keys of his prison in his own pocket.’” *Gompers*, 221 U. S., at 442, quoting *In re Nevitt*, 117 F. 448, 451 (CA8 1902).

By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a “completed act of disobedience,” *Gompers*, 221 U. S., at 443, such that

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the contemnor cannot avoid or abbreviate the confinement through later compliance. Thus, the *Gompers* Court concluded that a 12-month sentence imposed on Samuel Gompers for violating an antiboycott injunction was criminal. When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. “[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.” *Id.*, at 442.

This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine accordingly is considered civil and remedial if it either “coerce[s] the defendant into compliance with the court’s order, [or] . . . compensate[s] the complainant for losses sustained.” *United States v. Mine Workers*, 330 U. S. 258, 303–304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. See *Penfield Co. of Cal. v. SEC*, 330 U. S. 585, 590 (1947). Thus, a “flat, unconditional fine” totaling even as little as \$50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.*, at 588.

A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged. Less comfortable is the analogy between coercive imprisonment and suspended, determinate fines. In this Court’s sole prior decision squarely addressing the judicial power to impose coercive civil contempt fines, *Mine Workers*, *supra*, it held that fixed fines also may be considered purgable and civil when imposed and suspended pending future compliance. See also *Penfield*, 330 U. S., at 590 (“One who is fined, unless by a day certain he [complies,] has it in his power to avoid any penalty”); but see *Hicks*, 485 U. S., at 639,

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and n. 11 (suspended or probationary sentence is criminal). *Mine Workers* involved a \$3,500,000 fine imposed against the union for nationwide post-World War II strike activities. Finding that the determinate fine was both criminal and excessive, the Court reduced the sanction to a flat criminal fine of \$700,000. The Court then imposed and suspended the remaining \$2,800,000 as a coercive civil fine, conditioned on the union's ability to purge the fine through full, timely compliance with the trial court's order.<sup>4</sup> The Court concluded, in light of this purge clause, that the civil fine operated as "a coercive imposition upon the defendant union to compel obedience with the court's outstanding order." 330 U. S., at 307.

This Court has not revisited the issue of coercive civil contempt fines addressed in *Mine Workers*. Since that decision, the Court has erected substantial procedural protections in other areas of contempt law, such as criminal contempts, *e. g.*, *Bloom v. Illinois*, 391 U. S. 194 (1968), and summary contempts, *e. g.*, *Taylor v. Hayes*, 418 U. S. 488 (1974); *Codispoti v. Pennsylvania*, 418 U. S. 506, 513 (1974); *Johnson v. Mississippi*, 403 U. S. 212 (1971); *In re Oliver*, 333 U. S. 257, 275 (1948). Lower federal courts and state courts such as the trial court here nevertheless have relied on *Mine Workers* to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines.

## B

Underlying the somewhat elusive distinction between civil and criminal contempt fines, and the ultimate question posed

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<sup>4</sup>Although the size of the fine was substantial, the conduct required of the union to purge the suspended fine was relatively discrete. According to the Court, purgation consisted of (1) withdrawal of the union's notice terminating the Krug-Lewis labor agreement; (2) notifying the union members of this withdrawal; and (3) withdrawing and notifying the union members of the withdrawal of any other notice questioning the ongoing effectiveness of the Krug-Lewis agreement. *United States v. Mine Workers*, 330 U. S. 258, 305 (1947).

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in this case, is what procedural protections are due before any particular contempt penalty may be imposed. Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required. To the extent that such contempts take on a punitive character, however, and are not justified by other considerations central to the contempt power, criminal procedural protections may be in order.

The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with “power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution.” *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821). Courts thus have embraced an inherent contempt authority, see *Gompers*, 221 U. S., at 450; *Ex parte Robinson*, 19 Wall. 505, 510 (1874), as a power “necessary to the exercise of all others,” *United States v. Hudson*, 7 Cranch 32, 34 (1812).

But the contempt power also uniquely is “‘liable to abuse.’” *Bloom*, 391 U. S., at 202, quoting *Ex parte Terry*, 128 U. S. 289, 313 (1888). Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy “often strikes at the most vulnerable and human qualities of a judge’s temperament,” *Bloom*, 391 U. S., at 202, and its fusion of legislative, executive, and judicial powers “summons forth . . . the prospect of ‘the most tyrannical licentiousness,’” *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 822 (1987) (SCALIA, J., concurring in judgment), quoting *Anderson*, 6 Wheat., at 228. Accordingly, “in [criminal] contempt cases an even more compelling argument can be made [than in ordinary criminal cases] for providing

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a right to jury trial as a protection against the arbitrary exercise of official power.” *Bloom*, 391 U. S., at 202.

Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play. The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court’s immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court. See *Young*, 481 U. S., at 820–821 (SCALIA, J., concurring in judgment) (the judicial contempt power is a “power of self-defense,” limited to sanctioning “those who interfere with the orderly conduct of [court] business or disobey orders necessary to the conduct of that business”). Thus, petty, direct contempts in the presence of the court traditionally have been subject to summary adjudication, “to maintain order in the courtroom and the integrity of the trial process in the face of an ‘actual obstruction of justice.’” *Codispoti v. Pennsylvania*, 418 U. S., at 513, quoting *In re McConnell*, 370 U. S. 230, 236 (1962); cf. *United States v. Wilson*, 421 U. S. 309, 315–316 (1975); *Harris v. United States*, 382 U. S. 162, 164 (1965). In light of the court’s substantial interest in rapidly coercing compliance and restoring order, and because the contempt’s occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation, summary proceedings have been tolerated.

Summary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts. If a court delays punishing a direct contempt until the completion of trial, for example, due process requires that the contemnor’s rights to notice and a hearing be respected. *Taylor v. Hayes*, 418 U. S. 488 (1974). There “it is much more difficult to argue that action without notice



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or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business,” *id.*, at 498, particularly “in view of the heightened potential for abuse posed by the contempt power,” *id.*, at 500; see also *Harris v. United States*, 382 U. S., at 164–165. Direct contempts also cannot be punished with serious criminal penalties absent the full protections of a criminal jury trial. *Bloom*, 391 U. S., at 210.

Still further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain. Summary adjudication of indirect contempts is prohibited, *e. g.*, *Cooke v. United States*, 267 U. S. 517, 534 (1925), and criminal contempt sanctions are entitled to full criminal process, *e. g.*, *Hicks*, 485 U. S., at 632. Certain indirect contempts nevertheless are appropriate for imposition through civil proceedings. Contempts such as failure to comply with document discovery, for example, while occurring outside the court’s presence, impede the court’s ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power. Courts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party’s failure to comply with the rules of conduct governing the litigation process. See, *e. g.*, Fed. Rules Civ. Proc. 11, 37. Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority. Similarly, indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings since the need for extensive, impartial factfinding is less pressing.

For a discrete category of indirect contempts, however, civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions

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often require elaborate and reliable factfinding. Cf. *Green v. United States*, 356 U.S. 165, 217, n. 33 (1958) (Black, J., dissenting) (“Alleged contempts committed beyond the court’s presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event. And often . . . crucial facts are in close dispute” (citation omitted)). Such contempts do not obstruct the court’s ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. *Id.*, at 214–215. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

## C

In the instant case, neither any party nor any court of the Commonwealth has suggested that the challenged fines are compensatory. At no point did the trial court attempt to calibrate the fines to damages caused by the union’s contumacious activities or indicate that the fines were “to compensate the complainant for losses sustained.” *Mine Workers*, 330 U.S., at 303–304. The nonparty governments, in turn, never requested any compensation or presented any evidence regarding their injuries, never moved to intervene in the suit, and never actively defended the fines imposed. The issue before us accordingly is limited to whether these fines, despite their noncompensatory character, are coercive civil or criminal sanctions.

The parties propose two independent tests for determining whether the fines are civil or criminal. Petitioners argue that because the injunction primarily prohibited certain conduct rather than mandated affirmative acts, the sanctions are criminal. Respondents in turn urge that because the trial court established a prospective fine schedule that

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the union could avoid through compliance, the fines are civil in character.

Neither theory satisfactorily identifies those contempt fines that are criminal and thus must be imposed through the criminal process. Petitioners correctly note that *Gompers* suggests a possible dichotomy “between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term.” 221 U. S., at 443. The distinction between mandatory and prohibitory orders is easily applied in the classic contempt scenario, where contempt sanctions are used to enforce orders compelling or forbidding a single, discrete act. In such cases, orders commanding an affirmative act simply designate those actions that are capable of being coerced.

But the distinction between coercion of affirmative acts and punishment of prohibited conduct is difficult to apply when conduct that can recur is involved, or when an injunction contains both mandatory and prohibitory provisions. Moreover, in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms. Under a literal application of petitioners’ theory, an injunction ordering the union: “Do not strike,” would appear to be prohibitory and criminal, while an injunction ordering the union: “Continue working,” would be mandatory and civil. See Tr. of Oral Arg. 8–9; Dobbs, *Contempt of Court: A Survey*, 56 *Cornell L. Rev.* 183, 239 (1971). In enforcing the present injunction, the trial court imposed fines without regard to the mandatory or prohibitory nature of the clause violated. Accordingly, even though a parsing of the injunction’s various provisions might support the classification of contempts such as rock throwing and placing tire-damaging “jackrocks” on roads as criminal and the refusal to place supervisors at picket sites as civil, the parties have not asked us to review the order in that manner. In a case like this involving an injunction that pre-

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scribes a detailed code of conduct, it is more appropriate to identify the character of the entire decree. Cf. *Hicks*, 485 U. S., at 638, n. 10 (internal quotation marks omitted) (Where both civil and criminal relief is imposed “the criminal feature of the order is dominant and fixes its character for purposes of review”).

Despite respondents’ urging, we also are not persuaded that dispositive significance should be accorded to the fact that the trial court prospectively announced the sanctions it would impose. Had the trial court simply levied the fines after finding the union guilty of contempt, the resulting “determinate and unconditional” fines would be considered “solely and exclusively punitive.” *Id.*, at 632–633 (internal quotation marks omitted); see also *Penfield Co. of Cal. v. SEC*, 330 U. S. 585 (1947). Respondents nevertheless contend that the trial court’s announcement of a prospective fine schedule allowed the union to “avoid paying the fine[s] simply by performing the . . . act required by the court’s order,” *Hicks*, 485 U. S., at 632, and thus transformed these fines into coercive, civil ones. Respondents maintain here, as the Virginia Supreme Court held below, that the trial court could have imposed a daily civil fine to coerce the union into compliance, and that a prospective fine schedule is indistinguishable from such a sanction.

Respondents’ argument highlights the difficulties encountered in parsing coercive civil and criminal contempt fines. The fines imposed here concededly are difficult to distinguish either from determinate, punitive fines or from initially suspended, civil fines. Ultimately, however, the fact that the trial court announced the fines before the contumacy, rather than after the fact, does not in itself justify respondents’ conclusion that the fines are civil or meaningfully distinguish these penalties from the ordinary criminal law. Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed. The trial court here simply announced the pen-

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alty—determinate fines of \$20,000 or \$100,000 per violation—that would be imposed for future contempts. The union’s ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law. The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed. We therefore decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.

Other considerations convince us that the fines challenged here are criminal. The union’s sanctionable conduct did not occur in the court’s presence or otherwise implicate the court’s ability to maintain order and adjudicate the proceedings before it. Nor did the union’s contumacy involve simple, affirmative acts, such as the paradigmatic civil contempts examined in *Gompers*. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners’ compliance with an entire code of conduct that the court itself had imposed. The union’s contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over \$52 million.<sup>5</sup> Under such circumstances,

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<sup>5</sup> “[P]etty contempt like other petty criminal offenses may be tried without a jury,” *Taylor v. Hayes*, 418 U. S. 488, 495 (1974), and the imposition only of serious criminal contempt fines triggers the right to jury trial. *Bloom*, 391 U. S., at 210. The Court to date has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of \$10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to jury trial. See *Muniz v. Hoffman*, 422 U. S. 454, 477 (1975); see also 18 U. S. C. § 1(3) (1982 ed., Supp. V) (defining petty offenses as crimes “the penalty for which . . . does not exceed imprisonment for a period of six months or a fine of not more than \$5,000 for an individual and \$10,000 for a person other than an individual,

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disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial.

In reaching this conclusion, we recognize that this Court generally has deferred to a legislature's determination whether a sanction is civil or criminal, see, *e. g.*, *United States v. Ward*, 448 U. S. 242, 248 (1980); *Helvering v. Mitchell*, 303 U. S. 391 (1938), and that "[w]hen a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority 'in a non-punitive, noncriminal manner.'" *Hicks*, 485 U. S., at 631, quoting *Allen v. Illinois*, 478 U. S. 364, 368 (1986). We do not deviate from either tradition today. Where a single judge, rather than a legislature, declares a particular sanction to be civil or criminal, such deference is less appropriate. Cf. *Madsen v. Women's Health Center, Inc.*, *ante*, p. 753. Moreover, this Court has recognized that even for state proceedings, the label affixed to a contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law." *Hicks v. Feiock*, 485 U. S., at 631. We conclude that the serious contempt fines imposed here were criminal and constitutionally could not be imposed absent a jury trial.

## III

Our decision concededly imposes some procedural burdens on courts' ability to sanction widespread, indirect contempts of complex injunctions through noncompensatory fines. Our holding, however, leaves unaltered the longstanding authority of judges to adjudicate direct contempts summarily, and to enter broad compensatory awards for all contempts through civil proceedings. See, *e. g.*, *Sheet Metal Workers v. EEOC*, 478 U. S. 421 (1986). Because the right to trial by

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or both") (repealed 1984). We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a \$52 million fine unquestionably is a serious contempt sanction.

SCALIA, J., concurring

jury applies only to serious criminal sanctions, courts still may impose noncompensatory, petty fines for contempts such as the present ones without conducting a jury trial. We also do not disturb a court's ability to levy, albeit through the criminal contempt process, serious fines like those in this case.

Ultimately, whatever slight burden our holding may impose on the judicial contempt power cannot be controlling. The Court recognized more than a quarter century ago:

“We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.” *Bloom*, 391 U. S., at 208.

Where, as here, “a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.” *Id.*, at 209.

The judgment of the Supreme Court of Virginia is reversed.

*It is so ordered.*

JUSTICE SCALIA, concurring.

I join the Court's opinion classifying the \$52 million in contempt fines levied against petitioners as criminal. As the Court's opinion demonstrates, our cases have employed a variety of not easily reconcilable tests for differentiating between civil and criminal contempts. Since all of those tests

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would yield the same result here, there is no need to decide which is the correct one—and a case so extreme on its facts is not the best case in which to make that decision. I wish to suggest, however, that when we come to making it, a careful examination of historical practice will ultimately yield the answer.

That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. See *ante*, at 831; *Green v. United States*, 356 U. S. 165, 198–199 (1958) (Black, J., dissenting); cf. *Bloom v. Illinois*, 391 U. S. 194, 202 (1968); *Cooke v. United States*, 267 U. S. 517, 539 (1925). And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials. Only the clearest of historical practice could establish that such a departure from the procedures that the Constitution normally requires is not a denial of due process of law. See *Burnham v. Superior Court of Cal., County of Marin*, 495 U. S. 604, 623–625 (1990); cf. *Honda Motor Co. v. Oberg*, *ante*, at 430–431.

At common law, contempts were divided into criminal contempts, in which a litigant was punished for an affront to the court by a fixed fine or period of incarceration; and civil contempts, in which an uncooperative litigant was incarcerated (and, in later cases, fined\*) until he complied with a specific order of the court. See *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441–444 (1911). Incarceration until compliance was a distinctive sanction, and sheds light upon the nature of the decrees enforced by civil contempt. That sanction makes sense only if the order requires performance

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\*The per diem fines that came to be used to coerce compliance with decrees were in most relevant respects like conditional prison terms. With them, as with incarceration, the penalty continued until the contemnor complied, and compliance stopped any further punishment but of course did not eliminate or restore any punishment already endured.



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of an identifiable act (or perhaps cessation of continuing performance of an identifiable act). A general prohibition for the future does not lend itself to enforcement through conditional incarceration, since no single act (or the cessation of no single act) can demonstrate compliance and justify release. One court has expressed the difference between criminal and civil contempts as follows: “Punishment in criminal contempt cannot undo or remedy the thing which has been done, but in civil contempt punishment remedies the disobedience.” *In re Fox*, 96 F. 2d 23, 25 (CA3 1938).

As one would expect from this, the orders that underlay civil contempt fines or incarceration were usually mandatory rather than prohibitory, see *Gompers, supra*, at 442, directing litigants to perform acts that would further the litigation (for example, turning over a document), or give effect to the court’s judgment (for example, executing a deed of conveyance). The latter category of order was particularly common, since the jurisdiction of equity courts was generally *in personam* rather than *in rem*, and the relief they decreed would almost always be a directive to an individual to perform an act with regard to property at issue. See 4 J. Pomeroy, *Equity Jurisprudence* §1433, pp. 3386–3388 (4th ed. 1919). The mandatory injunctions issued upon termination of litigation usually required “a single simple act.” H. McClintock, *Principles of Equity* §15, pp. 32–33 (2d ed. 1948). Indeed, there was a “historical prejudice of the court of chancery against rendering decrees which called for more than a single affirmative act.” *Id.*, §61, at 160. And where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision. See, e.g., *Marble Co. v. Ripley*, 10 Wall. 339, 358–359 (1870); see also McClintock, *supra*, §61, at 160–161; 1 J. Story, *Commentaries on Equity Jurisprudence* §778b, p. 782 (Redfield ed.; 10th ed. 1870). Compliance with these “single act” mandates could, in addition to being simple, be

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quick; and once it was achieved the contemnor's relationship with the court came to an end, at least insofar as the subject of the order was concerned. Once the document was turned over or the land conveyed, the litigant's obligation to the court, and the court's coercive power over the litigant, ceased. See *United States v. Mine Workers*, 330 U. S. 258, 332 (1947) (Black, J., concurring in part and dissenting in part). The court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior.

Even equitable decrees that were prohibitory rather than mandatory were, in earlier times, much less sweeping than their modern counterparts. Prior to the labor injunctions of the late 1800's, injunctions were issued primarily in relatively narrow disputes over property. See, *e. g.*, W. Kerr, *Law and Practice of Injunctions* \*7 (2d Am. Ed. 1880); see also F. Frankfurter & N. Greene, *The Labor Injunction* 23–24, 87–88 (1930).

Contemporary courts have abandoned these earlier limitations upon the scope of their mandatory and injunctive decrees. See G. McDowell, *Equity and the Constitution* 4, 9 (1982). They routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions. See, *e. g.*, *Missouri v. Jenkins*, 495 U. S. 33, 56–58 (1990); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). Professor Chayes has described the extent of the transformation:

“[The modern decree] differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it *is* the centerpiece. . . . It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute.” Chayes, *The*

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Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1298 (1976).

The consequences of this change for the point under discussion here are obvious: When an order governs many aspects of a litigant's activities, rather than just a discrete act, determining compliance becomes much more difficult. Credibility issues arise, for which the factfinding protections of the criminal law (including jury trial) become much more important. And when continuing prohibitions or obligations are imposed, the order cannot be complied with (and the contempt "purged") in a single act; it continues to govern the party's behavior, on pain of punishment—not unlike the criminal law.

The order at issue here provides a relatively tame example of the modern, complex decree. The amended injunction prohibited, *inter alia*, rock throwing, the puncturing of tires, threatening, following or interfering with respondents' employees, placing pickets in other than specified locations, and roving picketing; and it required, *inter alia*, that petitioners provide a list of names of designated supervisors. App. to Pet. for Cert. 113a–116a. Although it would seem quite in accord with historical practice to enforce, by conditional incarceration or per diem fines, compliance with the last provision—a discrete command, observance of which is readily ascertained—using that same means to enforce the remainder of the order would be a novelty.

\* \* \*

The use of a civil process for contempt sanctions "makes no sense except as a consequence of historical practice." *Weiss v. United States*, 510 U. S. 163, 198 (1994) (SCALIA, J., concurring in part and concurring in judgment). As the scope of injunctions has expanded, they have lost some of the distinctive features that made enforcement through civil process acceptable. It is not that the times, or our perceptions of fairness, have changed (that is in my view no basis

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for either tightening or relaxing the traditional demands of due process); but rather that the modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt. So adjustments will have to be made. We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement. We need not draw that line in the present case, and so I am content to join the opinion of the Court.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The issue in this case is whether the contempt proceedings brought against the petitioner unions are to be classified as “civil” or “criminal.” As the Court explains, if those proceedings were “criminal,” then the unions were entitled under our precedents to a jury trial, and the disputed fines, imposed in bench proceedings, could not stand. See *ante*, at 826–827.

## I

*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911), as the Court notes, see *ante*, at 827–828, is a pathmarking case in this area. The civil contempt sanction, *Gompers* instructs, is designed “to coerce the defendant to do the thing required by the order for the benefit of the complainant,” rather than “to vindicate the authority of the law.” 221 U. S., at 442. The sanction operates coercively because it applies continuously until the defendant performs the discrete, “affirmative act” required by the court’s order, for example, production of a document or presentation of testimony. *Ibid.* The civil contemnor thus “‘carries the keys of his prison in his own pocket’”: At any moment, “[h]e can end the sentence and discharge himself . . . by doing what he had previously refused to do.” *Ibid.*, quoting *In re Nevitt*, 117 F. 448, 461 (CA8 1902).

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The criminal contempt sanction, by contrast, is “punitive, [imposed] to vindicate the authority of the court.” *Gompers*, 221 U. S., at 441. Unlike the civil contemnor, who has refused to perform some discrete, affirmative act commanded by the court, *Gompers* explains, the criminal contemnor has “do[ne] that which he has been commanded not to do.” *Id.*, at 442. The criminal contemnor’s disobedience is past, a “completed act,” *id.*, at 443, a deed no sanction can undo. See *id.*, at 442. Accordingly, the criminal contempt sanction operates not to coerce a future act from the defendant for the benefit of the complainant, but to uphold the dignity of the law, by punishing the contemnor’s disobedience. *Id.*, at 442–443. Because the criminal contempt sanction is determinate and unconditional, the Court said in *Gompers*, “the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.” *Id.*, at 442.

Even as it outlined these civil and criminal contempt prototypes, however, the Court in *Gompers* acknowledged that the categories, when filled by actual cases, are not altogether neat and tidy. Civil contempt proceedings, although primarily remedial, also “vindicat[e] . . . the court’s authority”; and criminal contempt proceedings, although designed “to vindicate the authority of the law,” may bestow “some incidental benefit” upon the complainant, because “such punishment tends to prevent a repetition of the disobedience.” *Id.*, at 443.

## II

The classifications described in *Gompers* have come under strong criticism, particularly from scholars. Many have observed, as did the Court in *Gompers* itself, that the categories, “civil” and “criminal” contempt, are unstable in theory and problematic in practice. See *ante*, at 827, n. 3 (citing scholarly criticism); see also Dudley, Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 Va. L. Rev. 1025, 1025, n. 1 (1993) (citing additional scholarly criticism).

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Our cases, however, have consistently resorted to the distinction between criminal and civil contempt to determine whether certain constitutional protections, required in criminal prosecutions, apply in contempt proceedings. See, *e. g.*, *United States v. Dixon*, 509 U. S. 688, 696 (1993) (“We have held that [certain] constitutional protections for criminal defendants . . . apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions.”) (citing cases). And the Court has repeatedly relied upon *Gompers*’ delineation of the distinction between criminal and civil contempt. See, *e. g.*, *Hicks v. Feiock*, 485 U. S. 624, 631–633, 635–636 (1988). The parties, accordingly, have presented their arguments within the *Gompers* framework.

Two considerations persuade me that the contempt proceedings in this case should be classified as “criminal” rather than “civil.” First, were we to accept the logic of Bagwell’s argument that the fines here were civil, because “conditional” and “coercive,” no fine would elude that categorization. The fines in this case were “conditional,” Bagwell says, because they would not have been imposed if the unions had complied with the injunction. The fines would have been “conditional” in this sense, however, even if the court had not supplemented the injunction with its fines schedule; indeed, any fine is “conditional” upon compliance or noncompliance before its imposition. Cf. *ante*, at 837 (the unions’ ability to avoid imposition of the fines was “indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law”). Furthermore, while the fines were “coercive,” in the sense that one of their purposes was to encourage union compliance with the injunction, criminal contempt sanctions may also “coerce” in this same sense, for they, too, “ten[d] to prevent a repetition of the disobedience.” *Gompers*, 221 U. S., at 443. Bagwell’s thesis that the fines were civil, because “condi-

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tional” and “coercive,” would so broaden the compass of those terms that their line-drawing function would be lost.\*

Second, the Virginia courts’ refusal to vacate the fines, despite the parties’ settlement and joint motion, see *ante*, at 825–826, is characteristic of criminal, not civil, proceedings. In explaining why the fines outlived the underlying civil dispute, the Supreme Court of Virginia stated: “Courts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained.” 244 Va. 463, 478, 423 S. E. 2d 349, 358 (1992). The Virginia court’s references to upholding public authority and maintaining “the dignity of the law” reflect the very purposes *Gompers* ranked on the criminal contempt side. See *supra*, at 844–845. Moreover, with the private complainant gone from the scene, and an official appointed by the Commonwealth to collect the fines for the Commonwealth’s coffers, it is implausible to invoke the justification of benefiting the civil complainant. The Commonwealth here pursues the fines on its own account, not as the agent of a private party, and without tying the exactions exclusively to a claim for compensation. Cf. *Hicks*, 485 U. S., at 632 (“[A] fine . . . [is] punitive when it is paid to the court,” but “remedial” or “civil” “when the defendant can avoid paying the fine simply by performing the affirmative act required by the court’s order.”). If, as the trial court declared, the proceedings

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\*Bagwell further likens the prospective fines schedule to the civil contempt fine imposed in *United States v. Mine Workers*, 330 U. S. 258 (1947). In that case, however, the contemnor union was given an opportunity, after the fine was imposed, to avoid the fine by “effect[ing] full compliance” with the injunction. As the Court explains, see *ante*, at 830, n. 4, for purposes of allowing the union to avoid the fine, “full compliance” with the broad no-strike injunction, see 330 U. S., at 266, n. 12, was reduced to the performance of three affirmative acts. This opportunity to purge, consistent with the civil contempt scenario described in *Gompers*, see *supra*, at 844, was unavailable to the unions in this case.

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were indeed civil from the outset, then the court should have granted the parties' motions to vacate the fines.

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Concluding that the fines at issue “are more closely analogous to . . . criminal fines” than to civil fines, *ante*, at 837, I join the Court's judgment and all but Part II–B of its opinion.



## Syllabus

MCFARLAND *v.* SCOTT, DIRECTOR, TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE,  
INSTITUTIONAL DIVISIONCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 93–6497. Argued March 29, 1994—Decided June 30, 1994

Title 21 U. S. C. § 848(q)(4)(B) entitles capital defendants to qualified legal representation in any “post conviction proceeding” under 28 U. S. C. § 2254 or § 2255, sections of the federal habeas corpus statute. Having failed to obtain a modification of his impending execution date in Texas state court, petitioner McFarland commenced this action in the Federal District Court by filing a *pro se* motion stating that he wished to challenge his conviction and death sentence under § 2254, requesting the appointment of counsel under § 848(q)(4)(B), and seeking a stay of execution to give that counsel time to prepare and file a habeas petition. The court denied the motion, concluding that because no “post conviction proceeding” had been initiated, McFarland was not entitled to counsel and the court lacked jurisdiction to issue a stay. In denying his subsequent stay application, the Court of Appeals noted that § 2251 authorizes a federal judge, before whom a “habeas corpus proceeding is pending,” to stay a state action, but held that no federal proceeding was pending because a motion for stay and for appointed counsel was not the equivalent of a habeas petition.

*Held:* A capital defendant need not file a formal habeas corpus petition in order to invoke his right to counsel under § 848(q)(4)(B) and to establish a federal court’s jurisdiction to enter a stay of execution. Pp. 854–859.

(a) The language and purposes of § 848(q)(4)(B) and its related provisions establish that the right to qualified appointed counsel adheres before the filing of a formal, legally sufficient habeas petition and includes a right to legal assistance in the preparation of such a petition. Thus, a “post conviction proceeding” within § 848(q)(4)(B)’s meaning is commenced by the filing of a death row defendant’s motion requesting the appointment of counsel for his federal habeas proceeding. McFarland filed such a motion and was entitled to the appointment of a lawyer. Pp. 854–857.

(b) The District Court had jurisdiction to grant McFarland’s motion for stay of execution. The language of §§ 848(q)(4)(B) and 2251 indicates that “post conviction” and “habeas corpus” refer to the same proceeding. Thus, the two statutes must be read *in pari materia* to pro-

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vide that once a capital defendant invokes his right to appointed counsel under § 848(q)(4)(B), a proceeding is “pending” under § 2251, such that the federal court has jurisdiction to enter a stay in its sound discretion. The Anti-Injunction Act does not bar the exercise of this authority, since § 2251 expressly authorizes a stay of state-court proceedings “for any matter involved in the habeas corpus proceeding.” Pp. 857–858.

7 F. 3d 47, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. O’CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 859. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 864.

*Mandy Welch* argued the cause for petitioner. With her on the briefs was *Douglas G. Robinson*.

*Margaret Portman Griffey*, Assistant Attorney General of Texas, argued the cause for respondent. With her on the brief were *Dan Morales*, Attorney General, *Jorge Vega*, First Assistant Attorney General, *Stephani A. Stelmach*, Assistant Attorney General, and *Drew T. Durham*, Deputy Attorney General.\*

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\*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *R. William Ide III*, *Stephen H. Sachs*, *Michael A. Millemann*, and *Michael A. Mello*; for the American Civil Liberties Union et al. by *Larry W. Yackle*, *Steven R. Shapiro*, and *Diann Y. Rust-Tierney*; and for the Texas Criminal Defense Lawyers Association by *Jim E. Lavine*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Dane R. Gillette*, Deputy Attorney General, and *Mark L. Krotoski*, Special Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jimmy H. Evans* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Larry Echo-Hawk* of Idaho, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Deborah T. Poritz* of New Jersey, *Michael F. Easley* of North Carolina, *Lee Fisher* of Ohio, *Susan B. Loving* of Oklahoma, *Ernest*

## Opinion of the Court

JUSTICE BLACKMUN delivered the opinion of the Court.

In establishing a federal death penalty for certain drug offenses under the Anti-Drug Abuse Act of 1988, 21 U. S. C. § 848(e), Congress created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings. § 848(q)(4)(B). This case presents the question whether a capital defendant must file a formal habeas corpus petition in order to invoke this statutory right and to establish a federal court's jurisdiction to enter a stay of execution.

## I

Petitioner Frank Basil McFarland was convicted of capital murder on November 13, 1989, in the State of Texas and sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction and sentence, *McFarland v. State*, 845 S. W. 2d 824 (1992), and on June 7, 1993, this Court denied certiorari. 508 U. S. 963. Two months later, on August 16, 1993, the Texas trial court scheduled McFarland's execution for September 23, 1993. On September 19, McFarland filed a *pro se* motion requesting that the trial court stay or withdraw his execution date to allow the Texas Resource Center an opportunity to recruit volunteer counsel for his state habeas corpus proceeding. Texas opposed a stay of execution, arguing that McFarland had not filed an application for writ of habeas corpus and that the court thus lacked jurisdiction to enter a stay. The trial court declined to appoint counsel, but modified McFarland's execution date to October 27, 1993.

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*D. Preate, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *Jan Graham* of Utah, *James S. Gilmore III* of Virginia, and *Joseph B. Meyer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

*Tim Curry*, *Charles M. Mallin*, *John Vance*, and *Steven C. Hilbig* filed a brief for the Tarrant, Bexar, Dallas, and Harris County District Attorneys as *amicus curiae*.

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On October 16, 1993, the Resource Center informed the trial court that it had been unable to recruit volunteer counsel and asked the court to appoint counsel for McFarland. Concluding that Texas law did not authorize the appointment of counsel for state habeas corpus proceedings, the trial court refused either to appoint counsel or to modify petitioner's execution date. McFarland then filed a *pro se* motion in the Texas Court of Criminal Appeals requesting a stay and a remand for appointment of counsel. The court denied the motion without comment.

Having failed to obtain either the appointment of counsel or a modification of his execution date in state court, McFarland, on October 22, 1993, commenced the present action in the United States District Court for the Northern District of Texas by filing a *pro se* motion stating that he "wish[ed] to challenge [his] conviction and sentence under [the federal habeas corpus statute,] 28 U. S. C. Sec. 2254." App. 42. McFarland requested the appointment of counsel under 21 U. S. C. § 848(q)(4)(B) and a stay of execution to give that counsel time to prepare and file a habeas corpus petition.<sup>1</sup>

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<sup>1</sup>Traditionally in Texas, capital defendants had invoked their federal right to appointed counsel by filing a perfunctory habeas corpus petition, often reciting a single claim. Texas customarily did not oppose a stay following the filing of such a *pro forma* petition, and federal district courts regularly granted a stay of execution under these circumstances and appointed counsel to file a legally sufficient habeas application. Tr. of Oral Arg. 32–33.

In the month prior to McFarland's scheduled execution, however, a capital defendant facing imminent execution filed such a *pro forma* habeas petition in District Court. Texas did not oppose the filing, but the District Court denied the stay and dismissed the skeletal petition on the merits. *Gosch v. Collins*, No. SA–93–CA–731 (WD Tex., Sept. 15, 1993). The Court of Appeals for the Fifth Circuit affirmed, *Gosch v. Collins*, 8 F. 3d 20 (1993), cert. dism'd *sub nom.* *Gosch v. Scott*, *post*, p. 1216. Gosch then filed a subsequent, substantive habeas petition, which the District Court dismissed as successive and abusive. *Gosch v. Collins*, No. SA–93–CA–736 (WD Tex., Oct. 12, 1993).

In a letter supporting McFarland's motion in the District Court, the Resource Center indicated that the *Gosch* case had left capital defendants

## Opinion of the Court

The District Court denied McFarland's motion on October 25, 1993, concluding that because no "post conviction proceeding" had been initiated pursuant to 28 U. S. C. § 2254 or § 2255, petitioner was not entitled to appointment of counsel and the court lacked jurisdiction to enter a stay of execution. App. 77. The court later denied a certificate of probable cause to appeal.

On October 26, the eve of McFarland's scheduled execution, the Court of Appeals for the Fifth Circuit denied his application for stay. 7 F. 3d 47. The court noted that federal law expressly authorizes federal courts to stay state proceedings while a federal habeas corpus proceeding is pending, 28 U. S. C. § 2251, but held that no such proceeding was pending, because a "motion for stay and for appointment of counsel [is not] the equivalent of an application for habeas relief." 7 F. 3d, at 49. The court concluded that any other federal judicial interference in state-court proceedings was barred by the Anti-Injunction Act, 28 U. S. C. § 2283.

Shortly before the Court of Appeals ruled, a Federal Magistrate Judge located an attorney willing to accept appointment in McFarland's case and suggested that if the attorney would file a skeletal document entitled "petition for writ of habeas corpus," the District Court might be willing to appoint him and grant McFarland a stay of execution. The attorney accordingly drafted and filed a *pro forma* habeas petition, together with a motion for stay of execution and appointment of counsel. As in the *Gosch* case, see n. 1, *supra*, despite the fact that Texas did not oppose a stay, the District Court found the petition to be insufficient and denied the motion for stay on the merits. *McFarland v. Collins*, No. 4:93-CV-723-A (WD Tex., Oct. 26, 1993).

On October 27, 1993, this Court granted a stay of execution in McFarland's original suit pending consideration of

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reluctant to invoke their federal right to counsel by filing *pro forma* habeas petitions, given the substantial possibility that the petition might be dismissed on the merits, and that any habeas petition later filed would be dismissed summarily as an abuse of the writ. See App. 73-74.

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his petition for certiorari. 510 U. S. 938. The Court later granted certiorari, 510 U. S. 989 (1993), to resolve an apparent conflict with *Brown v. Vasquez*, 952 F. 2d 1164 (CA9 1991).

## II

## A

Section 848(q)(4)(B) of Title 21 provides:

“In any *post conviction proceeding* under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)” (emphasis added).

On its face, this statute grants indigent capital defendants a mandatory right to qualified legal counsel<sup>2</sup> and related services “[i]n any [federal] post conviction proceeding.” The express language does not specify, however, how a capital defendant’s right to counsel in such a proceeding shall be invoked.

Neither the federal habeas corpus statute, 28 U. S. C. § 2241 *et seq.*, nor the rules governing habeas corpus proceedings define a “post conviction proceeding” under § 2254 or § 2255 or expressly state how such a proceeding shall be commenced. Construing § 848(q)(4)(B) in light of its related pro-

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<sup>2</sup>Counsel appointed to represent capital defendants in postconviction proceedings must meet more stringent experience criteria than attorneys appointed to represent noncapital defendants under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A. At least one attorney appointed to represent a capital defendant must have been authorized to practice before the relevant court for at least five years, and must have at least three years of experience in handling felony cases in that court. 21 U. S. C. § 848(q)(6).

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visions, however, indicates that the right to appointed counsel adheres prior to the filing of a formal, legally sufficient habeas corpus petition. Section 848(q)(4)(B) expressly incorporates 21 U. S. C. § 848(q)(9), which entitles capital defendants to a variety of expert and investigative services upon a showing of necessity:

“Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, . . . the court *shall authorize* the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore” (emphasis added).

The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital defense counsel will have been appointed under § 848(q)(4)(B) before the need for such technical assistance arises, since the statute requires “the defendant’s attorneys to obtain such services” from the court. § 848(q)(9). In adopting § 848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

This interpretation is the only one that gives meaning to the statute as a practical matter. Congress’ provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of “the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.” § 848(q)(7). An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because “[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be

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able to file successful petitions for collateral relief without the assistance of persons learned in the law.” *Murray v. Giarratano*, 492 U. S. 1, 14 (1989) (KENNEDY, J., joined by O’CONNOR, J., concurring in judgment); see also *id.*, at 28 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting) (“[T]his Court’s death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master”).

Habeas corpus petitions must meet heightened pleading requirements, see 28 U. S. C. § 2254 Rule 2(c), and comply with this Court’s doctrines of procedural default and waiver, see *Coleman v. Thompson*, 501 U. S. 722 (1991). Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, see 28 U. S. C. § 2254 Rule 4, and to deny a stay of execution where a habeas petition fails to raise a substantial federal claim, see *Barefoot v. Estelle*, 463 U. S. 880, 894 (1983). Moreover, should a defendant’s *pro se* petition be summarily dismissed, any petition subsequently filed by counsel could be subject to dismissal as an abuse of the writ. See *McCleskey v. Zant*, 499 U. S. 467, 494 (1991). Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits. Congress legislated against this legal backdrop in adopting § 848(q)(4)(B), and we safely assume that it did not intend for the express requirement of counsel to be defeated in this manner.

The language and purposes of § 848(q)(4)(B) and its related provisions establish that the right to appointed counsel includes a right to legal assistance in the preparation of a habeas corpus application. We therefore conclude that a “post conviction proceeding” within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant’s motion requesting the appointment of counsel for his federal habeas



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corpus proceeding.<sup>3</sup> McFarland filed such a motion and was entitled to the appointment of a lawyer.

## B

Even if the District Court had granted McFarland's motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless McFarland's execution also was stayed. We therefore turn to the question whether the District Court had jurisdiction to grant petitioner's motion for stay.

Federal courts cannot enjoin state-court proceedings unless the intervention is authorized expressly by federal statute or falls under one of two other exceptions to the Anti-Injunction Act. See *Mitchum v. Foster*, 407 U. S. 225, 226 (1972). The federal habeas corpus statute grants any federal judge "before whom a *habeas corpus proceeding is pending*" power to stay a state-court action "for any matter involved in the habeas corpus proceeding." 28 U. S. C. § 2251 (emphasis added). McFarland argues that his request for counsel in a "post conviction proceeding" under § 848(q)(4)(B) initiated a "habeas corpus proceeding" within the meaning of § 2251, and that the District Court thus had jurisdiction to enter a stay. Texas contends, in turn, that even if a "post conviction proceeding" under § 848(q)(4)(B) can be

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<sup>3</sup>JUSTICE THOMAS argues in dissent that reading § 848(q)(4)(B) to allow the initiation of a habeas corpus proceeding through the filing of a motion for appointment of counsel ignores the fact that such proceedings traditionally have been commenced by the filing of a habeas corpus petition and creates a divergent practice for capital defendants. *Post*, at 872, n. 3. As JUSTICE O'CONNOR agrees, *post*, at 860, however, § 848(q)(4)(B) bestows upon capital defendants a mandatory right to counsel, including a right to preapplication legal assistance, that is unknown to other criminal defendants. Because noncapital defendants have no equivalent right to the appointment of counsel in federal habeas corpus proceedings, it is not surprising that their habeas corpus proceedings typically will be initiated by the filing of a habeas corpus petition.

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triggered by a death row defendant's request for appointment of counsel, no "habeas corpus proceeding" is "pending" under § 2251, and thus no stay can be entered, until a legally sufficient habeas petition is filed.

The language of these two statutes indicates that the sections refer to the same proceeding. Section 848(q)(4)(B) expressly applies to "any post conviction proceeding under section 2254 or 2255"—the precise "habeas corpus proceeding[s]" that § 2251 involves. The terms "post conviction" and "habeas corpus" also are used interchangeably in legal parlance to refer to proceedings under §§ 2254 and 2255. We thus conclude that the two statutes must be read *in pari materia* to provide that once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution. Because § 2251 expressly authorizes federal courts to stay state-court proceedings "for any matter involved in the habeas corpus proceeding," the exercise of this authority is not barred by the Anti-Injunction Act.

This conclusion by no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court. Under ordinary circumstances, a capital defendant presumably will have sufficient time to request the appointment of counsel and file a formal habeas petition prior to his scheduled execution. But the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is not afforded, "[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper." *Barefoot*, 463 U. S., at 889. On the other hand, if a dilatory capital defendant inexcusably ignores this opportunity and flouts the available processes, a federal court presumably would not abuse its discretion in denying a stay of execution.

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## III

A criminal trial is the “main event” at which a defendant’s rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to “relitigate state trials.” *Id.*, at 887. At the same time, criminal defendants are entitled by federal law to challenge their conviction and sentence in habeas corpus proceedings. By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

We conclude that a capital defendant may invoke this right to a counseled federal habeas corpus proceeding by filing a motion requesting the appointment of habeas counsel, and that a district court has jurisdiction to enter a stay of execution where necessary to give effect to that statutory right. McFarland filed a motion for appointment of counsel and for stay of execution in this case, and the District Court had authority to grant the relief he sought.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

I agree with the Court’s conclusion that 21 U. S. C. § 848 entitles capital defendants pursuing federal habeas corpus relief to a properly trained attorney. I also agree that this right includes legal assistance in preparing a habeas petition. Thus, the Court correctly holds that a defendant need not file a habeas petition to invoke the right to counsel. *Ante*, at 856–857. I write separately, however, because I disagree with the Court’s conclusion that 28 U. S. C. § 2251 allows a district court to stay an execution pending counsel’s prepara-

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tion of an application for a writ of habeas corpus. *Ante*, at 857–858.

As the Court explains, § 848(q) must be read to apply prior to the filing of a habeas petition. It is almost meaningless to provide a lawyer to pursue claims on federal habeas if the lawyer is not available to help prepare the petition. First, the habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims. See Habeas Corpus Rule 2(c) ("The petition . . . shall specify all the grounds for relief which are available to the petitioner . . . and shall set forth in summary form the facts supporting each of the grounds thus specified"). Furthermore, district courts are authorized to summarily dismiss petitions which appear on their face to be meritless. See Habeas Corpus Rule 4. And our carefully crafted doctrines of waiver and abuse of the writ make it especially important that the first petition adequately set forth all of a state prisoner's colorable grounds for relief. Indeed, Congress expressly recognized "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." 21 U.S.C. § 848(q)(7). Moreover, the statute entitles capital defendants not only to qualified counsel, but also to "investigative, expert or other services . . . reasonably necessary for the representation of the defendant." § 848(q)(9). For such services to be meaningful in the habeas context, they also must be available prior to the filing of a first habeas petition. See *ante*, at 855.

In my view, however, petitioner is not entitled under present law to a stay of execution while counsel prepares a habeas petition. The habeas statute provides in relevant part that "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may . . . stay any proceeding against the person detained in any State court." 28 U.S.C. § 2251. While this provision authorizes a stay in the habeas context, it does not explicitly allow a stay prior to the filing of a petition, and our cases have made it clear

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that capital defendants must raise at least some colorable federal claim before a stay of execution may be entered.

“[F]ederal habeas [is not] a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.” *Barefoot v. Estelle*, 463 U. S. 880, 887–888 (1983).

See also *Autry v. Estelle*, 464 U. S. 1 (1983) (*per curiam*) (no automatic stay in this Court for review of a first federal habeas petition where petition lacks merit).

Petitioner has not filed anything describing the nature of his claims, if any. As a consequence, the Court's approach, which permits a stay of execution in the absence of any showing of a constitutional claim, conflicts with the sound principle underlying our precedents that federal habeas review exists only to review errors of constitutional dimension, and that the habeas procedures may be invoked only when necessary to resolve a constitutional claim. *Barefoot*, *supra*, at 892–896; see *Townsend v. Sain*, 372 U. S. 293, 312 (1963).

Congress knows how to give courts the broad authority to stay proceedings of the sort urged by petitioner. For example, Congress expressly provided this Court with authority to grant stays pending the filing of a petition for a writ of certiorari:

“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.” 28 U. S. C. § 2101(f).

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The absence of such explicit authority in the habeas statute is evidence that Congress did not intend federal courts to enter stays of execution in the absence of some showing on the merits.

Moreover, just as the counsel provisions of § 848(q) are intended to apply before the submission of a petition, the text and structure of the federal habeas statute suggest that the stay provision contained in § 2251 is intended to apply only after a petition has been filed. Although the statute does not specifically identify when “a habeas corpus proceeding is pending,” *ibid.*, other provisions of the statute show that there is no “pending” habeas corpus proceeding until an application for habeas corpus has been filed, which is the mechanism for “institut[ing]” a proceeding under the statute. For example, § 2254(d) refers to “any proceeding *instituted* in a Federal court *by an application* for a writ of habeas corpus” (emphasis added). Another statute setting filing fees provides that “the parties *instituting* any . . . proceeding in [district court must] pay a filing fee of \$120, except that on application for a writ of habeas corpus the filing fee shall be \$5.” 28 U. S. C. § 1914(a) (emphasis added). This indicates that the institution of a proceeding requires the filing of an “application,” which petitioner has not done. See § 2242 (an “[a]pplication for a writ of habeas corpus . . . shall allege the facts concerning the applicant’s commitment or detention”); Habeas Corpus Rule 2(a) (“[T]he application shall be in the form of a petition”).

The rules governing § 2254 cases confirm this conclusion. Although originally enacted by this Court, the rules were amended by Congress and approved as amended. See Pub. L. 94–426, § 1, 90 Stat. 1334 (1976). By their terms, the habeas rules only apply to “procedure[s] in the United States district courts on *applications* under 28 U. S. C. § 2254.” Rule 1(a) (emphasis added). See also Habeas Corpus Rule 2 (referring to “[a]pplicants in present custody” and “[a]pplicants subject to future custody”). These same rules also

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make an express exception for the appointment of counsel “at any stage of the case,” Rule 8(c), a further indication that the rules otherwise apply *after* an application for a writ of habeas corpus has been filed in the district court. This consistent textual focus on the existence of an “application” leads me to conclude that the district court’s authority to issue a stay pursuant to § 2251 also requires the filing of an “application.”\*

Congress is apparently aware of the clumsiness of its handiwork in authorizing appointment of an attorney under 21 U. S. C. § 848(q)(4)(B) “[i]n any post conviction proceeding,” while leaving intact 28 U. S. C. § 2251, which authorizes a stay only when a “habeas corpus proceeding is pending.” See S. 1441, § 3(b), 103d Cong., 1st Sess. (1993). The remedy for this problem, however, lies with Congress, and not, as the Court would have it, by reading the Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4393, to impliedly amend the habeas statute. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974). Such a reading is inconsistent with our prior cases and with the important federalism principles underlying the limited habeas jurisdiction of the federal courts. I would leave the matter to Congress to resolve. Finally, prisoners can avoid the need for a stay by filing a prompt request for appointment of counsel well in advance of the scheduled execution.

In the judgment currently under review, the Court of Appeals for the Fifth Circuit held that petitioner’s “motion for stay of execution and appointment of counsel is . . . denied.” 7 F. 3d 47, 49 (1993) (*per curiam*). Because I agree with the Court that petitioner is entitled to an attorney, I concur

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\*Because the habeas statute itself addresses when district courts may order a stay of state proceedings, the All Writs Act, 28 U. S. C. § 1651, does not provide a residual source of authority for a stay. “Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.” *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U. S. 34, 43 (1985).

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in the judgment reversing the Court of Appeals on this point. But because in my view petitioner cannot obtain a stay of execution before filing a petition for a writ of habeas corpus in the District Court, I would affirm the judgment in part. I therefore respectfully dissent from the Court's contrary determination.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court holds that a state prisoner under sentence of death may invoke a federal district court's jurisdiction to obtain appointed counsel under 21 U. S. C. § 848(q)(4)(B) and to obtain a stay of execution under 28 U. S. C. § 2251 simply by filing a motion for appointment of counsel. In my view, the Court's conclusion is at odds with the terms of both statutory provisions. Each statute allows a federal district court to take action (appointing counsel under § 848(q)(4)(B) or granting a stay under § 2251) only after a habeas proceeding has been commenced. As JUSTICE O'CONNOR points out, such a proceeding is initiated under the habeas corpus statute, 28 U. S. C. § 2241 *et seq.*, only with the filing of an application for a writ of habeas corpus. I therefore agree with JUSTICE O'CONNOR that a district court lacks jurisdiction to grant a stay under § 2251 until such an application has been filed. See *ante*, at 860–863 (concurring in judgment in part and dissenting in part). But because § 848(q)(4)(B), like § 2251, conditions a court's power to act upon the existence of a habeas proceeding, I would also hold that a district court cannot appoint counsel until an application for habeas relief has been filed. I therefore respectfully dissent.

## I

In its attempt to discern Congress' intent regarding the point at which § 848(q)(4)(B) makes counsel available, the Court spends a good deal of time considering how, as a "practical matter," the provision of counsel can be made meaning-



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ful. See *ante*, at 855. See also *ante*, at 860 (O’CONNOR, J., concurring in judgment in part and dissenting in part). But here, as in any case of statutory interpretation, our primary guide to Congress’ intent should be the text of the statute. The relevant terms of § 848(q)(4)(B) state that an indigent prisoner shall be entitled to an attorney and “investigative, expert, or other reasonably necessary services” only “[i]n any post conviction proceeding under section 2254 . . . seeking to vacate or set aside a death sentence.” The clear import of the provision is that an indigent prisoner is not entitled to an attorney or to other services under the section *until* a “post conviction proceeding under section 2254” exists—that is, not until after such a proceeding has been commenced in district court.

The Court appears to acknowledge that a § 2254 proceeding must be initiated before counsel can be appointed under § 848(q)(4)(B), but asserts that “[n]either the federal habeas corpus statute . . . nor the rules governing habeas corpus proceedings define a ‘post conviction proceeding’ under § 2254 . . . or expressly state how such a proceeding shall be commenced.” *Ante*, at 854. It is difficult to imagine, however, how the federal habeas statute could be more “express” on the matter. As JUSTICE O’CONNOR explains in detail, the statute makes clear that a “proceeding” is commenced only with the filing of an application for a writ of habeas corpus. See *ante*, at 862–863 (concurring in judgment in part and dissenting in part).<sup>1</sup> Section 2254(d), for example, provides that the well-known presumption of correctness of state court findings of fact attaches “[i]n any proceeding *instituted*

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<sup>1</sup>JUSTICE O’CONNOR, of course, discusses the question of how a habeas “proceeding” is commenced in the context of determining whether a district court has jurisdiction under § 2251 to enter a stay of execution prior to the filing of an application for habeas relief. See 28 U. S. C. § 2251 (“A justice or judge of the United States before whom a *habeas corpus proceeding is pending*, may . . . stay any proceeding against the person detained” under state authority) (emphasis added).

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in a Federal court *by an application for a writ of habeas corpus* by a person in custody pursuant to the judgment of a State court.” 28 U. S. C. § 2254(d) (emphasis added). See also § 2241(d) (power to grant the writ is not triggered except by “application for a writ of habeas corpus”). Cf. § 1914 (equating the filing of an “application for a writ of habeas corpus” with the “instituting” of a “proceeding” for purposes of setting filing fees).<sup>2</sup>

By providing that death-sentenced prisoners may obtain counsel “[i]n any post conviction proceeding under section 2254,” Congress referred to a well-known form of action with established contours. We should therefore assume that Congress intended to incorporate into § 848(q)(4)(B) the settled understanding of what constitutes a “proceeding under section 2254” in the habeas statute. Cf. *Miles v. Apex Marine Corp.*, 498 U. S. 19, 32 (1990). Indeed, the similarity between the language in §§ 848(q)(4)(B) and 2254(d) suggests that Congress used the phrase “[i]n any post conviction proceeding under section 2254” in the former provision as a shorthand form of the language “[i]n any proceeding instituted in a Federal court by an application for a writ of habeas corpus” contained in the latter. In short, the terms of § 848(q)(4)(B) indicate that Congress intended that legal assistance be made available under the provision only after a habeas proceeding has been commenced by the filing of an application for habeas relief.

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<sup>2</sup>The procedural rules governing § 2254 cases confirm that it is the filing of a habeas petition that commences a habeas proceeding. Rule 3 of the Federal Rules of Civil Procedure clearly states that “[a] civil action is commenced by filing a complaint.” The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules. See 28 U. S. C. § 2254 Rule 11; Fed. Rule Civ. Proc. 81(a)(2). The analogue to a complaint in the habeas context is an “application . . . in the form of a petition for a writ of habeas corpus.” 28 U. S. C. § 2254 Rule 2(a). Thus, a habeas action is commenced with the filing of such an application.

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The Court rejects this interpretation. Rather than turning to the habeas statute for guidance in determining when a “proceeding under section 2254” commences, the Court bases its examination of the question primarily on what it perceives to be the time at which legal assistance would be most useful to a death-sentenced prisoner. See *ante*, at 855–856. From this analysis, the Court concludes that a “‘post conviction proceeding’ within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant’s [preapplication] motion requesting the appointment of counsel.” *Ante*, at 856. The only textual provision the Court cites in support of that conclusion is 21 U. S. C. § 848(q)(9), which states:

“Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore . . . .”

At bottom, the Court’s textual argument amounts to the following: because investigative, expert, and other services described in § 848(q)(9) “may be critical in the preapplication phase of a habeas corpus proceeding,” *ante*, at 855, and because § 848(q)(9) provides that those services are to be obtained by the defendant’s attorneys, an attorney must be appointed “before the need for such technical assistance arises”—that is, prior to the filing of an application for habeas relief. *Ibid.* Thus, the sole textual source upon which the Court relies is the statement that “the defendant’s attorneys” are “authorize[d]” to obtain services on the defendant’s behalf.

In my view, such an oblique reference to “the defendant’s attorneys” is a remarkably thin reed upon which to rest Congress’ supposed intention to “establis[h] a right to preapplication legal assistance for capital defendants in federal

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habeas corpus proceedings.” *Ibid.* Indeed, had Congress intended to establish such a “right,” it surely would have done so in § 848(q)(4)(B), which provides for appointment of counsel, rather than in § 848(q)(9), which sets forth the mechanics of how “investigative, expert or other services” are to be obtained.

Moreover, § 848(q)(9) simply does not address the issue of *when* “investigative, expert or other services” are to be made available to a death-sentenced prisoner. The Court asserts that such services “may be critical” in the preapplication period. *Ibid.* Yet the issue of when these services are to be available, like the question of when a prisoner is entitled to counsel, is expressly addressed not in § 848(q)(9), but in § 848(q)(4). See § 848(q)(4)(A) (indigent defendant “charged with a [federal] crime which may be punishable by death” may obtain “representation [and] investigative, expert, or other reasonably necessary services” both “before judgment” and “after the entry of a judgment imposing a sentence of death but before the execution of that judgment”); see also § 848(q)(4)(B) (indigent prisoner “seeking to vacate or set aside [his] death sentence” may obtain “representation [and] investigative, expert, or other reasonably necessary services” “[i]n any post conviction proceeding under section 2254 or 2255”). And for purposes of this case, § 848(q)(4)(B) resolves the issue: Such services are to be made available only after a “post conviction proceeding under 2254” has been commenced.

As for the policy concerns rehearsed by the Court, I agree that legal assistance prior to the filing of a federal habeas petition can be very valuable to a prisoner. See *ante*, at 855–856. That such assistance is valuable, however, does not compel the conclusion that Congress intended the Federal Government to *pay* for it under § 848(q). As the Ninth Circuit has aptly observed: “Section 848(q) is a *funding statute*. It provides for the appointment of attorneys and the furnishing of investigative services for [federal] defendants or habeas corpus petitioners seeking to vacate or set aside a

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death sentence.” *Jackson v. Vasquez*, 1 F. 3d 885, 888 (1993) (emphasis added). It might well be a wise and generous policy for the Government to provide prisoners appointed counsel prior to the filing of a habeas petition, but that is not a policy declared by Congress in the terms of § 848(q)(4)(B).

Implicit in the Court’s analysis is the assumption that it would be unthinkable for Congress to grant an entitlement to appointed counsel, but to have that entitlement attach only upon the filing of a habeas petition. The Court suggests that its interpretation is required because it is “the *only* one that gives meaning to the statute as a practical matter.” *Ante*, at 855 (emphasis added). Any other interpretation, according to the Court, would “requir[e] an indigent capital petitioner to proceed without counsel in order to obtain counsel.” *Ante*, at 856. Yet under the interpretation of § 848(q)(4)(B) I have outlined above, Congress has not required death-sentenced prisoners to proceed *without counsel* during the preapplication period; rather, it has merely concluded that such prisoners would proceed without counsel *funded under* § 848(q)(4)(B).

Moreover, leaving prisoners without counsel appointed under § 848(q)(4)(B) during the preapplication period would be fully reasonable. Congress was no doubt aware that alternative sources of funding for preapplication legal assistance exist for death-sentenced prisoners. Petitioner, for example, is represented by the Texas Resource Center, which has been “designated . . . a Community Defender Organization in accordance with 18 U. S. C. § 3006A for the purpose of providing representation, assistance, information, and other related services to eligible persons and appointed attorneys in connection with” federal habeas corpus cases arising from capital convictions. Brief for Petitioner 4, n. 3 (internal quotation marks and citation omitted). The center, which is “funded primarily by a grant from the Administrative Office of the United States Courts,” *id.*, at 5, n. 4, became involved in petitioner’s case soon after his conviction was affirmed

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by the Texas Court of Criminal Appeals. Thus, although petitioner did not have preapplication assistance of counsel made available to him under § 848(q)(4)(B), he still could benefit from federally funded legal assistance.

In addition, it seems likely that Congress expected that the States would also shoulder some of the burden of providing preapplication legal assistance to indigent death-sentenced prisoners. Cf. *Hill v. Lockhart*, 992 F.2d 801, 803 (CA8 1993) (“A state that has elected to impose the death penalty should provide adequate funding for the procedures it has adopted to properly implement that penalty”). Defendants under a state-imposed sentence of death must exhaust state remedies by presenting their claims in state court prior to coming to federal court. See 28 U.S.C. § 2254(b). See also *Coleman v. Thompson*, 501 U.S. 722 (1991). Given this exhaustion requirement, it would have been logical for Congress, in drafting § 848(q)(4)(B), to assume that by the time a death-sentenced prisoner reaches federal court, “possible claims and their factual bases” will already have been “researched and identified.” *Ante*, at 855. Indeed, if the claims have not been identified and presented to state courts, a prisoner cannot proceed on federal habeas. See *Coleman, supra*, at 731 (“This Court has long held that a state prisoner’s federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims”). Thus, it would not have been unreasonable for Congress to require prisoners to meet the ordinary requirement for invoking a federal court’s habeas jurisdiction—namely, the filing of an adequate application for habeas corpus relief—prior to obtaining an attorney under § 848(q)(4)(B).

## II

Had the Court ended its analysis with the ruling that an indigent death-sentenced prisoner is entitled to counsel under § 848(q)(4)(B) prior to filing an application for habeas relief, today’s decision would have an impact on federal coffers, but would not expand the power of the federal courts

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to interfere with States' legitimate interests in enforcing the judgments of their criminal justice systems. The Court, however, does not stop with its decision on availability of counsel; rather, it goes on to hold that upon a motion for appointment of counsel, a death-sentenced prisoner is also able to obtain a stay of his execution in order to permit counsel "to research and present [his] habeas claims." *Ante*, at 858.

The Court reaches its decision through the sheerest form of bootstrapping. After reasoning that "a proceeding under section 2254" for purposes of § 848(q)(4)(B) commences with the filing of a motion for appointment of counsel, the Court imports that meaning of "proceeding" into 28 U. S. C. § 2251, which provides that a federal judge "before whom *a habeas corpus proceeding is pending*" may "stay any proceeding against the person detained in any State court" (emphasis added). The Court thus concludes that "once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution." *Ante*, at 858. I agree with the Court that the "language of [§§ 848(q)(4)(B) and 2251] indicates that the sections refer to the same proceeding." *Ibid*. But the method the Court employs to impart meaning to the term "proceeding" in the two provisions is simply backwards. Section 848(q)(4)(B) was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4393, long after the enactment of the habeas statute. As noted above, in using the terms "post conviction proceeding under section 2254" in § 848(q)(4)(B), Congress was referring to a form of action whose contours were well established under the habeas statute. As a matter of basic statutory construction, then, we should look to the habeas statute to inform our construction of § 848(q)(4)(B), not vice versa.

The reason the Court pursues a different approach is clear: There is no basis in the habeas statute for reading "habeas corpus proceeding" in § 2251 to mean an action commenced

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by the filing of a motion for appointment of counsel. Thus, to avoid the conclusion that a “proceeding” in § 2251 is commenced by the filing of an application for habeas relief, the Court is forced to hold that by enacting § 848(q), Congress amended the habeas statute *sub silentio*. Cf. *ante*, at 863 (O’CONNOR, J., concurring in judgment in part and dissenting in part).<sup>3</sup> In effect, the Court determines that Congress, in providing death-sentenced prisoners with federally funded counsel in § 848(q)(4)(B), intended to expand the jurisdiction of the federal courts to stay state proceedings under the habeas statute. Yet § 848(q)(4)(B) in no way suggests a connection between the availability of counsel and the stay power; indeed, the provision does not even mention the term “stay.” A proper interpretation of the provisions at issue here, however, avoids the dubious assumption that Congress intended to effect such an amendment of the habeas statute by implication. Correctly interpreted, both §§ 848(q)(4)(B) and 2251 refer to a “proceeding” that begins with the filing of an application for habeas relief, after which a federal court has jurisdiction to enter a stay and to appoint counsel.

In reaching its expansive interpretation of § 2251, the Court ignores the fact that the habeas statute provides federal courts with exceptional powers. Federal habeas review “disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.”

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<sup>3</sup> Presumably, the Court’s holding regarding a federal court’s jurisdiction to stay a state proceeding only applies when a state prisoner is “seeking to vacate or set aside a death sentence.” 21 U. S. C. § 848(q)(4)(B). Thus, after today, the “proceeding” to which § 2251 refers will have two different meanings depending upon whether the stay is sought by a capital or non-capital prisoner. In the former situation, a “habeas corpus proceeding” under § 2251 will be “pending” once a motion for appointment of counsel is filed. In the latter, no matter how many preliminary motions a prisoner might file, a proceeding will not be “pending” until an application for habeas relief is filed.



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*Duckworth v. Eagan*, 492 U. S. 195, 210 (1989) (O'CONNOR, J., concurring) (internal quotation marks and citation omitted). See also *ante*, at 863 (O'CONNOR, J., concurring in judgment in part and dissenting in part). We should not lightly assume that Congress intended to expand federal courts' habeas power; this is particularly true regarding their power directly to interfere with state proceedings through granting stays.

Moreover, as JUSTICE O'CONNOR observes, in expanding the federal courts' power to grant stays, the Court's decision "conflicts with the sound principle underlying our precedents that federal habeas review exists only to review errors of constitutional dimension." *Ante*, at 861 (concurring in judgment in part and dissenting in part). Under the Court's interpretation of § 2251, a prisoner may obtain a stay of execution without presenting a single claim to a federal court. Indeed, under the Court's reading of the statute, a federal district court determining whether to enter a stay will no longer have to evaluate whether a prisoner has presented a potentially meritorious constitutional claim. Rather, the court's task will be to determine whether a "capital defendant" who comes to federal court shortly before his scheduled execution has been "dilatory" in pursuing his "right to counsel." *Ante*, at 858. If he has not been "dilatory," the district court presumably must enter a stay to preserve his "right to counsel" and his "right for that counsel meaningfully to research and present [his] habeas claims." *Ibid.* In my view, simply by providing for the appointment of counsel in habeas cases, Congress did not intend to achieve such an extraordinary result.

\* \* \*

Because petitioner had not filed an application for habeas relief prior to filing his motion for stay of execution and for appointment of counsel, the courts below correctly determined that they lacked jurisdiction to consider his motion. I respectfully dissent.

## Syllabus

HOLDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY  
AS COUNTY COMMISSIONER FOR BLECKLEY  
COUNTY, GEORGIA, ET AL. *v.* HALL ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

No. 91–2012. Argued October 4, 1993—Decided June 30, 1994

Bleckley County, Georgia, has always had a form of government whereby a single commissioner holds all legislative and executive authority. In 1985, the state legislature authorized the county to adopt by referendum a multimember commission consisting of five members elected from single-member districts and a chair elected at large, but voters defeated the proposal, although they had previously approved a five-member district plan for the county school board. Respondents, black voters and the local chapter of the National Association for the Advancement of Colored People, filed this action. The District Court rejected their constitutional claim that the single-member commission was enacted or maintained with an intent to exclude or limit the political influence of the county's black community in violation of the Fourteenth and Fifteenth Amendments. The court also ruled against their claim that the commission's size violated §2 of the Voting Rights Act of 1965, finding that respondents satisfied only one of the three preconditions established in *Thornburg v. Gingles*, 478 U.S. 30. The Court of Appeals reversed on the statutory claim, holding that the totality of the circumstances supported §2 liability and remanding for a formulation of a remedy, which it suggested could be modeled after the county's school board election system.

*Held:* The judgment is reversed, and the case is remanded.

955 F.2d 1563, reversed and remanded.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE O'CONNOR, concluded in Parts I, II–A, and III:

1. The size of a governing authority is not subject to a vote dilution challenge under §2. Along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances support a liability finding, a court in a §2 suit must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice. However, there is no objective and workable standard for choosing a reasonable benchmark where, as here, the challenge is brought to the government body's size. There is no reason why one

## Syllabus

size should be picked over another. Respondents have offered no convincing reasons why the benchmark should be a hypothetical five-member commission. That such a commission is the most common form of governing authority in the State does not bear on dilution, since a sole commissioner system has the same impact on voting strength whether it is shared by none, or by all, of Georgia's counties. That the county was authorized to expand its commission, and that it adopted a five-member school board, are likewise irrelevant considerations. At most, they indicate that the county could change the size of its governing body with minimal disruption, but the failure to do so says nothing about the effects the current system has on the county citizens' voting power. Pp. 880–882.

2. The case is remanded for consideration of respondents' constitutional claim. P. 885.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, concluded in Part II–B that a voting practice subject to the preclearance requirement of § 5 of the Act is not necessarily subject to a dilution challenge under § 2. The sections differ in structure, purpose, and application; and in contrast to § 2 cases, a baseline for comparison under § 5 exists by definition: A proposed voting practice is measured against the existing practice to determine whether retrogression would result from the proposed change. Pp. 882–885.

JUSTICE O'CONNOR concluded that precedent compels the conclusion that the size of a governing authority is both a "standard, practice, or procedure" under § 2 and a "standard, practice, or procedure with respect to voting" under § 5, but agreed that a § 2 dilution challenge to a governing authority's size cannot be maintained because there can never be an objective alternative benchmark for comparison. Pp. 885–888.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that the size of a governing body cannot be attacked under § 2 because it is not a "standard, practice, or procedure" within the terms of § 2. An examination of § 2's text makes it clear that those terms refer only to practices that affect minority citizens' access to the ballot. Districting systems and electoral mechanisms that may affect the "weight" given to a ballot duly cast and counted are simply beyond the purview of the Act. The decision in *Thornburg v. Gingles*, 478 U. S. 30, which interprets § 2 to reach claims of vote "dilution," should be overruled. *Gingles* was based upon a flawed method of statutory construction and has produced an interpretation of § 2 that is at odds with the text of the Act and that has proved unworkable in practice. Pp. 891–946.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., joined, and in all but Part II–B of

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which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 885. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 891. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 946. GINSBURG, J., filed a dissenting opinion, *post*, p. 956. STEVENS, J., filed a separate opinion, in which BLACKMUN, SOUTER, and GINSBURG, JJ., joined, *post*, p. 957.

*R. Napier Murphy* argued the cause for petitioners. With him on the briefs was *W. Lonnie Barlow*.

*Christopher Coates* argued the cause for respondents. With him on the brief were *Laughlin McDonald, Kathleen Wilde, Neil Bradley, Mary Wyckoff, John A. Powell, and Steven R. Shapiro*.\*

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joined, and in all but Part II–B of which JUSTICE O'CONNOR joined.

This case presents the question whether the size of a governing authority is subject to a vote dilution challenge under § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973.

## I

The State of Georgia has 159 counties, one of which is Bleckley County, a rural county in central Georgia. Black persons make up nearly 20% of the eligible voting population in Bleckley County. Since its creation in 1912, the county has had a single-commissioner form of government for the exercise of “county governing authority.” See Ga. Code Ann. § 1–3–3(7) (Supp. 1993). Under this system, the

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\*Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Bryson, Acting Assistant Attorney General Turner, Acting Deputy Solicitor General Kneedler, Michael R. Dreeben, and Dennis J. Dimsey*; and for the Lawyers' Committee for Civil Rights Under Law by *Antonia B. Ianniello, Herbert M. Wachtell, William H. Brown III, Norman Redlich, Thomas J. Henderson, Frank R. Parker, and Brenda Wright*.

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Bleckley County Commissioner performs all of the executive and legislative functions of the county government, including the levying of general and special taxes, the directing and controlling of all county property, and the settling of all claims. Ga. Code Ann. §36-5-22.1 (1993). In addition to Bleckley County, about 10 other Georgia counties use the single-commissioner system; the rest have multimember commissions.

In 1985, the Georgia Legislature authorized Bleckley County to adopt a multimember commission consisting of five commissioners elected from single-member districts and a single chairman elected at large. 1985 Ga. Laws, p. 4406. In a referendum held in 1986, however, the electorate did not adopt the change to a multimember commission. (In a similar referendum four years earlier, county voters had approved a five-member district plan for the election of the county school board.)

In 1985, respondents (six black registered voters from Bleckley County and the Cochran/Bleckley County Chapter of the National Association for the Advancement of Colored People) challenged the single-commissioner system in a suit filed against petitioners (Jackie Holder, the incumbent county commissioner, and Probate Judge Robert Johnson, the superintendent of elections). The complaint raised both a constitutional and a statutory claim.

In their constitutional claim, respondents alleged that the county's single-member commission was enacted or maintained with an intent to exclude or to limit the political influence of the county's black community in violation of the Fourteenth and Fifteenth Amendments. At the outset, the District Court made extensive findings of fact about the political history and dynamics of Bleckley County. The court found, for example, that when the county was formed in 1912, few, if any, black citizens could vote. Indeed, until passage of federal civil rights laws, Bleckley County "enforced racial segregation in all aspects of local government—courthouse,

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jails, public housing, governmental services—and deprived its black citizens of the opportunity to participate in local government.” 757 F. Supp. 1560, 1562 (MD Ga. 1991). And even today, though legal segregation no longer exists, “more black than white residents of Bleckley County continue to endure a depressed socio-economic status.” *Ibid.* No black person has run for or been elected to the office of Bleckley County Commissioner, and the District Judge stated that, having run for public office himself, he “wouldn’t run if [he] were black in Bleckley [C]ounty.” See 955 F. 2d 1563, 1571 (CA11 1992).

The court rejected respondents’ constitutional contention, however, concluding that respondents “ha[d] failed to provide any evidence that Bleckley County’s single member county commission [wa]s the product of original or continued racial animus or discriminatory intent.” 757 F. Supp., at 1571. Nor was there evidence that the system was maintained “for tenuous reasons” or that the commissioner himself was unresponsive to the “particularized needs” of the black community. *Id.*, at 1564. There was no “slating process” to stand as a barrier to black candidates, and there was testimony from respondents that they were unaware of any racial appeals in recent elections. *Id.*, at 1562, n. 2, 1583.

In their statutory claim, respondents asserted that the county’s single-member commission violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973. Under the statute, the suit contended, Bleckley County must have a county commission of sufficient size that, with single-member election districts, the county’s black citizens would constitute a majority in one of the single-member districts. Applying the § 2 framework established in *Thornburg v. Gingles*, 478 U. S. 30 (1986), the District Court found that respondents satisfied the first of the three *Gingles* preconditions because black voters were sufficiently numerous and compact that they could have constituted a majority in one district of a multimember commission. In particular,

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the District Court found that “[i]f the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority ‘safe’ district . . . would result.” 757 F. Supp., at 1565. The court found, however, that respondents failed to satisfy the second and third *Gingles* preconditions—that whites vote as a bloc in a manner sufficient to defeat the black-preferred candidate and that blacks were politically cohesive.

The Court of Appeals for the Eleventh Circuit reversed on the statutory claim. Relying on its decision in *Carrollton Branch of NAACP v. Stallings*, 829 F. 2d 1547 (1987), the court first held that a challenge to the single-commissioner system was subject to the same analysis as that used in *Gingles*. Applying that analysis, the Court of Appeals agreed with the District Court that respondents had satisfied the first *Gingles* precondition by showing that blacks could constitute a majority of the electorate in one of five single-member districts. The court explained that it was “appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive.” 955 F. 2d, at 1569. The Court of Appeals further found that the District Court had erred in concluding that the second and third *Gingles* preconditions were not met. Turning to the totality of the circumstances, the court found that those circumstances supported a finding of liability under § 2. The court therefore concluded that respondents had proved a violation of § 2, and it remanded for formulation of a remedy, which, it suggested, “could well be modeled” after the system used to elect the Bleckley County school board. 955 F. 2d, at 1573–1574, and n. 20. Because of its statutory ruling, the Court of Appeals did not consider the District Court’s ruling on respondents’ constitutional claim.

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We granted certiorari to review the statutory holding of the Court of Appeals. 507 U. S. 959 (1993).

## II

## A

Section 2 of the Voting Rights Act of 1965 provides that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U. S. C. § 1973(a). In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met<sup>1</sup> and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice. See *post*, at 887 (O’CONNOR, J., concurring in part and concurring in judgment). As JUSTICE O’CONNOR explained in *Gingles*: “The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained . . . . [I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.” 478 U. S., at 88 (opinion concurring in judgment) (internal quotation marks omitted).

In certain cases, the benchmark for comparison in a § 2 dilution suit is obvious. The effect of an anti-single-shot voting rule, for instance, can be evaluated by comparing the

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<sup>1</sup> *Gingles* requires a showing that “the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district,” 478 U. S., at 50, that the minority group is politically cohesive, and that the majority group “votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority’s preferred candidate,” *id.*, at 51.



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system with that rule to the system without that rule. But where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under §2. See *post*, at 887–891 (O’CONNOR, J., concurring in part and concurring in judgment).

As the facts of this case well illustrate, the search for a benchmark is quite problematic when a §2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison. Respondents here argue that we should compare Bleckley County’s sole commissioner system to a hypothetical five-member commission in order to determine whether the current system is dilutive. Respondents and the United States as *amicus curiae* give three reasons why the single-commissioner structure should be compared to a five-member commission (instead of, say, a 3-, 10-, or 15-member body): (1) because the five-member commission is a common form of governing authority in the State; (2) because the state legislature had authorized Bleckley County to adopt a five-member commission if it so chose (it did not); and (3) because the county had moved from a single superintendent of education to a school board with five members elected from single-member districts. See Brief for United States as *Amicus Curiae* 17–18.

These referents do not bear upon dilution. It does not matter, for instance, how popular the single-member commission system is in Georgia in determining whether it dilutes the vote of a minority racial group in Bleckley County. That the single-member commission is uncommon in the State of Georgia, or that a five-member commission is quite common, tells us nothing about its effects on a minority group’s voting strength. The sole commissioner system has the same impact regardless of whether it is shared by none, or by all, of the other counties in Georgia. It makes little

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sense to say (as do respondents and the United States) that the sole commissioner system should be subject to a dilution challenge if it is rare—but immune if it is common.

That Bleckley County was authorized by the State to expand its commission, and that it adopted a five-member school board, are likewise irrelevant considerations in the dilution inquiry. At most, those facts indicate that Bleckley County could change the size of its commission with minimal disruption. But the county's failure to do so says nothing about the effects the sole commissioner system has on the voting power of Bleckley County's citizens. Surely a minority group's voting strength would be no more or less diluted had the State not authorized the county to alter the size of its commission, or had the county not enlarged its school board. One gets the sense that respondents and the United States have chosen a benchmark for the sake of having a benchmark. But it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place.

## B

To bolster their argument, respondents point out that our §5 cases may be interpreted to indicate that covered jurisdictions may not change the size of their government bodies without obtaining preclearance from the Attorney General or the federal courts. Brief for Respondents 29; see *Presley v. Etowah County Comm'n*, 502 U. S. 491, 501–503 (1992); *City of Lockhart v. United States*, 460 U. S. 125, 131–132 (1983); *City of Rome v. United States*, 446 U. S. 156, 161 (1980). Respondents contend that these §5 cases, together with the similarity in language between §§2 and 5 of the Act, compel the conclusion that the size of a government body must be subject to a dilution challenge under §2. It is true that in *Chisom v. Roemer*, 501 U. S. 380, 401–402 (1991), we said that the coverage of §§2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). We did not adopt a conclusive rule to that effect, however,

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and we do not think that the fact that a change in a voting practice must be precleared under §5 necessarily means that the voting practice is subject to challenge in a dilution suit under §2.

To be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application.<sup>2</sup> Section 5 applies only in certain jurisdictions specified by Congress and “only to proposed changes in voting procedures.” *Beer v. United States*, 425 U. S. 130, 138 (1976); see 42 U. S. C. §1973b(b) (specifying jurisdictions where §5 applies). In those covered jurisdictions, a proposed change in a voting practice must be approved in advance by the Attorney General or the federal courts. §1973c. The purpose of this requirement “has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” 425 U. S., at 141. Under §5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change. See *ibid.* The baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a pro-

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<sup>2</sup>Section 2 provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U. S. C. §1973(a).

Section 5 requires preclearance approval by a court or by the Attorney General “[w]hensoever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . different from that [previously] in force or effect” so as to ensure that it “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . .” 42 U. S. C. §1973c.

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posed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur. See 28 CFR § 51.54(b) (1993).

Retrogression is not the inquiry in § 2 dilution cases. 42 U. S. C. § 1973(a) (whether voting practice “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”); S. Rep. No. 97-417, p. 68, n. 224 (1982) (“Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group”). Unlike in § 5 cases, therefore, a benchmark does not exist by definition in § 2 dilution cases. And as explained above, with some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under § 2. For that reason, a voting practice that is subject to the preclearance requirements of § 5 is not necessarily subject to a dilution challenge under § 2.

This conclusion is quite unremarkable. For example, in *Perkins v. Matthews*, 400 U. S. 379, 388 (1971), we held that a town’s annexation of land was covered under § 5. Notwithstanding that holding, we think it quite improbable to suggest that a § 2 dilution challenge could be brought to a town’s existing political boundaries (in an attempt to force it to annex surrounding land) by arguing that the current boundaries dilute a racial group’s voting strength in comparison to the proposed new boundaries. Likewise, in *McCain v. Lybrand*, 465 U. S. 236 (1984), we indicated that a change from an appointive to an elected office was covered under § 5. Here, again, we doubt Congress contemplated that a racial group could bring a § 2 dilution challenge to an appointive office (in an attempt to force a change to an elective office) by arguing that the appointive office diluted its voting strength in comparison to the proposed elective office. We think these examples serve to show that a voting practice is

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not necessarily subject to a dilution challenge under §2 even when a change in that voting practice would be subject to the preclearance requirements of §5.

## III

With respect to challenges to the size of a governing authority, respondents fail to explain where the search for reasonable alternative benchmarks should begin and end, and they provide no acceptable principles for deciding future cases. The wide range of possibilities makes the choice “inherently standardless,” *post*, at 889 (O'CONNOR, J., concurring in part and concurring in judgment), and we therefore conclude that a plaintiff cannot maintain a §2 challenge to the size of a government body, such as the Bleckley County Commission. The judgment of the Court of Appeals is reversed, and the case is remanded for consideration of respondents' constitutional claim.

*It is so ordered.*

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I agree with JUSTICES KENNEDY and THOMAS that a plaintiff cannot maintain a §2 vote dilution challenge to the size of a governing authority, though I reach that conclusion by a somewhat different rationale. JUSTICE THOMAS rejects the notion that §2 covers *any* dilution challenges, and would hold that §2 is limited to “state enactments that regulate citizens' access to the ballot or the processes for counting a ballot.” *Post*, at 945. As JUSTICE STEVENS points out, however, *stare decisis* concerns weigh heavily here. *Post*, at 963–966 (opinion of STEVENS, J.); see also *Thornburg v. Gingles*, 478 U. S. 30, 84 (1986) (O'CONNOR, J., concurring in judgment) (“We know that Congress intended to allow vote dilution claims to be brought under §2”); *id.*, at 87 (“I agree with the Court that proof of vote dilution can establish a violation of §2”). These concerns require me to reject JUSTICE

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THOMAS' suggestion that we overhaul our established reading of §2.

I also agree with JUSTICE BLACKMUN, see *post*, at 946–950, that our precedents compel the conclusion that the size of the Bleckley County Commission is both a “standard, practice, or procedure” under §2 and a “standard, practice, or procedure with respect to voting” under §5. See, *e.g.*, *Presley v. Etowah County Comm’n*, 502 U. S. 491, 503 (1992) (change in size is a change in a “standard, practice, or procedure” because the change “increase[s] or diminish[es] the number of officials for whom the electorate may vote”); *City of Lockhart v. United States*, 460 U. S. 125, 131–132 (1983) (change from three-member commission to five-member commission is subject to §5 preclearance); *City of Rome v. United States*, 446 U. S. 156, 160–161 (1980) (it “is not disputed” that an expansion in the size of a board of education is subject to §5 preclearance); *Bunton v. Patterson*, decided with *Allen v. State Bd. of Elections*, 393 U. S. 544, 569–571 (1969) (change from elected to appointed office is subject to §5 preclearance); *id.*, at 566–567 (§2 should be given “the broadest possible scope”).

As JUSTICES KENNEDY and BLACKMUN both recognize, in these cases we have consistently said that a change in size is a “standard, practice, or procedure with respect to voting” that is subject to §5 preclearance. See *ante*, at 882 (opinion of KENNEDY, J.); *post*, at 946–948 (BLACKMUN, J., dissenting). And though our cases involving size have concerned §5, I do not think it possible to read the terms of §2 more narrowly than the terms of §5. Section 2 covers any “standard, practice, or procedure,” while §5 covers any “standard, practice, or procedure with respect to voting.” As a textual matter, I cannot see how a practice can be a “standard, practice, or procedure with respect to voting,” yet not be a “standard, practice, or procedure.” Indeed, the similarity in language led to our conclusion in *Chisom v. Roemer*, 501 U. S. 380,

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401–402 (1991), that, at least for determining threshold coverage, §§2 and 5 have parallel scope.

But determining the threshold scope of coverage does not end the inquiry, at least so far as §2 dilution challenges are concerned. As JUSTICES KENNEDY and BLACKMUN agree, the fact that the size of a governing authority is a “standard, practice, or procedure” does not answer the question whether respondents may maintain a §2 vote dilution challenge. See *ante*, at 880 (opinion of KENNEDY, J.); *post*, at 951 (BLACKMUN, J., dissenting). Section 2 vote dilution plaintiffs must establish that the challenged practice is dilutive. In order for an electoral system to dilute a minority group’s voting power, there must be an alternative system that would provide greater electoral opportunity to minority voters. “Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it ‘should’ be for minority voters to elect their preferred candidates under an acceptable system.” *Gingles*, 478 U. S., at 88 (O’CONNOR, J., concurring in judgment). As we have said, “[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.” *Id.*, at 50, n. 17 (emphasis in original); see also *id.*, at 99 (O’CONNOR, J., concurring in judgment) (“[T]he relative lack of minority electoral success under a challenged plan, *when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing*, can constitute powerful evidence of vote dilution”) (emphasis added).

Accordingly, to determine whether voters possess the potential to elect representatives of choice in the absence of the challenged structure, courts must choose an objectively reasonable alternative practice as a benchmark for the dilution comparison. On this, there is general agreement. See *ante*, at 880 (opinion of KENNEDY, J.) (“[A] court must find a

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reasonable alternative practice as a benchmark against which to measure the existing voting practice”); *post*, at 951 (BLACKMUN, J., dissenting) (“[T]he allegedly dilutive mechanism must be measured against the benchmark of an alternative structure or practice that is reasonable and workable under the facts of the specific case”). We require preclearance of changes in size under §5, because in a §5 case the question of an alternative benchmark never arises—the benchmark is simply the former practice employed by the jurisdiction seeking approval of a change. See *ante*, at 883 (opinion of KENNEDY, J.).

But §2 dilution challenges raise more difficult questions. This case presents the question whether, in a §2 dilution challenge to size, there can ever be an objective alternative benchmark for comparison. And I agree with JUSTICE KENNEDY that there cannot be. As JUSTICE KENNEDY points out, *ante*, at 880, the alternative benchmark is often self-evident. In a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts. See *Gingles, supra*, at 38, 50; Davidson, *Minority Vote Dilution: An Overview*, in *Minority Vote Dilution 5* (C. Davidson ed. 1984). Similarly, a court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single-shot rules by comparing the election results under a system with the challenged practice to the results under a system without the challenged practice. Cf. *City of Rome, supra*, at 183–185; U.S. Comm’n on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 206–208 (1975); Note, *Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws*, 91 *Colum. L. Rev.* 1127, 1148 (1991). Though there may be disagreements about the precise appropriate alternative practice in these cases, see *Gingles, supra*, at 88–89 (O’CONNOR, J., concurring in judgment), there are at least some objectively determinable constraints on the dilution inquiry.



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This is not so with §2 dilution challenges to size, however. In a dilution challenge to the size of a governing authority, choosing the alternative for comparison—a hypothetical larger (or smaller) governing authority—is extremely problematic. See *ante*, at 881–882 (opinion of KENNEDY, J.). The wide range of possibilities makes the choice inherently standardless. Here, for example, respondents argued that the single-member commission structure was dilutive in comparison to a five-member structure, in which African-Americans would probably have been able to elect one representative of their choice. Some groups, however, will not be able to constitute a majority in one of five districts. Once a court accepts respondents' reasoning, it will have to allow a plaintiff group insufficiently large or geographically compact to form a majority in one of five districts to argue that the jurisdiction's failure to establish a 10-, 15-, or 25-commissioner structure is dilutive. See, e. g., *Romero v. Pomona*, 883 F. 2d 1418, 1425, n. 10 (CA9 1989); Heath, *Managing the Political Thicket: Developing Objective Standards in Voting Rights Litigation*, 21 *Stetson L. Rev.* 819, 827 (1992) (“[O]nce one departs from the current number of districts or other objective standard, the test loses its validity as a threshold standard”).

Respondents argue that this concern with arbitrary and standardless intrusions into the size of local governing authority is overstated. Respondents' principal support for this conclusion is that a five-member commission is the *most* common size for Georgia. But a five-member commission is not the *only* common size in Georgia: 22 Georgia counties have three-member commissions (and one county has an 11-member commission). Moreover, there is no good reason why the search for benchmarks should be limited to Georgia. Expanding the search nationwide produces many 20-person county commissions in Tennessee, and 40-member commissions in Wisconsin. DeSantis, *County Government: A Century of Change*, in *The Municipal Yearbook 1989*, pp. 80, 83.

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In sum, respondents do not explain how common an alternative practice must be before it can be a reliable alternative benchmark for the dilution comparison, nor do they explain where the search for alternative benchmarks should begin and end.

Respondents' failure to provide any meaningful principles for deciding future cases demonstrates the difficulty with allowing dilution challenges to the size of a governing authority. Under respondents' open-ended test, a wide range of state governmental bodies may be subject to a dilution challenge. Within each State there are many forms of government, including county commissions that range dramatically in size. For example, the majority of county commissions in New Jersey have seven members, but three counties have smaller commissions and one has a larger commission. *Id.*, at 76. Similarly, in South Carolina the norm is a seven-member commission, but a number of counties deviate. *Id.*, at 79. In Tennessee, the average size for a county commission is 19 members, but one county has as few as 9 and another has as many as 40. *Id.*, at 80. And in Wisconsin the average size is 27 members, but the commission sizes range from 7 to 46. *Id.*, at 83.

Nor are deviations from the norm limited to counties. Statewide governing authorities also range dramatically in size, and often do not correlate to the size of the State. For example, Texas has only 31 members in its State Senate, while tiny Rhode Island has 50. Council of State Governments, *State Elective Officials and the Legislatures 1993-94*, p. vi. The Texas Senate is smaller than the national average and the Rhode Island Senate is larger. Similarly, California has an unusually small 80-person Assembly, while New Hampshire has a 400-person House. *Ibid.*

The discrepancies in size among state and local governing authorities reinforce my concern that the limiting principle offered by respondents will in practice limit very little. Though respondents purport to present Bleckley County as

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unique, it is not. County commissions throughout New Jersey, South Carolina, Tennessee, and Wisconsin, and the state legislatures of Texas, Rhode Island, California, and New Hampshire are ripe for a dilution challenge under respondents' theory, since they do not fit the norm for their State. Moreover, though my examples are some of the more extreme ones, they are not alone. In these cases, and perhaps in many more, the potential reach of allowing dilution challenges to size will not be meaningfully circumscribed by the open-ended requirement that the alternative benchmark be "reasonable and workable." *Post*, at 951 (BLACKMUN, J., dissenting).

For these reasons, I concur in the conclusion that respondents' dilution challenge to the size of the Bleckley County Commission cannot be maintained under §2 of the Voting Rights Act, and I join Parts I, II–A, and III of JUSTICE KENNEDY's opinion. Because the Court appropriately reverses the judgment below and remands for consideration of respondents' constitutional claim of intentional discrimination, I also concur in the judgment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

We are asked in this case to determine whether the size of a local governing body is subject to challenge under §2 of the Voting Rights Act of 1965 as a "dilutive" practice. While I agree with JUSTICES KENNEDY and O'CONNOR that the size of a governing body cannot be attacked under §2, I do not share their reasons for reaching that conclusion. JUSTICE KENNEDY persuasively demonstrates that there is no principled method for determining a benchmark against which the size of a governing body might be compared to determine whether it dilutes a group's voting power. Both he and JUSTICE O'CONNOR rely on that consideration to conclude that size cannot be challenged under §2 of the Act. See *ante*, at 880–882, 885 (opinion of KENNEDY, J.);

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*ante*, at 888–891 (O’CONNOR, J., concurring in part and concurring in judgment).

While the practical concerns JUSTICES KENNEDY and O’CONNOR point out can inform a proper construction of the Act, I would explicitly anchor analysis in this case in the statutory text. Only a “voting qualification or prerequisite to voting, or standard, practice, or procedure” can be challenged under §2. I would hold that the size of a governing body is not a “standard, practice, or procedure” within the terms of the Act. In my view, however, the only principle limiting the scope of the terms “standard, practice, or procedure” that can be derived from the text of the Act would exclude, not only the challenge to size advanced today, but also challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past.

I believe that a systematic reassessment of our interpretation of §2 is required in this case. The broad reach we have given the section might suggest that the size of a governing body, like an election method that has the potential for diluting the vote of a minority group, should come within the terms of the Act. But the gloss we have placed on the words “standard, practice, or procedure” in cases alleging dilution is at odds with the terms of the statute and has proved utterly unworkable in practice. A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an “undiluted” vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial “balkaniz[ation]” of the Nation. *Shaw v. Reno*, 509 U. S. 630, 658 (1993).

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I can no longer adhere to a reading of the Act that does not comport with the terms of the statute and that has produced such a disastrous misadventure in judicial policy-making. I would hold that the size of a government body is not a “standard, practice, or procedure” because, properly understood, those terms reach only state enactments that limit citizens’ access to the ballot.

## I

If one surveys the history of the Voting Rights Act, 42 U. S. C. §1973 *et seq.*, one can only be struck by the sea change that has occurred in the application and enforcement of the Act since it was passed in 1965. The statute was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks’ ability to register and vote in the segregated South. Now, the Act has grown into something entirely different. In construing the Act to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups. In the process, we have read the Act essentially as a grant of authority to the federal judiciary to develop theories on basic principles of representative government, for it is only a resort to political theory that can enable a court to determine which electoral systems provide the “fairest” levels of representation or the most “effective” or “undiluted” votes to minorities.

Before I turn to an analysis of the text of §2 to explain why, in my view, the terms of the statute do not authorize the project that we have undertaken in the name of the Act, I intend first simply to describe the development of the basic contours of vote dilution actions under the Voting Rights Act.<sup>1</sup> An examination of the current state of our decisions

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<sup>1</sup>Of course, many of the basic principles I will discuss are equally applicable to constitutional vote dilution cases. Indeed, prior to the amendment of the Voting Rights Act in 1982, dilution claims typically were

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should make obvious a simple fact that for far too long has gone unmentioned: Vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make. A clear understanding of the destructive assumptions that have developed to guide vote dilution decisions and the role we have given the federal courts in redrawing the political landscape of the Nation should make clear the pressing need for us to reassess our interpretation of the Act.

A

As it was enforced in the years immediately following its enactment, the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437, was perceived primarily as legislation directed at eliminating literacy tests and similar devices that had been used to prevent black voter registration in the segregated South. See A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 17–27 (1987) (hereinafter Thernstrom). See also Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *Cardozo L. Rev.* 1135, 1151 (1993) (referring to actions securing access to the ballot as the “first generation” of Voting Rights Act claims).<sup>2</sup> This focus in enforcement flowed, no doubt, from the emphasis on access to the ballot apparent in the central provision of the Act, § 4, which used a mathematical formula based on voter registration and

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brought under the Equal Protection Clause. See, e. g., *White v. Regester*, 412 U. S. 755 (1973); *Whitcomb v. Chavis*, 403 U. S. 124 (1971); *Burns v. Richardson*, 384 U. S. 73 (1966). The early development of our voting rights jurisprudence in those cases provided the basis for our analysis of vote dilution under the amended § 2 in *Thornburg v. Gingles*, 478 U. S. 30 (1986).

<sup>2</sup> Cf. L. Guinier, *The Tyranny of the Majority* 49, n. 58 (1994) (hereinafter Guinier) (“The first generation of voting litigation, and the 1965 statute which represented the congressional response, were concerned with the complete and total exclusion of blacks from the electoral process”).

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turnout in 1964 to define certain “covered” jurisdictions in which the use of literacy tests was immediately suspended. Pub. L. 89–110, §4, 79 Stat. 438. Section 6 of the Act reflected the same concern for registration as it provided that federal examiners could be dispatched to covered jurisdictions whenever the Attorney General deemed it necessary to supervise the registration of black voters. 42 U. S. C. §1973d. And to prevent evasion of the requirements of §4, §5 required that covered jurisdictions obtain “preclearance” from the Department of Justice before altering any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” §1973c.

The Act was immediately and notably successful in removing barriers to registration and ensuring access to the ballot. For example, in Mississippi, black registration levels skyrocketed from 6.7% to 59.8% in a mere two years; in Alabama the increase was from 19.3% to 51.6% in the same time period. See Thernstrom 18. By the end of 1967, black voter registration had reached at least 50% in every covered State. See B. Grofman, L. Handley, & R. Niemi, *Minority Representation and the Quest for Voting Equality* 22 (1992).

The Court’s decision in *Allen v. State Bd. of Elections*, 393 U. S. 544 (1969), however, marked a fundamental shift in the focal point of the Act. In an opinion dealing with four companion cases, the *Allen* Court determined that the Act should be given “the broadest possible scope.” *Id.*, at 567. Thus, in *Fairley v. Patterson*, the Court decided that a covered jurisdiction’s switch from a districting system to an at-large system for election of county supervisors was a “standard, practice, or procedure with respect to voting,” subject to preclearance under §5. *Id.*, at 569. Stating that the Act “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race,” *id.*, at 565, the Court reasoned that §5’s preclearance provisions should apply, not only to changes in electoral laws that pertain to

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registration and access to the ballot, but to provisions that might “dilute” the force of minority votes that were duly cast and counted. See *id.*, at 569. The decision in *Allen* thus ensured that the terms “standard, practice, or procedure” would extend to encompass a wide array of electoral practices or voting systems that might be challenged for reducing the potential impact of minority votes.

As a consequence, *Allen* also ensured that courts would be required to confront a number of complex and essentially political questions in assessing claims of vote dilution under the Voting Rights Act. The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilution can be measured. As Justice Frankfurter observed several years before *Allen*, “[t]alk of ‘debasement’ or ‘dilution’ is circular talk. One cannot speak of ‘debasement’ or ‘dilution’ of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.” *Baker v. Carr*, 369 U. S. 186, 300 (1962) (dissenting opinion). See also *Thornburg v. Gingles*, 478 U. S. 30, 88 (1986) (O’CONNOR, J., concurring in judgment) (“[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it ‘should’ be for minority voters to elect their preferred candidates under an acceptable system”). But in setting the benchmark of what “undiluted” or fully “effective” voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory. As Justice Harlan pointed out in his dissent in *Allen*, the Voting Rights Act supplies no rule for a court to rely upon in deciding, for example, whether a multimember at-large system of election is to be preferred to a single-member district system; that is, whether one provides a more “effective” vote than another. “Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers.” *Allen*,



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*supra*, at 586 (opinion concurring in part and dissenting in part). The choice is inherently a political one, and depends upon the selection of a theory for defining the fully “effective” vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is “to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.” *Baker, supra*, at 300 (Frankfurter, J., dissenting).

Perhaps the most prominent feature of the philosophy that has emerged in vote dilution decisions since *Allen* has been the Court’s preference for single-member districting schemes, both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities undiluted voting power. See, e. g., *Grove v. Emison*, 507 U. S. 25, 40 (1993); *Gingles, supra*, at 50, n. 17 (declaring that the “single-member district is generally the appropriate standard against which to measure minority group potential to elect”); *Mobile v. Bolden*, 446 U. S. 55, 66, n. 12 (1980) (plurality opinion) (noting that single-member districts should be preferred in court-ordered remedial schemes); *Connor v. Finch*, 431 U. S. 407, 415 (1977) (same). Indeed, commentators surveying the history of voting rights litigation have concluded that it has been the objective of voting rights plaintiffs to use the Act to attack multimember districting schemes and to replace them with single-member districting systems drawn with majority-minority districts to ensure minority control of seats. See Guinier, 14 *Cardozo L. Rev.*, at 1151; Guinier 49–54; Thernstrom 193.

It should be apparent, however, that there is no principle inherent in our constitutional system, or even in the history of the Nation’s electoral practices, that makes single-member districts the “proper” mechanism for electing representatives to governmental bodies or for giving “undiluted” effect to the votes of a numerical minority. On the contrary, from

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the earliest days of the Republic, multimember districts were a common feature of our political systems. The Framers left unanswered in the Constitution the question whether congressional delegations from the several States should be elected on a general ticket from each State as a whole or under a districting scheme and left that matter to be resolved by the States or by Congress. See U. S. Const., Art. I, § 4, cl. 1. It was not until 1842 that Congress determined that Representatives should be elected from single-member districts in the States. See Act of June 25, 1842, ch. 47, 5 Stat. 491.<sup>3</sup> Single-member districting was no more the rule in the States themselves, for the Constitutions of most of the 13 original States provided that representatives in the state legislatures were to be elected from multimember districts.<sup>4</sup> Today, although they have come under increasing attack under the Voting Rights Act, multimember district systems continue to be a feature on the American political landscape, especially in municipal governments. See *The Municipal Yearbook* 14 (table) (1988) (over 60% of American cities use at-large election systems for their governing bodies).

The obvious advantage the Court has perceived in single-member districts, of course, is their tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body. See *Gingles*, *supra*, at 50–51. But in choosing single-member districting as a benchmark electoral plan on that basis the Court has made a political decision and, indeed, a decision that itself depends on a prior political choice made in answer to Justice Harlan's question in *Allen*. Justice Harlan asked whether a

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<sup>3</sup>At that time, seven States elected their congressional delegations on a statewide ticket. See *Wesberry v. Sanders*, 376 U. S. 1, 8, n. 11 (1964).

<sup>4</sup>See, e. g., Ga. Const., Art. IV (1777); Mass. Const., Part II, ch. I, § II, Arts. I, II (1780); N. H. Const., Part II (1784); N. J. Const., Art. III (1776); N. Y. Const., Art. IV (1777); S. C. Const., Art. XIII (1778). See also Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal*, 49 *Am. Pol. Sci. Rev.* 1105, 1112–1113 (1955).

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group's votes should be considered to be more "effective" when they provide *influence* over a greater number of seats, or *control* over a lesser number of seats. See 393 U. S., at 586. In answering that query, the Court has determined that the purpose of the vote—or of the fully "effective" vote—is controlling seats. In other words, in an effort to develop standards for assessing claims of dilution, the Court has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body.<sup>5</sup> Under this theory, votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Cf. *id.*, at 569 (equating denial of the ability to elect candidates with denial of the vote). Such conclusions, of course, depend upon a certain theory of the "effective" vote, a theory that is not inherent in the concept of representative democracy itself.<sup>6</sup>

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<sup>5</sup>See, e. g., *Gingles*, 478 U. S., at 88 (O'CONNOR, J., concurring in judgment) (noting that the Court has determined that "minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers") (emphasis deleted). See also Abrams, "Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N. Y. U. L. Rev. 449, 456, n. 43, 468–471 (1988) (criticizing the Court's "electoral focus" as a narrow conception of "political opportunity"); Guinier 49 (arguing that since *Gingles*, courts "have measured black political representation and participation solely by reference to the number and consistent election of black candidates").

<sup>6</sup>Undoubtedly, one factor that has prompted our focus on control of seats has been a desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues before us. If using control of seats as our standard does not reflect a very nuanced theory of political participation, it at least has the superficial advantage of appealing to the "most easily measured indicia of political power." *Davis v. Bandemer*, 478 U. S. 109, 157 (1986) (O'CONNOR, J., concurring in judgment).

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In fact, it should be clear that the assumptions that have guided the Court reflect only one possible understanding of effective exercise of the franchise, an understanding based on the view that voters are “represented” only when they choose a delegate who will mirror their views in the legislative halls. See generally H. Pitkin, *The Concept of Representation* 60–91 (1967).<sup>7</sup> But it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters’ ability to influence, rather than control, elections. And especially in a two-party system such as ours, the influence of a potential “swing” group of voters composing 10% to 20% of the electorate in a given district can be considerable.<sup>8</sup> Even such a focus on practical influence, however, is not a necessary component of the definition of the “effective” vote. Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in

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<sup>7</sup> Indeed, the assumptions underpinning the Court’s conclusions largely parallel principles that John Stuart Mill advanced in proposing a system of proportional representation as an electoral reform in Great Britain. See J. S. Mill, *Considerations on Representative Government* (1861). In Mill’s view, a just system of representative government required an electoral system that ensured “a minority of the electors would always have a minority of the representatives.” *Id.*, at 133. To Mill, a system that allowed a portion of the population that constituted a majority in each district to control the election of all representatives and to defeat the minority’s choice of candidates was unjust because it operated to produce a “complete disfranchisement of minorities.” *Id.*, at 132.

<sup>8</sup> We ourselves have tacitly acknowledged that our current view of what constitutes an effective vote may be subject to reevaluation, or at least that it may not provide an exclusive definition of effective voting power, as we repeatedly have reserved the question whether a vote dilution claim may be brought for failure to create minority “influence” districts. See, e. g., *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (citing cases). Cf. *Bandemer, supra*, at 132 (noting that “the power to influence the political process is not limited to winning elections”); *Gingles, supra*, at 99 (O’CONNOR, J., concurring in judgment) (suggesting that the Court should not focus solely on a minority group’s ability to elect representatives in assessing the effectiveness of the group’s votes).

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the electoral process, whether it results in control of a seat or not. Cf. *id.*, at 14–59.<sup>9</sup> Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as “effective” as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.<sup>10</sup>

In short, there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy that could be drawn upon to answer the questions posed in *Allen*. See generally Pitkin, *supra*. I do not pretend to have provided the most sophisticated account of the various possibilities; but such matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law.<sup>11</sup> As such, they are not readily subjected

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<sup>9</sup> Cf. also Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation*, 33 UCLA L. Rev. 257, 260–261 (1985).

<sup>10</sup> There are traces of this view in our cases as well. See *Whitcomb*, 403 U. S., at 153, 155; *id.*, at 160 (“The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them”). See also *League of United Latin American Citizens v. Midland Independent School Dist.*, 812 F. 2d 1494, 1507 (CA5) (Higginbotham, J., dissenting) (“I had supposed that the essence of our republican arrangement is that *voting* minorities lose”), vacated on rehearing, 829 F. 2d 546 (1987) (en banc) (*per curiam*).

<sup>11</sup> The point is perhaps so widely accepted at this date that it needs little further demonstration. See, e. g., L. Tribe, *American Constitutional Law* § 13–7, p. 1076, n. 7 (2d ed. 1988) (stating that “no strategy [in vote dilution cases] can avoid the necessity for at least some hard substantive decisions of political theory by the federal judiciary”); Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1633, 1635 (1983) (hereinafter

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to any judicially manageable standards that can guide courts in attempting to select between competing theories.

But the political choices the Court has had to make do not end with the determination that the primary purpose of the “effective” vote is controlling seats or with the selection of single-member districting as the mechanism for providing that control. In one sense, these were not even the most critical decisions to be made in devising standards for assessing claims of dilution, for, in itself, the selection of single-member districting as a benchmark election plan will tell a judge little about the number of minority districts to create. Single-member districting tells a court “how” members of a minority are to control seats, but not “how many” seats they should be allowed to control.

But “how many” is the critical issue. Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim is an assertion that the group in question is unable to control the “proper” number of seats—that is, the number of seats that the minority’s percentage of the population would enable it to control in the benchmark “fair” system. The claim is inherently based on ratios between the numbers of the minority in the population and the numbers of seats controlled. As JUSTICE O’CONNOR has noted, “any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.” *Gingles*, 478 U. S., at 84 (opinion concurring in judgment). As a result, only a mathematical calculation can answer the fundamental question posed by a claim of vote dilution. And once again, in selecting the proportion that will be used to define the undiluted strength of a minor-

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Howard & Howard) (arguing that the Court has developed a “substantive theory of representative government” and a theory of “allocating political power” in vote dilution cases).

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ity—the ratio that will provide the principle for decision in a vote dilution case—a court must make a political choice.

The ratio for which this Court has opted, and thus the mathematical principle driving the results in our cases, is undoubtedly direct proportionality. Indeed, four Members of the Court candidly recognized in *Gingles* that the Court had adopted a rule of roughly proportional representation, at least to the extent proportionality was possible given the geographic dispersion of minority populations. See *id.*, at 85, 91, 98–99 (O’CONNOR, J., concurring in judgment). While in itself that choice may strike us intuitively as the fairest or most just rule to apply, opting for proportionality is still a political choice, not a result required by any principle of law.

## B

The dabbling in political theory that dilution cases have prompted, however, is hardly the worst aspect of our vote dilution jurisprudence. Far more pernicious has been the Court’s willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well. Of necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own “minority preferred” representatives holding seats in elected bodies if they are to be considered represented at all.

It is true that in *Gingles* we stated that whether a racial group is “politically cohesive” may not be assumed, but rather must be proved in each case. See 478 U. S., at 51, 56. See also *Grove*, 507 U. S., at 40–41. But the standards we have employed for determining political cohesion have proved so insubstantial that this “precondition” does not present much of a barrier to the assertion of vote dilution

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claims on behalf of any racial group.<sup>12</sup> Moreover, it provides no test—indeed, it is not designed to provide a test—of whether race itself determines a distinctive political community of interest. According to the rule adopted in *Gingles*, plaintiffs must show simply that members of a racial group tend to prefer the same candidates. See 478 U. S., at 61–67 (opinion of Brennan, J.). There is no set standard defining how strong the correlation must be, and an inquiry into the cause for the correlation (to determine, for example, whether it might be the product of similar socioeconomic interests rather than some other factor related to race) is unnecessary. *Ibid.* See also *id.*, at 100 (O’CONNOR, J., concurring in judgment).<sup>13</sup> Thus, whenever similarities in political preferences along racial lines exist, we proclaim that the cause of the correlation is irrelevant, but we effectively rely on the fact of the correlation to assume that racial groups have unique political interests.

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<sup>12</sup> Cf. *Citizens for a Better Gretna v. Gretna*, 834 F. 2d 496, 501–502 (CA5 1987) (emphasizing that political cohesion under *Gingles* can be shown where a “significant number” of minority voters prefer the same candidate, and suggesting that data showing that anywhere from 49% to 67% of the members of a minority group preferred the same candidate established cohesion), cert. denied, 492 U. S. 905 (1989).

<sup>13</sup> JUSTICE O’CONNOR agreed with Justice Brennan in *Gingles* that, insofar as determining political cohesion was concerned, the cause for a correlation between race and candidate preference was irrelevant. She maintained, however, that evidence of the cause of the correlation would still be relevant to the overall vote dilution inquiry and particularly to the question whether a white majority will usually vote to defeat the minority’s preferred candidate. See 478 U. S., at 100 (opinion concurring in judgment). The splintering of opinions in *Gingles* on this point has produced, at best, “uncertainty,” *Overton v. Austin*, 871 F. 2d 529, 538 (CA5 1989), and has allowed bivariate regression analysis—that is, an analysis that measures merely the correlation between race and candidate preference and that does not directly control for other factors—to become the norm for determining cohesion in vote dilution cases. See *id.*, at 539. But cf. *League of United Latin American Citizens v. Clements*, 999 F. 2d 831, 850–851 (CA5 1993), cert. denied, 510 U. S. 1071 (1994).



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As a result, *Gingles*' requirement of proof of political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups. And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their "just" share of seats in elected bodies throughout the Nation.

To achieve that result through the currently fashionable mechanism of drawing majority-minority single-member districts, we have embarked upon what has been aptly characterized as a process of "creating racially 'safe boroughs.'" *United States v. Dallas County Comm'n*, 850 F. 2d 1433, 1444 (CA11 1988) (Hill, J., concurring specially), cert. denied, 490 U. S. 1030 (1989). We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of "political apartheid." *Shaw*, 509 U. S., at 647. See also *id.*, at 657 (noting that racial gerrymandering "may balkanize us into competing racial factions"). Blacks are drawn into "black districts" and given "black representatives"; Hispanics are drawn into Hispanic districts and given "Hispanic representatives"; and so on. Worse still, it is not only the courts that have taken up this project. In response to judicial decisions and the promptings of the Justice Department, the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. That practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created. See, e. g., *Shaw, supra*; *Hays v. Louisiana*, 839 F. Supp. 1188 (WD La. 1993), appeal pending, No. 93-1539.

The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that

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strives for the ideal of a color-blind Constitution. “The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.” *Wright v. Rockefeller*, 376 U. S. 52, 66 (1964) (Douglas, J., dissenting). Despite Justice Douglas’ warning sounded 30 years ago, our voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race. Cf. *id.*, at 63–66. Under our jurisprudence, rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations and to ensure the existence of the “appropriate” number of “safe minority seats.”

That distinction in the practical implementation of the concept, of course, is immaterial.<sup>14</sup> The basic premises underlying our system of safe minority districts and those behind the racial register are the same: that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view. Such a “system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant.” *Id.*, at 66. Justice Douglas correctly predicted the results of state sponsorship of such a theory of representation: “When racial or religious

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<sup>14</sup> Cf. Lijphart, Proportionality by Non-PR Methods: Ethnic Representation in Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe, in *Electoral Laws and Their Political Consequences* 113, 116 (B. Grofman & A. Lijphart eds. 1986) (describing methods other than separate electoral registers to allocate political power on the basis of ethnicity or race).

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lines are drawn by the State, . . . antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.” *Id.*, at 67. In short, few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.

As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. “Black-preferred” candidates are assured election in “safe black districts”; white-preferred candidates are assured election in “safe white districts.” Neither group needs to draw on support from the other’s constituency to win on election day. As one judge described the current trend of voting rights cases: “We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.” *Dallas County Comm’n*, 850 F. 2d, at 1444 (Hill, J., concurring specially).

As this description suggests, the system we have instituted affirmatively encourages a racially based understanding of the representative function. The clear premise of the system is that geographic districts are merely a device to be manipulated to establish “black representatives” whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race. The “black representative’s” function, in other words, is to represent the “black interest.” Cf. *Shaw*, 509 U. S., at 650 (recognizing that systems that “classify and separate voters by race” threaten “to undermine our system of representative democ-

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racy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole”).

Perhaps not surprisingly, the United States has now adopted precisely this theory of racial group representation, as the arguments advanced in another case decided today, *Johnson v. De Grandy*, *post*, p. 997, should show. The case involved a claim that an apportionment plan for the Florida Legislature should have provided another Hispanic district in Dade County. Florida responded to the claim of vote dilution by arguing that the plan already provided Dade County Hispanics with seats in proportion to their numbers. According to the Solicitor General, this claim of proportionality should have been evaluated, not merely on the basis of the population in the Dade County area where the racial gerrymandering was alleged to have occurred, but on a state-wide basis. It did not matter, in the Solicitor General’s view, that Hispanic populations elsewhere in the State could not meet the *Gingles* geographic compactness test, see 478 U. S., at 50, and thus could not possibly have controlled districts of their own. After all, the Solicitor General reasoned, the Hispanic legislators elected from Hispanic districts in Dade County would represent, not just the interests of the Dade County Hispanics, but the interests of all the Hispanics in the State. Brief for United States in *Johnson v. De Grandy*, O. T. 1993, No. 92–519, p. 20. As the argument shows, at least some careful observers have recognized the racial gerrymandering in our vote dilution cases for what it is: a slightly less precise mechanism than the racial register for allocating representation on the basis of race.

### C

While the results we have already achieved under the Voting Rights Act might seem bad enough, we should recognize that our approach to splintering the electorate into racially designated single-member districts does not by any means

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mark a limit on the authority federal judges may wield to rework electoral systems under our Voting Rights Act jurisprudence. On the contrary, in relying on single-member districting schemes as a touchstone, our cases so far have been somewhat arbitrarily limited to addressing the interests of minority voters who are sufficiently geographically compact to form a majority in a single-member district. See *Gingles, supra*, at 49–50. There is no reason *a priori*, however, that our focus should be so constrained. The decision to rely on single-member geographic districts as a mechanism for conducting elections is merely a political choice—and one that we might reconsider in the future. Indeed, it is a choice that has undoubtedly been influenced by the adversary process: In the cases that have come before us, plaintiffs have focused largely upon attacking multimember districts and have offered single-member schemes as the benchmark of an “undiluted” alternative.

But as the destructive effects of our current penchant for majority-minority districts become more apparent, cf. *Shaw, supra*, courts will undoubtedly be called upon to reconsider adherence to geographic districting as a method for ensuring minority voting power. Already, some advocates have criticized the current strategy of creating majority-minority districts and have urged the adoption of other voting mechanisms—for example, cumulative voting<sup>15</sup> or a system using

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<sup>15</sup> Under a cumulative voting scheme, a system commonly used in corporations to protect the interests of minority shareholders, see R. Clark, *Corporate Law* §9.1.3, pp. 361–366 (1986), each voter has as many votes as there are posts to be filled, and the voter may cast as many of his votes as he wishes for a single candidate. The system thus allows a numerical minority to concentrate its voting power behind a given candidate without requiring that the minority voters themselves be concentrated into a single district. For a complete description of the mechanics of cumulative voting, see Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 *Wm. & Mary L. Rev.* 621, 654–657 (1978).

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transferable votes<sup>16</sup>—that can produce proportional results without requiring division of the electorate into racially segregated districts. Cf., *e.g.*, Guinier 14–15, 94–101; Howard & Howard 1660; Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. Civ. Rights-Civ. Lib. L. Rev. 173, 174–175, 231–236 (1989) (hereinafter Karlan); Taebel, Engstrom, & Cole, Alternative Electoral Systems As Remedies for Minority Vote Dilution, 11 Hamline J. of Public Law & Policy 19 (1990); Note, Reconciling the Right to Vote with the Voting Rights Act, 92 Colum. L. Rev. 1810, 1857–1865 (1992).

Such changes may seem radical departures from the electoral systems with which we are most familiar. Indeed, they may be unwanted by the people in the several States who purposely have adopted districting systems in their electoral laws. But nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under §2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.<sup>17</sup> As some Members of the Court have already recog-

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<sup>16</sup>A system utilizing transferable votes is designed to ensure proportional representation with “mathematical exactness.” *Id.*, at 640. Under such a system, each voter rank orders his choices of candidates. To win, a candidate must receive a fixed quota of votes, which may be set by any of several methods. Ballots listing a given candidate as the voter’s first choice are counted for that candidate until the candidate has secured the quota of votes necessary for election. Remaining first-choice ballots for that candidate are then transferred to another candidate, usually the one listed as the second choice on the ballot. See *id.*, at 640–642. Like cumulative voting, the system allows a minority group to concentrate its voting power without requiring districting, and it has the additional advantage of ensuring that “surplus” votes are transferred to support the election of the minority voters’ next preference.

<sup>17</sup>Such methods of voting cannot be rejected out-of-hand as bizarre concoctions of Voting Rights Act plaintiffs. The system of transferable votes was a widely celebrated, although unsuccessful, proposal for English par-

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nized, geographic districting is not a requirement inherent in our political system. See, e. g., *Davis v. Bandemer*, 478 U. S. 109, 159 (1986) (O'CONNOR, J., concurring in judgment) ("Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties"); *id.*, at 160 (noting that our current practice of accepting district-based elections as a given is simply a "political judgment"). Rather, districting is merely another political choice made by the citizenry in the drafting of their state constitutions. Like other political choices concerning electoral systems and models of representation, it too is presumably subject to a judicial override if it comes into conflict with the theories of representation and effective voting that we may develop under the Voting Rights Act.

Indeed, the unvarnished truth is that all that is required for districting to fall out of favor is for Members of this Court to further develop their political thinking. We should not be surprised if voting rights advocates encourage us to "revive our political imagination," Guinier, 14 *Cardozo L. Rev.*, at 1137, and to consider "innovative and nontraditional remedies" for vote dilution, *Karlan 221*, for under our Voting Rights Act jurisprudence, it is only the limits on our "political imagination" that place restraints on the standards we may select for defining undiluted voting systems. Once we candidly recognize that geographic districting and other aspects of electoral systems that we have so far placed beyond question are merely political choices, those practices, too,

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liamentary reform in the last century. See generally T. Hare, *Election of Representatives* (4th ed. 1873); J. S. Mill, *Considerations on Representative Government* (1861). And while it is an oddity in American political history, cumulative voting in an at-large system has been employed in some American jurisdictions. See Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in *Choosing an Electoral System* 191, 198 (A. Lijphart & B. Grofman eds. 1984); Hyneman & Morgan, *Cumulative Voting in Illinois*, 32 *Ill. L. Rev.* 12 (1937). See also *Ill. Const.*, Art. IV, §§ 7, 8 (1870).

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may fall under suspicion of having a dilutive effect on minority voting strength. And when the time comes to put the question to the test, it may be difficult indeed for a Court that, under *Gingles*, has been bent on creating roughly proportional representation for geographically compact minorities to find a principled reason for holding that a geographically dispersed minority cannot challenge districting itself as a dilutive electoral practice. In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race.

At least one court, in fact, has already abandoned districting and has opted instead for cumulative voting on a county-wide basis as a remedy for a Voting Rights Act violation. The District Court for the District of Maryland recently reasoned that, compared to a system that divides voters into districts according to race, “[c]umulative voting is less likely to increase polarization between different interests,” and that it “will allow the voters, by the way they exercise their votes, to ‘district’ themselves,” thereby avoiding government involvement in a process of segregating the electorate. *Cane v. Worcester County*, 847 F. Supp. 369, 373 (1994). Cf. Guinier, 14 *Cardozo L. Rev.*, at 1135–1136 (proposing a similar analysis of the benefits of cumulative voting); Karlan 236 (same). If such a system can be ordered on a county-wide basis, we should recognize that there is no limiting principle under the Act that would prevent federal courts from requiring it for elections to state legislatures as well.

#### D

Such is the current state of our understanding of the Voting Rights Act. That our reading of the Act has assigned the federal judiciary the task of making the decisions I have described above should suggest to the Members of this Court



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that something in our jurisprudence has gone awry.<sup>18</sup> We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the “correct” theories of democratic representation, the “best” electoral systems for securing truly “representative” government, the “fairest” proportions of minority political influence, or, as respondents would have us hold today, the “proper” sizes for local governing bodies. We should be cautious in interpreting any Act of Congress to grant us power to make such determinations.

JUSTICE BLACKMUN suggests that, if we were to interpret the Act to allow challenges to the size of governmental bodies under §2, the Court’s power to determine the structure that local governing bodies must take would be bounded by the constraints that local customs provide in the form of benchmarks. *Post*, at 952–953. But as JUSTICE O’CONNOR rightly points out, such benchmarks are themselves arbitrarily selected and would provide no assured limits on judicial power. *Ante*, at 888–891. In my view, the local standards to which JUSTICE BLACKMUN points today are little different from the various standards to which the Court has resorted in the past as touchstones of undiluted voting systems. The appeal to such standards, which are necessarily arbitrarily chosen, should not serve to obscure the assumption in the Court’s vote dilution jurisprudence of a sweeping

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<sup>18</sup>JUSTICE STEVENS suggests that the discussion above outlines policy arguments best addressed to Congress. See *post*, at 957. In one sense, that is precisely my point. The *issues* I have discussed above involve policy decisions that are matters best left to Congress. Our interpretation of the Voting Rights Act, however, has required federal courts to take over the policymaking role in the area of voting rights and has forced judges to make decisions on matters beyond the normal sphere of judicial competence.

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authority to select the electoral systems to be used by every governing body in each of the 50 States, and to do so based upon little more than the passing preference of five Members of this Court for one political theory over another.

A full understanding of the authority that our current interpretation of the Voting Rights Act assigns to the federal courts, and of the destructive effects that our exercise of that authority is presently having upon our body politic, compels a single conclusion: A systematic reexamination of our interpretation of the Act is required.

## II

Section 2(a) of the Voting Rights Act provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote” on account of race, color, or membership in one of the language minority groups defined in the Act. 42 U. S. C. § 1973(a). Respondents contend that the terms “standard, practice, or procedure” should extend to cover the size of a governmental body. An examination of the text of § 2 makes it clear, however, that the terms of the Act do not reach that far; indeed, the terms of the Act do not allow many of the challenges to electoral mechanisms that we have permitted in the past. Properly understood, the terms “standard, practice, or procedure” in § 2(a) refer only to practices that affect minority citizens’ access to the ballot. Districting systems and electoral mechanisms that may affect the “weight” given to a ballot duly cast and counted are simply beyond the purview of the Act.

## A

In determining the scope of § 2(a), as when interpreting any statute, we should begin with the statutory language. See *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253–

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254 (1992). Under the plain terms of the Act, §2(a) covers only a defined category of state actions. Only “voting qualification[s],” “prerequisite[s] to voting,” or “standard[s], practice[s], or procedure[s]” are subject to challenge under the Act. The first two items in this list clearly refer to conditions or tests applied to regulate citizens’ access to the ballot. They would cover, for example, any form of test or requirement imposed as a condition on registration or on the process of voting on election day.

Taken in isolation, the last grouping of terms—“standard, practice, or procedure”—may seem somewhat less precise. If we give the words their ordinary meanings, however—for they have no technical significance and are not defined in the Act—they would not normally be understood to include the size of a local governing body. Common sense indicates that the size of a governing body and other aspects of government structure do not comfortably fit within the terms “standard, practice, or procedure.” Moreover, we need not simply treat the terms in isolation; indeed, it would be a mistake to do so. Cf. *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Reading the words in context strongly suggests that §2(a) must be understood as referring to any standard, practice, or procedure *with respect to voting*. And thus understood, the terms of the section would not extend to the size of a governmental body; we would not usually describe the size or form of a governing authority as a “practice” or “procedure” concerning voting.

But under our precedents, we have already stretched the terms “standard, practice, or procedure” beyond the limits of ordinary meaning. We have concluded, for example, that the choice of a certain set of district lines is a “procedure,” or perhaps a “practice,” concerning voting subject to challenge under the Act, see *Growe*, 507 U. S., at 40–41, even though the drawing of a given set of district lines has nothing to do with the basic process of allowing a citizen to vote—that is,

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the process of registering, casting a ballot, and having it counted. Similarly, we have determined that the use of multimember districts, rather than single-member districts, can be challenged under the Act. See *Gingles*, 478 U. S., at 46–51. Undoubtedly, one of the critical reasons we have read §2 to reach such districting decisions is that the choice of one districting system over another can affect a minority group’s power to control seats in the elected body. See *ibid.* In that respect, however, the districting practices we have treated as subject to challenge under the Act are essentially similar to choices concerning the size of a governing authority. Just as drawing district lines one way rather than another, or using one type of districting system rather than another, can affect the ability of a minority group to control seats, so can restricting the number of seats that are available. And if *how* districts are drawn is a “practice” concerning voting, why not conclude that *how many* districts are drawn is a “practice” as well?

To be sure, a distinction can be made between the size of a local governing body and a districting mechanism. After all, we would ordinarily think that the size of a government has greater independent significance for the functioning of the governmental body than the choice of districting systems apportioning representation. Interfering with the form of government, therefore, might appear to involve a greater intrusion on state sovereignty. But such distinctions between the size of a governing body and other potential “voting practices” do not, at bottom, depend upon how closely each is related to “voting,” and thus they are not rooted in any way in the text of §2(a). On the contrary, while it may seem obvious that the size of a government is not within the reach of the Act, if we look to the text of the statute for the limiting principle that confines the terms “standard, practice, or procedure” and excludes government size from their reach, we must conclude that the only line drawn in §2 excludes many

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“practices” that we have already decided are subject to challenge under the Act.

If we return to the Act to reexamine the terms setting out the actions regulated by §2, a careful reading of the statutory text will reveal a good deal more about the limitations on the scope of the section than suggested above. The terms “standard, practice, or procedure” appear to have been included in §2 as a sort of catchall provision. They seem phrased with an eye to eliminating the possibility of evasion.<sup>19</sup> Nevertheless, they are catchall terms that round out a list, and a sensible and long-established maxim of construction limits the way we should understand such general words appended to an enumeration of more specific items. The principle of *ejusdem generis* suggests that such general terms should be understood to refer to items belonging to the same class that is defined by the more specific terms in the list. See, e. g., *Cleveland v. United States*, 329 U. S. 14, 18 (1946).

Here, the specific items described in §2(a) (“voting qualification[s]” and “prerequisite[s] to voting”) indicate that Congress was concerned in this section with any procedure, however it might be denominated, that regulates citizens’ access to the ballot—that is, any procedure that might erect a barrier to prevent the potential voter from casting his vote. In describing the laws that would be subject to §2, Congress focused attention upon provisions regulating the interaction between the individual voter and the voting process—on hurdles the citizen might have to cross in the form of “prerequisites” or “qualifications.” The general terms in the section are most naturally understood, therefore, to refer to

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<sup>19</sup> Cf. *South Carolina v. Katzenbach*, 383 U. S. 301, 335 (1966) (noting that “Congress knew that some of the States . . . had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees” and that “Congress had reason to suppose that these States might try similar maneuvers in the future”).

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any methods for conducting a part of the voting process that might similarly be used to interfere with a citizen's ability to cast his vote, and they are undoubtedly intended to ensure that the entire voting process—a process that begins with registration and includes the casting of a ballot and having the ballot counted—is covered by the Act. Cf. *infra*, at 919–920. Simply by including general terms in §2(a) to ensure the efficacy of the restriction imposed, Congress should not be understood to have expanded the scope of the restriction beyond the logical limits implied in the specific terms of the statute. Cf. *Cleveland, supra*, at 18 (“Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it”).

Moreover, it is not only in the terms describing the practices regulated under the Act that §2(a) focuses on the individual voter. The section also speaks only in the singular of the right of “any citizen” to vote. Giving the terms “standard, practice, or procedure” an expansive interpretation to reach potentially dilutive practices, however, would distort that focus on the individual, for a vote dilution claim necessarily depends on the assertion of a group right. Cf. *Bandemer*, 478 U. S., at 150–151 (O’CONNOR, J., concurring in judgment). At the heart of the claim is the contention that the members of a group collectively have been unable to exert the influence that their numbers suggest they might under an alternative system. Such a group right, however, finds no grounding in the terms of §2(a).

Of course, the scope of the right that *is* protected under the Act can provide further guidance concerning the meaning of the terms “standard, practice, or procedure.” Under the terms of the Act, only a “standard, practice, or procedure” that may result in the “denial or abridgement of the right . . . to vote” is within the reach of §2(a). But nothing in the language used in §2(a) to describe the protection provided by the Act suggests that in protecting the “right to vote,” the section was meant to incorporate a concept of vot-

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ing that encompasses a concern for the “weight” or “influence” of votes. On the contrary, the definition of the terms “vote” and “voting” in § 14(c)(1) of the Act focuses precisely on access to the ballot. Thus, § 14(c)(1) provides that the terms “vote” and “voting” shall encompass any measures necessary to ensure “registration” and any “other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast.” 42 U. S. C. § 1973l(c)(1).

It is true that § 14(c)(1) also states that the term “voting” “include[s] all action necessary to make a vote *effective*,” *ibid.* (emphasis added), and the Court has seized on this language as an indication that Congress intended the Act to reach claims of vote dilution. See *Allen*, 393 U. S., at 566. But if the word “effective” is not plucked out of context, the rest of § 14(c)(1) makes clear that the actions Congress deemed necessary to make a vote “effective” were precisely the actions listed above: registering, satisfying other voting prerequisites, casting a ballot, and having it included in the final tally of votes cast. These actions are described in the section only as examples of the steps necessary to make a vote effective. See 42 U. S. C. § 1973l(c)(1). And while the list of such actions is not exclusive, the nature of all the examples that are provided demonstrates that as far as the Act is concerned, an “effective” vote is merely one that has been cast and fairly counted. See 393 U. S., at 590, n. 7 (Harlan, J., concurring in part and dissenting in part).

Reading the Act’s prohibition of practices that may result in a “denial or abridgement of the right . . . to vote” as protecting only access to the ballot also yields an interpretation that is consistent with the Court’s construction of virtually identical language in the Fifteenth Amendment. The use of language taken from the Amendment suggests that the section was intended to protect a “right to vote” with the same scope as the right secured by the Amendment itself; certainly, no reason appears from the text of the Act for giving

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the language a broader construction in the statute than we have given it in the Constitution. The Court has never decided, however, whether the Fifteenth Amendment should be understood to protect against vote “dilution.” See *Voinovich v. Quilter*, 507 U. S. 146, 159 (1993). See also *Beer v. United States*, 425 U. S. 130, 142, n. 14 (1976) (noting that there is no decision of this Court holding a legislative apportionment plan violative of the Fifteenth Amendment).<sup>20</sup>

While the terms of §2(a) thus indicate that the section focuses only on securing access to the ballot, it might be argued that reenactment of §2 in 1982 should be understood as an endorsement of the interpretation contained in cases such as *Allen* that the terms “standard, practice, or procedure” were meant to reach potentially dilutive practices. See *Lorillard v. Pons*, 434 U. S. 575, 580–581 (1978). It is true that we generally will assume that reenactment of specific statutory language is intended to include a “settled judicial interpretation” of that language. *Pierce v. Underwood*, 487 U. S. 552, 567 (1988). And while §2 was amended in

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<sup>20</sup> Indeed, in *Mobile v. Bolden*, 446 U. S. 55 (1980), a plurality of the Court concluded that the Fifteenth Amendment did not address concerns of dilution at all. See *id.*, at 65. Cf. *id.*, at 84, n. 3 (STEVENS, J., concurring in judgment) (noting that the plurality had concluded that the Fifteenth Amendment “applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar”).

Contrary to JUSTICE STEVENS’ suggestions, *post*, at 958, 962, *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), does not indicate that the Fifteenth Amendment, in protecting the right to vote, incorporates a concern for anything beyond securing access to the ballot. The *Gomillion* plaintiffs’ claims centered precisely on access: Their complaint was not that the weight of their votes had been diminished in some way, but that the boundaries of a city had been drawn to prevent blacks from voting in municipal elections altogether. *Id.*, at 341. *Gomillion* thus “maintains the distinction between an attempt to exclude Negroes totally from the relevant constituency, and a statute that permits Negroes to vote but which uses the gerrymander to contain the impact of Negro suffrage.” *Allen v. State Bd. of Elections*, 393 U. S. 544, 589 (1969) (Harlan, J., concurring in part and dissenting in part).



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1982, the amended section did retain the same language that had appeared in the original Act regulating “standard[s], practice[s], or procedure[s].”<sup>21</sup> But it was hardly well settled in 1982 that *Allen’s* broad reading of the terms “standard, practice, or procedure” in § 5 would set the scope of § 2 as a provision reaching claims of vote dilution.

On the contrary, in 1980 in *Mobile v. Bolden*, 446 U. S. 55, a plurality of the Court construed § 2 in a manner flatly inconsistent with the understanding that those terms were meant to reach dilutive practices. Emphasizing that the section tracked the language of the Fifteenth Amendment by prohibiting the use of practices that might “deny or abridge the right . . . to vote,” the *Bolden* plurality determined that § 2 was “intended to have an effect no different from that of the Fifteenth Amendment itself.” *Id.*, at 61. In the plurality’s view, however, the Fifteenth Amendment did not extend to reach dilution claims; its protections were satisfied as long as members of racial minorities could “register and vote without hindrance.” *Id.*, at 65. *Bolden* remained the last word from this Court interpreting § 2 at the time the section was amended in 1982. Cf. *Rogers v. Lodge*, 458 U. S. 613, 619, n. 6 (1982). Thus, the reenactment in the amended section of the same language covering any “standard, practice, or procedure” and the retention of virtually identical language protecting against the “denial or abridgment of the right . . . to vote” can hardly be understood as an endorsement of a broad reading of the section as a provision reaching claims of vote dilution.<sup>22</sup>

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<sup>21</sup>The original § 2 provided that no “standard, practice, or procedure” should be imposed or applied “to deny or abridge the right . . . to vote.” Pub. L. 89–110, § 2, 79 Stat. 437.

<sup>22</sup>If anything, applying the *Lorillard v. Pons*, 434 U. S. 575 (1978), principle of construction might suggest that, by reenacting virtually the same language derived from the Fifteenth Amendment to define the basic interest protected by the Act, Congress intended to preserve the limitation that the *Bolden* plurality found implicit in that language. It is clear from the terms of the amendments passed in 1982 that where Congress sought

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Finally, as our cases have shown, reading §2(a) to reach beyond laws that regulate in some way citizens' *access* to the ballot turns the section into a command for courts to evaluate abstract principles of political theory in order to develop rules for deciding which votes are "diluted" and which are not. See generally *supra*, at 894–903. Common sense would suggest that we should not lightly interpret the Act to require courts to address such matters so far outside the normal bounds of judicial competence, and the mere use of three more general terms at the end of the list of regulated practices in §2(a) cannot properly be understood to incorporate such an expansive command into the Act.

Properly understood, therefore, §2(a) is a provision designed to protect access to the ballot, and in regulating "standard[s], practice[s], and procedure[s]," it reaches only "those state laws that [relate to] either voter qualifications or the manner in which elections are conducted." *Allen*, 393 U. S., at 591 (Harlan, J., concurring in part and dissenting in part). The section thus covers all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted. The

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to alter the understanding of the Act announced in *Bolden*, it did so explicitly in the text of the statute. As I explain more fully, *infra*, at 923–925, the 1982 amendments modified §2 to eliminate the requirement under *Bolden* that §2 plaintiffs, like plaintiffs under the Fifteenth Amendment, show that a challenged practice was adopted with a discriminatory *intent*, see 446 U. S., at 62–63, and replaced that test with specific language in §2(b) setting a standard based simply on discriminatory *results*. See Pub. L. 97–205, §3, 96 Stat. 134. Had Congress intended to alter the understanding that §2 protects a concept of the "right to vote" that does not extend to prohibit vote dilution, it likely would have addressed that aspect of *Bolden* explicitly as well.

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section does not cover, however, the choice of a multimember over a single-member districting system or the selection of one set of districting lines over another, or any other such electoral mechanism or method of election that might reduce the weight or influence a ballot may have in controlling the outcome of an election.

Of course, this interpretation of the terms “standard, practice, or procedure” effectively means that §2(a) does not provide for any claims of what we have called vote “dilution.” But that is precisely the result suggested by the text of the statute. Section 2(a) nowhere uses the term “vote dilution” or suggests that its goal is to ensure that votes are given their proper “weight.” And an examination of §2(b) does not suggest any different result. It is true that in construing §2 to reach vote dilution claims in *Thornburg v. Gingles*, 478 U. S. 30 (1986), the Court relied largely on the gloss on §2(b) supplied in the legislative history of the 1982 amendments to the Act. See *id.*, at 43–46. But the text of §2(b) supplies a weak foundation indeed for reading the Act to reach such claims.

As the Court concluded in *Gingles*, the 1982 amendments incorporated into the Act, and specifically into §2(b), a “results” test for measuring violations of §2(a). That test was intended to replace, for §2 purposes, the “intent” test the Court had announced in *Bolden* for voting rights claims under §2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments. Section 2(a) thus prohibits certain state actions that may “result in a denial or abridgement” of the right to vote, and §2(b) incorporates virtually the exact language of the “results test” employed by the Court in *White v. Regester*, 412 U. S. 755 (1973), and applied in constitutional voting rights cases before our decision in *Bolden*. The section directs courts to consider whether “based on the totality of circumstances,” a state practice results in members of a minority group “hav[ing] less opportunity than other members of the electorate to participate in

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the political process and to elect representatives of their choice.” 42 U. S. C. §1973(b). Cf. *White, supra*, at 766; *Whitcomb v. Chavis*, 403 U. S. 124, 149 (1971).

But the mere adoption of a “results” test, rather than an “intent” test, says nothing about the *type* of state laws that may be challenged using that test. On the contrary, the type of state law that may be challenged under §2 is addressed explicitly in §2(a). As we noted in *Chisom v. Roemer*, 501 U. S. 380 (1991), §§2(a) and (b) address distinct issues. While §2(a) defines and explicitly limits the type of voting practice that may be challenged under the Act, §2(b) provides only “the test for determining the legality of such a practice.” *Id.*, at 391. Thus, as an initial matter, there is no reason to think that §2(b) could serve to expand the scope of the prohibition in §2(a), which, as I described above, does not extend by its terms to electoral mechanisms that might have a dilutive effect on group voting power.

Even putting that concern aside for the moment, it should be apparent that the incorporation of a results test into the amended section does not necessarily suggest that Congress intended to allow claims of vote dilution under §2. A results test is useful to plaintiffs whether they are challenging laws that restrict access to the ballot or laws that accomplish some diminution in the “proper weight” of a group’s vote. Nothing about the test itself suggests that it is inherently tied to vote dilution claims. A law, for example, limiting the times and places at which registration can occur might be adopted with the purpose of limiting black voter registration, but it could be extremely difficult to prove the discriminatory intent behind such a facially neutral law. The results test would allow plaintiffs to mount a successful challenge to the law under §2 without such proof.

Moreover, nothing in the language §2(b) uses to describe the results test particularly indicates that the test was intended to be used under the Act for assessing claims of dilution. Section 2(b) directs courts to consider whether, under

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the “totality of circumstances,” members of a minority group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U. S. C. § 1973(b). The most natural reading of that language would suggest that citizens have an equal “*opportunity*” to participate in the electoral process and an equal “*opportunity*” to elect representatives when they have been given the same free and open access to the ballot as other citizens and their votes have been properly counted. The section speaks in terms of an opportunity—a chance—to participate and to elect, not an assured ability to attain any particular result. And since the ballot provides the formal mechanism for obtaining access to the political process and for electing representatives, it would seem that one who has had the same chance as others to register and to cast his ballot has had an equal opportunity to participate and to elect, whether or not any of the candidates he chooses is ultimately successful.

To be sure, the test in §2(b) could be read to apply to claims of vote dilution as well. But to conclude, for example, that a multimember districting system had denied a group of voters an equal opportunity to participate in the political process and to elect representatives, a court would have to embark on the extended project in political theory that I described above in Part I of this opinion. In other words, a court would have to develop some theory of the benchmark undiluted voting system that provides minorities with the “fairest” or most “equitable” share of political influence. Undoubtedly, a dizzying array of concepts of political equality might be described to aid in that task, and each could be used to attribute different values to different systems of election. See, *e. g.*, Still, Political Equality and Election Systems, 91 *Ethics* 375 (1981).<sup>23</sup> But the statutory command to deter-

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<sup>23</sup> See also Banzhaf, Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle, 75 *Yale L. J.* 1309 (1966) (suggesting that how close different districting systems come to providing persons

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mine whether members of a minority have had an equal “opportunity . . . to participate in the political process and to elect representatives” provides no guidance concerning which one of the possible standards setting undiluted voting strength should be chosen over the others. And it would be contrary to common sense to read §2(b)’s reference to equal opportunity as a charter for federal courts to embark on the ambitious project of developing a theory of political equality to be imposed on the Nation.<sup>24</sup>

It is true that one factor courts may consider under the results test might fit more comfortably with an interpretation of the Act that reaches vote dilution claims. Section 2(b) provides that “one circumstance” that may be considered in assessing the results test is the “extent to which members of a protected class have been elected to office.” 42 U. S. C. §1973(b). Obviously, electoral outcomes would be relevant to claims of vote dilution (assuming, of course, that control

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equal political “power” can be measured by comparing the statistical probability under each system that a person’s vote will determine the election result). Cf. *Whitcomb*, 403 U. S., at 145, n. 23.

<sup>24</sup>In addition, in one respect there is a significant tension between the terms of the results test and an interpretation of the Act that reaches vote dilution claims. Section 2(b) provides that a violation may be established where it is shown that members of a minority have less opportunity than other members of the electorate “to participate in the political process *and* to elect representatives of their choice.” 42 U. S. C. §1973(b) (emphasis added). We have held that any challenged “standard, practice, or procedure” must have *both* of these effects to violate the test outlined in §2(b). See *Chisom v. Roemer*, 501 U. S. 380, 397 (1991). It is not clear, however, that a potentially dilutive districting method can satisfy both prongs of the test. The primary effect of the choice of one districting system over another will be the direct and mathematically quantifiable impact that the system will have on a minority group’s ability to control a given number of seats. But even if one assumes that a districting system may therefore be said to impair a group’s “opportunity” to “elect representatives of its choice,” it is difficult to see how a districting system could be said to impair a group’s opportunity to “participate in the political process,” at least if participation is understood to have any meaning distinct from controlling seats.

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of seats has been selected as the measure of effective voting). But in some circumstances, results in recent elections might also be relevant for demonstrating that a particular practice concerning registration or polling has served to suppress minority voting. Better factors to consider would be figures for voter registration or turnout at the last election, broken down according to race. But where such data are not readily available, election results may certainly be “one circumstance” to consider in determining whether a challenged practice has resulted in denying a minority group access to the political process. The Act merely directs courts not to ignore such evidence of electoral outcomes altogether.

Moreover, the language providing that electoral outcomes may be considered as “one circumstance” in the results test is explicitly qualified by the provision in §2(b) that most directly speaks to the question whether §2 was meant to reach claims of vote dilution—and which suggests that dilution claims are not covered by the section. The last clause in the subsection states in unmistakable terms that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U. S. C. §1973(b). As four Members of the Court observed in *Gingles*, there is “an inherent tension” between this disclaimer of proportional representation and an interpretation of §2 that encompasses vote dilution claims. 478 U. S., at 84 (O’CONNOR, J., concurring in judgment). As I explained above, dilution claims, by their very nature, depend upon a mathematical principle. The heart of the claim is an assertion that the plaintiff group does not hold the “proper” number of seats. As a result, the principle for deciding the case must be supplied by an arithmetic ratio. Either the group has attained the “proper” number of seats under the current election system, or it has not.

By declaring that the section provides no right to proportional representation, §2(b) necessarily commands that the existence or absence of proportional electoral results should

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not become the deciding factor in assessing §2 claims. But in doing so, §2(b) removes from consideration the most logical ratio for assessing a claim of vote dilution. To resolve a dilution claim under §2, therefore, a court either must arbitrarily select a different ratio to represent the “undiluted” norm, a ratio that would have less intuitive appeal than direct proportionality, or it must effectively apply a proportionality test in direct contravention of the text of the Act<sup>25</sup>—hence the “inherent tension” between the text of the Act and vote dilution claims. Given that §2 nowhere speaks in terms of “dilution,” an explicit disclaimer removing from the field of play the most natural deciding principle in dilution cases is surely a strong signal that such claims do not fall within the ambit of the Act.<sup>26</sup>

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<sup>25</sup> As I discuss more fully below, our cases have pursued the latter option. See *infra*, at 936–944.

<sup>26</sup> In *Johnson v. De Grandy*, *post*, p. 997, the Court suggests that §2(b) disclaims only a guarantee of success for *minority candidates* and thus that it has nothing to say concerning remedial schemes designed to provide a minority group proportional control over seats. See *post*, at 1014, n. 11. See also *post*, at 1026–1027 (KENNEDY, J., concurring in part and concurring in judgment). Minority control, of course, may or may not result in the election of minority candidates. The Court’s reading of the disclaimer, in my view, distorts the obvious import of the provision. The clause rejecting a group’s right to elect its own members in proportion to their numbers must be understood as a disclaimer of a minority group’s right to proportional political power. Otherwise, in practical terms, the clause would be reduced to a nullity.

It should be clear that a system that gives a minority group proportional control effectively provides the “right” to elect a proportionate number of minority candidates that the Act disclaims. Whether that right is utilized by minority voters to elect minority candidates is a matter of the voters’ choice. The *De Grandy* Court’s position seems to be that the proviso is directed, not at a system intended to guarantee the *ability* to elect minority candidates in proportion to the minority’s numbers, but only at a system that will *invariably guarantee* the election of a proportionate number of minority candidates. Only one system would fit that description: a system based on a racial register in which a quota of seats are set aside for members of a minority group. I think it would be preposterous



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It is true that the terms “standard, practice, or procedure” in §5 of the Act have been construed to reach districting systems and other potentially dilutive electoral mechanisms, see, *e. g.*, *Allen*, 393 U. S., at 569, and Congress has reenacted §5 subsequent to our decisions adopting that expansive interpretation. See, *e. g.*, *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110, 134–135 (1978); *Georgia v. United States*, 411 U. S. 526, 533 (1973). Nevertheless, the text of the section suggests precisely the same focus on measures that relate to access to the ballot that appears in §2. Section 5 requires covered jurisdictions to obtain preclearance for a change in “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” 42 U. S. C. §1973c. As in §2, the specific terms in the list of regulated state actions describe only laws that would limit access to the ballot. Moreover, §5 makes the focus on the individual voter and access to the voting booth even more apparent as the section goes on to state that “no person shall be denied the right to vote *for failure to comply* with such qualification, prerequisite, standard, practice, or procedure.” 42 U. S. C. §1973c (emphasis added). This command makes it explicit that in regulating standards, practices, or procedures with respect to voting, “Congress was clearly concerned with changes in procedure with which

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to suggest that the disclaimer in §2(b) was intended solely to prohibit the use of such a system. Such a device has never, to my knowledge, been proposed in any voting rights case. Moreover, to the extent that the decisions in *White* and *Whitcomb* can inform our understanding of §2(b), they suggest that in expressing a concern that “proportionality” not be used as the measure of a voting rights violation, Congress was concerned with proportional electoral power, not merely proportional election of minority candidates. See, *e. g.*, *Whitcomb*, 403 U. S., at 153 (rejecting the “failure of [the minority group] to *have legislative seats* in proportion to its population” as a sufficient basis for a claim) (emphasis added). The proviso has been understood in the past simply as a disclaimer of a right to proportional representation, see, *e. g.*, *Gingles*, 478 U. S., at 84–86, 94 (O’CONNOR, J., concurring in judgment), and I think that understanding is correct.

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voters could *comply*.” *Allen, supra*, at 587 (Harlan, J., concurring in part and dissenting in part). But it should be obvious that a districting system, or any other potentially dilutive mechanism for that matter, is not something with which a voter can comply. As is the case with § 2, § 5’s description of the terms “standard, practice, or procedure” thus suggests a focus on rules that regulate the individual voter’s ability to register and cast a ballot, not a more abstract concern with the effect that various electoral systems might have on the “weight” of the votes cast by a group that constitutes a numerical minority in the electorate.

In my view, the tension between the terms of the Act and the construction we have placed on § 5 at the very least suggests that our interpretation of § 5 should not be adopted wholesale to supply the meaning of the terms “standard, practice, or procedure” under § 2. An expansive construction of § 5 was well established in 1980, yet a plurality of the Court in *Bolden*, after focusing on the terms of the Act, did not adopt a similarly expansive construction of § 2. Rather, the *Bolden* plurality concluded that § 2 should be strictly limited to have the same reach as the Fifteenth Amendment, which the plurality interpreted as addressing only matters relating to access to the ballot. See *Bolden*, 446 U. S., at 61, 65. I would reach a similar result here. Where a careful reading of the language of § 2 dictates a narrow interpretation of the section, there is no reason for transplanting our interpretation of the terms of § 5—an interpretation that I believe is in tension with the text of § 5 itself—to another section of the Act.<sup>27</sup>

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<sup>27</sup> I need not decide in this case whether I would overrule our decisions construing the terms “standard, practice, or procedure” in § 5; the challenge here involves only § 2. Although in my view our construction of § 5 may well be incorrect as a matter of first impression, *stare decisis* would suggest that such an error in prior decisions may not in itself justify overruling settled precedent. Determining whether to abandon prior decisions requires weighing a multitude of factors, one of the most important of which is the extent to which the decisions in question have proved unworkable. Cf. *infra*, at 936–937. In that regard, while the practical

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## B

From the foregoing, it should be clear that, as far as the text of the Voting Rights Act is concerned, “§2 does not speak in terms of ‘vote dilution.’” *Gingles*, 478 U. S., at 87 (O’CONNOR, J., concurring in judgment). One might wonder, then, why we have consistently concluded that “[w]e know that Congress intended to allow vote dilution claims to be brought under §2.” *Id.*, at 84. The juxtaposition of the two statements surely makes the result in our cases appear extraordinary, since it suggests a sort of statutory construction through divination that has allowed us to determine that Congress “really meant” to enact a statute about vote dilution even though Congress did not do so explicitly. In truth, our method of construing §2 has been only little better than that, for the only source we have relied upon for the expansive meaning we have given §2 has been the legislative history of the Act.

We first considered the amended §2 in *Thornburg v. Gingles*. Although the precise scope of the terms “standard, practice, or procedure” was not specifically addressed in that case, *Gingles* nevertheless established our current interpretation of the amended section as a provision that addresses vote dilution, and in particular it fixed our understanding that the results test in §2(b) is intended to measure vote dilution in terms of electoral outcomes. See *id.*, at 93 (O’CONNOR, J., concurring in judgment) (stating that *Gingles* made electoral results the “linchpin” of vote dilution claims). In reaching its interpretation of §2, the *Gingles* Court re-

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differences in the application of §§2 and 5 that JUSTICE KENNEDY points out, see *ante*, at 883–884, would not, in my view, suggest as an original matter that the same terms in the two sections should be read to have different meanings, JUSTICE KENNEDY’s observations might suggest that different considerations would have a bearing on the question whether our past interpretations should be abandoned in the §5 and §2 contexts. Indeed, in the §5 context they might suggest a contrary conclusion to the result I reach under §2. See *infra*, at 936–945. That, however, is a question for another day.

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jected the argument advanced by the United States as *amicus curiae* that §2(b)'s test based on an equal "opportunity . . . to participate in the political process and to elect representatives" suggested a focus on nothing more than securing equal *access* to the political process, not a focus on measuring the influence of a minority group's votes in terms of electoral outcomes. See Brief for United States as *Amicus Curiae* in *Thornburg v. Gingles*, O. T. 1985, No. 83-1968, pp. 7-19. That understanding of §2 is, of course, compatible with the interpretation I have set out above.

In approaching §2, the *Gingles* Court, based on little more than a bald assertion that "the authoritative source for legislative intent lies in the Committee Reports on the bill," 478 U. S., at 43, n. 7, bypassed a consideration of the text of the Act and proceeded to interpret the section based almost exclusively on its legislative history.<sup>28</sup> It was from the legislative history that the Court culled its understanding that §2

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<sup>28</sup>In offering two citations to support the sweeping proposition that committee reports provide the authoritative source for legislative intent, *Gingles* plainly misread the import of our prior decisions. Far from giving an unqualified endorsement of committee reports as a guide to congressional intent, the Court in *Garcia v. United States*, 469 U. S. 70 (1984), merely indicated that, *when* resort to legislative history is necessary, it is only committee reports, not the various other sources of legislative history, that should be considered. See *id.*, at 76. The Court, however, carefully repeated Justice Jackson's admonition that "[r]esort to legislative history is only justified where the face of the [statute] is inescapably ambiguous." *Id.*, at 76, n. 3 (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (concurring opinion)). Similarly, in *Zuber v. Allen*, 396 U. S. 168 (1969), we considered the reliability of committee reports only as a relative matter in comparing them to statements made by individual Congressmen during floor debates. See *id.*, at 186.

Even if I agreed with Justice Jackson that resort to legislative history is permissible when the text of a statute is "inescapably ambiguous," I could not agree with the use the Court has made of legislative history in interpreting §2. I think it is clear, first, that in interpreting §2 the Court has never undertaken any inquiry into the meaning of the plain language of the statute to determine whether it is ambiguous, and second, that the text of §2 is not riddled with such hopeless ambiguity.

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is a provision encompassing claims that an electoral system has diluted a minority group's vote and its understanding that claims of dilution are to be evaluated based upon how closely electoral outcomes under a given system approximate the outcomes that would obtain under an alternative, undiluted norm. See, *e. g.*, *id.*, at 43–51.

Contrary to the remarkable “legislative history first” method of statutory construction pursued in *Gingles*, however, I had thought it firmly established that the “authoritative source” for legislative intent was the text of the statute passed by both Houses of Congress and presented to the President, not a series of partisan statements about purposes and objectives collected by congressional staffers and packaged into a committee report. “We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Germain*, 503 U. S., at 253–254. See also *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241–242 (1989); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). Nevertheless, our analysis in *Gingles* was marked conspicuously by the absence of any attempt to pursue a close reading of the text of the Act. As outlined above, had the Court addressed the text, it would have concluded that the terms of the Act do not address matters of vote “dilution.”

Moreover, the legislative history of §2 itself, and the Court's use of it in *Gingles*, aptly illustrate that legislative history is often used by this Court as “a forensic rather than an interpretive device,” *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597, 621 (1991) (SCALIA, J., concurring in judgment), and is read selectively to support the result the Court intends to achieve. It is well documented in the history of the 1982 amendments to the Act that §2 was passed only after a compromise was reached through the addition of the provision in §2(b) disclaiming any right to proportional representation. See S. Rep. No. 97–417, pp. 2–4 (1982); *id.*, at 94–97 (additional views of Sen. Hatch). But the views of

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the author of that compromise, Senator Dole, hardly coincide with the gloss the Court has placed on §2.

According to Senator Dole, amended §2 would “[a]bsolutely not” provide any redress to a group of voters challenging electoral mechanisms in a jurisdiction “if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting or having their vote counted, or registering, whatever the process may include.” 128 Cong. Rec. 14133 (1982). Contrary to the Court’s interpretation of the section in *Gingles*, Senator Dole viewed §2 as a provision more narrowly focused on *access* to the processes surrounding the casting of a ballot, not a provision concerned with ensuring electoral *outcomes* in accordance with some “undiluted” norm. See S. Rep. No. 97–417, *supra*, at 193–194 (additional views of Sen. Dole). The legislative history thus hardly provided unambiguous support for the Court’s interpretation; indeed, it seems that the Court used what was helpful to its interpretation in the legislative history and ignored what was not. Cf. *Mortier*, *supra*, at 617 (SCALIA, J., concurring in judgment).

Of course, as mentioned above, *Gingles* did not directly address the meaning of the terms “standard, practice, or procedure” in §2(a). The understanding that those terms extend to a State’s laws establishing various electoral mechanisms dates to our decision in *Allen*, in which we construed the identical terms in §5 of the Act. But the Court’s method of statutory construction in *Allen* was little different from that pursued in *Gingles*, and as the analysis of the text of §5 above demonstrates, it similarly yielded an interpretation in tension with the terms of the Act.

In *Allen*, after noting that §14(c)(1) defined “voting” to include “all action necessary to make a vote effective,” 42 U. S. C. §1973l(c)(1), the Court abandoned any further attempt to construe the text of the Act and went on, instead, to conclude that the “legislative history on the whole supports the view that Congress intended to reach any state

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enactment which altered the election law of a covered State in even a minor way.” *Allen*, 393 U. S., at 566. Not surprisingly, the legislative history relied upon in *Allen* also displayed the typical flaws that one might expect—it was hardly unequivocal. See *id.*, at 590–591, and n. 9 (Harlan, J., concurring in part and dissenting in part) (noting inconsistencies in the legislative history). Thus, to the extent that *Allen* implicitly has served as the basis for our subsequent interpretation of the terms of §2, it hardly can be thought to provide any surer rooting in the language of the Act than the method of statutory construction pursued in *Gingles*.

Remarkably, thanks to our reliance on legislative history, we have interpreted §2 in such a way that four Members of this Court at one time candidly admitted that “[t]here is an inherent tension [in §2] between what Congress wished to do and what it wished to avoid.” *Gingles*, 478 U. S., at 84 (O’CONNOR, J., concurring in judgment). But our understanding of what Congress purportedly “wished to do”—that is, to allow claims of vote “dilution”—depends solely on a selective reading of legislative history, whereas Congress’ statement of what it “wished to avoid” appears explicitly in §2(b)’s disclaimer of a right to proportional representation. I can see no logical reason to import the “inherent tension” between these two imperatives into the Act, when on its face the statute incorporates only one of two potentially contradictory commands. I would have thought the key to resolving any such conflict between the text and the legislative history obvious: The text of the statute must control, and the text of §2 does not extend the Act to claims of dilution.

Were it our function to interpret and apply committee reports or other pieces of legislative history, rather than Acts of Congress, I might conclude that we had made the best of a bad situation in interpreting §2 of the Voting Rights Act, and that the quagmire that is §2 was Congress’ creation, not our own. It is apparent, however, that we have arrived at our current understanding of the Act, with all of its attend-

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ant pitfalls, only by abandoning proper methods of statutory construction. Our errors in method in past cases ordinarily might not indicate a need to forsake an established line of precedent. But here they have produced an “inherent tension” between our interpretation of §2 and the text of the Act and have yielded a construction of the statute that, as I discuss below, is so unworkable in practice and destructive in its effects that it must be repudiated.

### C

“*Stare decisis* is not an inexorable command,” *Payne v. Tennessee*, 501 U. S. 808, 828 (1991). Indeed, “when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.” *Id.*, at 827 (internal quotation marks omitted). The discussion above should make clear that our decision in *Gingles* interpreting the scope of §2 was badly reasoned; it wholly substituted reliance on legislative history for analysis of statutory text. In doing so, it produced a far more expansive interpretation of §2 than a careful reading of the language of the statute would allow.

Our interpretation of §2 has also proved unworkable. As I outlined above, it has mired the federal courts in an inherently political task—one that requires answers to questions that are ill-suited to principled judicial resolution. Under §2, we have assigned the federal judiciary a project that involves, not the application of legal standards to the facts of various cases or even the elaboration of legal principles on a case-by-case basis, but rather the creation of standards from an abstract evaluation of political philosophy.

Worse, our interpretation of §2 has required us to distort our decisions to obscure the fact that the political choice at the heart of our cases rests on precisely the principle the Act condemns: proportional allocation of political power according to race. Continued adherence to a line of decisions that necessitates such dissembling cannot possibly promote what



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we have perceived to be one of the central values of the policy of *stare decisis*: the preservation of “the actual and perceived integrity of the judicial process.” *Payne, supra*, at 827.

I have endeavored to explain above that the core of any vote dilution claim is an assertion that the plaintiff group does not hold seats in the proportion that it should.<sup>29</sup> There is no logical way to avoid reliance on a simple ratio in evaluating such a claim. And allocation of seats in direct proportion to the minority group’s percentage in the population provides the most logical ratio to apply as an “undiluted” norm. But § 2 makes it clear that the Act does not create a right to proportional representation, and thus dictates that proportionality should not provide the rule of decision for § 2 claims. See *supra*, at 927–928, and n. 26. Nevertheless, despite the statutory command, in deciding claims of vote dilution we have turned to proportionality as a guide, simply for lack of any better alternative.

No formulation of the test for evaluating vote dilution claims has ever dispensed with the inevitable need to consult a mathematical formula to decide a case. The factors listed in *White v. Regester*, 412 U. S., at 766–767, resurrected in the Senate Report on the 1982 amendments to § 2, see S. Rep. No. 97–417, at 28–29, and finally reincorporated into our decision in *Gingles*, see 478 U. S., at 44–45, although praised in our cases as a multifaceted test ensuring that vote dilution is determined based on the “totality of circumstances,” in reality provide no rule for deciding a vote dilution claim based on anything other than a numerical principle.

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<sup>29</sup> I assume for purposes of the analysis here that the measure of effective votes is control of seats. That is precisely the measure the Court has applied, both in the past, see, e. g., *Gingles*, 478 U. S., at 46–51; *id.*, at 93, 99 (O’CONNOR, J., concurring in judgment) (noting that the Court had made electoral results the “linchpin” of dilution claims), and today, see *Johnson v. De Grandy*, *post*, at 1014–1015 (equating “political effectiveness” with control of majority-minority districts).

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In *Gingles*, we condensed the import of these “factors” into a formula stating that the “essence” of a vote dilution claim under §2 is that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Id.*, at 47. But it should be apparent that whether an electoral practice does or does not reduce the ability of a numerical minority to control the election of representatives can be determined wholly without reference to “social and historical conditions.” *Ibid.* The dilutive effects of various electoral procedures are matters of mathematics. The “social and historical conditions” “interact” with the election mechanism, and thus are relevant in a vote dilution case, only to the extent that they are important for establishing that the minority group does in fact define a distinct political interest group that might assert that its vote has been diluted by the mechanism at issue. Such social and historical considerations, however, cannot supply the answer to the ultimate question whether the group’s vote has been *diluted*.

In reality, the list of *White* factors provides nothing more than just that: a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction, but a list that cannot provide a rule for deciding a vote dilution claim. Take, for example, a case in which a district court determines that a minority group constituting 34% of the population in a certain jurisdiction has suffered discrimination in the past, that the group currently bears the effects of that discrimination, and that there has been a history of racial campaigning in the jurisdiction. Cf. *White, supra*, at 766–767. How can these facts possibly answer the question whether the group’s votes have been diluted if the group controls two rather than three seats in a 10-member governing body? Will the answer to the ultimate question change if the first two factors are found, but the third is not? Obviously, the various “fac-

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tors,” singly or in any combination, cannot provide a principle for determining the result. What one must know to decide the case is whether 20% of the seats in the government is sufficient to reflect “undiluted” voting strength, or if 30% should be required.

Of course, as suggested above, the *White* factors may be relevant to determining as a threshold matter whether the minority group is a distinct political group that should be able to assert a claim of dilution. But after *Gingles*, the inquiry into whether race defines political interest effectively has been boiled down to the weakened test for minority “political cohesiveness” and majority bloc voting embodied in the second and third *Gingles* preconditions. See 478 U. S., at 51. Once a plaintiff group establishes that it is mathematically possible for it to control another seat (that is, that it satisfies the first *Gingles* precondition of size and geographic compactness), see *id.*, at 50, and that it is a distinct political group (that is, that it can show political cohesion and majority bloc voting), the only question remaining in the vote dilution claim is whether the current number of seats is the proper number or not. The other *White* factors have become essentially superfluous. They may be dutifully intoned by courts performing the empty ritual of applying the “totality of circumstances” test, but they can provide no guidance concerning whether the current allocation of seats constitutes “dilution.” Cf. *Gingles, supra*, at 92–93 (O’CONNOR, J., concurring in judgment) (suggesting that the basic contours of a dilution claim require no reference to most of the *White* factors).

In short, it should be clear that the factors listed in *Gingles*—in their various incarnations and by whatever names they are known—are nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a reasoned evaluation of a variety of relevant circumstances. The “totality of circumstances” test outlined in *Gingles* thus

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serves to obscure the inherent conflict between the text of the Act and an underlying reliance on proportionality.

The resort to proportionality in our cases should hardly come as a surprise. Before §2 was amended in 1982, and thus before the Act explicitly disavowed a right to proportional representation, some Members of the Court recognized the inevitable drift toward proportional representation that would occur if the test outlined in *White* were used to evaluate vote dilution claims. As Justice Stewart, writing for four Members of the Court, observed, the factors listed in *White* amounted to little more than “gauzy sociological considerations,” and it did not appear that “they could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates *than arithmetic indicates it might.*” *Bolden*, 446 U. S., at 75, n. 22 (emphasis added). Indeed, Justice Stewart was correct in concluding that “the putative limits [imposed by the *White* factors] are bound to prove illusory if the express purpose informing their application would be,” as our vote dilution cases have assumed, “to redress the inequitable distribution of political influence.” *Ibid.* (internal quotation marks omitted).

In fact, the framework established by this Court for evaluating vote dilution claims in *Gingles* was at its inception frankly, and in my view correctly, labeled as setting a rule of roughly proportional representation. See *Gingles*, *supra*, at 91, 93, 97–99 (O’CONNOR, J., concurring in judgment). Nothing has happened in the intervening years to change the basic import of the *Gingles* test. Yet we have continued to apply the same *Gingles* framework, see, e. g., *Growe v. Emison*, 507 U. S. 25 (1993), all the while suggesting that we are pursuing merely a “totality of the circumstances” test.

In another case decided today, the Court reconfirms the unstated centrality of proportional results in an opinion that demonstrates the obfuscation that must come to characterize our Voting Rights Act rulings if we continue to entertain

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dilution claims while pretending to renounce reliance on proportionality as a rule of decision. In *Johnson v. De Grandy*, *post*, p. 997, the Court assures us that proportionality does not provide the principle for deciding vote dilution claims. *Post*, at 1000, 1017–1021. Rather, the result in each case must depend on a searching inquiry into the ever-nebulously defined “totality of circumstances.” *Post*, at 1000.

But after the *Gingles* preconditions have been established, *post*, at 1008–1009, and after *White* factors such as a history of discrimination have been found, see *post*, at 1013, where does the Court turn for a deciding principle to give some meaning to these multifarious facts, which taken individually would each appear to count in favor of a finding of vote dilution? Quite simply, the Court turns to proportionality: “Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness [that is, majority-minority districts] in proportion to voting-age numbers, deny equal political opportunity.” *Post*, at 1014. See also *post*, at 1013 (noting that in assessing “dilutive effect,” the “pertinent features” of the districting system at issue “were majority-minority districts in substantial proportion to the minority’s share of voting-age population”); *post*, at 1025 (O’CONNOR, J., concurring) (the Court’s central teaching in *De Grandy* “is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group’s share of the relevant population—is *always* relevant evidence in determining vote dilution”). JUSTICE O’CONNOR’s comment about the Court’s holding in *Davis v. Bandemer*, 478 U. S. 109 (1986), is equally applicable to the course pursued in *De Grandy* today: “[The Court’s decision] ultimately rests on a political preference for proportionality—. . . a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes.” 478 U. S., at 159 (opinion concurring in judgment).

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To be sure, the *De Grandy* Court repeatedly declares that proportionality is not a defense to a vote dilution claim. See *post*, at 1017–1021. That, of course, must be the stated rule if we are not to abandon openly the explicit disclaimer enacted by Congress in §2(b). But given the Court’s equivocation—proportionality is still *always relevant*—and the Court’s ultimate analysis, such assurances ring hollow. The Court decides the question of dilution based upon proportionality. And it is apparent from the reasons the Court gives for rejecting maximization as a rule for decision that proportionality will drive results in future dilution cases as well.

Consider, for example, the hypothetical rehearsed by the Court concerning a jurisdiction with a 10-member elected body and a 40% minority voting population. See *post*, at 1016–1017. Assume that as currently constituted the districting scheme creates four majority-minority districts. Even if it is established in this hypothetical jurisdiction that all of the *Gingles* factors have been proved (as was found in *De Grandy*), and that there are both a history of discrimination and continuing discrimination (as was found in *De Grandy*), can it be seriously contended that the minority group can succeed, under any combination of facts, in bringing a §2 challenge to require the creation of the mathematically possible seven majority-minority districts? The Court recognizes that it would be “absurd” to think that §2 would allow such a result. That, after all, would give the group “effective political power 75 percent above its *numerical strength*”—that is, above its proportion in the population. *Post*, at 1017 (emphasis added). But if it is absurd to give the members of the group seven seats, why is it not equally ridiculous to give them six, or five? Or, indeed, anything beyond the four that would secure them seats in proportion to their numbers in the population?

If it is absurd to give members of the group seven seats, that is because, as the Court tacitly acknowledges, we assume that seats in accord with “numerical strength” will

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ensure the group “equal” “political effectiveness.” Thus, deliberately drawing districts so as to give, under the assumptions of the hypothetical, 40% of the population control over 50% of the seats, while leaving 60% of the population with control of a similar 50% of the seats, would seem to us unfair. Greater deviations from proportionality may appear more patently “absurd” than lesser, but the dividing line between what seems fair and what does not remains the same. The driving principle is proportionality.<sup>30</sup>

Few words would be too strong to describe the dissembling that pervades the application of the “totality of circumstances” test under our interpretation of § 2. It is an empty incantation—a mere conjurer’s trick that serves to hide the

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<sup>30</sup>Of course, throughout this discussion concerning the Court’s inevitable resort to proportionality, I have assumed that effective votes will be measured in terms of control of seats. See n. 29, *supra*. As JUSTICE O’CONNOR suggests in her opinion in *De Grandy*, if we were to measure the effectiveness of votes not simply in terms of numbers of seats, but in terms of some more amorphous concept of “access to the political process,” there would be no need to make proportionality “dispositive.” See *De Grandy, post*, at 1026 (O’CONNOR, J., concurring). Cf. *White*, 412 U. S., at 765–766. But *Gingles* made control of seats the determining factor in dilution claims; that is the measure that has been applied in cases under *Gingles*, and it remains the measure applied in practice in the cases handed down today. In my view, it is unrealistic to think that the Court will now reverse course and establish some broader understanding of “political effectiveness” under the “totality of circumstances” test, after it consistently has pursued a measure of effective voting that makes electoral results the “linchpin” of dilution claims. See 478 U. S., at 93 (O’CONNOR, J., concurring in judgment).

Indeed, any change in course is made more unlikely by one very practical consideration. As the Court’s decision in *De Grandy* perhaps suggests, measuring political effectiveness by any method other than counting numbers of seats can rapidly become a wholly unmanageable task. As I suggested above, see n. 6, *supra*, one of the reasons the Court seized upon control of seats as a measure of effective political participation is simply that control of seats provides the “most easily measured indicia of political power.” *Bandemer*, 478 U. S., at 157 (O’CONNOR, J., concurring in judgment).

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drive for proportionality that animates our decisions. As actions such as that brought in *Shaw v. Reno*, 509 U. S. 630 (1993), have already started to show, what might euphemistically be termed the benign “creation of majority-minority single-member districts to enhance the opportunity of minority groups to elect representatives of their choice” might also more simply and more truthfully be termed “racial gerrymandering.” Similarly, what we might call a “totality of circumstances” test to determine whether an electoral practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives,” *Gingles*, 478 U. S., at 47, might more accurately be called a test for ensuring proportional electoral results according to race. Cf. *id.*, at 97 (O’CONNOR, J., concurring in judgment).

In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary. The “inherent tension”—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the Federal Judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate understanding of the Act.

*Stare decisis* is a powerful concern, especially in the field of statutory construction. See *Patterson v. McLean Credit Union*, 491 U. S. 164, 172 (1989). See also *Fogerty v. Fantasy, Inc.*, 510 U. S. 517, 538–539 (1994) (THOMAS, J., concurring in judgment). But “we have never applied *stare decisis*



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mechanically to prohibit overruling our earlier decisions determining the meaning of statutes.” *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 695 (1978). *Stare decisis* should not bind the Court to an interpretation of the Voting Rights Act that was based on a flawed method of statutory construction from its inception and that in every day of its continued existence involves the Federal Judiciary in attempts to obscure the conflict between our cases and the explicit commands of the Act. The Court has noted in the past that *stare decisis* “is a principle of policy,” *Payne*, 501 U. S., at 828 (quoting *Helvering v. Hallock*, 309 U. S. 106, 119 (1940)), and it “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” 501 U. S., at 827 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). I cannot subscribe to the view that in our decisions under the Voting Rights Act it is more important that we have a settled rule than that we have the right rule. When, under our direction, federal courts are engaged in methodically carving the country into racially designated electoral districts, it is imperative that we stop to reconsider whether the course we have charted for the Nation is the one set by the people through their representatives in Congress. I believe it is not.

I cannot adhere to the construction of §2 embodied in our decision in *Thornburg v. Gingles*. I reject the assumption implicit in that case that the terms “standard, practice, or procedure” in §2(a) of the Voting Rights Act can be construed to cover potentially dilutive electoral mechanisms. Understood in context, those terms extend the Act’s prohibitions only to state enactments that regulate citizens’ access to the ballot or the processes for counting a ballot. The terms do not include a State’s or political subdivision’s choice of one districting scheme over another. The terms certainly do not include, as respondents would argue, the size of a local governing authority.

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## III

For the foregoing reasons, I agree with the Court's conclusion that the size of a governing body is not subject to challenge under §2 of the Voting Rights Act. I therefore concur in the Court's judgment reversing the judgment below and remanding for consideration of respondents' constitutional claim of intentional discrimination.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Five Justices today agree that the size of a governing body is a "standard, practice, or procedure" under §2 of the Voting Rights Act of 1965 (Act), as amended, 42 U. S. C. § 1973. A different five Justices decide, under three separate theories, that voting rights plaintiffs cannot bring §2 dilution challenges based on size. I, however, believe that the Act, its history, and our own precedent require us to conclude not only that the size of a governing body is a "standard, practice, or procedure" under §2, but also that minority voters may challenge the dilutive effects of this practice by demonstrating their potential to elect representatives under an objectively reasonable alternative practice. Accordingly, I dissent from the Court's decision that minority voters cannot bring §2 vote dilution challenges based on the size of an existing government body.

## I

Section 2(a) of the Act prohibits the imposition or application of any "voting qualification or prerequisite to voting, or *standard, practice, or procedure*" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U. S. C. § 1973(a) (emphasis added). Section 5 parallels §2 by requiring certain jurisdictions to preclear with the Attorney General a change in "any voting qualification or prerequisite to voting, or *standard, practice, or procedure* with respect to voting." 42 U. S. C. § 1973c (emphasis added). Under the broad inter-

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pretation that this Court, Congress, and the Attorney General consistently have given the Act in general and §5 in particular, the practice of electing a single commissioner, as opposed to a multimember commission, constitutes a “standard, practice, or procedure” under §2.

Nearly 30 years of precedent admonish us that the Act, which was adopted “for the broad remedial purpose of ‘rid[ding] the country of racial discrimination in voting,’” *Chisom v. Roemer*, 501 U. S. 380, 403 (1991), quoting *South Carolina v. Katzenbach*, 383 U. S. 301, 315 (1966), should be given “the broadest possible scope,” *Allen v. State Bd. of Elections*, 393 U. S. 544, 567 (1969). Because “the Act itself nowhere amplifies the meaning of the phrase ‘standard, practice, or procedure with respect to voting,’” the Court “ha[s] sought guidance from the history and purpose of the Act.” *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32, 37 (1978); see also *McCain v. Lybrand*, 465 U. S. 236, 246 (1984) (the Act must “be interpreted in light of its prophylactic purpose and the historical experience which it reflects”).

Consistent with the Act’s remedial purposes, this Court has held that a wide variety of election- and voting-related practices fit within the term “standard, practice, or procedure.” Among the covered practices are the annexation of land to enlarge city boundaries, see *Perkins v. Matthews*, 400 U. S. 379, 388 (1971), and *Pleasant Grove v. United States*, 479 U. S. 462, 467 (1987); a rule requiring employees to take leaves of absence while they campaign for elective office, see *Dougherty County Bd. of Ed.*, 439 U. S., at 34; candidate filing dates and other procedural requirements, see *Whitley v. Williams*, decided with *Allen v. State Bd. of Elections*, *supra*; *Hadnott v. Amos*, 394 U. S. 358, 365 (1969); *NAACP v. Hampton County Election Comm’n*, 470 U. S. 166, 176–177 (1985); and candidate residency requirements, see *City of Rome v. United States*, 446 U. S. 156, 160 (1980).

Specifically, this Court long has treated a change in the size of a governing authority as a change in a “standard,

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practice, or procedure” with respect to voting. In *City of Rome*, 446 U. S., at 161, it noted that it “is not disputed” that an expansion in the size of a board of education was “within the purview of the Act” and subject to preclearance under § 5. In *City of Lockhart v. United States*, 460 U. S. 125, 131 (1983), it stated that a change from a three-member commission to a five-member commission was subject to § 5 preclearance. And, most recently, it said that the term “standard, practice, or procedure with respect to voting” included a change in the size of a governing authority or an increase or decrease in the number of elected offices. *Presley v. Etowah County Comm’n*, 502 U. S. 491, 500 (1992).

This conclusion flowed naturally from the holding in *Bunton v. Patterson*, 393 U. S. 544 (1969), that a change from an elected to an appointed office was a “standard, practice, or procedure with respect to voting.” In *Bunton*, the Court reasoned that the power of a citizen’s vote is affected by the change because the citizen has been “prohibited from electing an officer formerly subject to the approval of the voters.” *Id.*, at 570. The reverse is also true: A change from an appointed to an elected office affects a citizen’s voting power by increasing the number of officials for whom he may vote. See *McCain v. Lybrand*, 465 U. S. 236 (1984). And, as the Court recognized in *Presley*, a change in the size of a governing authority is a “standard, practice, or procedure with respect to voting” because the change “increase[s] or diminish[es] the number of officials for whom the electorate may vote,” 502 U. S., at 503; this change bears “on the substance of voting power” and has “a direct relation to voting and the election process.” *Ibid.*

To date, our precedent has dealt with § 5 challenges to a change in the size of a governing authority, rather than § 2 challenges to the existing size of a governing body. I agree with JUSTICE O’CONNOR, *ante*, at 886–887, that, as a textual matter, “standard, practice, or procedure” under § 2 is at

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least as broad as “standard, practice, or procedure with respect to voting” under §5. In fact, because of the “close connection” between §§2 and 5, we interpret them similarly. See *Chisom v. Roemer*, 501 U. S., at 402 (concluding that it would be “anomalous” to do otherwise). And in the context of §2, the Court stated: “Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview.” *Id.*, at 392. See also *Houston Lawyers’ Assn. v. Attorney General of Tex.*, 501 U. S. 419 (1991) (rejecting a “single-member-office” exception to §2).

Congress repeatedly has endorsed the broad construction this Court has given the Act in general and §5 in particular.<sup>1</sup> Significantly, when Congress considered the 1982 amendments to the Voting Rights Act, it made no effort to curtail the application of §5 to changes in size, in the face of the longstanding practice of submitting such changes for preclearance, and on the heels of this Court’s recognition just two years earlier that it was “not disputed” that a change in the size of a governing body was covered under §5. See *City of Rome*, 446 U. S., at 161. Similarly, the Attorney General, whose construction of the Act “is entitled to considerable deference,” *NAACP v. Hampton County Election Comm’n*, 470 U. S., at 178–179, for years has required §5 preclearance of the expansion or reduction of a governing

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<sup>1</sup>See *Georgia v. United States*, 411 U. S. 526, 533 (1973) (“After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of §5”) (footnote omitted); *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32, 39 (1978) (“Again in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the ‘broad interpretations to the scope of Section 5’ in *Allen* and *Perkins v. Matthews* [400 U. S. 379 (1971)]”); *NAACP v. Hampton County Election Comm’n*, 470 U. S. 166, 176 (1985) (in the 1982 extension of the Act, “Congress specifically endorsed a broad construction” of §5).

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body.<sup>2</sup> It is not surprising that no party to this case argued that the size of a governing authority is not a “standard, practice, or procedure.”

In light of this consistent and expansive interpretation of the Act by this Court, Congress, and the Attorney General, the Act’s “all-inclusive” definition of “standard, practice, or procedure” cannot be read to exclude threshold coverage of challenges to the size of a governing authority. As five Members of the Court today agree, the size of a governing authority is a “standard, practice, or procedure” with respect to voting for purposes of §2 as well as §5 of the Voting Rights Act.

## II

Although five Justices agree that the size of a governing body is a “standard, practice, or procedure” under §2, a like number of Justices conclude, under varying rationales, that Voting Rights plaintiffs nonetheless cannot bring size challenges under §2. This conclusion is inconsistent with our precedent giving the Act “‘the broadest possible scope’ in combating racial discrimination,” *Chisom*, 501 U. S., at 403, quoting *Allen*, 393 U. S., at 567, and with the vote-dilution

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<sup>2</sup>See Hearings on S. 1992 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1748 (1982) (noting Attorney General’s objection in 1971 to proposed reduction in the size of a school board); *id.*, at 1751 (1971 objection to expansion of a parish council); *id.*, at 1782 (1980 objection to decrease in number of city council members); *id.*, at 1384–1385 (the Voting Rights Act afforded protection against “[s]hifts from ward to at-large elections, from plurality win to majority vote, from slating to numbered posts, annexations and *changes in the size of electoral bodies*,” that “could . . . deprive minority voters of fair and effective procedures for electing candidates of their choice”) (statement of Drew S. Days III, former Assistant Attorney General for Civil Rights) (emphasis added).

Since covered jurisdictions routinely have submitted changes in the size of their legislative bodies for preclearance, it is not surprising that petitioners concede that a *change* in the size of the Bleckley County Commission would be subject to §5 preclearance. Tr. of Oral Arg. 4, 13.

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analysis prescribed in *Thornburg v. Gingles*, 478 U. S. 30 (1986).

To prevail in a vote-dilution challenge, minority voters must show that they “possess the *potential* to elect representatives *in the absence of the challenged structure or practice*.” *Id.*, at 50, n. 17 (second emphasis supplied).<sup>3</sup> There is widespread agreement, see *ante*, at 880 (opinion of KENNEDY, J., and REHNQUIST, C. J.); *ante*, at 887 (opinion of O’CONNOR, J.), that minority voters’ potential “in the absence of” the allegedly dilutive mechanism must be measured against the benchmark of an alternative structure or practice that is reasonable and workable under the facts of the specific case.<sup>4</sup>

By all objective measures, the proposed five-member Bleckley County Commission presents a reasonable, workable benchmark against which to measure the practice of electing a sole commissioner. First, the Georgia Legislature specifically authorized a five-member commission for Bleckley County. 1985 Ga. Laws 4406. Moreover, a five-member commission is the most common form of governing authority in Georgia. See Georgia Dept. of Community Af-

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<sup>3</sup> Although *Gingles* dealt with the use of multimember districts, the analysis it prescribes is applicable in certain other vote-dilution contexts, such as a claim of “vote fragmentation” through single-member districts, see *Grove v. Emison*, 507 U. S. 25, 37–42 (1993), or the case before us.

<sup>4</sup> As the United States explains, the minority group must be permitted to establish that, under “a proposed alternative voting arrangement that is reasonable in the legal and factual context of a particular case,” it could constitute a majority. Brief for United States as *Amicus Curiae* 8. The Court of Appeals followed this approach, concluding that “it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive” (emphasis in original). 955 F. 2d 1563, 1569 (CA11 1992). See also *Carrollton Branch of NAACP v. Stallings*, 829 F. 2d 1547 (CA11 1987) (remand of challenge to sole-commissioner system with instructions to consider size and geographic compactness within proposed three- and five-member commission forms of government).

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fairs, County Government Information Catalog (1989) (Table 1.A: Form of Government) (76 of Georgia's 159 counties had five commissioners, including 25 counties smaller than Bleckley County). Bleckley County, as one of a small and dwindling number of counties in Georgia still employing a sole commissioner, markedly departs from practices elsewhere in Georgia. This marked "depart[ure] . . . from practices elsewhere in the jurisdiction . . . bears on the fairness of [the sole commissioner's] impact." S. Rep. No. 97-417, p. 29, n. 117 (1982). Finally, the county itself has moved from a single superintendent of education to a school board with five members elected from single-member districts, providing a workable and readily available model for commission districts. Thus, the proposed five-member baseline is reasonable and workable.

In this case, identifying an appropriate baseline against which to measure dilution is not difficult. In other cases, it may be harder. But the need to make difficult judgments does not "justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Chisom*, 501 U. S., at 403. Vote dilution is inherently a relative concept, requiring a highly "flexible, fact-intensive" inquiry, *Gingles*, 478 U. S., at 46, and calling for an exercise of the "court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case," as mandated by Congress. S. Rep. No. 97-417, at 29, n. 118. Certainly judges who engage in the complex task of evaluating reapportionment plans and examining district lines will be able to determine whether a proposed baseline is an appropriate one against which to measure a claim of vote dilution based on the size of a county commission.

There are, to be sure, significant constraints on size challenges. Minority plaintiffs, who bear the burden of demonstrating dilution, also bear the burden of demonstrating that



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their proposed benchmark is reasonable and workable. One indication of a benchmark's reasonableness is its grounding in history, custom, or practice. This consideration will discourage size challenges to traditional single-member executive offices, such as governors and mayors, or even sheriffs or clerks of court. By tradition and practice, these executive positions are occupied by one person, so plaintiffs could rarely point to an objectively reasonable alternative size that has any foundation in the past or present. Cf. *The Federalist* No. 69, p. 415 (C. Rossiter ed. 1961) (A. Hamilton) (“[T]he executive authority, with few exceptions, is to be vested in a single magistrate”). The sole commissioner, by contrast, holds plenary legislative, as well as executive, power. Ga. Code Ann. § 36-5-22.1 (1993). A one-member legislature, far from being the norm, is an anomaly. Accordingly, the Eleventh Circuit, while permitting § 2 challenges to the practice of electing a sole commissioner, has held that this provision cannot be used to alter the practice of electing a single person to offices such as lieutenant governor, sheriff, probate judge, and tax collector. See *Dillard v. Crenshaw County*, 831 F. 2d 246, 251 (1987); *United States v. Dallas County Comm’n*, 850 F. 2d 1430, 1432, n. 1 (1988), cert. denied, 490 U. S. 1030 (1989).<sup>5</sup>

Additionally, every successful vote-dilution challenge will be based on the “totality of the circumstances,” often including the lingering effects of past discrimination. S. Rep. No. 97-417, at 28-30. Not every racial or language minority that constitutes 5% of the population has a claim to have a governing authority expanded to 20 members in order to give them an opportunity to elect a representative. Instead, the voters would have to prove that a 20-

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<sup>5</sup> Of course, this is not to suggest that single-member executive offices are not within the scope of § 2, see *Houston Lawyers’ Assn. v. Attorney General of Tex.*, 501 U. S. 419, 425-428 (1991), but only that they are not generally susceptible to size challenges under § 2.

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member governing authority was a reasonable benchmark—which, of course, respondents could not do here—and that their claim satisfied the three *Gingles* preconditions, 478 U. S., at 49, and was warranted under the totality of the circumstances.<sup>6</sup>

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<sup>6</sup>The Senate Report accompanying the 1982 amendments to the Act directed that the vote-dilution inquiry include an examination of the factors identified in *White v. Regester*, 412 U. S. 755 (1973), and refined and developed in *Zimmer v. McKeithen*, 485 F. 2d 1297 (CA5 1973) (en banc), aff'd, 424 U. S. 636 (1976) (*per curiam*). This nonexclusive list of factors, now known variously as the *Regester-Zimmer* factors or “Senate Report factors,” includes “the extent of any history of official discrimination . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; . . . the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; . . . [and] the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” S. Rep. No. 97-417, pp. 28-29 (1982).

In this case, for example, the District Court found that, until the passage of federal civil rights laws, Bleckley County “enforced racial segregation in all aspects of local government—courthouse, jails, public housing, governmental services—and deprived its black citizens of the opportunity to participate in local government.” *Hall v. Holder*, 757 F. Supp. 1560, 1562 (MD Ga. 1991). Until the passage of the Voting Rights Act of 1965, “black citizens were virtually prohibited from registering to vote in Bleckley County.” *Id.*, at 1563. Until 1984, there were no African-American voting registrars and no voter registration in places where African-Americans normally congregated. *Ibid.* From 1978 until 1986, the respondent probate judge appointed 224 poll managers, all white, and 509 poll clerks, 479 of whom were white. *Ibid.* Since 1964, the election of Bleckley County’s sole commissioner has been subject to a majority-vote requirement. Although official segregation is no longer imposed, its vestiges remain, as “more black than white residents of Bleckley County continue to endure a depressed socio-economic status,” *id.*, at 1562, which “hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political

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With these limitations, successful vote-dilution challenges to the size of a governing authority always will be based not on abstract manipulation of numbers, but on a “searching practical evaluation of the ‘past and present reality.’” S. Rep. No. 97-417, at 30, quoting *White v. Regester*, 412 U. S. 755, 770 (1973). These limitations protect against a proliferation of vote-dilution challenges premised on eccentric or impracticable alternative methods of redistricting.

### III

The Voting Rights Act of 1965 was bold and ambitious legislation, designed to eradicate the vestiges of past discrimination and to make members of racial and language minorities full participants in American political life. Nearly 30 years after the passage of this landmark civil rights legislation, its goals remain unfulfilled. Today, the most blatant forms of discrimination—including poll taxes, literacy tests, and “white” primaries—have been eliminated. But subtler, more complex means of infringing minority voting strength—including submergence or dispersion of minority voters—are still present and indeed prevalent. We have recognized over the years that seemingly innocuous and even well-intentioned election practices may impede minority voters’ ability not only to vote, but to have their votes count. It is clear that the practice of electing a single-member county commission can be one such dilutive practice. It is equally clear that a five-member commission is an appropriate benchmark against which to measure the alleged dilutive effects of Bleckley County’s practice of electing a sole commissioner. I respectfully dissent.

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process,” *id.*, at 1563. The “barriers to active participation in the political process are . . . compounded by the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area.” *Id.*, at 1563, n. 3. That single polling place is located at an all-white civic club. 955 F. 2d 1563, 1566 (CA11 1992).

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JUSTICE GINSBURG, dissenting.

I join the dissenting opinion by JUSTICE BLACKMUN and the separate opinion of JUSTICE STEVENS, and add a further observation about the responsibility Congress has given to the judiciary.

Section 2 of the Voting Rights Act of 1965 calls for an inquiry into “[t]he extent to which members of a protected class have been elected to office,” but simultaneously disclaims any “right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U. S. C. § 1973(b). “There is an inherent tension between what Congress wished to do and what it wished to avoid”—between Congress’ “inten[t] to allow vote dilution claims to be brought under § 2” and its intent to avoid “creat[ing] a right to proportional representation for minority voters.” *Thornburg v. Gingles*, 478 U. S. 30, 84 (1986) (O’CONNOR, J., joined by Burger, C. J., and Powell and REHNQUIST, JJ., concurring in judgment). Tension of this kind is hardly unique to the Voting Rights Act, for when Congress acts on issues on which its constituents are divided, sometimes bitterly, the give-and-take of legislative compromise can yield statutory language that fails to reconcile conflicting goals and purposes.

Title VII of the Civil Rights Act of 1964, for example, is similarly janus faced, prohibiting discrimination against historically disadvantaged groups, see 42 U. S. C. §§ 2000e–2(a), (d), without “diminish[ing] traditional management prerogatives,” *Steelworkers v. Weber*, 443 U. S. 193, 207 (1979), in regard to employment decisions. See 42 U. S. C. § 2000e–2(j) (no requirement that employer “grant preferential treatment to any individual or to any group because of . . . race, color, religion, sex, or national origin”); see also *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 649 (1987) (O’CONNOR, J., concurring in judgment) (noting two “conflicting concerns” built into Title VII: “Congress’ intent

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to root out invidious discrimination against *any* person on the basis of race or gender, and its goal of eliminating the lasting effects of discrimination against minorities”) (emphasis in original) (citation omitted).

When courts are confronted with congressionally crafted compromises of this kind, it is “not an easy task” to remain “faithful to the balance Congress struck.” *Thornburg v. Gingles*, 478 U. S., at 84 (O’CONNOR, J., joined by Burger, C. J., and Powell and REHNQUIST, JJ., concurring in judgment). The statute’s broad remedial purposes, as well as the constraints on the courts’ remedial powers, need to be carefully considered in light of the particular circumstances of each case to arrive at an appropriate resolution of the competing congressional concerns. However difficult this task may prove to be, it is one that courts must undertake because it is their mission to effectuate Congress’ multiple purposes as best they can. See *Chisom v. Roemer*, 501 U. S. 380, 403 (1991) (“Even if serious problems lie ahead in applying the ‘totality of the circumstances’ [inquiry under § 2(b) of the Voting Rights Act], that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute[.]”).

Separate opinion of JUSTICE STEVENS, in which JUSTICE BLACKMUN, JUSTICE SOUTER, and JUSTICE GINSBURG join.

JUSTICE THOMAS has written a separate opinion proposing that the terms “standard, practice, or procedure” as used in the Voting Rights Act of 1965 should henceforth be construed to refer only to practices that affect minority citizens’ access to the ballot. Specifically, JUSTICE THOMAS would no longer interpret the Act to forbid practices that dilute minority voting strength. To the extent that his opinion advances policy arguments in favor of that interpretation of the statute, it should be addressed to Congress, which has ample power to amend the statute. To the extent that the opinion

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suggests that federal judges have an obligation to subscribe to the proposed narrow reading of statutory language, it is appropriate to supplement JUSTICE THOMAS' writing with a few words of history.

## I

JUSTICE THOMAS notes that the first generation of Voting Rights Act cases focused on access to the ballot. *Ante*, at 894–895. By doing so, he suggests that the early pattern of enforcement is an indication of the original meaning of the statute. In this regard, it is important to note that the Court's first case addressing a voting practice other than access to the ballot arose under the Fifteenth Amendment. In *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), the Court held that a change in the boundaries of the city of Tuskegee, Alabama, violated the Fifteenth Amendment. In his opinion for the Court, Justice Frankfurter wrote:

“The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions.” *Id.*, at 345.

“A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens,

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and only colored citizens, of their theretofore enjoyed voting rights.” *Id.*, at 347.<sup>1</sup>

Because *Gomillion* was decided only a few years before the Voting Rights Act of 1965 was passed, and because coverage under the Voting Rights Act is generally coextensive with or broader than coverage under the Fifteenth Amendment, see *Katzenbach v. Morgan*, 384 U. S. 641 (1966); *Mobile v. Bolden*, 446 U. S. 55, 60–61 (1980) (plurality opinion), it is surely not unreasonable to infer that Congress intended the Act to reach the kind of voting practice that was at issue in that case. Nevertheless, the text of the Act would also have supported the opposite inference, because the language of the Fifteenth Amendment would seem to forbid any denial or abridgment of the right to vote, whereas §§ 2 and 5 of the Voting Rights Act refer only to “voting qualification[s], . . . prerequisite[s] to voting, . . . standard[s], practice[s], [and] procedure[s].”

During the years between 1965 and 1969 the question whether the Voting Rights Act should be narrowly construed to cover nothing more than impediments to access to the ballot was an unresolved issue. What JUSTICE THOMAS describes as “a fundamental shift in the focal point of the Act,” *ante*, at 895, occurred in 1969 when the Court unequivocally rejected the narrow reading, relying heavily on a broad

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<sup>1</sup>In most of his opinion, JUSTICE THOMAS seems to use the phrase “access to the ballot” to refer to the voter’s ability to cast a vote. In an attempt to characterize the *Gomillion* gerrymander as a practice that interfered with access to the ballot, however, he seems to take the position that the redrawing of the boundaries of a governmental unit is a practice that affects access to the ballot because some voters’ ballots could not thereafter be cast for the same offices as before. See *ante*, at 920, n. 20. Under such reasoning the substitution of an appointive office for an elective office, see *Bunton v. Patterson*, decided with *Allen v. State Bd. of Elections*, 393 U. S. 544, 550–551 (1969), or a change in district boundaries that prevented voters from casting ballots for the reelection of their incumbent congressional Representatives, would also be covered practices.

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definition of the term “voting” as including “‘all action necessary to make a vote effective.’” *Allen v. State Bd. of Elections*, 393 U. S. 544, 565–566.

Despite *Allen*’s purported deviation from the Act’s true meaning, Congress one year later reenacted § 5 without in any way changing the operative words. During the next five years, the Court consistently adhered to *Allen*, see *Perkins v. Matthews*, 400 U. S. 379 (1971); *Georgia v. United States*, 411 U. S. 526 (1973), and in 1975, Congress again reenacted § 5 without change.

When, in the late seventies, some parties advocated a narrow reading of the Act, the Court pointed to these congressional reenactments as solid evidence that *Allen*, even if not correctly decided in 1969, would now be clearly correct. In *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110, 132–133 (1978), the Court noted:

“In 1970, Congress was clearly fully aware of this Court’s interpretation of § 5 as reaching voter changes other than those affecting the registration process and plainly contemplated that the Act would continue to be so construed. See, *e. g.*, Hearings on H. R. 4249 et al. before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 1, 4, 18, 83, 130–131, 133, 147–149, 154–155, 182–184, 402–454 (1969); Hearings on S. 818 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 48, 195–196, 369–370, 397–398, 426–427, 469 (1970) . . . .

“The congressional history is even clearer with respect to the 1975 extension . . . .”<sup>2</sup>

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<sup>2</sup>See also *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144, 157–159 (1977) (opinion of White, J.): “In *Allen v. State Board of Elections*[, 393 U. S. 544 (1969),] . . . we held that a change from district to at-large voting for county supervisors had to be submitted for federal approval under § 5, because of the potential for a ‘dilution’ of minority voting power which could ‘nullify [its] ability to elect the candidate of [its]



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As the Court in that case also noted, when Congress reenacts a statute with knowledge of its prior interpretation, that interpretation is binding on the Court.

“Whatever one might think of the other arguments advanced, the legislative background of the 1975 re-enactment is conclusive of the question before us. When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby. See, *e. g.*, *Don E. Williams Co. v. Commissioner*, 429 U. S. 569, 576–577 (1977); *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 414 n. 8 (1975); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1404 (tent. ed. 1958); *cf. Zenith Radio Corp. v. Hazeltine Research*, 401 U. S. 321, 336 n. 7 (1971); *Girouard v. United States*, 328 U. S. 61, 69–70 (1946). *Don E. Williams Co. v. Commissioner*, *supra*, is instructive. As here, there had been a longstanding administrative interpretation of a statute when Congress re-enacted it, and there, as here, the legislative history of the re-enactment showed that Congress agreed with that inter-

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choice . . . .’ 393 U. S., at 569. When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of § 5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts. In 1975, Congress was unmistakably cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that § 5 ‘has had its broadest impact . . . in the areas of redistricting and reapportionment,’ and the Senate and House Reports recommending the extension of the Act referred specifically to the Attorney General’s role in screening redistricting plans to protect the opportunities for nonwhites to be elected to public office” (footnote omitted).

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pretation, leading this Court to conclude that Congress had ratified it. 429 U. S., at 574–577.” *Id.*, at 134–135.

If the 1970 and 1975 reenactments had left any doubt as to congressional intent, that doubt would be set aside by the 1982 amendments to § 2. Between 1975 and 1982, the Court continued to interpret the Voting Rights Act in the broad manner set out by *Allen*. See *City of Rome v. United States*, 446 U. S. 156 (1980); *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32 (1978); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144 (1977); *Richmond v. United States*, 422 U. S. 358 (1975). In *Mobile v. Bolden*, 446 U. S. 55 (1980), a plurality of this Court concluded that violations of both the Voting Rights Act and the Fifteenth Amendment required discriminatory purpose. The case involved a claim that at-large voting diluted minority voting strength. In his opinion for the plurality in *Bolden*, Justice Stewart expressly relied upon *Gomillion v. Lightfoot*'s holding “that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment.” 446 U. S., at 62; see also *id.*, at 85–86 (STEVENS, J., concurring in judgment). The only reason *Gomillion* did not control the outcome in *Bolden* was that an “invidious purpose” had been alleged in the earlier case but not in *Bolden*. 446 U. S., at 63.<sup>3</sup> The congressional response to *Bolden* is familiar history. In the 1982 amendment to § 2 of the Voting Rights Act, Congress substituted a “results” test for an intent requirement. Pub. L. 97–205, § 3, 96 Stat. 134; see 42 U. S. C. § 1973. It is crystal

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<sup>3</sup>The idea that the Court in *Bolden* cast doubt on whether the Voting Rights Act reached diluting practices is flatly refuted by another decision handed down the very same day as the *Bolden* decision. In *City of Rome v. United States*, 446 U. S. 156, 186–187 (1980), the Court held that § 5 required preclearance of annexations potentially diluting minority voting strength. Even the dissenters did not suggest that vote dilution claims were now questionable.

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clear that Congress intended the 1982 amendment to cover nonaccess claims like those in *Bolden* and *Gomillion*.<sup>4</sup>

## II

JUSTICE THOMAS' narrow interpretation of the words "voting qualification . . . standard, practice, or procedure," if adopted, would require us to overrule *Allen* and the cases that have adhered to its reading of the critical statutory language. The radical character of that suggested interpretation is illustrated by the following passage from an opinion decided only nine years after *Allen*:

"The Court's decisions over the past 10 years have given § 5 the broad scope suggested by the language of the Act. We first construed it in *Allen v. State Board of Elections*, [393 U. S. 544 (1969)]. There our examination of the Act's objectives and original legislative history led us to interpret § 5 to give it 'the broadest possible scope,' 393 U. S., at 567, and to require prior federal scrutiny of 'any state enactment which altered the election law in a covered State in even a minor way.' *Id.*, at 566. In so construing § 5, we unanimously rejected—as the plain terms of the Act would themselves have seemingly required—the argument of an appellee that § 5 should apply only to enactments affecting who may register to vote. 393 U. S., at 564. Our decisions have required federal preclearance of laws changing the location of polling places, see *Perkins v. Matthews*, 400 U. S.

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<sup>4</sup>We recently confirmed that interpretation of the 1982 amendment, stating: "Moreover, there is no question that the terms 'standard, practice, or procedure' are broad enough to encompass the use of multimember districts to minimize a racial minority's ability to influence the outcome of an election covered by § 2." *Chisom v. Roemer*, 501 U. S. 380, 390 (1991). Though disagreeing with the Court's holding that the statute covered judicial elections, even the dissenters in that case agreed that the amended § 2 "extends to vote dilution claims for the elections of representatives . . ." *Id.*, at 405.

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379 (1971), laws adopting at-large systems of election, *ibid.*; *Fairley v. Patterson* (decided with *Allen, supra*); laws providing for the appointment of previously elected officials, *Bunton v. Patterson* (decided with *Allen, supra*); laws regulating candidacy, *Whitley v. Williams* (decided with *Allen, supra*); laws changing voting procedures, *Allen, supra*; annexations, *City of Richmond v. United States*, 422 U. S. 358 (1975); *City of Petersburg v. United States*, 410 U. S. 962 (1973), summarily aff'g 354 F. Supp. 1021 (DC 1972); *Perkins v. Matthews, supra*; and reapportionment and redistricting, *Beer v. United States*, 425 U. S. 130 (1976); *Georgia v. United States*, 411 U. S. 526 (1973); see *United Jewish Organizations v. Carey*, 430 U. S. 144 (1977). In each case, federal scrutiny of the proposed change was required because the change had the potential to deny or dilute the rights conferred by §4(a).” *United States v. Sheffield Bd. of Comm'rs*, 435 U. S., at 122–123 (footnote omitted).

The *Allen* interpretation of the Act has also been followed in a host of cases decided in later years, among them *Houston Lawyers' Assn. v. Attorney General of Tex.*, 501 U. S. 419 (1991); *Pleasant Grove v. United States*, 479 U. S. 462 (1987); *Thornburg v. Gingles*, 478 U. S. 30 (1986); *Port Arthur v. United States*, 459 U. S. 159 (1982); *City of Rome v. United States*, 446 U. S. 156 (1980); *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32 (1978). In addition, JUSTICE THOMAS' interpretation would call into question the numerous other cases since 1978 that have assumed the broad coverage of the Voting Rights Act that JUSTICE THOMAS would now have us reject. *Chisom v. Roemer*, 501 U. S. 380 (1991); *Clark v. Roemer*, 500 U. S. 646 (1991); *McCain v. Lybrand*, 465 U. S. 236 (1984); *Hathorn v. Lovorn*, 457 U. S. 255 (1982); *Blanding v. DuBose*, 454 U. S. 393 (1982); *McDaniel v. Sanchez*, 452 U. S. 130 (1981); *Berry v. Doles*, 438 U. S. 190 (1978); see also *Presley v. Etowah County Comm'n*, 502 U. S. 491 (1992); *Voinovich v. Quilter*, 507 U. S. 146 (1993); *Grove v. Emison*,

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507 U. S. 25 (1993); *City of Lockhart v. United States*, 460 U. S. 125 (1983).

The large number of decisions that we would have to overrule or reconsider, as well as the congressional reenactments discussed above, suggests that JUSTICE THOMAS' radical reinterpretation of the Voting Rights Act is barred by the well-established principle that *stare decisis* has special force in the statutory arena. *Ankenbrandt v. Richards*, 504 U. S. 689, 700 (1992); *Patterson v. McLean Credit Union*, 491 U. S. 164, 171–172 (1989); *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736–737 (1977).

JUSTICE THOMAS attempts to minimize the radical implications of his interpretation of the phrase “voting qualification . . . standard, practice, or procedure” by noting that this case involves only the interpretation of §2 of the Voting Rights Act. Section 5, he hints, might be interpreted differently. Even limiting the reinterpretation to §2 cases, however, would require overruling a sizable number of this Court's precedents. *Houston Lawyers' Assn. v. Attorney General of Tex.*, 501 U. S. 419 (1991); *Chisom v. Roemer*, 501 U. S. 380 (1991); *Thornburg v. Gingles*, 478 U. S. 30 (1986); see also *Voinovich v. Quilter*, 507 U. S. 146 (1993); *Growe v. Emison*, 507 U. S. 25 (1993). In addition, a distinction between §§2 and 5 is difficult to square with the language of the statute. Sections 2 and 5 contain exactly the same words: “voting qualification . . . standard, practice, or procedure.” If anything, the wording of §5 is narrower, because it adds the limiting phrase “with respect to voting” after the word “procedure.” Moreover, when Congress amended the Voting Rights Act in 1982 in response to *Bolden*, it amended §2. As noted above, in those amendments Congress clearly endorsed the application of the Voting Rights Act to vote dilution claims. While a distinction between §§2 and 5 might be supportable on policy grounds, it is an odd distinction for devotees of “plain language” interpretation.

Opinion of STEVENS, J.

Throughout his opinion, JUSTICE THOMAS argues that this case is an exception to *stare decisis*, because *Allen* and its progeny have “immersed the federal courts in a hopeless project of weighing questions of political theory.” *Ante*, at 892. There is no question that the Voting Rights Act has required the courts to resolve difficult questions, but that is no reason to deviate from an interpretation that Congress has thrice approved. Statutes frequently require courts to make policy judgments. The Sherman Act, for example, requires courts to delve deeply into the theory of economic organization. Similarly, Title VII of the Civil Rights Act has required the courts to formulate a theory of equal opportunity. Our work would certainly be much easier if every case could be resolved by consulting a dictionary, but when Congress has legislated in general terms, judges may not invoke judicial modesty to avoid difficult questions.

## III

When a statute has been authoritatively, repeatedly, and consistently construed for more than a quarter century, and when Congress has reenacted and extended the statute several times with full awareness of that construction, judges have an especially clear obligation to obey settled law. Whether JUSTICE THOMAS is correct that the Court’s settled construction of the Voting Rights Act has been “a disastrous misadventure,” *ante*, at 893, should not affect the decision in this case. It is therefore inappropriate for me to comment on the portions of his opinion that are best described as an argument that the statute be repealed or amended in important respects.

## Syllabus

TUILAEPÄ *v.* CALIFORNIA

## CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 93–5131. Argued March 22, 1994—Decided June 30, 1994\*

A defendant in California is eligible for the death penalty when a jury finds him guilty of first-degree murder and finds one or more of the special circumstances listed in Cal. Penal Code Ann. §190.2. The case then proceeds to the penalty phase, where the jury is instructed to consider numerous other factors listed in §190.3 in deciding whether to impose death. Petitioners Tuilaepa and Proctor were convicted of first-degree murder in separate cases. At the penalty phase of each trial, the jury was instructed to consider the relevant sentencing factors in §190.3. Both petitioners were sentenced to death, and the State Supreme Court affirmed. Here, they challenge the constitutionality of penalty-phase factor (a), which requires the sentencer to consider the “circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstances found to be true.” Tuilaepa also challenges factor (b), which requires the sentencer to consider the “presence or absence of criminal activity [involving] the use or attempted use of force or violence or the express or implied threat to use force or violence,” and factor (i), which requires the sentencer to consider the defendant’s age at the time of the crime.

*Held:* The factors in question are not unconstitutionally vague under this Court’s decisions construing the Cruel and Unusual Punishments Clause. Pp. 971–980.

(a) The Court’s vagueness review is quite deferential, and relies on the basic principle that a factor is not unconstitutional if it has some “common-sense core of meaning . . . that criminal juries should be capable of understanding.” *Jurek v. Texas*, 428 U. S. 262, 279 (White, J., concurring in judgment). Petitioners’ challenge to factor (a) is at some odds with settled principles, for the circumstances of the crime are a traditional subject for consideration by the sentencer, see, e. g., *Woodson v. North Carolina*, 428 U. S. 280, 304 (plurality opinion), and factor (a) instructs the jury in understandable terms. Factor (b) is framed in conventional and understandable terms as well. Asking a jury to consider matters of historical fact is a permissible part of the sentencing process. Tuilaepa’s challenge to factor (i) is also unusual in light of the

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\*Together with No. 93–5161, *Proctor v. California*, also on certiorari to the same court.

## Syllabus

Court's precedents. See *Eddings v. Oklahoma*, 455 U. S. 104, 115–117. While determining the bearing age ought to have in fixing the penalty can pose a dilemma for the jury, difficulty in application is not the equivalent of vagueness. Pp. 971–977.

(b) This Court's precedents also foreclose petitioners' remaining arguments. Selection factors need not require answers to factual questions. The States are not confined to submitting to the jury specific propositional questions, see, e. g., *Zant v. Stephens*, 462 U. S. 862, 878–880, 889, and there is no constitutional problem where an instruction directs consideration of a crime's facts and circumstances. Nor must a capital sentence be instructed how to weigh any particular fact in the sentencing decision. See, e. g., *California v. Ramos*, 463 U. S. 992, 1008–1009. Pp. 977–980.

No. 93–5131, 4 Cal. 4th 569, 842 P. 2d 1142, and No. 93–5161, 4 Cal. 4th 499, 842 P. 2d 1100, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. SCALIA, J., *post*, p. 980, and SOUTER, J., *post*, p. 980, filed concurring opinions. STEVENS, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 981. BLACKMUN, J., filed a dissenting opinion, *post*, p. 984.

*Howard W. Gillingham*, by appointment of the Court, 510 U. S. 1038, argued the cause and filed briefs for petitioner in No. 93–5131. *Wendy C. Lascher*, by appointment of the Court, 510 U. S. 1038, argued the cause for petitioner in No. 93–5161. With her on the brief was *Susan B. Lascher*.

*Wm. George Prahl*, Deputy Attorney General of California, argued the cause for respondent in both cases. With him on the brief were *Daniel E. Lungren*, Attorney General, *George Williamson*, Chief Assistant Attorney General, and *Dane R. Gillette*, Deputy Attorney General.†

†*Michael Laurence*, *Paul L. Hoffman*, and *Mark Silverstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal in No. 93–5131. *Clifford Gardner*, *Melissa W. Johnson*, *Gail R. Weinheimer*, and *Steven W. Parnes* filed a brief for the California Appellate Project as *amicus curiae* urging reversal in both cases.

*Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance in both cases.



## Opinion of the Court

JUSTICE KENNEDY delivered the opinion of the Court.

In California, to sentence a defendant to death for first-degree murder the trier of fact must find the defendant guilty and also find one or more of 19 special circumstances listed in Cal. Penal Code Ann. § 190.2 (West 1988 and Supp. 1994). The case then proceeds to the penalty phase, where the trier of fact must consider a number of specified factors in deciding whether to sentence the defendant to death. § 190.3.\* These two cases present the question whether three of the § 190.3 penalty-phase factors are unconstitutionally vague under decisions of this Court construing the

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\*Section 190.3 provides in part:

“In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

“(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

“(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

“(c) The presence or absence of any prior felony conviction.

“(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

“(e) Whether or not the victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.

“(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

“(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

“(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the [e]ffects of intoxication.

“(i) The age of the defendant at the time of the crime.

“(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

“(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”

## Opinion of the Court

Cruel and Unusual Punishments Clause of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment.

## I

Petitioner Tuilaepa's case arises out of a murder he committed in Long Beach, California, in October 1986. Tuilaepa and an accomplice walked into the Wander Inn Bar in Long Beach, where a small crowd had gathered to watch Monday Night Football. Tuilaepa, who was carrying a .22-caliber rifle, approached the bartender, pointed the rifle at him, and demanded money from the cash register. After the bartender turned over the money, Tuilaepa and his accomplice began robbing the bar's patrons. When the accomplice demanded money from a man named Melvin Whiddon, Whiddon refused and knocked the accomplice to the floor. Tuilaepa shot Whiddon in the neck and next shot Whiddon's brother, Kelvin, who was standing nearby. Tuilaepa turned to another man, Bruce Monroe, and shot him in the stomach. As Tuilaepa and his accomplice ran toward the back door, they confronted Kenneth Boone. Tuilaepa shot Boone in the neck. Melvin Whiddon died at the scene from the gunshot wounds; the others suffered serious and in some cases permanent injuries.

The State sought the death penalty against Tuilaepa, charging him with the murder of Melvin Whiddon and one special circumstance under § 190.2: murder during the commission of a robbery. The jury found Tuilaepa guilty of first-degree murder and also found the special circumstance true. At the penalty phase, the trial judge instructed the jury to consider the relevant sentencing factors specified in § 190.3. The jury was unanimous in sentencing Tuilaepa to death.

Petitioner Proctor murdered Bonnie Stendal, a 55-year-old schoolteacher who lived in Burney, a small community in Shasta County, California. On a night in April 1982, Proctor entered Mrs. Stendal's home and beat her, causing numerous

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cuts and bruises on her face. Proctor stabbed Mrs. Stendal in the neck several times and inflicted seven stab wounds in the area of the right breast. Proctor raped Mrs. Stendal and committed further sexual assaults with a foreign object. After beating, torturing, and raping Mrs. Stendal, Proctor strangled her to death and dumped her body on the side of the road near Lake Britton, 12 miles from Burney. The body was found late the next afternoon, clad in a nightgown with hands tied behind the back.

The State sought the death penalty against Proctor, charging him with murder and a number of special circumstances under § 190.2 including murder during the commission of a rape, murder during the commission of a burglary, and infliction of torture during a murder. The jury found Proctor guilty of murder and found the three special circumstances true. After a mistrial at the penalty phase, Proctor's motion for change of venue was granted, and a new sentencing jury was empaneled in Sacramento County. The trial judge instructed the jury to consider the sentencing factors specified in § 190.3. The jury was unanimous in sentencing Proctor to death.

Petitioners appealed to the Supreme Court of California, which affirmed their convictions and death sentences. No. 93-5131, 4 Cal. 4th 569, 842 P. 2d 1142 (1992), and No. 93-5161, 4 Cal. 4th 499, 842 P. 2d 1100 (1992). We granted certiorari, 510 U. S. 1010 (1993), and now affirm.

## II

## A

Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U. S. 584 (1977). To render a defendant eligible for the death penalty

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in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one “aggravating circumstance” (or its equivalent) at either the guilt or penalty phase. See, e.g., *Lowenfield v. Phelps*, 484 U. S. 231, 244–246 (1988); *Zant v. Stephens*, 462 U. S. 862, 878 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). *Lowenfield, supra*, at 244–246. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See *Arave v. Creech*, 507 U. S. 463, 474 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm”). Second, the aggravating circumstance may not be unconstitutionally vague. *Godfrey v. Georgia*, 446 U. S. 420, 428 (1980); see *Arave, supra*, at 471 (court “must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer”) (quoting *Walton v. Arizona*, 497 U. S. 639, 654 (1990)).

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. “What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.” *Zant, supra*, at 879; see also *Woodson v. North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion). That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. *Blystone v. Pennsylvania*, 494 U. S. 299, 307 (1990) (“requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all

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relevant mitigating evidence”); see *Johnson v. Texas*, 509 U. S. 350, 361 (1993).

The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to “make rationally reviewable the process for imposing a sentence of death.” *Arave, supra*, at 471 (internal quotation marks omitted). The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s culpability. The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. See *Romano v. Oklahoma, ante*, at 6 (referring to “two somewhat contradictory tasks”). There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision. See *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (procedures must “minimize the risk of wholly arbitrary and capricious action”). That is the controlling objective when we examine eligibility and selection factors for vagueness. Indeed, it is the reason that eligibility and selection factors (at least in some sentencing schemes) may not be “too vague.” *Walton, supra*, at 654; see *Maynard v. Cartwright*, 486 U. S. 356, 361–364 (1988).

Because “the proper degree of definition” of eligibility and selection factors often “is not susceptible of mathematical precision,” our vagueness review is quite deferential. *Walton, supra*, at 655; see *Gregg, supra*, at 193–194 (factors “are by necessity somewhat general”). Relying on the basic principle that a factor is not unconstitutional if it has some “common-sense core of meaning . . . that criminal juries should be capable of understanding,” *Jurek v. Texas*, 428 U. S. 262, 279 (1976) (White, J., concurring in judgment), we

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have found only a few factors vague, and those in fact are quite similar to one another. See *Maynard, supra*, at 363–364 (question whether murder was “especially heinous, atrocious, or cruel”); *Godfrey, supra*, at 427–429 (question whether murder was “outrageously or wantonly vile, horrible and inhuman”); cf. *Arave*, 507 U. S., at 472 (“We are not faced with pejorative adjectives . . . that describe a crime as a whole”). In providing for individualized sentencing, it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion. That is evident from the numerous factors we have upheld against vagueness challenges. See, e.g., *id.*, at 472–473 (question whether the defendant was a “cold-blooded, pitiless slayer” is not unconstitutionally vague); *Walton, supra*, at 654 (question whether “perpetrator inflict[ed] mental anguish or physical abuse before the victim’s death” with “[m]ental anguish includ[ing] a victim’s uncertainty as to his ultimate fate” is not unconstitutionally vague) (internal quotation marks omitted); *Proffitt v. Florida*, 428 U. S. 242, 255–258 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (various “mitigating” questions not unconstitutionally vague, nor is the question whether the crime was a “conscienceless or pitiless crime which [wa]s unnecessarily torturous to the victim”) (internal quotation marks omitted); *Jurek, supra*, at 274–276 (question “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is not unconstitutionally vague).

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process

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prohibited by *Furman v. Georgia*, 408 U. S. 238 (1972). See *Stringer v. Black*, 503 U. S. 222 (1992). Those concerns are mitigated when a factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter. See Cal. Penal Code Ann. §§ 190.3(a), (k) (West 1988). Both types of factors (and the distinction between the two is not always clear) have their utility. For purposes of vagueness analysis, however, in examining the propositional content of a factor, our concern is that the factor have some “common-sense core of meaning . . . that criminal juries should be capable of understanding.” *Jurek, supra*, at 279 (White, J., concurring in judgment).

## B

With those principles in mind, we consider petitioners’ vagueness challenge to the California scheme. A defendant in California is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the § 190.2 special circumstances true. See *California v. Ramos*, 463 U. S. 992, 1008 (1983) (jury found that “the defendant [fell] within the legislatively defined category of persons eligible for the death penalty [by] determining the truth of the alleged special circumstance,” commission of murder during the course of a robbery). (Petitioners do not argue that the special circumstances found in their cases were insufficient, so we do not address that part of California’s scheme save to describe its relation to the selection phase.) At the penalty phase, the jury is instructed to consider numerous other factors listed in § 190.3 in deciding whether to impose the death penalty on a particular defendant. Petitioners contend that three of those § 190.3 sentencing factors are unconstitutional and that, as a consequence, it was error to instruct their juries to consider them. Both Proctor and Tullaepa challenge factor (a), which requires the sentencer to consider the “circumstances of the crime of which the defendant was convicted in the present proceeding and the exist-

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ence of any special circumstances found to be true.” Tuilaepa challenges two other factors as well: factor (b), which requires the sentencer to consider “[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence”; and factor (i), which requires the sentencer to consider “[t]he age of the defendant at the time of the crime.” We conclude that none of the three factors is defined in terms that violate the Constitution.

Petitioners’ challenge to factor (a) is at some odds with settled principles, for our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. See, *e.g.*, *Woodson*, 428 U. S., at 304 (“[C]onsideration of . . . the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death”). We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

Tuilaepa also challenges factor (b), which requires the sentencer to consider the defendant’s prior criminal activity. The objection fails for many of the same reasons. Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact. Under other sentencing schemes, in Texas for example, jurors may be asked to make a predictive judgment, such as “whether there is a probability that the defendant would commit criminal acts of violence that would



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constitute a continuing threat to society.” See *Jurek*, 428 U. S., at 269. Both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process, however, and the States have considerable latitude in determining how to guide the sentencer’s decision in this respect. Here, factor (b) is not vague.

Tuilaepa’s third challenge is to factor (i), which requires the sentencer to consider “[t]he age of the defendant at the time of the crime.” This again is an unusual challenge in light of our precedents. See *Eddings v. Oklahoma*, 455 U. S. 104, 115–117 (1982) (age may be relevant factor in sentencing decision). The factual inquiry is of the most rudimentary sort, and there is no suggestion that the term “age” is vague. Petitioner contends, however, that the age factor is equivocal and that in the typical case the prosecution argues in favor of the death penalty based on the defendant’s age, no matter how old or young he was at the time of the crime. It is neither surprising nor remarkable that the relevance of the defendant’s age can pose a dilemma for the sentencer. But difficulty in application is not equivalent to vagueness. Both the prosecution and the defense may present valid arguments as to the significance of the defendant’s age in a particular case. Competing arguments by adversary parties bring perspective to a problem, and thus serve to promote a more reasoned decision, providing guidance as to a factor jurors most likely would discuss in any event. We find no constitutional deficiency in factor (i).

## C

Petitioners could not and do not take great issue with the conclusion that factors (a), (b), and (i) provide common and understandable terms to the sentencer. Cf. *Godfrey*, 446 U. S., at 429 (“jury’s interpretation of [outrageously or wantonly vile, horrible and inhuman factor] can only be the subject of sheer speculation”). Petitioners argue, however, that selection factors must meet the requirements for eligibility

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factors, Brief for Petitioner in No. 93–5161, pp. 10–25, and therefore must require an answer to a factual question, as eligibility factors do. According to petitioners, a capital jury may not be instructed simply to consider an open-ended subject matter, such as “the circumstances of the crime” or “the background of the defendant.” Apart from the fact that petitioners’ argument ignores the obvious utility of these open-ended factors as part of a neutral sentencing process, it contravenes our precedents. Our decisions in *Zant* and *Gregg* reveal that, at the selection stage, the States are not confined to submitting to the jury specific propositional questions. In *Zant*, we found no constitutional difficulty where the jury had been told to consider “‘all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense.’” 462 U. S., at 878–880, 889, n. 25. We also stated that “[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant’s prior criminal record in making its sentencing determination.” *Id.*, at 888. And in *Gregg*, we rejected a vagueness challenge to that same Georgia sentencing scheme in a case in which the “judge . . . charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.” 428 U. S., at 161, 203–204. In both cases, therefore, the Court found no constitutional problem with a death sentence where the jury instructions directed consideration of the “facts and circumstances” of the case. In these cases as well, we must reject petitioners’ suggestion that the Constitution prohibits sentencing instructions that require the trier of fact to consider a relevant subject matter such as the “circumstances of the crime.”

Petitioners also suggest that the § 190.3 sentencing factors are flawed because they do not instruct the sentencer how to

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weigh any of the facts it finds in deciding upon the ultimate sentence. In this regard, petitioners claim that a single list of factors is unconstitutional because it does not guide the jury in evaluating and weighing the evidence and allows the prosecution (as well as the defense) to make wide-ranging arguments about whether the defendant deserves the death penalty. This argument, too, is foreclosed by our cases. A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. In *California v. Ramos*, for example, we upheld an instruction informing the jury that the Governor had the power to commute life sentences and stated that “the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem.” 463 U. S., at 1008–1009, n. 22. Likewise, in *Proffitt v. Florida*, we upheld the Florida capital sentencing scheme even though “the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them.” 428 U. S., at 258. In *Gregg*, moreover, we “approved Georgia’s capital sentencing statute even though it clearly did not channel the jury’s discretion by enunciating specific standards to guide the jury’s consideration of aggravating and mitigating circumstances.” *Zant*, 462 U. S., at 875. We also rejected an objection “to the wide scope of evidence and argument” allowed at sentencing hearings. 428 U. S., at 203–204. In sum, “discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed” is not impermissible in the capital sentencing process. *McCleskey v. Kemp*, 481 U. S. 279, 315, n. 37 (1987). “Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.” *Ramos*, *supra*, at 1008. Indeed, the sentencer may be given “unbridled discretion in determining whether the death penalty should be

SOUTER, J., concurring

imposed after it has found that the defendant is a member of the class made eligible for that penalty.” *Zant, supra*, at 875; see also *Barclay v. Florida*, 463 U. S. 939, 948–951 (1983) (plurality opinion). In contravention of those cases, petitioners’ argument would force the States to adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors. The States are not required to conduct the capital sentencing process in that fashion. See *Gregg, supra*, at 199–200, n. 50.

The instructions to the juries in petitioners’ cases directing consideration of factor (a), factor (b), and factor (i) did not violate the Constitution. The judgments of the Supreme Court of California are

*Affirmed.*

JUSTICE SCALIA, concurring.

It is my view that once a State has adopted a methodology to narrow the eligibility for the death penalty, thereby ensuring that its imposition is not “freakish,” *Wainwright v. Goode*, 464 U. S. 78, 87 (1983) (*per curiam*), the distinctive procedural requirements of the Eighth Amendment have been exhausted. See *Walton v. Arizona*, 497 U. S. 639, 669–673 (1990) (SCALIA, J., concurring in part and concurring in judgment). Today’s decision adheres to our cases which acknowledge additional requirements, but since it restricts their further expansion it moves in the right direction. For that reason, and without abandoning my prior views, I join the opinion of the Court.

JUSTICE SOUTER, concurring.

I join the Court’s opinion because it correctly recognizes that factors adequate to perform the function of genuine narrowing, as well as factors that otherwise guide the jury in selecting which defendants receive the death penalty, are not

STEVENS, J., concurring in judgment

susceptible to mathematical precision; they must depend for their requisite clarity on embodying a “common-sense core of meaning,” as Justice White put it in *Jurek v. Texas*, 428 U. S. 262, 279 (1976) (concurring opinion). Taking factor (b) to be essentially propositional, as the Court uses the term, *ante*, at 974–975, I find it is sufficiently clear to pass muster; and I agree with the Court’s analysis of factor (i) and the challenged portion of factor (a), neither of which is framed as a proposition.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in the judgment.

As these cases come to us they present a question that the Court answered in *Zant v. Stephens*, 462 U. S. 862 (1983). California, like Georgia, has provided a procedure for determining whether a defendant found guilty of murder is eligible for the death penalty. Petitioners have not challenged the constitutionality of that procedure or its application in these cases. Accordingly, our decision rests on the same assumption that we made in *Zant*, namely, that the statutory procedure for determining eligibility adequately confines the class of persons eligible for the death penalty to a narrow category in which there is a special justification for “the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Id.*, at 877.

The question is whether, in addition to adequately narrowing the class of death-eligible defendants, the State must channel the jury’s sentencing discretion when it is deciding whether to impose the death sentence on an eligible defendant by requiring the trial judge to characterize relevant sentencing factors as aggravating or mitigating. In *Zant* we held that the incorrect characterization of a relevant factor as an aggravating factor did not prejudice the defendant; it follows, I believe, that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable.

STEVENS, J., concurring in judgment

Indeed, I am persuaded that references to such potentially ambiguous, but clearly relevant, factors actually reduces the risk of arbitrary capital sentencing.

Prior to the Court's decision in *Furman v. Georgia*, 408 U. S. 238 (1972), in a number of States the death penalty was authorized not only for all first-degree murders, but for less serious offenses such as rape, armed robbery, and kidnaping as well. Moreover, juries had virtually unbridled discretion in determining whether a human life should be taken or spared. The risk of arbitrary and capricious sentencing, specifically including the danger that racial prejudice would determine the fate of the defendant,\* persuaded a majority of the Court in *Furman* that such capital sentencing schemes were unconstitutional. The two principal protections against such arbitrary sentencing that have been endorsed in our subsequent jurisprudence focus, respectively, on the eligibility determination and the actual sentencing decision.

First, as CHIEF JUSTICE REHNQUIST writing for the Court in *Lowenfield v. Phelps*, 484 U. S. 231 (1988), succinctly stated: "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Id.*, at 244 (quoting *Zant v. Stephens*, 462 U. S., at 877). When only a narrow subclass of murderers can be subjected to the death penalty, the risk of cruel and unusual punishment—either because it is disproportionate to the severity of the offense or because its imposition may be influenced by unacceptable factors—is diminished. See *McCleskey v. Kemp*, 481 U. S. 279, 367 (1987) (STEVENS, J., dissenting). Because those risks can never be entirely eliminated, however, the Court has identified an ad-

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\*See Justice Douglas' concurring opinion, 408 U. S., at 249–251.

STEVENS, J., concurring in judgment

ditional safeguard to protect death-eligible defendants from the arbitrary imposition of the extreme penalty.

In *Lockett v. Ohio*, 438 U. S. 586, 602–605 (1978), Chief Justice Burger emphasized the importance of requiring the jury to make an individualized determination on the basis of the character of the individual and the circumstances of the crime. Insisting that the jury have an opportunity to consider all evidence *relevant* to a fair sentencing decision reduces the danger that they might otherwise rely on an irrelevant and improper consideration such as the race of the defendant. In *Zant*, even though the trial judge had incorrectly characterized the defendant’s prior history of “assaultive offenses” as a statutory aggravating circumstance, we found no constitutional error because the evidence supporting that characterization was relevant and admissible. 462 U. S., at 887–889. We made it clear, however, that it would be error for a State to attach the “aggravating” label to, or otherwise authorize the jury to draw adverse inferences from, “factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.” *Id.*, at 885.

The three penalty-phase factors in California’s statute that are challenged in these cases do not violate that command. Matters such as the age of the defendant at the time of the crime, the circumstances of the crime, and the presence or absence of force or violence are, in my opinion, relevant to an informed, individualized sentencing decision. Under *Lockett*, the defendant has a right to have the sentencer consider favorable evidence on each of these subjects, and under *Zant* it is permissible for the prosecutor to adduce unfavorable evidence on the same subjects. If, as we held in *Zant*, it is not constitutional error for the trial judge to place an incorrect label on the prosecutor’s evidence, it necessarily follows that refusing to characterize ambiguous evidence as

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mitigating or aggravating is also constitutionally permissible. Indeed, as I have indicated, I think the identification of additional factors that are relevant to the sentencing decision reduces the danger that a juror may vote in favor of the death penalty because he or she harbors a prejudice against a class of which the defendant is a member.

Accordingly, given the assumption (unchallenged by these petitioners) that California has a statutory “scheme” that complies with the narrowing requirement defined in *Lowenfield v. Phelps*, 484 U. S., at 244, I conclude that the sentencing factors at issue in these cases are consistent with the defendant’s constitutional entitlement to an individualized “determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would vacate petitioners’ death sentences. Even if I did not hold this view, I would find that the three challenged factors do not withstand a meaningful vagueness analysis because “as a practical matter [they] fail to guide the sentencer’s discretion.” *Stringer v. Black*, 503 U. S. 222, 235 (1992).

I

A

The California capital punishment scheme does more than simply direct the sentencing jurors’ attention to certain subject matters. It lists 11 factors and authorizes the jury to treat any of them as aggravating circumstances to be placed on death’s side of the scale. Jurors are instructed that they “shall impose a death sentence if [they] conclud[e] that the aggravating circumstances outweigh the mitigating circumstances.” Cal. Penal Code Ann. §190.3 (West 1988). De-



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spite the critical—even decisive—role these factors play in the determination of who actually receives the death penalty, jurors are given no guidance in how to consider them. We have stated: “A vague aggravating factor used in the weighing process . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.” *Stringer*, 503 U. S., at 235.

The majority introduces a novel distinction between “propositional” and “nonpropositional” aggravating circumstances. *Ante*, at 974. The majority acknowledges that the “distinction between the two is not always clear,” *ante*, at 975; I find it largely illusory. The Court suggests, but does not make explicit, that propositional factors are those that “require a yes or a no answer to a specific question,” while nonpropositional factors are those that “only poin[t] the sentencer to a subject matter.” *Ibid.* Presumably, then, asking the jury whether “the murder was especially heinous, atrocious, or cruel” would be a propositional aggravator, while directing the sentencer to “the presence or absence of any especial heinousness, atrocity, or cruelty” would be a nonpropositional factor. I am at a loss to see how the mere rephrasing does anything more to channel or guide jury discretion. Nor does this propositional/nonpropositional distinction appear to play any role in the Court’s decision. The Court nowhere discloses specifically where the line is drawn, on which side of it the three challenged factors fall, and what relevance, if any, this distinction should have to the Court’s future vagueness analysis.<sup>1</sup>

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<sup>1</sup>Nor does it matter for Eighth Amendment purposes that California uses one set of factors (the § 190.2 “special circumstances”) to determine eligibility and another set (the § 190.3 “relevant factors”) in the weighing or selection process. Whether an aggravator is used for narrowing, or for weighing, or for both, it cannot be impermissibly vague. See *Arave v. Creech*, 507 U. S. 463 (1993) (vagueness analysis applied to aggravating factor, even though remaining aggravating factor made defendant death

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The more relevant distinction is not how an aggravating factor is presented, but what the sentencer is told to do with it. Where, as in Georgia, “aggravating factors as such have no specific function in the jury’s decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case,” *Stringer*, 503 U. S., at 229–230, we have not subjected aggravating circumstances to a vagueness analysis. See *Zant v. Stephens*, 462 U. S. 862, 873–874 (1983). In California, by contrast, where the sentencer is instructed to weigh the aggravating and mitigating circumstances, a vague aggravator creates the risk of an arbitrary thumb on death’s side of the scale, so we analyze aggravators for clarity, objectivity, and principled guidance. See *Maynard v. Cartwright*, 486 U. S. 356 (1988); *Godfrey v. Georgia*, 446 U. S. 420 (1980); see also *Pensing v. California*, 502 U. S. 930, 931 (1991) (O’CONNOR, J., dissenting from denial of certiorari) (observing that California, like Mississippi, “requires its juries to weigh aggravating and mitigating circumstances”); *Stringer*, 503 U. S., at 231 (difference between “nonweighing” States like Georgia and “weighing” States like California is “not one of ‘semantics’”) (citation omitted).

Each of the challenged California factors “leave[s] the sentencer without sufficient guidance for determining the presence or absence of the factor.” *Espinosa v. Florida*, 505 U. S. 1079, 1081 (1992). Each of the three—circumstances of the crime, age, and prior criminal activity—has been exploited to convince jurors that just about anything is aggravating.

Prosecutors have argued, and jurors are free to find, that “circumstances of the crime” constitutes an aggravating factor because the defendant killed the victim for some purport-

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eligible); *Sochor v. Florida*, 504 U. S. 527 (1992) (same); *Walton v. Arizona*, 497 U. S. 639 (1990) (same). The Court recognizes as much by subjecting the challenged factors to a vagueness analysis.

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edly aggravating motive, such as money,<sup>2</sup> or because the defendant killed the victim for no motive at all;<sup>3</sup> because the defendant killed in cold blood,<sup>4</sup> or in hot blood;<sup>5</sup> because the defendant attempted to conceal his crime,<sup>6</sup> or made no attempt to conceal it;<sup>7</sup> because the defendant made the victim endure the terror of anticipating a violent death,<sup>8</sup> or because the defendant killed without any warning;<sup>9</sup> and because the defendant had a prior relationship with the victim,<sup>10</sup> or because the victim was a complete stranger.<sup>11</sup> Similarly, prosecutors have argued, and juries are free to find, that the age of the victim was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;<sup>12</sup> or that the method of killing was aggravating, because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;<sup>13</sup> or that the location of

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<sup>2</sup> *People v. Howard*, Cal. Sup. Ct. No. S004452, Brief for California Appellate Project as *Amicus Curiae* 14, n. 9, 17, n. 29 (hereinafter *Amicus Brief*).

<sup>3</sup> *People v. Edwards*, Cal. Sup. Ct. No. S004755, *id.*, at 15, n. 13, 17, n. 29.

<sup>4</sup> *People v. Visciotti*, Cal. Sup. Ct. No. S004597, *id.*, at 15, n. 15.

<sup>5</sup> *People v. Jennings*, Cal. Sup. Ct. No. S004754, *id.*, at 15, n. 16.

<sup>6</sup> *People v. Benson*, Cal. Sup. Ct. No. S004763, *id.*, at 15, n. 17.

<sup>7</sup> *People v. Morales*, Cal. Sup. Ct. No. S004552, *id.*, at 15, n. 18.

<sup>8</sup> *People v. Webb*, Cal. Sup. Ct. No. S006938, *id.*, at 16, n. 19.

<sup>9</sup> *People v. Freeman*, Cal. Sup. Ct. No. S004787, *id.*, at 18, n. 31.

<sup>10</sup> *People v. Padilla*, Cal. Sup. Ct. No. S0144964, *id.*, at 16, n. 25.

<sup>11</sup> *People v. Anderson*, Cal. Sup. Ct. No. S004385, *id.*, at 16, n. 26.

<sup>12</sup> *People v. Deere*, Cal. Sup. Ct. No. S004722, *id.*, at 17, n. 27 (victims were two and six); *People v. Bonin*, Cal. Sup. Ct. No. S004565, *ibid.* (victims were adolescents); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, *ibid.* (victim was 20); *People v. Phillips*, 41 Cal. 3d 29, 63, 711 P. 2d 423, 444 (1985) (26-year-old victim was “in the prime of his life”); *People v. Melton*, Cal. Sup. Ct. No. S004518, *Amicus Brief* 17, n. 27 (victim was 77).

<sup>13</sup> *People v. Clair*, Cal. Sup. Ct. No. S004789, *id.*, at 17, n. 28 (strangulation); *People v. Kipp*, Cal. Sup. Ct. No. S004784, *ibid.* (same); *People v. Fauber*, Cal. Sup. Ct. No. S005868, *ibid.* (use of an axe); *People v. Benson*, Cal. Sup. Ct. No. S004763, *ibid.* (use of a hammer); *People v. Cain*, Cal. Sup. Ct. No. S006544, *ibid.* (use of a club); *People v. Jackson*, Cal. Sup. Ct. No. S010723, *ibid.* (use of a gun); *People v. Reilly*, Cal. Sup. Ct.

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the killing was an aggravating factor, because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.<sup>14</sup> In short, because neither the California Legislature nor the California courts ever have articulated a limiting construction of this term, prosecutors have been permitted to use the “circumstances of the crime” as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide—something this Court condemned in *Godfrey v. Georgia*, 446 U. S. 420 (1980). See *Maynard v. Cartwright*, 486 U. S., at 363 (the Court “plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty”).<sup>15</sup>

The defendant’s age as a factor, applied inconsistently and erratically, similarly fails to channel the jurors’ discretion. In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age: in their teens, twenties, thirties, forties, and fifties at the time of the

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No. S004607, *ibid.* (stabbing); *People v. Scott*, Cal. Sup. Ct. No. S010334, *ibid.* (fire).

<sup>14</sup>*People v. Anderson*, Cal. Sup. Ct. No. S004385, *id.*, at 18, n. 31 (victim’s home); *People v. Freeman*, Cal. Sup. Ct. No. S004787, *ibid.* (public bar); *People v. Ashmus*, Cal. Sup. Ct. No. S004723, *ibid.* (city park); *People v. Carpenter*, Cal. Sup. Ct. No. S004654, *ibid.* (forested area); *People v. Comtois*, Cal. Sup. Ct. No. S017116, *ibid.* (remote, isolated location).

<sup>15</sup>Although we have required that jurors be allowed to consider “*as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,” *Lockett v. Ohio*, 438 U. S. 586, 604 (1978) (emphasis in original), we have never approved such unrestricted consideration of a circumstance in aggravation. Similarly, while we approved the Georgia capital sentencing scheme, which permits jurors to consider all the circumstances of the offense and the offender, we did so in the context of a system in which aggravators performed no function beyond the eligibility decision. See *Zant v. Stephens*, 462 U. S. 862, 873–874 (1983).

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crime.<sup>16</sup> Far from applying any narrowing construction, the California Supreme Court has described age as a “metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty.” *People v. Lucky*, 45 Cal. 3d 259, 302, 753 P. 2d 1052, 1080 (1988), cert. denied, 488 U. S. 1034 (1989).

Nor do jurors find meaningful guidance from “the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence.” Although the California Supreme Court has held that “criminal” is “limited to conduct *that violates a penal statute*,” *People v. Wright*, 52 Cal. 3d 367, 425, 802 P. 2d 221, 259 (1990) (emphasis in original), and that “force or violence” excludes violence to property, *People v. Boyd*, 38 Cal. 3d 762, 700 P. 2d 782 (1985), that court has not required such an instruction, and petitioner Tuilaepa’s jurors were not so instructed. This left the prosecution free to introduce evidence of “trivial incidents of misconduct and ill temper,” *id.*, at 774, 700 P. 2d, at 791, and left the jury free to find an aggravator on that basis.<sup>17</sup>

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<sup>16</sup> See, e. g., *People v. Williams*, Cal. Sup. Ct. No. S004522, *id.*, at 20, n. 34 (teens); *People v. Avena*, Cal. Sup. Ct. No. S004422, *ibid.* (teens); *People v. Bean*, 46 Cal. 3d 919, 952, n. 18, 760 P. 2d 996, 1017, n. 18 (1988) (age 20); *People v. Coleman*, 48 Cal. 3d 112, 153–154, 768 P. 2d 32, 55–56 (1989) (age 22), cert. denied, 494 U. S. 1038 (1990); *People v. Gonzalez*, 51 Cal. 3d 1179, 1233, 800 P. 2d 1159, 1187 (1990) (age 31), cert. denied, 502 U. S. 835 (1991); *People v. McLain*, 46 Cal. 3d 97, 111–112, 757 P. 2d 569, 576–577 (1988) (age 41), cert. denied, 489 U. S. 1072 (1989); *People v. Douglas*, 50 Cal. 3d 468, 538, 788 P. 2d 640, 681 (1990) (age 56), cert. denied, 498 U. S. 1110 (1991).

<sup>17</sup> Even with the limiting construction, “prior criminal activity involving force or violence” is far more open ended than factors invalidated by other state courts as vague or subjective. See, e. g., *Arnold v. State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976) (invalidating aggravating circumstance that the “murder . . . was committed by a person . . . who has a substantial history of serious assaultive convictions”); *State v. David*, 468

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No less a danger is that jurors—or even judges—will treat the mere absence of a mitigator as an aggravator, transforming a neutral or factually irrelevant factor into an illusory aggravator.<sup>18</sup> Although the California Supreme Court has ruled that certain of the factors can serve only as mitigators,<sup>19</sup> it has not required that the jury be so instructed. See, e. g., *People v. Raley*, 2 Cal. 4th 870, 919, 830 P. 2d 712, 744–745 (1992), cert. denied, 507 U. S. 945 (1993). Nor has that court restricted jury instructions to those aggravating

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So. 2d 1126, 1129–1130 (La. 1985) (invalidating aggravating circumstance of “significant” history of criminal conduct).

<sup>18</sup> Judges, as well as juries, have fallen into this trap. See, e. g., *People v. Kaurish*, 52 Cal. 3d 648, 717, 802 P. 2d 278, 316 (1990) (trial judge concluded that factor (h), dealing with a defendant’s impaired capacity to appreciate the criminality of his actions, was an aggravating factor because defendant did not have diminished capacity or other impairment), cert. denied, 502 U. S. 837 (1991); *People v. Hamilton*, 48 Cal. 3d 1142, 1186, 774 P. 2d 730, 757 (1989) (trial court concluded that 10 of 11 factors were aggravating, including factors (d)–(h) and (j)), cert. denied, 494 U. S. 1039 (1990).

<sup>19</sup> The factors that can serve only as mitigators are:

“(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

“(e) Whether or not the victim was a participant in the defendant’s homicidal act or consented to the homicidal act.

“(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

“(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

“(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease and defect, or the [e]ffects of intoxication.

“(i) The age of the defendant at the time of the crime.

“(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.”

Cal. Penal Code Ann. §190.3 (West 1988); see also *Amicus* Brief 22–24, and nn. 47, 48, and cases cited therein.

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factors that are factually relevant to the case.<sup>20</sup> Clearly, some of the mitigating circumstances are so unusual that treating their absence as an aggravating circumstance would make them applicable to virtually all murderers. See *People v. Davenport*, 41 Cal. 3d 247, 289, 710 P. 2d 861, 888 (1985) (most murder cases present the absence of the mitigating circumstances of moral justification and victim participation). An aggravating factor that exists in nearly every capital case fails to fulfill its purpose of guiding the jury in distinguishing “those who deserve capital punishment from those who do not.” *Arave v. Creech*, 507 U. S. 463, 474 (1993). Moreover, a process creating the risk that the absence of mitigation will count as aggravation artificially inflates the number of aggravating factors the jury weighs, “creat[ing] the possibility not only of randomness but also of bias in favor of . . . death.” *Stringer v. Black*, 503 U. S., at 236.

In short, open-ended factors and a lack of guidance to regularize the jurors’ application of these factors create a system in which, as a practical matter, improper arguments can be made in the courtroom and credited in the jury room. I am at a loss to see how these challenged factors furnish the “‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Walton v. Arizona*, 497 U. S. 639, 651 (1990) (SCALIA, J., concurring in part and dissenting in part), quoting *Godfrey v. Georgia*, 446 U. S., at 428 (some internal quotation marks omitted).

## B

One of the greatest evils of leaving jurors with largely unguided discretion is the risk that this discretion will be

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<sup>20</sup> Although the trial judge at petitioner Tuilaepa’s trial instructed the jury on only those factors that were factually relevant, the jury at petitioner Proctor’s trial was instructed on all of the factors in § 190.3. The prosecutor argued that 9 of the 11 factors were aggravating. Brief for Petitioner in No. 93–5161, pp. 4–5.

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exercised on the basis of constitutionally impermissible considerations—primary among them, race. Racial prejudice is “the paradigmatic capricious and irrational sentencing factor.” *Graham v. Collins*, 506 U. S. 461, 484 (1993) (THOMAS, J., concurring). In part to diminish the danger that a sentencer will “attac[h] the ‘aggravating’ label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process,” *Zant v. Stephens*, 462 U. S., at 885, this Court has required that a sentencer’s discretion be curbed and informed by “clear and objective standards,” *Gregg v. Georgia*, 428 U. S. 153, 198 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (internal quotation marks omitted).

Because the “circumstances of the crime” factor lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb to either overt or subtle racial impulses or appeals. This risk is not merely theoretical. For far too many jurors, the most important “circumstances of the crime” are the race of the victim or the defendant. See *McCleskey v. Kemp*, 481 U. S. 279, 320 (1987) (Brennan, J., dissenting); see also General Accounting Office, Report to Senate and House Committees on the Judiciary, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Feb. 1990) (surveying and synthesizing studies and finding a “remarkably consistent” conclusion that the race of the victim influenced the likelihood of being charged with capital murder or receiving the death penalty in 82% of cases), reprinted at 136 Cong. Rec. 12267–12268 (1990).

The California capital sentencing scheme does little to minimize this risk. The “circumstances of the crime” factor may be weighed in aggravation in addition to the applicable special circumstances. Cal. Penal Code Ann. § 190.3(a) (West 1988) (the trier of fact shall take into account “[t]he circumstances of the crime of which the defendant was convicted in the present proceeding *and* the existence of any special circumstances found to be true”) (emphasis added).



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The special circumstances themselves encompass many of the factors generally recognized as aggravating, including multiple-murder convictions; commission of the murder in relation to another felony; the “especially heinous, atrocious, or cruel” nature of the murder; and the relevant identity of the victim (as a law enforcement officer, a witness to a crime, a judge, a prosecutor, or a public official). The statute, therefore, invites the jurors to speculate about, and give aggravating weight to, unspecified circumstances apart from these.

Nor has the California Supreme Court attempted to limit or guide this ranging inquiry. Far from it. That court has concluded that the “circumstances of the crime” factor extends beyond “merely the immediate temporal and spatial circumstances of the crime,” *People v. Edwards*, 54 Cal. 3d 787, 833, 819 P. 2d 436, 465 (1991), and leaves “the sentencer free to evaluate the evidence in accordance with his or her own subjective values,” *People v. Tuilaepa*, 4 Cal. 4th 569, 595, 842 P. 2d 1142, 1158 (1992) (case below). The court has even warned that it has not yet “explore[d] the outer reaches of the evidence admissible as a circumstance of the crime.” *People v. Edwards*, 54 Cal. 3d, at 835, 819 P. 2d, at 467. Thus, the “unique opportunity for racial prejudice to operate but remain undetected,” *Turner v. Murray*, 476 U. S. 28, 35 (1986), exists unchecked in the California capital sentencing scheme. This does not instill confidence in the jury’s decision to impose the death penalty on petitioner Tuilaepa, who is Samoan, and whose victim was white.

## II

Although the Court today rejects a well-founded facial challenge to 3 of the 11 factors that permit California jurors to select from among capital defendants those who will receive the death penalty, it has not given the California system a clean bill of health. Its unwillingness to conclude that these factors are valid on their face leaves the door open to a challenge to the application of one of these factors in such

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a way that the risk of arbitrariness is realized.<sup>21</sup> The cases before us, for example, do not clearly present a situation in which the absence of a mitigator was treated as an aggravator.

Additionally, the Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance."<sup>22</sup> By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing. See *Zant v. Stephens*, 462 U. S. 862 (1983).

Of particular significance, the Court's consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components—the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review—and whether their end result satisfies the Eighth Amendment's commands. The Court's treatment today of the relevant factors as "selection factors" alone rests on the

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<sup>21</sup> Such a challenge would require something more than merely pointing to others who committed similar offenses and did not receive the death penalty, *Lewis v. Jeffers*, 497 U. S. 764 (1990), but it is not hard to imagine more pronounced erratic outcomes.

<sup>22</sup> The special circumstances include premeditated and deliberate murder; felony murder based on nine felonies; the infliction of torture; that the murder was especially heinous, atrocious, or cruel; that the victim was killed because of his race, religion, or ethnic origin; and the identity of the victim, including that he was a peace officer, a federal law enforcement officer, a firefighter, a witness to a crime, a prosecutor or assistant prosecutor, a former or current local, state, or federal judge, or an elected or appointed local, state, or federal official. Cal. Penal Code Ann. §190.2 (West 1988).

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assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors.

Similarly, in *Pulley v. Harris*, 465 U. S. 37, 51 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," thereby "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, quoting *Harris v. Pulley*, 692 F. 2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

In summary, the Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it.

### III

For two decades now, the Court has professed a commitment to guiding sentencers' discretion so as to "minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia*, 428 U. S., at 189 (joint opinion of Stewart, Powell, and STEVENS, JJ.), and to achieve principled distinctions between those who receive the death penalty and those who do not, see, e. g., *Espinosa v. Florida*, 505 U. S. 1079 (1992); *Shell v. Mississippi*, 498 U. S. 1 (1990); *Maynard v. Cart-*

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*wright*, 486 U. S. 356 (1988). The Court's approval today of these California relevant factors calls into question the continued strength of that commitment. I respectfully dissent.

## Syllabus

JOHNSON, SPEAKER OF THE FLORIDA HOUSE  
OF REPRESENTATIVES, ET AL. *v.*  
DE GRANDY ET AL.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA

No. 92-519. Argued October 4, 1993—Decided June 30, 1994\*

In these consolidated cases, a group of Hispanic voters, a group of black voters, and the Federal Government claim that Florida's reapportionment plan for the State's single-member Senate and House districts (SJR 2-G) unlawfully dilutes the voting strength of Hispanics and blacks in the Dade County area, in violation of §2 of the Voting Rights Act of 1965. The State Supreme Court, in a review required by the State Constitution, declared the plan valid under federal and state law, while acknowledging that time constraints precluded full review and authorizing any interested party to bring a §2 challenge in that court. The plaintiffs chose, however, to pursue their claims in federal court. A three-judge District Court reviewed the totality of circumstances as required by §2 and *Thornburg v. Gingles*, 478 U.S. 30, and concluded that the three *Gingles* preconditions for establishing dilution were satisfied, justifying a finding of vote dilution. Specifically, the court found that voting proceeded largely along racial lines, producing a system of "tripartite politics"; that Hispanics in the Dade County area could constitute a majority in 11 House and 4 Senate districts, but that SJR 2-G had created only 9 House and 3 Senate districts with Hispanic majorities; that an additional majority-black Senate district could have been drawn; and that Florida's minorities had suffered historically from official discrimination, the social, economic, and political effects of which they continued to feel. The court imposed a remedial plan with 11 majority-Hispanic House districts but, concluding that the remedies for blacks and Hispanics in the senatorial districts were mutually exclusive, left SJR 2-G's Senate districts in force.

*Held:*

1. The District Court properly refused to give preclusive effect to the State Supreme Court's decision validating SJR 2-G. Pp. 1004-1006.

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\*Together with No. 92-593, *De Grandy et al. v. Johnson, Speaker of the Florida House of Representatives, et al.*, and No. 92-767, *United States v. Florida*, also on appeal from the same court.

## Syllabus

2. There is no violation of §2 in SJR 2–G’s House districts, where in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of House districts roughly proportional to their respective shares in the voting-age population. While such proportionality is not dispositive, it is a relevant fact in the totality of circumstances to be analyzed when determining whether minority voters have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,” 42 U. S. C. §1973(b). Pp. 1006–1022.

(a) This Court assumes without deciding that the first *Gingles* factor has been satisfied in these cases. Pp. 1008–1009.

(b) While proof of the *Gingles* factors is necessary to make out a claim that a set of district lines violates §2, it is not necessarily sufficient. Rather, a court must assess the probative significance of the *Gingles* factors after considering all circumstances with arguable bearing on the issue of equal political opportunity. Here, the court misjudged the relative importance of the *Gingles* factors and of historical discrimination by equating dilution where these had been found with failure to maximize the number of majority-minority districts. Dilution cannot be inferred from the mere failure to guarantee minority voters maximum political influence. Pp. 1009–1017.

(c) Ruling as the State proposes, that as a matter of law no dilution occurs whenever proportionality exists, would likewise provide a bright-line decisional rule only in derogation of the statutory text. While proportionality is an indication that minority voters have equal political and electoral opportunity in spite of racial polarization, it is no guarantee, and it cannot serve as a shortcut to determining whether a set of districts unlawfully dilutes minority voting strength. Pp. 1017–1021.

(d) This Court need not reach the United States’ argument that proportionality should be assessed only on a statewide basis in cases challenging districts for electing a body with statewide jurisdiction. The argument would recast this litigation as it comes before the Court, for up until now the dilution claims have been litigated not on a statewide basis, but on a smaller geographical scale. Pp. 1021–1022.

3. The District Court’s decision to leave undisturbed the State’s plan for Senate districts was correct. However, in reaching its decision, the court once again misapprehended the legal test for vote dilution. As in the case of the House districts, the totality of circumstances appears not to support a finding of dilution in the Senate districts. Pp. 1023–1024.

815 F. Supp. 1550, affirmed in part and reversed in part.

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SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, and GINSBURG, JJ., joined, and in all but Parts III-B-2, III-B-4, and IV of which KENNEDY, J., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 1025. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 1026. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 1031.

*Joel I. Klein* argued the cause for appellants in No. 92-519 and appellees in Nos. 92-593 and 92-767. With him on the brief for appellees in Nos. 92-593 and 92-767 were *Stephen N. Zack, Keith E. Hope, Richard E. Doran, George L. Waas, and Gerald B. Curington*. *Donald B. Verrilli, Jr., Scott A. Sinder, Kevin X. Crowley, James A. Peters*, and Messrs. Doran, Waas, and Curington filed briefs for appellants in No. 92-519.

*James A. Feldman* argued the cause for the United States in all cases. With him on the briefs were *Solicitor General Days, Acting Solicitor General Bryson, Acting Assistant Attorney General Turner, Acting Deputy Solicitor General Kneedler, and Jessica Dunsay Silver*.

*C. Allen Foster* argued the cause for appellees in No. 92-519 and appellants in No. 92-593. With him on the briefs were *Robert N. Hunter, Jr., Benjamin L. Ginsberg, Marshall R. Hurley, E. Thom Rumberger, and George N. Meros, Jr. E. Barrett Prettyman, Jr., John C. Keeney, Jr., Charles G. Burr, Dennis Courtland Hayes, and Willie Abrams* filed a brief in all cases for appellee Florida State Conference of NAACP Branches.†

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†*Marc D. Stern, Lois C. Waldman, and Richard F. Wolfson* filed a brief for the American Jewish Congress et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Lawyers' Committee for Civil Rights Under Law by *Herbert M. Wachtell, William H. Brown III, Thomas J. Henderson, Frank R. Parker, and Brenda Wright*; and for the Mexican American Legal Defense and Educational Fund et al. by *Kenneth Kimerling, Arthur A. Baer, Antonia Hernandez, and Judith Sanders-Castro*.

[Footnote † is continued on p. 1000]

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JUSTICE SOUTER delivered the opinion of the Court.

These consolidated cases are about the meaning of vote dilution and the facts required to show it, when §2 of the Voting Rights Act of 1965 is applied to challenges to single-member legislative districts. See 79 Stat. 437, as amended, 42 U.S.C. §1973. We hold that no violation of §2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Ibid.*

## I

On the first day of Florida's 1992 legislative session, a group of Hispanic voters including Miguel De Grandy (De Grandy plaintiffs) complained in the United States District Court against the speaker of Florida's House of Representatives, the president of its Senate, the Governor, and other state officials (State). The complainants alleged that the districts from which Florida voters had chosen their state senators and representatives since 1982 were malapportioned, failing to reflect changes in the State's population during the ensuing decade. The State Conference of NAACP Branches and individual black voters (NAACP

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Briefs of *amici curiae* were filed for Grant Woods, Attorney General of Arizona, et al. by *Christopher D. Cerf*; and for the Anti-Defamation League of B'nai B'rith by *Chesterfield Smith, David E. Cardwell, Scott D. Makar, and Steven M. Freeman.*



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plaintiffs) filed a similar suit, which the three-judge District Court consolidated with the De Grandy case.<sup>1</sup>

Several months after the first complaint was filed, on April 10, 1992, the state legislature adopted Senate Joint Resolution 2-G (SJR 2-G), providing the reapportionment plan currently at issue. The plan called for dividing Florida into 40 single-member Senate, and 120 single-member House, districts based on population data from the 1990 census. As the Constitution of Florida required, the state attorney general then petitioned the Supreme Court of Florida for a declaratory judgment that the legislature's apportionment plan was valid under federal and state law. See Fla. Const., Art. III, §16(c). The court so declared, while acknowledging that state constitutional time constraints precluded full review for conformity with §2 of the Voting Rights Act and recognizing the right of any interested party to bring a §2 challenge to the plan in the Supreme Court of Florida. See *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285-286 (1992).<sup>2</sup>

The De Grandy and NAACP plaintiffs responded to SJR 2-G by amending their federal complaints to charge the new

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<sup>1</sup>The complaints also challenged Florida's congressional districts, but that element of the litigation has been resolved separately, see *De Grandy v. Wetherell*, 794 F. Supp. 1076 (ND Fla. 1992) (three-judge court), and without appeal.

<sup>2</sup>In an additional step not directly relevant to this appeal, the State submitted SJR 2-G to the Department of Justice for preclearance pursuant to 42 U.S.C. §1973c (§5 of the Voting Rights Act of 1965). Five Florida counties, but not Dade County, are subject to preclearance. *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1574 (ND Fla. 1992). When the Attorney General of the United States refused to preclear the plan's Senate districts for the Hillsborough County area and the state legislature refused to revise the plan, the Supreme Court of Florida ordered the adjustments necessary to obtain preclearance, 601 So. 2d 543 (1992); it is the version of SJR 2-G so adjusted that is at issue in this litigation. 815 F. Supp., at 1557-1558.

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reapportionment plan with violating §2.<sup>3</sup> They claimed that SJR 2–G “unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process,” and they pointed to areas around the State where black or Hispanic populations could have formed a voting majority in a politically cohesive, reasonably compact district (or in more than one), if SJR 2–G had not fragmented each group among several districts or packed it into just a few. *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1559–1560 (ND Fla. 1992).

The Department of Justice filed a similar complaint, naming the State of Florida and several elected officials as defendants and claiming that SJR 2–G diluted the voting strength of blacks and Hispanics in two parts of the State in violation of §2. The Government alleged that SJR 2–G diluted the votes of the Hispanic population in an area largely covered by Dade County (including Miami) and the black population in an area covering much of Escambia County (including Pensacola).<sup>4</sup> App. 75. The District Court consolidated this action with the other two and held a 5-day trial, followed immediately by an hours-long hearing on remedy.

At the end of the hearing, on July 1, 1992, the District Court ruled from the bench. It held the plan’s provisions for state House districts to be in violation of §2 because “more than [SJR 2–G’s] nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters,” and it imposed a remedial plan offered by the De Grandy plaintiffs calling for 11 majority-Hispanic House dis-

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<sup>3</sup>The complaints also alleged violation of Art. I, §2, and the Fourteenth and Fifteenth Amendments of the United States Constitution, but these claims were later dismissed voluntarily.

<sup>4</sup>The Voting Rights Act of 1965 and constitutional claims as to the Escambia County area were settled by the parties and are not at issue in this appeal.

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tricts. App. to Juris. Statement 2a, 203a. As to the Senate, the court found that a fourth majority-Hispanic district could be drawn in addition to the three provided by SJR 2-G, but only at the expense of black voters in the area. *Id.*, at 202a; 815 F. Supp., at 1560. The court was of two minds about the implication of this finding, once observing that it meant the legislature's plan for the Senate was a violation of §2 but without a remedy, once saying the plan did not violate §2 at all.<sup>5</sup> In any event, it ordered elections to be held using SJR 2-G's senatorial districts.

In a later, expanded opinion the court reviewed the totality of circumstances as required by §2 and *Thornburg v. Gingles*, 478 U. S. 30 (1986). In explaining Dade County's "tripartite politics," in which "ethnic factors . . . predominate over all other[s] . . .," 815 F. Supp., at 1572, the court found political cohesion within each of the Hispanic and black populations but none between the two, *id.*, at 1569, and a tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates except in a dis-

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<sup>5</sup>The court's judgment filed July 2, 1992, App. to Juris. Statement 5a, said SJR 2-G's state senatorial districts "do not violate Section 2," but its subsequent opinion explaining the judgment said the senatorial districts do indeed violate §2, and that its earlier language "should be read as holding that the Florida Senate plan does not violate Section 2 *such that a different remedy must be imposed.*" 815 F. Supp., at 1582 (emphasis added).

Any conflict in these two formulations is of no consequence here. "This Court 'reviews judgments, not statements in opinions,'" *California v. Rooney*, 483 U. S. 307, 311 (1987) (*per curiam*) (quoting *Black v. Cutter Laboratories*, 351 U. S. 292, 297 (1956)), and the De Grandy plaintiffs and the United States have appealed the failure of the District Court to provide relief for alleged §2 violations in SJR 2-G's senatorial districts. The State is entitled to "urge any grounds which would lend support to the judgment below," *Dayton Bd. of Ed. v. Brinkman*, 433 U. S. 406, 419 (1977), including the argument it makes here that the District Court was correct not to impose a remedy different from SJR 2-G because the State's reapportionment plan did not violate §2.

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trict where a given minority makes up a voting majority,<sup>6</sup> *id.*, at 1572. The court further found that the nearly one million Hispanics in the Dade County area could be combined into 4 Senate and 11 House districts, each one relatively compact and with a functional majority of Hispanic voters, *id.*, at 1568–1569, whereas SJR 2–G created fewer majority-Hispanic districts; and that one more Senate district with a black voting majority could have been drawn, *id.*, at 1576. Noting that Florida’s minorities bore the social, economic, and political effects of past discrimination, the court concluded that SJR 2–G impermissibly diluted the voting strength of Hispanics in its House districts and of both Hispanics and blacks in its Senate districts. *Id.*, at 1574. The findings of vote dilution in the senatorial districts had no practical effect, however, because the court held that remedies for the blacks and the Hispanics were mutually exclusive; it consequently deferred to the state legislature’s work as the “fairest” accommodation of all the ethnic communities in south Florida. *Id.*, at 1580.

We stayed the judgment of the District Court, 505 U. S. 1232 (1992), and noted probable jurisdiction, 507 U. S. 907 (1993).

## II

Before going to the issue at the heart of these cases, we need to consider the District Court’s refusal to give preclusive effect to the decision of the State Supreme Court validating SJR 2–G. The State argues that the claims of the De Grandy plaintiffs should have been dismissed as *res judicata* because they had a full and fair opportunity to litigate vote dilution before the State Supreme Court, see *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d, at 285. The premise, how-

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<sup>6</sup>The Court recognizes that the terms “black,” “Hispanic,” and “white” are neither mutually exclusive nor collectively exhaustive. We follow the practice of the District Court in using them as rough indicators of south Florida’s three largest racial and linguistic minority groups.

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ever, is false, exaggerating the review afforded the De Grandy plaintiffs in the state court and ignoring that court's own opinion of its judgment's limited scope. Given the state constitutional mandate to review apportionment resolutions within 30 days, see Fla. Const., Art. III, § 16(c), the Supreme Court of Florida accepted briefs and evidentiary submissions, but held no trial. In that court's own words, it was "impossible . . . to conduct the complete factual analysis contemplated by the Voting Rights Act . . . within the time constraints of article III," and its holding was accordingly "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." 597 So. 2d, at 282, 285–286.

The State balks at recognizing this express reservation by blaming the De Grandy plaintiffs for not returning to the State Supreme Court with the § 2 claims. But the plaintiffs are free to litigate in any court with jurisdiction, and their choice to forgo further, optional state review hardly converted the state constitutional judgment into a decision following "full and fair opportunity to litigate," *Allen v. McCurry*, 449 U. S. 90, 104 (1980), as res judicata would require. For that matter, a federal court gives no greater preclusive effect to a state-court judgment than the state court itself would do, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U. S. 373, 384–386 (1985), and the Supreme Court of Florida made it plain that its preliminary look at the vote dilution claims would have no preclusive effect under Florida law.

The State does not, of course, argue that res judicata bars the claims of the United States, which was not a party in the Florida Supreme Court action. It contends instead that the Federal Government's § 2 challenge deserved dismissal under this Court's *Rooker/Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state

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judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights. See *District of Columbia Court of Appeals v. Feldman*, 460 U. S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 416 (1923). But the invocation of *Rooker/Feldman* is just as inapt here, for unlike *Rooker* or *Feldman*, the United States was not a party in the state court. It was in no position to ask this Court to review the state court's judgment and has not directly attacked it in this proceeding. Cf. *Feldman*, *supra*, at 468, and n. 2, 472, and n. 8 (suing District of Columbia Court of Appeals); *Rooker*, *supra*, at 414 (seeking to have state court's judgment declared null and void). The United States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts.

## III

On the merits of the vote dilution claims covering the House districts, the crux of the State's argument is the power of Hispanics under SJR 2–G to elect candidates of their choice in a number of districts that mirrors their share of the Dade County area's voting-age population (*i. e.*, 9 out of 20 House districts); this power, according to the State, bars any finding that the plan dilutes Hispanic voting strength. The District Court is said to have missed that conclusion by mistaking our precedents to require the plan to maximize the number of Hispanic-controlled districts.

The State's argument takes us back to ground covered last Term in two cases challenging single-member districts. See *Voinovich v. Quilter*, 507 U. S. 146 (1993); *Growe v. Emison*, 507 U. S. 25 (1993). In *Growe*, we held that a claim of vote dilution in a single-member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district: that a minority group be “sufficiently large and geographically compact to constitute a ma-

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jority in a single-member district’”; that it be “‘politically cohesive’”; and that “‘the white majority vot[e] sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.’” *Id.*, at 40 (quoting *Thornburg v. Gingles*, 478 U. S., at 50–51). Of course, as we reflected in *Voinovich* and amplify later in this opinion, “the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.” 507 U. S., at 158.

In *Voinovich* we explained how manipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door. See *id.*, at 153–154. Section 2 prohibits either sort of line-drawing where its result, “‘interact[ing] with social and historical conditions,’ impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.” *Ibid.* (quoting *Gingles*, *supra*, at 47).<sup>7</sup>

Plaintiffs in *Grove* and *Voinovich* failed to show vote dilution because the former did not prove political cohesiveness of the minority group, *Grove*, *supra*, at 41–42, and the latter showed no significant white bloc voting, *Voinovich*, *supra*, at 158. Here, on the contrary, the District Court found, and the State does not challenge, the presence of both these *Gingles* preconditions. The dispute in this litigation centers on two quite different questions: whether Hispanics are sufficiently numerous and geographically compact to be a majority in additional single-member districts, as required by the first *Gingles* factor; and whether, even with all three *Gingles*

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<sup>7</sup>See also 478 U. S., at 50, n. 16 (discussing vote dilution through gerrymandering district lines). For earlier precedents recognizing that racial gerrymanders have played a central role in discrimination against minority groups, see *Gomillion v. Lightfoot*, 364 U. S. 339 (1960); *Perkins v. Matthews*, 400 U. S. 379 (1971); *Connor v. Finch*, 431 U. S. 407 (1977).

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conditions satisfied, the circumstances in totality support a finding of vote dilution when Hispanics can be expected to elect their chosen representatives in substantial proportion to their percentage of the area's population.

## A

When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice. The District Court found the condition satisfied by contrasting SJR 2-G with the De Grandy plan for the Dade County area, which provided for 11 reasonably compact districts, each with a voting-age population at least 64 percent Hispanic. 815 F. Supp., at 1580. While the percentage figures are not disputed, the parties disagree about the sufficiency of these supermajorities to allow Hispanics to elect representatives of their choice in all 11 districts. The District Court agreed with plaintiffs that the supermajorities would compensate for the number of voting-age Hispanics who did not vote, most commonly because they were recent immigrants who had not become citizens of the United States. *Id.*, at 1567-1568. The State protests that fully half of the Hispanic voting-age residents of the region are not citizens, with the result that several districts in the De Grandy plan lack enough Hispanic voters to elect candidates of their choice without cross-over votes from other ethnic groups. On these assumptions, the State argues that the condition necessary to justify tinkering with the State's plan disappears.

We can leave this dispute without a winner. The parties' ostensibly factual disagreement raises an issue of law about which characteristic of minority populations (*e. g.*, age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy. These cases may be resolved, however, without reaching this issue or the related



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question whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created (that is, by proof that plaintiffs can devise an additional district in which members of a minority group are a minority of the voters, but a potentially influential one). As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases. See *Voinovich, supra*, at 154; see also *Grove, supra*, at 41–42, n. 5 (declining to reach the issue); *Gingles, supra*, at 46–47, n. 12 (same).

## B

We do, however, part company from the District Court in assessing the totality of circumstances. The District Court found that the three *Gingles* preconditions were satisfied, and that Hispanics had suffered historically from official discrimination, the social, economic, and political effects of which they generally continued to feel, 815 F. Supp., at 1573–1574. Without more, and on the apparent assumption that what could have been done to create additional Hispanic supermajority districts should have been done, the District Court found a violation of §2. But the assumption was erroneous, and more is required, as a review of *Gingles* will show.

## 1

*Thornburg v. Gingles*, 478 U. S. 30 (1986), prompted this Court's first reading of §2 of the Voting Rights Act of 1965 after its 1982 amendment.<sup>8</sup> Section 2(a) of the amended Act prohibits any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or

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<sup>8</sup> Congress amended the statute to reach cases in which discriminatory intent is not identified, adding new language designed to codify *White v. Regester*, 412 U. S. 755, 766 (1973). S. Rep. No. 97–417, p. 2 (1982) (hereinafter Senate Report).

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membership in a language minority group]. . .” Section 2(b) provides that a denial or abridgment occurs where,

“based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. §1973(b).

*Gingles* provided some structure to the statute’s “totality of circumstances” test in a case challenging multimember legislative districts. See 478 U.S., at 46–51. The Court listed the factors put forward as relevant in the Senate Report treating the 1982 amendments,<sup>9</sup> and held that

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<sup>9</sup>As summarized in *Gingles*, 478 U.S., at 44–45: “The Senate Report specifies factors which typically may be relevant to a §2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. [Senate Report 28–29.] The Report

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“[w]hile many or all of [them] may be relevant to a claim of vote dilution through submergence in multi-member districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.” *Id.*, at 48–49 (footnote omitted) (emphasis in original).

The Court thus summarized the three now-familiar *Gingles* factors (compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting) as “necessary preconditions,” *id.*, at 50, for establishing vote dilution by use of a multimember district.

But if *Gingles* so clearly identified the three as generally necessary to prove a §2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court’s examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution. This was true not only because bloc voting was a matter of degree, with a variable legal significance depending on other facts, *id.*, at 55–58, but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the po-

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notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State’s or the political subdivision’s use of the contested practice or structure is tenuous may have probative value. *Id.*, at 29.”

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litical processes. *Id.*, at 46, 79–80; *id.*, at 98–99 (O’CONNOR, J., concurring in judgment). To be sure, some § 2 plaintiffs may have easy cases, but although lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors, that conclusion must still be addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment.<sup>10</sup>

## 2

If the three *Gingles* factors may not be isolated as sufficient, standing alone, to prove dilution in every multimember district challenge, *a fortiori* they must not be when the challenge goes to a series of single-member districts, where dilution may be more difficult to grasp. Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral

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<sup>10</sup> If challenges to multimember districts are likely to be the easier plaintiffs’ cases, it is worth remembering that even in multimember district challenges, proof of the *Gingles* factors has not always portended liability under § 2. In *Baird v. Consolidated City of Indianapolis*, 976 F. 2d 357 (1992), the Seventh Circuit confronted a scheme for electing a City-County Council of 29 members. Voters chose 25 of their representatives from single-member districts and 4 at large, from a district representing the entire area. Black plaintiffs brought a vote dilution claim challenging the lines for single-member districts and the existence of the four-member at-large district. After the Council had redrawn its single-member districts to rectify dilution there, the District Court held, and the Seventh Circuit affirmed, that the four-member district did not dilute black voting strength because proof of the three *Gingles* factors was not enough “if other considerations show that the minority has an undiminished right to participate in the political process.” 976 F. 2d, at 359. The “other considerations” in *Baird* included the fact that the new single-member districts were so drawn that blacks formed a voting majority in seven of them (28 percent of the single-member districts and 24 percent of the entire council) while blacks constituted 21 percent of the local population; and that while the four at-large seats tended to go to Republicans, one of the Republicans elected in 1991 was black. *Id.*, at 358, 361.

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success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls. As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution.

The cases now before us, of course, fall on this more complex side of the divide, requiring a court to determine whether provision for somewhat fewer majority-minority districts than the number sought by the plaintiffs was dilution of the minority votes. The District Court was accordingly required to assess the probative significance of the *Gingles* factors critically after considering the further circumstances with arguable bearing on the issue of equal political opportunity. We think that in finding dilution here the District Court misjudged the relative importance of the *Gingles* factors and of historical discrimination, measured against evidence tending to show that in spite of these facts, SJR 2-G would provide minority voters with an equal measure of political and electoral opportunity.

The District Court did not, to be sure, commit the error of treating the three *Gingles* conditions as exhausting the enquiry required by §2. Consistently with *Gingles*, the court received evidence of racial relations outside the immediate confines of voting behavior and found a history of discrimination against Hispanic voters continuing in society generally to the present day. But the District Court was not critical enough in asking whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting-age population. The court failed to ask whether the totality of facts, including those pointing to

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proportionality,<sup>11</sup> showed that the new scheme would deny minority voters equal political opportunity.

Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity. The record establishes that Hispanics constitute 50 percent of the voting-age population in Dade County and under SJR 2–G would make up supermajorities in 9 of the 18 House districts located primarily within the county. Likewise, if one considers the 20 House districts located at least in part within Dade County, the record indicates that Hispanics would be an effective voting majority in 45 percent of them (*i. e.*, nine), and would constitute 47 percent of the voting-age population in the area. 815 F. Supp., at 1580; App. to Juris. Statement 180a–183a. In other words, under SJR 2–G Hispanics in the Dade County area would enjoy substantial proportionality. On this evidence, we think the State’s scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it. Thus in spite of that history and its legacy, including the racial cleavages that characterize Dade County politics today, we see no grounds for holding in these cases

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<sup>11</sup>“Proportionality” as the term is used here links the number of majority-minority voting districts to minority members’ share of the relevant population. The concept is distinct from the subject of the proportional representation clause of §2, which provides that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U. S. C. §1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. Cf. Senate Report 29, n. 115 (minority candidates’ success at the polls is not conclusive proof of minority voters’ access to the political process). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

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that SJR 2–G’s district lines diluted the votes cast by Hispanic voters.

The De Grandy plaintiffs urge us to put more weight on the District Court’s findings of packing and fragmentation, allegedly accomplished by the way the State drew certain specific lines: “[T]he line of District 116 separates heavily Hispanic neighborhoods in District 112 from the rest of the heavily Hispanic Kendall Lakes area and the Kendall area,” so that the line divides “neighbors making up the . . . same housing development in Kendall Lakes,” and District 114 “packs” Hispanic voters, while Districts 102 and 109 “fragment[t]” them. 815 F. Supp., at 1569 (internal quotation marks omitted). We would agree that where a State has split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) if the State had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction, the inconsistent treatment might be significant evidence of a §2 violation, even in the face of proportionality. The District Court, however, made no such finding. Indeed, the propositions the court recites on this point are not even phrased as factual findings, but merely as recitations of testimony offered by plaintiffs’ expert witness. While the District Court may well have credited the testimony, the court was apparently wary of adopting the witness’s conclusions as findings. But even if one imputed a greater significance to the accounts of testimony, they would boil down to findings that several of SJR 2–G’s district lines separate portions of Hispanic neighborhoods, while another district line draws several Hispanic neighborhoods into a single district. This, however, would be to say only that lines could have been drawn elsewhere, nothing more. But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size. Attaching the labels “packing” and “fragmenting” to these phenom-

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ena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality.

## 3

It may be that the significance of the facts under § 2 was obscured by the rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2, at least where societal discrimination against the minority had occurred and continued to occur. But reading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted.

Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts.<sup>12</sup> The point of the hypothetical is not, of course, that any given district is likely to be open to such extreme manipulation, or that bare majorities are likely to vote in full force and strictly along racial lines, but that reading § 2 to define dilution as any failure to maximize tends to

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<sup>12</sup> Minority voters might instead be denied control over a single seat, of course. Each district would need to include merely 51 members of the majority group; minority voters fragmented among the 10 districts could be denied power to affect the result in any district.



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obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical strength<sup>13</sup> indicates a denial of equal participation in the political process. Failure to maximize cannot be the measure of § 2.

## 4

While, for obvious reasons, the State agrees that a failure to leverage minority political strength to the maximum possible point of power is not definitive of dilution in bloc-voting societies, it seeks to impart a measure of determinacy by applying a definitive rule of its own: that as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population.<sup>14</sup> Proportionality so defined, see n. 11,

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<sup>13</sup>When 40 percent of the population determines electoral outcomes in 7 out of 10 districts, the minority group can be said to enjoy effective political power 75 percent above its numerical strength.

<sup>14</sup>See Brief for Appellees in Nos. 92-593, 92-767, p. 20 ("If the statutory prohibition against providing minorities 'less opportunity than other members of the electorate . . . to elect representatives of their choice' is given its natural meaning, it cannot be violated by a single-member district plan that assures minority groups voting control over numbers of districts that are numerically proportional to their population in the area where presence of the three *Gingles* preconditions has been established").

The parties dispute whether the relevant figure is the minority group's share of the population, or of some subset of the population, such as those who are eligible to vote, in that they are United States citizens, over 18 years of age, and not registered at another address (as students and members of the military often are). Because we do not elevate this proportion to the status of a magic parameter, and because it is not dispositive here, we do not resolve that dispute. See *supra*, at 1008-1009.

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*supra*, would thus be a safe harbor for any districting scheme.

The safety would be in derogation of the statutory text and its considered purpose, however, and of the ideal that the Voting Rights Act of 1965 attempts to foster. An inflexible rule would run counter to the textual command of §2, that the presence or absence of a violation be assessed “based on the totality of circumstances.” 42 U. S. C. §1973(b). The need for such “totality” review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, *McCain v. Lybrand*, 465 U. S. 236, 243–246 (1984), a point recognized by Congress when it amended the statute in 1982: “[S]ince the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength,” Senate Report 10 (discussing §5). In modifying §2, Congress thus endorsed our view in *White v. Regester*, 412 U. S. 755 (1973), that “whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality,’” Senate Report 30 (quoting 412 U. S., at 766, 770). In a substantial number of voting jurisdictions, that past reality has included such reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, and the white primary; and other practices censurable when the object of their use is discriminatory, such as at-large elections, runoff requirements, anti-single-shot devices, gerrymandering, the impeachment of officeholders, the annexation or deannexation of territory, and the creation or elimination of elective offices.<sup>15</sup> Some of those expedients

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<sup>15</sup> See generally J. M. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (1974); Kousser, *The Undermining of the First Reconstruction, Lessons for the Second*, in *Minority Vote Dilution* 27 (C. Davidson ed. 1984); *Hearings on the Extension of the Voting Rights Act before the Subcom-*

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could occur even in a jurisdiction with numerically demonstrable proportionality; the harbor safe for States would thus not be safe for voters.<sup>16</sup> It is, in short, for good reason that we have been, and remain, chary of entertaining a simplification of the sort the State now urges upon us. Cf. *Gingles*, 478 U. S., at 77 (“[P]ersistent proportional representation . . . [may] not accurately reflect the minority group’s ability to elect its preferred representatives”).

Even if the State’s safe harbor were open only in cases of alleged dilution by the manipulation of district lines, however, it would rest on an unexplored premise of highly suspect validity: that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under §2 may be traded off against the rights of other members of the same minority class. Under the State’s view, the most blatant racial gerrymandering in half of a county’s single-member districts would be irrelevant under §2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line. But see *Baird v. Consolidated City of Indianapolis*, 976 F. 2d 357, 359 (CA7 1992) (“A balanced bottom line does not foreclose proof of discrimination along the way”); *Richmond v. United States*, 422 U. S. 358, 378–379 (1975) (territorial annexation aimed at diluting black votes forbidden by §5, regardless of its actual effect).

Finally, we reject the safe harbor rule because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be neces-

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mittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., 1999–2022, 2115–2120 (1981).

<sup>16</sup>The State might say, of course, that ostensibly “proportional” districting schemes that were nonetheless subject to diluting practices would not “assur[e]” minority voters their apparent voting power. But this answer would take us right back to a searching review of the factual totality, leaving the State’s defensive rule without any particular utility.

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sary to achieve equal political and electoral opportunity. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts. It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of second best," see B. Grofman, L. Handley, & R. Niemi, *Minority Representation and the Quest for Voting Equality* 136 (1992). If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

It is enough to say that, while proportionality in the sense used here is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, "to participate in the political process and to elect representatives of their choice," 42 U. S. C. § 1973(b), the degree of probative value assigned to proportionality may vary with other facts.<sup>17</sup> No single statistic provides courts with a shortcut

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<sup>17</sup> So, too, the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well. "[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local con-

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to determine whether a set of single-member districts unlawfully dilutes minority voting strength.

## 5

While the United States concedes the relevance of proportionality to a § 2 claim, it would confine proportionality to an affirmative defense, and one to be made only on a statewide basis in cases that challenge districts for electing a body with statewide jurisdiction. In this litigation, the United States would have us treat any claim that evidence of proportionality supports the State's plan as having been waived because the State made no argument in the District Court that the proportion of districts statewide in which Hispanics constitute an effective voting majority mirrors the proportion of statewide Hispanic population.<sup>18</sup>

The argument has two flaws. There is, first, no textual reason to segregate some circumstances from the statutory totality, to be rendered insignificant unless the defendant pleads them by way of affirmative defense. Second, and just as importantly, the argument would recast these cases as they come to us, in order to bar consideration of proportionality except on statewide scope, whereas up until now the

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ditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision." *Gingles*, 478 U. S., at 94–95 (O'CONNOR, J., concurring in judgment).

<sup>18</sup>The argument for proportionality statewide favors the State if it is based on the proportion of Hispanic citizens of voting age statewide. According to census data not available at the time of trial and thus not in the record, Hispanics constitute 7.15 percent of the citizen voting-age population of Florida, which corresponds to eight or nine Hispanic-majority House districts ( $120 \times 7.15\% = 8.58$ ).

If instead one calculates the proportion of statewide Hispanic-majority House districts on the basis of total population or voting-age population, the result favors plaintiffs. Hispanics constitute 12.2 percent of the State's total population and 11.7 percent of the State's voting-age population, corresponding to 14 or 15 seats ( $120 \times 12.2\% = 14.64$ ;  $120 \times 11.7\% = 14.04$ ). We need not choose among these calculations to decide these cases.

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dilution claims have been litigated on a smaller geographical scale. It is, indeed, the plaintiffs themselves, including the United States, who passed up the opportunity to frame their dilution claim in statewide terms. While the United States points to language in its complaint alleging that the redistricting plans dilute the votes of “Hispanic citizens and black citizens in the State of Florida,” App. 77, the complaint identifies “several areas of the State” where such violations of §2 are said to occur, and then speaks in terms of Hispanics in the Dade County area (and blacks in the area of Escambia County), *id.*, at 75–76. Nowhere do the allegations indicate that claims of dilution “in the State of Florida” are not to be considered in terms of the areas specifically mentioned. The complaint alleges no facts at all about the contours, demographics, or voting patterns of any districts outside the Dade County or Escambia County areas, and neither the evidence at trial nor the opinion of the District Court addressed white bloc voting and political cohesion of minorities statewide. The De Grandy plaintiffs even voluntarily dismissed their claims of Hispanic vote dilution outside the Dade County area. See 815 F. Supp., at 1559, n. 13. Thus we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged §2 violation and devising its remedy.

## 6

In sum, the District Court’s finding of dilution did not address the statutory standard of unequal political and electoral opportunity, and reflected instead a misconstruction of §2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts. Because the ultimate finding of dilution in districting for the Florida House was based on a misreading of the governing law, we hold it to be clearly erroneous. See *Gingles*, 478 U. S., at 79.

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## IV

Having found insufficient evidence of vote dilution in the drawing of House districts in the Dade County area, we look now to the comparable districts for the state Senate. As in the case of House districts, we understand the District Court to have misapprehended the legal test for vote dilution when it found a violation of § 2 in the location of the Senate district lines. Because the court did not modify the State's plan, however, we hold the ultimate result correct in this instance.

SJR 2-G creates 40 single-member Senate districts, 5 of them wholly within Dade County. Of these five, three have Hispanic supermajorities of at least 64 percent, and one has a clear majority of black voters. Two more Senate districts crossing county lines include substantial numbers of Dade County voters, and in one of these, black voters, although not close to a majority, are able to elect representatives of their choice with the aid of cross-over votes. 815 F. Supp., at 1574, 1579.

Within this seven-district Dade County area, both minority groups enjoy rough proportionality. The voting-age population in the seven-district area is 44.8 percent Hispanic and 15.8 percent black. Record, U. S. Exh. 7. Hispanics predominate in 42.9 percent of the districts (three out of seven), as do blacks in 14.3 percent of them (one out of seven). While these numbers indicate something just short of perfect proportionality (42.9 percent against 44.8; 14.3 percent against 15.8), the opposite is true of the five districts located wholly within Dade County.<sup>19</sup>

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<sup>19</sup> In the five districts wholly within Dade County, where Hispanics are concentrated, the voting-age population is 53.9 percent Hispanic and 13.5 percent black. Sixty percent of the districts are Hispanic majority (three out of five), and 20 percent are black majority (one out of five), so that each minority group protected by § 2 enjoys an effective voting majority in marginally more districts than proportionality would indicate (60 percent over 53.9; 20 percent over 13.5).

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The District Court concentrated not on these facts but on whether additional districts could be drawn in which either Hispanics or blacks would constitute an effective majority. The court found that indeed a fourth senatorial district with a Hispanic supermajority could be drawn, or that an additional district could be created with a black majority, in each case employing reasonably compact districts. Having previously established that each minority group was politically cohesive, that each labored under a legacy of official discrimination, and that whites voted as a bloc, the District Court believed it faced “two independent, viable Section 2 claims.” 815 F. Supp., at 1577. Because the court did not, however, think it was possible to create both another Hispanic district and another black district on the same map, it concluded that no remedy for either violation was practical and, deferring to the State’s plan as a compromise policy, imposed SJR 2–G’s senatorial districts. *Id.*, at 1580.

We affirm the District Court’s decision to leave the State’s plan for Florida State Senate districts undisturbed. As in the case of the House districts, the totality of circumstances appears not to support a finding of vote dilution here, where both minority groups constitute effective voting majorities in a number of state Senate districts substantially proportional to their share in the population, and where plaintiffs have not produced evidence otherwise indicating that under SJR 2–G voters in either minority group have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U. S. C. § 1973(b).

## V

There being no violation of the Voting Rights Act shown, we have no occasion to review the District Court’s decisions going to remedy. The judgment of the District Court is accordingly affirmed in part and reversed in part.

*It is so ordered.*



O'CONNOR, J., concurring

JUSTICE O'CONNOR, concurring.

The critical issue in these cases is whether § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, requires courts to “maximize” the number of districts in which minority voters may elect their candidates of choice. The District Court, applying the maximization principle, operated “on the apparent assumption that what could have been done to create additional Hispanic supermajority districts should have been done.” *Ante*, at 1009. The Court today makes clear that the District Court was in error, and that the Voting Rights Act does not require maximization. *Ante*, at 1017 (“Failure to maximize cannot be the measure of § 2”); *ante*, at 1022 (the District Court improperly “equated dilution with failure to maximize the number of reasonably compact majority-minority districts”).

But today’s opinion does more than reject the maximization principle. The opinion’s central teaching is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group’s share of the relevant population—is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive. Lack of proportionality is probative evidence of vote dilution. “[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.” *Thornburg v. Gingles*, 478 U. S. 30, 84 (1986) (O’CONNOR, J., concurring in judgment). Thus, in evaluating the *Gingles* preconditions and the totality of the circumstances a court must always consider the relationship between the number of majority-minority voting districts and the minority group’s share of the population. Cf. *id.*, at 99 (“[T]he relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution”).

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The Court also makes clear that proportionality is never dispositive. Lack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances, including the extent to which minority groups have access to the political process. *Ante*, at 1011–1012. Nor does the presence of proportionality prove the absence of dilution. Proportionality is not a safe harbor for States; it does not immunize their election schemes from §2 challenge. *Ante*, at 1017–1021.

In sum, the Court’s carefully crafted approach treats proportionality as relevant evidence, but does not make it the only relevant evidence. In doing this the Court makes clear that §2 does not require maximization of minority voting strength, yet remains faithful to §2’s command that minority voters be given equal opportunity to participate in the political process and to elect representatives of their choice. With this understanding, I join the opinion of the Court.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

At trial, the plaintiffs alleged that the State violated §2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, by not creating as many majority-minority districts as was feasible. The District Court agreed and found a violation of §2, thus equating impermissible vote dilution with the failure to maximize the number of majority-minority districts. I agree with the Court that the District Court’s maximization theory was an erroneous application of §2.

A more difficult question is whether proportionality, ascertained by comparing the number of majority-minority districts to the minority group’s proportion of the relevant population, is relevant in deciding whether there has been vote dilution under §2 in a challenge to election district lines. The statutory text does not yield a clear answer.

The statute, in relevant part, provides: “The extent to which members of a protected class have been elected to

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office in the State or political subdivision is one circumstance which may be considered [in determining whether there has been vote dilution]: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” §1973(b) (emphasis in original). By its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter. See *Voinovich v. Quilter*, 507 U. S. 146, 151–152, 158 (1993); A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 210–216 (1987); C. Swain, *Black Faces, Black Interests*, ch. 6 (1993). And on a more fundamental level, the assumption reflects “the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.” *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 636 (1990) (KENNEDY, J., dissenting); see also *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144, 186–187 (1977) (Burger, C. J., dissenting).

Although the statutory text does not speak in precise terms to the issue, our precedents make clear that proportionality, or the lack thereof, has some relevance to a vote dilution claim under §2. In a unanimous decision last Term, we recognized that single-member districts were subject to vote dilution challenges under §2, and further that “[d]ividing [a politically cohesive] minority group among various [single-member] districts so that it is a majority in none” is one “device for diluting minority voting power” within the meaning of the statute. *Voinovich v. Quilter*, 507 U. S., at 152–153. If “the fragmentation of a minority group among

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various districts” is an acknowledged dilutive device, *id.*, at 153, it follows that analysis under §2 takes some account of whether the number of majority-minority districts falls short of a statistical norm. Cf. *Washington v. Davis*, 426 U. S. 229, 242 (1976) (discriminatory impact relevant to allegation of intentional discrimination). Both the majority and concurring opinions in *Thornburg v. Gingles*, 478 U. S. 30 (1986), reflect the same understanding of the statute. See *id.*, at 50, n. 16 (In a “gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote”); *id.*, at 84 (O’CONNOR, J., concurring in judgment) (“[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large”). Indeed, to say that proportionality is irrelevant under the §2 results test is the equivalent of saying (contrary to our precedents) that no §2 vote dilution challenges can be brought to the drawing of single-member districts.

To be sure, placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act of 1965, as amended. See *Gingles, supra*, at 99 (O’CONNOR, J., concurring in judgment). As today’s decision provides, a lack of proportionality is “never dispositive” proof of vote dilution, just as the presence of proportionality “is not a safe harbor for States [and] does not immunize their election schemes from §2 challenge.” *Ante*, at 1026 (O’CONNOR, J., concurring); see also *ante*, at 1020–1021, n. 17. But given our past construction of the statute, I would hesitate to conclude that proportionality has no relevance to the §2 inquiry.

It is important to emphasize that the precedents to which I refer, like today’s decision, only construe the statute, and

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do not purport to assess its constitutional implications. See *Chisom v. Roemer*, 501 U. S. 380, 418 (1991) (KENNEDY, J., dissenting). Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid §2 litigation. Likewise, a court finding a §2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under §5 of the Act, 42 U. S. C. §1973c, to a State's proposed legislative redistricting. Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. See *Metro Broadcasting, Inc. v. FCC*, *supra*, at 636–637 (KENNEDY, J., dissenting). As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.” *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 518 (1989) (KENNEDY, J., concurring in part and concurring in judgment). Racial classifications “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,” and are presumed invalid. *Shaw v. Reno*, 509 U. S. 630, 643 (1993) (internal quotation marks omitted); see also A. Bickel, *The Morality of Consent* 133 (1975). This is true regardless of “the race of those burdened or benefited by a particular classification.” *Croson*, *supra*, at 494 (opinion of O'CONNOR, J.); 488 U. S., at 520 (SCALIA, J., concurring in judgment). Furthermore, “[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons

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suffer them in equal degree.” *Powers v. Ohio*, 499 U. S. 400, 410 (1991); see also *Plessy v. Ferguson*, 163 U. S. 537, 560 (1896) (Harlan, J., dissenting).

These principles apply to the drawing of electoral and political boundaries. As Justice Douglas, joined by Justice Goldberg, stated 30 years ago:

“When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated . . . . Since that system is at war with the democratic ideal, it should find no footing here.” *Wright v. Rockefeller*, 376 U. S. 52, 67 (1964) (dissenting opinion).

In like fashion, Chief Justice Burger observed that the “use of a mathematical formula” to assure a minimum number of majority-minority districts “tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves.” *United Jewish Organizations v. Carey*, 430 U. S., at 186 (dissenting opinion). And last Term in *Shaw*, we voiced our agreement with these sentiments, observing that “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.” 509 U. S., at 657.

Our decision in *Shaw* alluded to, but did not resolve, the broad question whether “the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim.” *Id.*, at 649 (internal quotation marks omitted); see also *id.*, at 657. While recognizing that redistricting differs from many other kinds of state decision-

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making “in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religion and political persuasion,” we stated that “the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race” does “not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race.” *Id.*, at 646 (emphasis in original). We went on to hold that “a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race” must be subject to strict scrutiny under the Equal Protection Clause. *Id.*, at 658; see also *id.*, at 649, 653. Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. But no constitutional claims were brought here, and the Court’s opinion does not address any constitutional issues. Cf. *Voinovich v. Quilter*, 507 U. S., at 157.

With these observations, I concur in all but Parts III–B–2, III–B–4, and IV of the Court’s opinion and in its judgment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

For the reasons I explain in *Holder v. Hall*, *ante*, p. 891, I would vacate the judgment of the District Court and remand with instructions to dismiss the actions consolidated in these cases for failure to state a claim under §2 of the Voting Rights Act of 1965. 42 U. S. C. §1973. Each of the actions consolidated in these cases asserted that Florida’s apportionment plan diluted the vote of a minority group. In ac-

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cordance with the views I express in *Holder*, I would hold that an apportionment plan is not a “standard, practice, or procedure” that may be challenged under §2. I therefore respectfully dissent.



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REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1032 and 1201 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.

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ORDERS FOR JUNE 13 THROUGH  
SEPTEMBER 30, 1994

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JUNE 13, 1994

*Certiorari Granted—Vacated and Remanded*

No. 93-428. LIVINGSTONE *v.* DONAHEY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Key Tronic Corp. v. United States*, 511 U. S. 809 (1994). Reported below: 987 F. 2d 1250.

*Miscellaneous Orders*

No. A-991. GRIGSBY *v.* O'DONNELL, JUDGE, 301ST DISTRICT COURT, DALLAS COUNTY, TEXAS. Dist. Ct., 301st Jud. Dist., Dallas County, Tex. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D-1063. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see 502 U. S. 1011.]

No. D-1375. IN RE DISBARMENT OF MCNAMARA. Disbarment entered. [For earlier order herein, see 511 U. S. 1002.]

No. D-1380. IN RE DISBARMENT OF COOPER. Disbarment entered. [For earlier order herein, see 511 U. S. 1016.]

No. D-1385. IN RE DISBARMENT OF MCCLENNY. Disbarment entered. [For earlier order herein, see 511 U. S. 1028.]

No. D-1405. IN RE DISBARMENT OF WARNER. It is ordered that Marq J. Warner, of Englewood, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1406. IN RE DISBARMENT OF BRENNAN. It is ordered that John Daniel Brennan, of Evanston, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1407. IN RE DISBARMENT OF ANAST. It is ordered that Nick J. Anast, of Schererville, Ind., be suspended from the

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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-1408. *IN RE DISBARMENT OF LESLIE*. It is ordered that Brian Hal Leslie, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1409. *IN RE DISBARMENT OF BELLER*. It is ordered that Louis R. Beller, of Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. S-3. *IN RE DISBARMENT OF POWELL*. Disbarment entered. [For earlier order herein, see No. 882, Misc., 389 U. S. 924.]

No. 65, Orig. *TEXAS v. NEW MEXICO*. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded \$836 for the period January 1 through March 31, 1994, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 510 U. S. 1106.]

No. 111, Orig. *DELAWARE ET AL. v. NEW YORK*. Upon consideration of the Report of the Special Master, the Exceptions of Plaintiff-Intervenor States of Alabama et al., and the Reply of Delaware, it is ordered that Delaware's complaint against New York is dismissed, that the renewed motion of Delaware to dismiss the complaint without prejudice is denied, and that the motion of New York to amend its answer in order to assert certain counterclaims is denied without prejudice. The Court takes no action at this time on the recommendation of the Special Master for determining the location of noncorporate debtors. This cause shall now be known as *State of Texas et al., Plaintiffs-Intervenors v. State of New York*. [For earlier order herein, see, *e. g.*, 511 U. S. 1028.]

No. 92-1012. *SIMPSON PAPER (VERMONT) CO. v. DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL.* Sup. Ct. Vt. In light of the dismissal of the petition on January 5, 1994 [510 U. S.

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1032], the order entered June 6, 1994 [511 U. S. 1141], denying the petition for writ of certiorari is vacated.

No. 93-986. MCINTYRE *v.* OHIO ELECTIONS COMMISSION. Sup. Ct. Ohio. [Certiorari granted, 510 U. S. 1108.] Motion to substitute Joseph McIntyre, Executor, in place of Margaret McIntyre, deceased, as petitioner in this case granted. Motion of respondent to dismiss denied.

No. 93-1224. TODD SHIPYARDS CORP. ET AL. *v.* EDWARDS ET AL., 511 U. S. 1031. Motion of respondent Richard Edwards for assessment of costs and attorney's fees denied without prejudice to refile in the United States Court of Appeals for the Ninth Circuit.

No. 93-1535. WEST PENN POWER CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Commw. Ct. Pa. Motions of Metropolitan Edison Co. et al. and Edison Electric Institute for leave to file briefs as *amici curiae* granted.

No. 93-1652. CALDERON, WARDEN, ET AL. *v.* HAMILTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 93-8312. IN RE ANDERSON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [511 U. S. 364] denied.

No. 93-9060. IN RE LEWIS; and

No. 93-9171. IN RE NOLT. Petitions for writs of habeas corpus denied.

No. 93-8802. IN RE BIERLEY. Petition for writ of mandamus denied.

No. 93-1418. IN RE CALDERON, WARDEN, ET AL. Motion of respondent Melvin Wade for leave to proceed *in forma pauperis* granted. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 93-1631. BENTSEN, SECRETARY OF THE TREASURY *v.* ADOLPH COORS CO. C. A. 10th Cir. Certiorari granted. Reported below: 2 F. 3d 355.

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No. 93-1636. SWINT ET AL. *v.* CHAMBERS COUNTY COMMISSION ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 5 F. 3d 1435 and 11 F. 3d 1030.

No. 93-1677. OKLAHOMA TAX COMMISSION *v.* JEFFERSON LINES, INC. C. A. 8th Cir. Certiorari granted. Reported below: 15 F. 3d 90.

*Certiorari Denied*

No. 93-1328. INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED & MACHINE WORKERS, AFL-CIO, ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 6 F. 3d 1511.

No. 93-1348. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 529.

No. 93-1377. WARDLAW *v.* PICKETT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 1 F. 3d 1297.

No. 93-1437. GILFORD PARTNERS *v.* PIZITZ ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 630 So. 2d 404.

No. 93-1459. GREENFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93-1461. MAG INSTRUMENT, INC. *v.* COMMISSION OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1442.

No. 93-1463. SOUTHWESTERN BELL TELEPHONE CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 10 F. 3d 892.

No. 93-1468. POPELKA ET AL. *v.* LEE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 395.

No. 93-1469. FOXWOOD MANAGEMENT CO. ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

No. 93-1478. ANDERSON ET AL. *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 12 F. 3d 1069.

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No. 93-1486. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF TEXAS INVESTMENT BANK, N. A. *v.* DAWSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 4 F. 3d 1303.

No. 93-1489. LOWERY, TREASURER OF CLEVELAND COUNTY, OKLAHOMA, ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari denied. Reported below: 12 F. 3d 995.

No. 93-1519. FAIRFAX HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 594.

No. 93-1562. MR. SPROUT, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 8 F. 3d 118.

No. 93-1569. BOARDS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 10 F. 3d 587.

No. 93-1597. COMRIE ET AL. *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 36.

No. 93-1602. FIRST INTERSTATE BANK OF DENVER, N. A. *v.* DUFFIELD. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 1403.

No. 93-1608. McBEATH *v.* COOPER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 547.

No. 93-1615. ILLINOIS DEPARTMENT OF THE LOTTERY *v.* MARCHIANDO. C. A. 7th Cir. Certiorari denied. Reported below: 13 F. 3d 1111.

No. 93-1635. PIGNATO *v.* AMERICAN TRANS AIR, INC. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 342.

No. 93-1645. ADVANCED MICRO DEVICES, INC. *v.* INTEL CORP. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 908.

No. 93-1650. ELJER MANUFACTURING, INC. *v.* KOWIN DEVELOPMENT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 1250.

No. 93-1654. CRUTCHFIELD *v.* MCGREGOR. Ct. App. Ore. Certiorari denied.

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No. 93-1656. *EICHELBERGER ET AL. v. AYCOCK ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1097.

No. 93-1657. *LOWERY v. REDD ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 595.

No. 93-1659. *CAMPBELL v. CALIFORNIA.* C. A. 9th Cir. Certiorari denied.

No. 93-1665. *HUNGER ET AL. v. AB ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 118.

No. 93-1666. *STEVENS v. BOARD OF LAW EXAMINERS OF TEXAS.* Sup. Ct. Tex. Certiorari denied. Reported below: 868 S. W. 2d 773.

No. 93-1667. *ALABAMA v. MCREYNOLDS.* Ct. Crim. App. Ala. Certiorari denied. Reported below: 631 So. 2d 280.

No. 93-1671. *FRENCH v. KING, DIRECTOR OF CAROLINE COUNTY, VIRGINIA, SOCIAL SERVICES, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 594.

No. 93-1675. *DEMATTEIS v. PENNSYLVANIA.* Super. Ct. Pa. Certiorari denied. Reported below: 425 Pa. Super. 627, 619 A. 2d 787.

No. 93-1676. *FULLER ET AL. v. GOLDEN AGE FISHERIES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 14 F. 3d 1405.

No. 93-1681. *ROSS ET AL. v. FORD MOTOR CREDIT Co.* Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 867 S. W. 2d 546.

No. 93-1682. *BALCOR REAL ESTATE HOLDINGS, INC., FKA BALCOR REAL ESTATE FINANCE, INC. v. CLARK, TRUSTEE, BANKRUPTCY ESTATES OF MERIDITH HOFFMAN PARTNERS ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 12 F. 3d 1549.

No. 93-1683. *WHEELER v. KIDDER, PEABODY & Co., INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 21.

No. 93-1685. *HEBERT v. BROWN, SECRETARY OF VETERANS AFFAIRS.* C. A. Fed. Cir. Certiorari denied. Reported below: 14 F. 3d 612.

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No. 93-1688. *CENTRAL DISTRIBUTORS OF BEER, INC. v. CONN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 5 F. 3d 181.

No. 93-1689. *RICE v. OHIO DEPARTMENT OF TRANSPORTATION ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 1133.

No. 93-1691. *MANESS v. STAR-KIST FOODS, INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 704.

No. 93-1698. *SAUNDERS v. BUSH, FORMER PRESIDENT OF THE UNITED STATES, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 64.

No. 93-1704. *ABRAHAM, PERSONAL REPRESENTATIVE OF THE ESTATE OF ABRAHAM, ET AL. v. PWG PARTNERSHIP ET AL.* Sup. Ct. N. M. Certiorari denied. Reported below: 116 N. M. 583, 866 P. 2d 311.

No. 93-1737. *WOZNICK v. HINSON, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1224.

No. 93-1755. *MOBIL OIL CORP. v. TOWN OF CYRIL.* C. A. 10th Cir. Certiorari denied. Reported below: 11 F. 3d 996.

No. 93-1785. *ORGANIZACION JD LTDA. ET AL. v. UNITED STATES ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 18 F. 3d 91.

No. 93-1791. *REIVES v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 15 F. 3d 42.

No. 93-1804. *SACRAMENTO CITY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION v. HOLLAND, BY AND THROUGH HER GUARDIAN AD LITEM, HOLLAND, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 14 F. 3d 1398.

No. 93-1807. *SCHLEDWITZ v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93-1808. *ALAGO v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1092.

No. 93-1815. *BURNS-TOOLE v. BYRNE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 1270.



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No. 93-1819. *GONZALEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 16 F. 3d 1232.

No. 93-1868. *ORTMAN v. OAKLAND COUNTY, MICHIGAN, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1220.

No. 93-6289. *SMITH v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 996 F. 2d 1231.

No. 93-7161. *MURRAY v. DUNCAN, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 996 F. 2d 1226.

No. 93-8056. *COPELAND v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 10 F. 3d 1044.

No. 93-8382. *WILSON v. UNITED STATES*;

No. 93-8403. *WILLIAMS v. UNITED STATES*; and

No. 93-8450. *JONES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93-8395. *GUILLOU v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 219.

No. 93-8559. *GRIGGS v. KANSAS ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 416.

No. 93-8737. *RODENBAUGH v. RODENBAUGH ET AL.* C. A. 3d Cir. Certiorari denied.

No. 93-8740. *RODENBAUGH v. RODENBAUGH ET AL.* C. A. 3d Cir. Certiorari denied.

No. 93-8750. *WILLOUGHBY v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93-8751. *WALKER v. LANHAM ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 17 F. 3d 1435.

No. 93-8753. *WYATT v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied.

No. 93-8759. *CARMICHAEL v. BRYANT, ATTORNEY GENERAL OF ARKANSAS, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1227.

No. 93-8766. *IRVINE v. TEXAS*. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 857 S. W. 2d 920.

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No. 93-8768. *FUQUA v. GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS*. C. A. 9th Cir. Certiorari denied. Reported below: 10 F. 3d 808.

No. 93-8769. *JACKSON v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 1100.

No. 93-8771. *EDWARDS v. HARGETT, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 1557.

No. 93-8783. *EVANS v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 199 App. Div. 2d 191, 605 N. Y. S. 2d 287.

No. 93-8793. *MURPHY v. MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY*. Ct. App. Ore. Certiorari denied. Reported below: 122 Ore. App. 376, 857 P. 2d 890.

No. 93-8795. *LYON v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 872 S. W. 2d 732.

No. 93-8796. *PRICE v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied.

No. 93-8799. *STRINGER v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 627 So. 2d 326.

No. 93-8800. *GOFF v. BURTON ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 734.

No. 93-8801. *HOZDISH v. TYRA ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93-8803. *RUFFIN v. MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93-8805. *MORRIS v. PERLOS*. C. A. 6th Cir. Certiorari denied.

No. 93-8810. *DEA v. PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 47.

No. 93-8813. *JOHNSON ET UX. v. STATE FARM GENERAL INSURANCE CO.* C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 53.

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No. 93-8818. *DESMOND v. NORDBERG ET AL.* App. Ct. Mass. Certiorari denied. Reported below: 36 Mass. App. 1104, 629 N. E. 2d 1016.

No. 93-8820. *RODENBAUGH v. GERSON.* C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 49.

No. 93-8827. *YOUNG v. PENNSYLVANIA.* Super. Ct. Pa. Certiorari denied.

No. 93-8830. *BELL ET AL. v. COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 390.

No. 93-8831. *BARNES v. GARETNER ET AL.* Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 93-8832. *WIESE v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 15 F. 3d 100.

No. 93-8837. *CHAMBERS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93-8853. *WHITLEY v. FLORIDA.* Sup. Ct. Fla. Certiorari denied. Reported below: 630 So. 2d 1103.

No. 93-8859. *PENALES GUERRERO v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 19 Cal. App. 4th 401, 23 Cal. Rptr. 2d 803.

No. 93-8861. *COOLEY ET UX. v. KNAPP ET AL.* Sup. Ct. Ala. Certiorari denied. Reported below: 639 So. 2d 960.

No. 93-8864. *HILL v. CARUSO, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 93-8865. *JOHNSON v. WHITAKER.* C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 466.

No. 93-8866. *THOMAS v. ZAVARAS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 417.

No. 93-8870. *SWINEY v. HARRELSON, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied.

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No. 93-8874. *TRAINA v. MISSOURI*. Sup. Ct. Mo. Certiorari denied.

No. 93-8876. *HERRERA v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 109 Nev. 1400, 875 P. 2d 1062.

No. 93-8909. *MIDDLETON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93-8917. *DOLAN v. MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY*. C. A. 9th Cir. Certiorari denied. Reported below: 21 F. 3d 1112.

No. 93-8926. *BETKA v. OREGON DEPARTMENT OF REVENUE ET AL.* Sup. Ct. Ore. Certiorari denied. Reported below: 318 Ore. 55, 861 P. 2d 1018.

No. 93-8927. *DARRING v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 8 F. 3d 71.

No. 93-8935. *STOLLAR v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 10 F. 3d 1574.

No. 93-8941. *ROSAS v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1226.

No. 93-8945. *TAYLOR v. LUNGREN, ATTORNEY GENERAL OF CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 93-8950. *FULLER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 15 F. 3d 646.

No. 93-8979. *CASIMONO v. HUNDLEY, WARDEN, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 93-8986. *COLLINS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 1434.

No. 93-9009. *JONES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 15 F. 3d 1096.

No. 93-9013. *JOHNSON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 760.

No. 93-9019. *DAVIS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 17 F. 3d 1435.

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No. 93-9020. *CARPER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 417.

No. 93-9031. *ONOKPACHERE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 59.

No. 93-9044. *JOHNSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 506.

No. 93-9056. *MCCARTHY v. HEDRICK, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 93-9083. *SAMUELS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93-9092. *TAYLOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1215.

No. 93-9101. *BADARACCO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 396.

No. 93-9104. *FLORES ET UX. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 15 F. 3d 632.

No. 93-9107. *GOMEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1214.

No. 93-9115. *MOSES v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 15 F. 3d 774.

No. 93-9119. *AUSTIN v. PETERS ET AL.* C. A. 6th Cir. Certiorari denied.

No. 93-9120. *MERIT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 93-9129. *DIXON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 19 F. 3d 15.

No. 93-9132. *TIPTON ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 11 F. 3d 602.

No. 93-9141. *GOSHEN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 602.

No. 93-9156. *KEITH v. MCCAUGHTRY, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 1 F. 3d 1244.

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No. 93-960. MAYCO OIL & CHEMICAL CO. ET AL. *v.* TRANS-TECH INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 5 F. 3d 51.

No. 93-1383. ILLINOIS *v.* PERKINS. App. Ct. Ill., 5th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 248 Ill. App. 3d 762, 618 N. E. 2d 1275.

No. 93-1490. RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., ET AL. *v.* HIGGINS ET AL. Ct. App. N. Y. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 83 N. Y. 2d 156, 630 N. E. 2d 626.

No. 93-1674. TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK ET AL. *v.* KARIBIAN ET AL. C. A. 2d Cir. Motions of Chamber of Commerce of the United States of America, Commission on Independent Colleges and Universities, and Equal Employment Advisory Council et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 14 F. 3d 773.

No. 93-5944. MULLET *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 93-8855. KING *v.* BOONE, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 16 F. 3d 416.

No. 93-7545. HILL *v.* TEXAS. Ct. Crim. App. Tex.;

No. 93-8683. ROMINE *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 93-8728. SCOTT *v.* OHIO. Ct. App. Ohio, Cuyahoga County;

No. 93-8730. GILES *v.* ALABAMA. Sup. Ct. Ala.; and

No. 93-9049. PALMER *v.* CLARKE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: No. 93-8730, 632 So. 2d 577; No. 93-9049, 12 F. 3d 781.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent

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in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93-9506 (A-1028). *CRANK v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 19 F. 3d 172.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

*Rehearing Denied*

No. 93-1015. *CARDWELL v. UNITED STATES*, 511 U. S. 1051;  
No. 93-1269. *YOUNG IN HONG v. CHILDREN'S MEMORIAL HOSPITAL*, 511 U. S. 1005;

No. 93-1404. *MARTIN v. FLORIDA POWER CORP.*, 511 U. S. 1053;  
No. 93-1531. *POLYAK v. HAMILTON, JUDGE; POLYAK v. BUFORD EVANS & SONS; POLYAK v. BOSTON ET AL.; POLYAK v. HULEN ET AL.; POLYAK v. HULEN; and POLYAK v. STACK ET AL.*, 511 U. S. 1053;

No. 93-5455. *SIMS v. UNITED STATES*, 511 U. S. 1034;

No. 93-7484. *NEWSOME v. PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.*, 510 U. S. 1198;

No. 93-7823. *YITREF v. WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL.*, 511 U. S. 1036;

No. 93-7882. *JIMENEZ v. MGM*, 511 U. S. 1022;

No. 93-7999. *IN RE SANDERS*, 511 U. S. 1029;

No. 93-8038. *CLAY v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*, 511 U. S. 1055;

No. 93-8046. *DINGLE v. CRAWFORD ET AL.*, 511 U. S. 1055;

No. 93-8051. *WHITEHEAD v. BRADLEY UNIVERSITY ET AL.*, 511 U. S. 1055;

No. 93-8091. *BAKER v. LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, ATTORNEYS AT LAW, P. C.*, 511 U. S. 1056;

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No. 93–8113. ARNETT *v.* KELLOGG Co., 511 U. S. 1040;

No. 93–8159. BROWN-BRUNSON ET VIR *v.* HUNTER, SUPERINTENDENT, BALTIMORE COUNTY BOARD OF EDUCATION, ET AL., 511 U. S. 1057; and

No. 93–8342. BOALBEY *v.* ROCK ISLAND COUNTY ET AL., 511 U. S. 1076. Petitions for rehearing denied.

No. 93–7098. RICHLEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 511 U. S. 1063;

No. 93–7167. HOLMES ET AL. *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 511 U. S. 1063;

No. 93–7441. JEFFERSON *v.* ZANT, WARDEN, 511 U. S. 1046; and

No. 93–7730. ELKINS *v.* SOUTH CAROLINA, 511 U. S. 1063. Petitions for rehearing denied. JUSTICE BLACKMUN dissents from the denial of rehearing. He would grant the petitions for rehearing, grant the petitions for certiorari, and vacate petitioners' death sentences. See *Callins v. Collins*, 510 U. S. 1141, 1143 (1994).

No. 93–7178. DAVIS *v.* UNITED STATES, 510 U. S. 1127. Motion for leave to file petition for rehearing denied.

JUNE 14, 1994

*Miscellaneous Order*

No. 93–1984. IN RE LAWSON ET AL. Motion of petitioners for expedited review granted. Petition for writ of mandamus denied.

*Certiorari Denied*

No. 93–9538 (A–1036). LAWSON *v.* DIXON, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 25 F. 3d 1040.

JUSTICE BLACKMUN, dissenting.

Despite alleged procedural problems, I find petitioner's constitutional challenge to the gas chamber to be a serious one. Only four States, Arizona, California, Mississippi, and North Carolina, still use the gas chamber as a method of execution. Its cruelty has been attested to on more than one occasion. See, *e. g.*, the dissenting opinion of Justice Marshall, joined by Justice Brennan, in *Gray v. Lucas*, 463 U. S. 1237, 1240 (1983).



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In addition, adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

JUNE 16, 1994

*Dismissals Under Rule 46*

No. 93–1241. VIRTUAL MAINTENANCE, INC. *v.* COMPUTERVISION CORP.; and

No. 93–1826. COMPUTERVISION CORP. *v.* VIRTUAL MAINTENANCE, INC. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 11 F. 3d 660.

JUNE 17, 1994

*Dismissal Under Rule 46*

No. 93–6025. GOSCH *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 8 F. 3d 20.

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*Certiorari Granted—Vacated and Remanded*

No. 93–81. HART *v.* STOCKMAR ENERGIE, INC., DBA L. F. C. POWER CORP. Ct. App. Cal., 3d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Livadas v. Bradshaw*, *ante*, p. 107.

No. 93–1068. ARMADORES DE CABOTAJE, S. A. *v.* YOUNG. Ct. App. La., 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Howlett v. Birkdale Shipping Co.*, *ante*, p. 92. Reported below: 617 So. 2d 517.

No. 93–1293. SCINDIA STEAM NAVIGATION CO. ET AL. *v.* RIGGS. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Howlett v. Birkdale Shipping Co.*, *ante*, p. 92. Reported below: 8 F. 3d 1442.

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No. 93-5044. *WRIGHT v. VIRGINIA*. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons v. South Carolina*, ante, p. 154. Reported below: 245 Va. 177, 427 S. E. 2d 379.

No. 93-8309. *RAMDASS v. VIRGINIA*. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons v. South Carolina*, ante, p. 154. Reported below: 246 Va. 413, 437 S. E. 2d 566.

*Miscellaneous Orders*

No. — — —. *CABAL v. I. T., INC.*; and

No. — — —. *THREATT ET AL. v. FULTON COUNTY*. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. — — —. *DURDEN v. UNITED STATES*. Motion of Jon M. Hunter for leave to intervene in order to file petition for writ of certiorari denied.

No. — — —. *DUNKIN ET AL. v. LOUISIANA-PACIFIC CORP. ET AL.* Motion to direct the Clerk to file petition for writ of certiorari denied.

No. A-955. *MORRISON v. UNITED STATES*. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D-1379. *IN RE DISBARMENT OF FRESCO*. Disbarment entered. [For earlier order herein, see 511 U. S. 1016.]

No. D-1410. *IN RE DISBARMENT OF VANDER VORT*. It is ordered that Wayne A. Vander Vort, of Minneapolis, Minn., 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-1411. *IN RE DISBARMENT OF KARSCH*. It is ordered that Stephen Elias Karsch, 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.

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No. 93-180. BOCA GRANDE CLUB, INC. *v.* FLORIDA POWER & LIGHT CO., INC., 511 U. S. 222. Motion of respondent to retax costs denied.

No. 93-9098. DOSS *v.* CHEVY CHASE SAVINGS, F. S. B. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 11, 1994, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 93-9320. IN RE FRANZ. Petition for writ of habeas corpus denied.

No. 93-8925. IN RE JACKSON; and  
No. 93-9080. IN RE EISMAN. Petitions for writs of mandamus denied.

No. 93-8977. IN RE AL'SHABAZZ. Petition for writ of prohibition denied.

*Certiorari Granted*

No. 93-1151. FEDERAL ELECTION COMMISSION *v.* NRA POLITICAL VICTORY FUND ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE GINSBURG took no part in the consideration or decision of this petition. Reported below: 6 F. 3d 821.

No. 93-1456. U. S. TERM LIMITS, INC., ET AL. *v.* THORNTON ET AL.; and

No. 93-1828. BRYANT, ATTORNEY GENERAL OF ARKANSAS *v.* HILL ET AL. Sup. Ct. Ark. Motions of Citizens for Term Limits et al. and Washington Legal Foundation et al. for leave to file briefs as *amici curiae* in No. 93-1828 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 316 Ark. 251, 872 S. W. 2d 349.

*Certiorari Denied*

No. 92-1831. NORTHERN KENTUCKY WELFARE RIGHTS ASSN. ET AL. *v.* JONES, GOVERNOR OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 561.

No. 93-569. FERMAN, EXECUTRIX OF THE ESTATE OF PAGLIN, DECEASED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 993 F. 2d 485.

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No. 93-651. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* SHRADER & YORK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 991 F. 2d 216.

No. 93-1313. WHITE *v.* RUNYON, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 823.

No. 93-1327. BRANCH ET AL. *v.* TUNNELL, INDIVIDUALLY AND AS SPECIAL AGENT OF THE BUREAU OF LAND MANAGEMENT. C. A. 9th Cir. Certiorari denied. Reported below: 14 F. 3d 449.

No. 93-1358. JACKSON *v.* HOYLMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 212.

No. 93-1422. WEISSICH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 F. 3d 810.

No. 93-1446. CRETAN, WIDOW OF CRETAN, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 1 F. 3d 843.

No. 93-1471. SOMENSKI ET AL. *v.* COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 1541.

No. 93-1475. WONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 2 F. 3d 927.

No. 93-1522. MARAVILLA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 7 F. 3d 219.

No. 93-1540. MCNICHOLS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 13 F. 3d 432.

No. 93-1560. HUFF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 10 F. 3d 1440.

No. 93-1564. ALASKA ET AL. *v.* UNITED STATES; and  
No. 93-1639. UNITED STATES *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 33.

No. 93-1582. LEBLANC ET AL. *v.* LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT. Sup. Ct. La. Certiorari denied. Reported below: 626 So. 2d 1151.

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No. 93-1625. *NORTH STAR ALASKA HOUSING CORP. v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 14 F. 3d 36.

No. 93-1652. *CALDERON, WARDEN, ET AL. v. HAMILTON.* C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 1149.

No. 93-1692. *COUNTY OF SAN DIEGO ET AL. v. MURPHY.* C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1518.

No. 93-1697. *REILLY v. TUCSON ELECTRIC POWER CO. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 1370.

No. 93-1702. *HIDALGO v. FEATHERLITE BUILDING PRODUCTS CORP.* C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 52.

No. 93-1705. *HALL ET AL. v. SAN BERNARD ELECTRIC COOPERATIVE, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-1708. *WARDELL v. TRACY.* Ct. Sp. App. Md. Certiorari denied. Reported below: 97 Md. App. 772.

No. 93-1709. *NEW ORLEANS 2000 PARTNERSHIP v. BOARD OF COMMISSIONERS OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY.* Ct. App. La., 4th Cir. Certiorari denied. Reported below: 625 So. 2d 1070.

No. 93-1714. *KEPLINGER v. WILSON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 212.

No. 93-1716. *PROFILE MANUFACTURING, INC., ET AL. v. KRESS ET AL.* Cir. Ct. Macomb County, Mich. Certiorari denied.

No. 93-1717. *SNYDER v. CONSOLIDATED FREIGHTWAYS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1089.

No. 93-1719. *LINDMARK v. PENNSYLVANIA BOARD OF LAW EXAMINERS.* Sup. Ct. Pa. Certiorari denied.

No. 93-1720. *EVANS v. WEIR ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

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No. 93-1722. *MORGAN v. FORD ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 6 F. 3d 750.

No. 93-1724. *CABAZON BAND OF MISSION INDIANS ET AL. v. NATIONAL INDIAN GAMING COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 14 F. 3d 633.

No. 93-1726. *TARRANT SERVICE AGENCY, INC. v. AMERICAN STANDARD, INC., DBA TRANE CO.* C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 609.

No. 93-1732. *GILDER v. AETNA LIFE & CASUALTY.* C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1546.

No. 93-1738. *MARINE RECREATIONAL OPPORTUNITIES, INC. v. BERMAN ET UX.* C. A. 2d Cir. Certiorari denied. Reported below: 15 F. 3d 270.

No. 93-1739. *THOMPSON v. VIRGINIA.* C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 576.

No. 93-1740. *KUHN v. PHILIP MORRIS U. S. A.* C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 404.

No. 93-1741. *SEARS, ROEBUCK & Co. v. NEWPORT LTD.* C. A. 5th Cir. Certiorari denied. Reported below: 6 F. 3d 1058.

No. 93-1744. *CHOATE v. TRW, INC.* C. A. D. C. Cir. Certiorari denied. Reported below: 14 F. 3d 74.

No. 93-1754. *DANESHMAND v. R. B. HAZARD, INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 409.

No. 93-1762. *LARSON ET AL. v. SANFT ET AL.* Sup. Ct. Minn. Certiorari denied.

No. 93-1766. *U. S. ANCHOR MANUFACTURING, INC. v. RULE INDUSTRIES, INC., ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 7 F. 3d 986.

No. 93-1771. *CASILLAN ET AL. v. REGIONAL TRANSPORTATION DISTRICT ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 415.

No. 93-1774. *BEHRENS v. SHARP ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

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No. 93-1777. *LACHANCE v. RENO, ATTORNEY GENERAL, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 13 F. 3d 586.

No. 93-1778. *SHAW v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93-1799. *ROSENBAUM v. ROSENBAUM ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 253 Ill. App. 3d 1108, 667 N. E. 2d 747.

No. 93-1814. *FLORES DE BRENES, INDIVIDUALLY, AND AS EXECUTOR, ADMINISTRATOR, OR PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENES, DECEDENT, ET AL. v. TRANSPORTES AEREOS NACIONALES, S. A., ET AL.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 625 So. 2d 4.

No. 93-1822. *O'CONNOR v. COMMONWEALTH EDISON CO. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 13 F. 3d 1090.

No. 93-1838. *KING v. DUTTON, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 17 F. 3d 151.

No. 93-1856. *CLAY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1216.

No. 93-1858. *BREWER v. ROGERS ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 211 Ga. App. 343, 439 S. E. 2d 77.

No. 93-1859. *MEISLER v. GANNETT CO., INC.* C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 1026.

No. 93-1861. *PSI ENERGY, INC. v. EXXON COAL USA, INC., ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 17 F. 3d 969.

No. 93-1864. *KURZAWA v. WISCONSIN.* Sup. Ct. Wis. Certiorari denied. Reported below: 180 Wis. 2d 502, 509 N. W. 2d 712.

No. 93-1871. *ANTONIO URREGO v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1339.

No. 93-1888. *BRUN v. KENTUCKY.* Ct. App. Ky. Certiorari denied.

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No. 93-7932. *CHAPMAN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 66.

No. 93-8320. *PIRON v. DEPARTMENT OF ENERGY ET AL.* C. A. 9th Cir. Certiorari denied.

No. 93-8381. *SMITH v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93-8429. *DERSHEM v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93-8442. *DARDEN-BEY ET AL. v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 93-8468. *CHOATE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 1318.

No. 93-8540. *CALDWELL ET AL. v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1428.

No. 93-8581. *SEPULVEDA ET AL. v. UNITED STATES* (two cases). C. A. 1st Cir. Certiorari denied. Reported below: 15 F. 3d 1216 (first case) and 1161 (second case).

No. 93-8625. *GOODLEY v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-8654. *SWORD v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 6th Cir. Certiorari denied.

No. 93-8656. *TORRES-TIRADO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 236.

No. 93-8687. *MORRIS v. GRAVEN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 234.

No. 93-8807. *SULE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 590.

No. 93-8840. *MANUEL L. v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 4th 229, 865 P. 2d 718.

No. 93-8867. *ENGRON v. DEPARTMENT OF LABOR*. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 112.

No. 93-8871. *SMITH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 417.



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No. 93-8877. *WILSON v. TEXAS*. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 93-8890. *ROCHON v. ROEMER, GOVERNOR OF LOUISIANA, ET AL.* Sup. Ct. La. Certiorari denied. Reported below: 630 So. 2d 247.

No. 93-8891. *MOSLEY v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 93-8894. *MLO v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 335 N. C. 353, 440 S. E. 2d 98.

No. 93-8899. *WILLIAMS v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 93-8922. *JONES v. TOOMBS, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1220.

No. 93-8924. *JACKSON v. MAKEL, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 93-8929. *DEANGELO v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 13 F. 3d 1228.

No. 93-8937. *LAGATTA v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 12 F. 3d 1178.

No. 93-8980. *CHEVALIER v. WHITLEY, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 93-8981. *STARNES v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 1207.

No. 93-8991. *ANDERSEN v. ARIZONA*. Ct. App. Ariz. Certiorari denied. Reported below: 177 Ariz. 381, 868 P. 2d 964.

No. 93-9018. *DRAKE v. OHIO*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 93-9036. *DEARINGER v. BARBOUR, SUPERINTENDENT, TWIN RIVERS CORRECTIONS CENTER*. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1106.

No. 93-9040. *ARDITI v. RUNYON, POSTMASTER GENERAL*. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 211.

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No. 93-9041. *DEVITTO v. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* Sup. Ct. Fla. Certiorari denied. Reported below: 634 So. 2d 623.

No. 93-9042. *COOPER ET AL. v. MISSOURI BOARD OF PROBATION AND PAROLE ET AL.* Sup. Ct. Mo. Certiorari denied. Reported below: 866 S. W. 2d 135.

No. 93-9043. *HAYES v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 15 F. 3d 125.

No. 93-9062. *ANDRISANI v. LUCAS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 993 F. 2d 881.

No. 93-9065. *BRIM v. WRIGHT, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 593.

No. 93-9066. *SHIRAR v. OFFICE OF PERSONNEL MANAGEMENT.* C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1442.

No. 93-9067. *SWASEY v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-9084. *BELLUCCI v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 995 F. 2d 157.

No. 93-9086. *WENDT v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION.* C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 1169.

No. 93-9093. *BOYLAND v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 396.

No. 93-9095. *TOLVER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 397.

No. 93-9100. *BACKSTROM v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 644.

No. 93-9105. *HOLLON v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93-9111. *WITHERSPOON ET AL. v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 414.

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No. 93-9124. *TAYLOR v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 18 F. 3d 55.

No. 93-9127. *CAMPBELL v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 633 So. 2d 1070.

No. 93-9138. *BOSARGE v. DEPARTMENT OF EDUCATION ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1414.

No. 93-9142. *GLASGOW v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 17 F. 3d 1435.

No. 93-9143. *JOYNER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1439.

No. 93-9147. *LOGAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93-9154. *HAMILTON v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 18 F. 3d 953.

No. 93-9168. *OSPINA v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 18 F. 3d 1332.

No. 93-9180. *DEXTRAS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 16 F. 3d 1231.

No. 93-9187. *KLEIN v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 13 F. 3d 1182.

No. 93-9190. *PARKER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 113.

No. 93-9200. *DELBRIDGE ET UX. v. NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1429.

No. 93-9209. *TAVAREZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 16 F. 3d 1231.

No. 93-9210. *STROPE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 50.

No. 93-9211. *DICKINSON v. GOPALAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 1439.

No. 93-9213. *CHAVES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 13 F. 3d 1464.

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No. 93-9215. *SILVERS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 1101.

No. 93-9232. *WITHERSPOON v. REES, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 93-9236. *ISANG v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-9252. *FAULKNER v. WISCONSIN*. Ct. App. Wis. Certiorari denied. Reported below: 181 Wis. 2d 369, 514 N. W. 2d 423.

No. 93-9277. *JAMES v. MANN, SUPERINTENDENT, SHAWAN-GUNK CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied. Reported below: 22 F. 3d 1090.

No. 93-9306. *HAWKINS v. ABRAMAJTYS, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 93-9312. *GATLIN v. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1438.

No. 93-9315. *PREWITT v. PARKE, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93-9316. *LAMPHEAR v. ABRAHAMSON, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 93-241. *JAFFE v. SNOW ET AL.* Dist. Ct. App. Fla., 5th Dist. Motions of Government of Canada, International Human Rights Law Group et al., and Canadian Helsinki Watch Group for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 610 So. 2d 482.

No. 93-1033. *CHANDLER v. UNITED STATES*. C. A. 11th Cir.;

No. 93-6191. *HICKS v. TEXAS*. Ct. Crim. App. Tex.;

No. 93-6220. *JOHNSON v. ILLINOIS*. Sup. Ct. Ill.;

No. 93-7042. *COLVIN-EL v. MARYLAND*. Ct. App. Md.;

No. 93-8823. *VALDES v. FLORIDA*. Sup. Ct. Fla.;

No. 93-8839. *MILKE v. ARIZONA*. Sup. Ct. Ariz.; and

No. 93-8943. *MORDENTI v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: No. 93-1033, 996 F. 2d 1073; No. 93-6191, 860 S. W. 2d 419; No. 93-6220, 154 Ill. 2d 356, 609 N. E. 2d 294; No. 93-7042, 332 Md. 144, 630 A. 2d 725; No. 93-8823, 626

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So. 2d 1316; No. 93-8839, 177 Ariz. 118, 865 P. 2d 779; No. 93-8943, 630 So. 2d 1080.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93-1222. *GARCIA ET AL. v. SPUN STEAK CO.* C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 998 F. 2d 1480.

No. 93-1592. *INTERNATIONAL HOUSE OF PANCAKES v. PINNOCK ET AL.* C. A. 9th Cir. Certiorari before judgment denied.

No. 93-1710. *PHILIP MORRIS INC., DBA PHILIP MORRIS U. S. A. v. CABARRUS COUNTY, NORTH CAROLINA.* Sup. Ct. N. C. Motions of Committee on State Taxation, North Carolina Citizens for Business and Industry, and Institute of Property Taxation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 335 N. C. 227, 436 S. E. 2d 828.

No. 93-1742. *LUMMI INDIAN TRIBE v. WHATCOM COUNTY, WASHINGTON, ET AL.* C. A. 9th Cir. Motion of Blackfeet Tribe of Indians for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 5 F. 3d 1355.

No. 93-1833. *CITIZENS FOR TERM LIMITS v. FOLEY ET AL.* C. A. 9th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari granted. Certiorari before judgment denied.

No. 93-1955. *GREGOIRE, ATTORNEY GENERAL OF WASHINGTON, ET AL. v. THORSTED ET AL.* C. A. 9th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari granted. Certiorari before judgment denied.

No. 93-7724. *BUCHANAN v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN dissents and would grant the petition for writ of certiorari and remand the case for reentry of judgment and appointment of counsel. Reported below: 985 F. 2d 1372.

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No. 93–8423. *HOPKINS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN dissents and would grant the petition for writ of certiorari and remand the case for reentry of judgment and appointment of counsel. Reported below: 972 F. 2d 355.

No. 93–8599. *HAMILTON v. CALDERON, WARDEN, ET AL.* C. A. 9th Cir. Motion of counsel to supplement the petition for writ of certiorari denied. Certiorari denied. Reported below: 17 F. 3d 1149.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentence in this case.

*Rehearing Denied*

No. 93–594. *WATTS v. RICE, SECRETARY OF THE ARMY, ET AL.*, 510 U. S. 1012;

No. 93–1386. *RICHARDSON v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.*, 511 U. S. 1033;

No. 93–1410. *UNIVERSITY OF COLORADO, BOULDER, ET AL. v. DERDEYN*, 511 U. S. 1070;

No. 93–8066. *WITCHER v. WITCHER*, 511 U. S. 1055;

No. 93–8187. *LAFLAMME v. GOMEZ*, 511 U. S. 1073;

No. 93–8190. *PRICE v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES*, 511 U. S. 1073;

No. 93–8200. *HAZZARD v. CITY OF OAKLAND, CALIFORNIA, ET AL.*, 511 U. S. 1073;

No. 93–8208. *ISRAEL, AKA BRYANT v. UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA*, 511 U. S. 1110; and

No. 93–8333. *COCHRAN v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.*, 511 U. S. 1075. Petitions for rehearing denied.

No. 93–7809. *IN RE BENNETT ET AL.*, 511 U. S. 1016. Motion for leave to file petition for rehearing denied.

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*Certiorari Denied*

No. 93-9361 (A-1017). DEPUTY *v.* TAYLOR, WARDEN. C. A. 3d Cir. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 19 F. 3d 1485.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93-9675 (A-1077). DEPUTY *v.* SNYDER, WARDEN. C. A. 3d Cir. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

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*Vacated and Remanded on Appeal*

No. 93-45. NATIONAL INTERFAITH CABLE COALITION, INC., OPERATING AS THE VISION INTERFAITH SATELLITE NETWORK, ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Appeal from D. C. D. C. Judgment vacated and case remanded for further consideration in light of *Turner Broadcasting System, Inc. v. FCC*, *ante*, p. 622. Reported below: 819 F. Supp. 32.

No. 93-1539. LOUISIANA ET AL. *v.* HAYS ET AL. Appeal from D. C. W. D. La. Judgment vacated and case remanded for further consideration in light of Act 1 of the Second Extraordinary Ses-

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sion of the 1994 Louisiana Legislature and the parties' filings in this Court concerning Act 1. Reported below: 839 F. Supp. 1188.

*Certiorari Granted—Vacated and Remanded*

No. 93–696. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OHIO STATE UNIVERSITY, DBA OHIO STATE HOSPITALS. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thomas Jefferson Univ. v. Shalala*, *ante*, p. 504. Reported below: 996 F. 2d 122.

No. 93–697. SNAP-ON TOOLS CORP. ET AL. *v.* EULRICH ET AL. Ct. App. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Honda Motor Co. v. Oberg*, *ante*, p. 415. Reported below: 121 Ore. App. 25, 853 P. 2d 1350.

No. 93–842. EHRLICH *v.* CITY OF CULVER CITY ET AL. Ct. App. Cal., 2d App. Dist. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dolan v. City of Tigard*, *ante*, p. 374. JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG would deny certiorari. Reported below: 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468.

No. 93–935. FREEMAN UNITED COAL MINING CO. *v.* JONES, WIDOW OF JONES, DECEASED, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, *ante*, p. 267. Reported below: 988 F. 2d 706.

No. 93–964. CONSOLIDATION COAL CO. *v.* SKUKAN ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, *ante*, p. 267. Reported below: 993 F. 2d 1228.

No. 93–1584. HIRRAS *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hawaiian Airlines, Inc. v. Norris*, *ante*, p. 246. Reported below: 10 F. 3d 1142.



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*Miscellaneous Orders*

No. — — —. ESCAMILLA *v.* NEBRASKA;

No. — — —. HOLLOWAY *v.* BURCH ET AL.; and

No. — — —. KING *v.* VAUGHN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. — — —. SMITH *v.* HARGETT, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. D-1381. IN RE DISBARMENT OF MEACHAM. Disbarment entered. [For earlier order herein, see 511 U. S. 1027.]

No. D-1386. IN RE DISBARMENT OF HEIMAN. Disbarment entered. [For earlier order herein, see 511 U. S. 1028.]

No. D-1403. IN RE DISBARMENT OF MOSTMAN. Paul Ian Mostman, of Granada Hills, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 6, 1994 [511 U. S. 1140], is hereby discharged.

No. D-1412. IN RE DISBARMENT OF LEDERBERG. It is ordered that Joshua Lederberg, of Babylon, 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-1413. IN RE DISBARMENT OF KILPATRICK. It is ordered that Donald E. Kilpatrick, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1414. IN RE DISBARMENT OF WOODSIDE. It is ordered that Jon Lee Woodside, of Portland, Ore., 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-1415. IN RE DISBARMENT OF MARGOLIS. It is ordered that Marvin Margolis, of New York, N. Y., be suspended from the

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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-1416. *IN RE DISBARMENT OF MEYER*. It is ordered that Gary Kenneth Meyer, 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. 93-404. *GUSTAFSON ET AL. v. ALLOYD CO., INC., FKA ALLOYD HOLDINGS, INC., ET AL.* C. A. 7th Cir. [Certiorari granted, 510 U. S. 1176.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-1286. *AMERICAN AIRLINES, INC. v. WOLENS ET AL.* Sup. Ct. Ill. [Certiorari granted, 511 U. S. 1017.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-7407. *O'NEAL v. MCANINCH, WARDEN.* C. A. 6th Cir. [Certiorari granted, 511 U. S. 1017.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-823. *NEBRASKA DEPARTMENT OF REVENUE v. LOEWENSTEIN.* Sup. Ct. Neb. [Certiorari granted, 510 U. S. 1176.] Motion of Dreyfus Corp. for leave to file a brief as *amicus curiae* granted.

No. 93-1612. *NATIONSBANK OF NORTH CAROLINA, N. A., ET AL. v. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL.*; and

No. 93-1613. *LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL. v. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL.* C. A. 5th Cir. [Certiorari granted, 511 U. S. 1141.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 93-1660. *ARIZONA v. EVANS.* Sup. Ct. Ariz. [Certiorari granted, 511 U. S. 1126.] Motion for appointment of counsel granted, and it is ordered that Carol A. Carrigan, Esq., of Phoenix, Ariz., be appointed to serve as counsel for respondent in this case.

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No. 93-8394. *DiDOMENICO v. BERK ET AL.* Super. Ct. Pa. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [511 U. S. 1081] denied.

No. 93-8569. *IN RE WHITAKER.* Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [511 U. S. 1105] denied.

No. 93-9593. *GENDRON v. UNITED STATES.* C. A. 1st Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 93-9335. *IN RE THOMAS*; and

No. 93-9433. *IN RE ANDERSEN.* Petitions for writs of habeas corpus denied.

No. 93-8620. *IN RE MONROE*;

No. 93-8893. *IN RE MCCURDY*;

No. 93-8919. *IN RE TYLER*; and

No. 93-8990. *IN RE BILYEU.* Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 93-768. *MILWAUKEE BREWERY WORKERS' PENSION PLAN v. JOS. SCHLITZ BREWING CO. ET AL.* C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 3 F. 3d 994.

No. 93-7659. *HARRIS v. ALABAMA.* Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 632 So. 2d 543.

*Certiorari Denied*

No. 92-1751. *ALCAN ALUMINUM CORP. v. FRANCHISE TAX BOARD OF CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92-8835. *DEAN v. KENTUCKY.* Sup. Ct. Ky. Certiorari denied. Reported below: 844 S. W. 2d 417.

No. 93-474. *SANTORO v. MAHER TERMINALS, INC., ET AL.*; and

No. 93-666. *MAHER TERMINALS, INC. v. SANTORO ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 992 F. 2d 1277.

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No. 93-813. *ALCAN ALUMINUM CORP. v. FRANCHISE TAX BOARD OF CALIFORNIA*. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93-1132. *REUTERS LTD. v. TAX APPEALS TRIBUNAL ET AL.* Ct. App. N. Y. Certiorari denied. Reported below: 82 N. Y. 2d 112, 623 N. E. 2d 1145.

No. 93-1401. *ABI-GHANEM v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 114.

No. 93-1450. *CEDARS-SINAI MEDICAL CENTER ET AL. v. O'LEARY, SECRETARY OF ENERGY*. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1573.

No. 93-1544. *NEBRASKA v. HUGHES*. Sup. Ct. Neb. Certiorari denied. Reported below: 244 Neb. 810, 510 N. W. 2d 33.

No. 93-1570. *PREFERRED COMMUNICATIONS, INC. v. CITY OF LOS ANGELES ET AL.*; and

No. 93-1759. *CITY OF LOS ANGELES ET AL. v. PREFERRED COMMUNICATIONS, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 13 F. 3d 1327.

No. 93-1576. *UNITED TEXAS TRANSMISSION Co. v. UNITED STATES ARMY CORPS OF ENGINEERS ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 436.

No. 93-1587. *LOVELL ET AL. v. PEOPLES HERITAGE SAVINGS BANK ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 14 F. 3d 44.

No. 93-1591. *DELGADO GARCIA ET AL. v. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST CITY, TEXAS-HOUSTON, N. A., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 209.

No. 93-1599. *HENRY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93-1609. *CALVARY BAPTIST CHURCH ET AL. v. OKLAHOMA DEPARTMENT OF HUMAN SERVICES ET AL.* Ct. App. Okla. Certiorari denied.

No. 93-1621. *HARDY v. MERIT SYSTEMS PROTECTION BOARD*. C. A. Fed. Cir. Certiorari denied. Reported below: 13 F. 3d 1571.

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No. 93-1626. *TRUEX v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93-1629. *STEPHENS v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 121.

No. 93-1643. *BUDD ET UX. v. CITY OF SEWARD, ALASKA, ET AL.* Sup. Ct. Alaska. Certiorari denied.

No. 93-1673. *CHONICH ET AL. v. WAYNE COUNTY COMMUNITY COLLEGE ET AL.* C. A. 6th Cir. Certiorari denied.

No. 93-1745. *KILPATRICK v. STATE BAR OF TEXAS*. Sup. Ct. Tex. Certiorari denied. Reported below: 874 S. W. 2d 656.

No. 93-1746. *TWEEDY v. AMERICAN AIRLINES, INC.* C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 404.

No. 93-1747. *EIGHT UNKNOWN OFFICERS v. CENTANNI*. C. A. 6th Cir. Certiorari denied. Reported below: 15 F. 3d 587.

No. 93-1749. *SCHOOLCRAFT v. UTAH ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 417.

No. 93-1750. *MACE v. BLUNT ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 1042.

No. 93-1753. *CITY OF TIMBER LAKE, SOUTH DAKOTA, ET AL. v. CHEYENNE RIVER SIOUX TRIBE ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 10 F. 3d 554.

No. 93-1756. *COHEN v. CITY OF DES PLAINES*. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 484.

No. 93-1760. *OHIO v. CARPENTER*. Sup. Ct. Ohio. Certiorari denied. Reported below: 68 Ohio St. 3d 59, 623 N. E. 2d 66.

No. 93-1761. *SCHMIDT ET AL. v. TEXAS ET AL.* Sup. Ct. Tex. Certiorari denied. Reported below: 867 S. W. 2d 769.

No. 93-1764. *TAKEALL v. PEPSICO, INC.* C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93-1769. *SCHOOL DISTRICT No. 1J, MULTNOMAH COUNTY, OREGON v. ACANDS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 1255.

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No. 93-1770. *CIMORELLI v. GENERAL ELECTRIC Co.* C. A. 1st Cir. Certiorari denied. Reported below: 16 F. 3d 401.

No. 93-1772. *PUSEY v. CITY OF YOUNGSTOWN, OHIO, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 11 F. 3d 652.

No. 93-1773. *DEATON ET AL. v. CITY OF DAYTON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 600.

No. 93-1775. *MOSESIAN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 93-1780. *RYAN v. SCHUTTER ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1108.

No. 93-1781. *SPENCE v. NORFOLK SOUTHERN RAILWAY Co. ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 210 Ga. App. 284, 435 S. E. 2d 680.

No. 93-1786. *GALIN CORP. ET AL. v. MCI TELECOMMUNICATIONS CORP.* C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 465.

No. 93-1788. *BROWNLEE ET AL. v. LEAR SIEGLER MANAGEMENT SERVICES CORP.* C. A. 10th Cir. Certiorari denied. Reported below: 15 F. 3d 976.

No. 93-1792. *JONES v. ARKANSAS.* Sup. Ct. Ark. Certiorari denied. Reported below: 314 Ark. 383, 862 S. W. 2d 273.

No. 93-1798. *ROOD v. PINELLAS COUNTY ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 15 F. 3d 1096.

No. 93-1800. *SACKMAN ET UX. v. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY.* C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 49.

No. 93-1801. *BYRNE ET AL. v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 19 F. 3d 40.

No. 93-1813. *EL VOCERO DE PUERTO RICO (CARIBBEAN INTERNATIONAL NEWS CORP.) ET AL. v. RODRIGUEZ ET AL.* Sup. Ct. P. R. Certiorari denied. Reported below: 135 D. P. R. —.

No. 93-1818. *HICKEY v. HOLLISTER ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 18.

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No. 93-1834. *AQUARIAN FOUNDATION ET AL. v. WASHINGTON*. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 25.

No. 93-1837. *ABBOTT v. SHEARSON LEHMAN HUTTON, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 18 F. 3d 935.

No. 93-1853. *HARTLINE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARTLINE, ET AL. v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 11.

No. 93-1862. *MESSA v. FOLEY, SECRETARY OF DEPARTMENT OF LABOR AND INDUSTRY OF PENNSYLVANIA, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1430.

No. 93-1895. *THOMAS, A MINOR BY THOMAS ET AL., HIS NATURAL PARENTS AND GUARDIANS v. ZUBRITZKY ET AL.* Super. Ct. Pa. Certiorari denied. Reported below: 427 Pa. Super. 656, 625 A. 2d 100.

No. 93-1901. *BEDDOE v. SPILLMAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 24 F. 3d 244.

No. 93-1905. *KODAK, FKA KOZUCK v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 47.

No. 93-1919. *BERGMANN v. LEE DATA CORP. ET AL.* Ct. App. Minn. Certiorari denied.

No. 93-5738. *HARRISON v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied. Reported below: 858 S. W. 2d 172.

No. 93-5743. *BOGDANOFF v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 993 F. 2d 884.

No. 93-6747. *THIGPEN ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 4 F. 3d 1573.

No. 93-7000. *FISHER v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 10 F. 3d 115.

No. 93-7159. *MCLEAN v. HAMBLIN ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 224.

No. 93-7604. *YEPES-GONZALEZ v. IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 2d Cir. Certiorari denied.

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No. 93-8050. *BARBER v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 335 N. C. 120, 436 S. E. 2d 106.

No. 93-8126. *PIERCE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93-8262. *ANGELL v. UNITED STATES*; and  
No. 93-9125. *ANGELL v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 11 F. 3d 806.

No. 93-8426. *HARPER v. INTERIOR BOARD OF LAND APPEALS*. C. A. D. C. Cir. Certiorari denied.

No. 93-8427. *JONES v. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1251.

No. 93-8472. *NHAN KIEM TRAN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 229.

No. 93-8477. *SCOTT v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 591.

No. 93-8478. *TURNER v. LUMADUE*. C. A. D. C. Cir. Certiorari denied. Reported below: 13 F. 3d 421.

No. 93-8479. *URREGO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 93-8490. *GAYDOS v. NATIONAL FIRE INSURANCE CO. ET AL.* C. A. 3d Cir. Certiorari denied.

No. 93-8503. *ABREU v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 997 F. 2d 825.

No. 93-8506. *PALMER v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 109 Nev. 1421, 875 P. 2d 1083.

No. 93-8515. *MAYES v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 213.

No. 93-8551. *PARE ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 590.

No. 93-8557. *COLON-OSORIO v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 10 F. 3d 41.



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No. 93-8570. ALLEN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON. C. A. 9th Cir. Certiorari denied.

No. 93-8579. SYKES *v.* JAMES. C. A. 2d Cir. Certiorari denied. Reported below: 13 F. 3d 515.

No. 93-8608. BROOKS *v.* MCCAUSELAND. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 46.

No. 93-8609. AJAYI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 103.

No. 93-8614. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 10 F. 3d 734.

No. 93-8627. DONALDSON *v.* SWIDERSKI ET AL. C. A. 7th Cir. Certiorari denied.

No. 93-8645. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 996 F. 2d 301.

No. 93-8647. BERDUZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 32.

No. 93-8665. GIBBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93-8688. RUTHERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93-8760. DANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93-8772. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 766.

No. 93-8838. TAPLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 468.

No. 93-8846. BEASLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 2 F. 3d 1551.

No. 93-8907. NETTLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 57.

No. 93-8914. BARFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 21 F. 3d 425.

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No. 93-8933. *CLIFFORD v. ESPY, SECRETARY OF AGRICULTURE, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1218.

No. 93-8944. *REEVES v. KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY.* C. A. 2d Cir. Certiorari denied. Reported below: 23 F. 3d 396.

No. 93-8954. *GEORGESCU v. BECHTEL CONSTRUCTION, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1085.

No. 93-8957. *GEORGE v. ILLINOIS* (two cases). App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 263 Ill. App. 3d 968, 636 N. E. 2d 682 (first case); 251 Ill. App. 3d 1106, 661 N. E. 2d 1197 (second case).

No. 93-8958. *DUVALL v. PURKETT, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 15 F. 3d 745.

No. 93-8959. *BOODRAM v. MARYLAND FARMS CONDOMINIUM ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 408.

No. 93-8970. *PONCE-BRAN v. CALIFORNIA FACULTY ASSN. ET AL.* Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93-8975. *JONES v. WASHINGTON, WARDEN.* C. A. 7th Cir. Certiorari denied. Reported below: 15 F. 3d 671.

No. 93-8982. *CUTWRIGHT v. UNITED STATES*; and  
No. 93-9114. *MCKIBBEN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93-8992. *LORAH v. DEPARTMENT OF HUMAN RIGHTS.* C. A. D. C. Cir. Certiorari denied.

No. 93-8997. *CHAVEZ v. NEW MEXICO.* Ct. App. N. M. Certiorari denied. Reported below: 116 N. M. 807, 867 P. 2d 1189.

No. 93-8998. *SMITH v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

No. 93-9016. *DASILVA v. CALIFORNIA.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93-9109. *LONG v. UNITED STATES*; and  
No. 93-9206. *JACKSON v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 13 F. 3d 711.

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No. 93-9131. *D'ANJOU v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 604.

No. 93-9159. *BRYANT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1215.

No. 93-9161. *CARLTON v. DUTTON, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 93-9162. *WATTS v. FEDERAL BUREAU OF PRISONS* (two cases). C. A. D. C. Cir. Certiorari denied.

No. 93-9163. *QUINN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 18 F. 3d 1461.

No. 93-9167. *WHITE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 93-9188. *KLEIN v. ARIZONA*. Sup. Ct. Ariz. Certiorari denied.

No. 93-9189. *GUERRERO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1216.

No. 93-9191. *POINTER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1226.

No. 93-9192. *AILPORT v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 17 F. 3d 235.

No. 93-9194. *ARIONUS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 21 F. 3d 433.

No. 93-9198. *DANIEL v. FLORIDA*. Cir. Ct. Fla., Hillsborough County. Certiorari denied.

No. 93-9219. *WILSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93-9226. *TATE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93-9227. *ALLEN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93-9229. *SLOLEY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 149.

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No. 93-9241. *WORYTKO v. NICKERSON*. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 93-9243. *AUTREY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1439.

No. 93-9246. *WILLIAMS v. JOSEPHS ET AL.* C. A. 2d Cir. Certiorari denied.

No. 93-9253. *KIMBLE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93-9254. *FULTON ET AL. v. UNITED STATES*; and

No. 93-9310. *CUERO-GONGORA, AKA ARROYA-RIENA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 18 F. 3d 935.

No. 93-9255. *BUHL v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1431.

No. 93-9262. *LEONARD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 18 F. 3d 935.

No. 93-9266. *REID v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1439.

No. 93-9271. *BEARD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 465.

No. 93-9272. *TAYLOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 467.

No. 93-9280. *HOPSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 1434.

No. 93-9281. *HOPSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 18 F. 3d 465.

No. 93-9284. *WRIGHT v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1429.

No. 93-9285. *LECROIX v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 31.

No. 93-9294. *SCHUENEMANN v. HAMES, COMMISSIONER, ALASKA DEPARTMENT OF CORRECTIONS*. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 396.

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No. 93-9297. *BRADSHAW v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1439.

No. 93-9298. *DAMATTA-OLIVERA v. UNITED STATES*. Ct. Mil. App. Certiorari denied. Reported below: 37 M. J. 474.

No. 93-9299. *MCPHAIL ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 20 F. 3d 465.

No. 93-9302. *MATTHEWS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 32.

No. 93-9304. *MINTZ v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 1101.

No. 93-9307. *ANGEL GONZALEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 18 F. 3d 936.

No. 93-9323. *O'NEAL v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1439.

No. 93-9324. *MACMILLAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1109.

No. 93-9329. *ALEXANDER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 1103.

No. 93-9330. *WHITE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93-9332. *LEE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1092.

No. 93-9333. *LEGG v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 18 F. 3d 240.

No. 93-9336. *DAVIS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 17 F. 3d 1438.

No. 93-9337. *BALLARD v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 1110.

No. 93-9338. *DUARTE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 24 F. 3d 251.

No. 93-9342. *CASTNER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 1434.

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No. 93-9343. BRYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 30.

No. 93-9346. NASH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 31.

No. 93-9357. WARE *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 1435.

No. 93-9365. ROMANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 22 F. 3d 304.

No. 93-9370. COVINGTON *v.* MOODY, SUPERINTENDENT, WILDWOOD CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1084.

No. 93-9390. ANDERSON *v.* SUNY HEALTH SCIENCE CENTER AT SYRACUSE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 23 F. 3d 396.

No. 93-541. NCR CORP. *v.* NEW MEXICO TAXATION AND REVENUE DEPARTMENT. Ct. App. N. M. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 115 N. M. 612, 856 P. 2d 982.

No. 93-1416. NCR CORP. *v.* SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION. Sup. Ct. S. C. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 312 S. C. 52, 439 S. E. 2d 254.

No. 93-1354. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JACOBY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 8 F. 3d 27.

No. 93-1572. UNITED STATES *v.* VILLEGAS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 3 F. 3d 643.

No. 93-1713. WAYFIELD *v.* TOWN OF TISBURY ET AL. C. A. 1st Cir. Motion of Polish Historical Society for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 10 F. 3d 805.

No. 93-1797. INSURANCE COMPANY OF NORTH AMERICA ET AL. *v.* MORTON INTERNATIONAL, INC. Sup. Ct. N. J. Motion

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of Insurance Environmental Litigation Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 134 N. J. 1, 629 A. 2d 831.

No. 93-1870. AIDANT, INC., ET AL. *v.* SIREX, U. S. A., INC., ET AL.; AIDANT, L. P., ET AL. *v.* HUMMEL ET AL.; and IZADPANAH ET AL. *v.* HUMMEL ET AL. Sup. Ct. Va. Motion of petitioners to strike respondents' brief in opposition denied. Certiorari denied.

No. 93-1878. ROE *v.* LOUISIANA SUPREME COURT ET AL. C. A. 5th Cir. Motion of petitioner to direct that the response to the petition and the lodging be placed under seal denied. Motion of John Doe for leave to intervene and other relief denied. Certiorari denied. Reported below: 8 F. 3d 23.

No. 92-8717. ROBINSON *v.* TEXAS. Ct. Crim. App. Tex.;  
No. 93-6225. SLAWSON *v.* FLORIDA. Sup. Ct. Fla.;  
No. 93-7248. MCBRIDE *v.* TEXAS. Ct. Crim. App. Tex.;  
No. 93-7641. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex.;  
No. 93-8096. EDGESTON *v.* ILLINOIS. Sup. Ct. Ill.;  
No. 93-8147. BYRD *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8358. HICKS *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8360. POINDEXTER *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8372. HENDERSON *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8501. GIBBS *v.* NORTH CAROLINA. Sup. Ct. N. C.;  
No. 93-8505. SOWELL *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8571. BYRD *v.* OHIO; GREER *v.* OHIO; HENDERSON *v.* OHIO; HICKS *v.* OHIO; JAMISON *v.* OHIO; MONTGOMERY *v.* OHIO; POINDEXTER *v.* OHIO; SCOTT *v.* OHIO; and SOWELL *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8586. OTEY *v.* HOPKINS, WARDEN. C. A. 8th Cir.;  
No. 93-8604. TENNER *v.* ILLINOIS. Sup. Ct. Ill.;  
No. 93-8723. BEDFORD *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8825. SMITH *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8852. STEFFEN *v.* OHIO. Sup. Ct. Ohio;  
No. 93-8854. SCOTT *v.* OHIO. Sup. Ct. Ohio;  
No. 93-9025. RESNOVER *v.* CARTER, ATTORNEY GENERAL OF INDIANA, ET AL. C. A. 7th Cir.;  
No. 93-9046. HALL *v.* SOUTH CAROLINA. Sup. Ct. S. C.;  
No. 93-9112. WOODARD *v.* OHIO. Sup. Ct. Ohio; and  
No. 93-9364. ROSE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 92-8717, 851 S. W. 2d 216;

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No. 93-6225, 619 So. 2d 255; No. 93-7248, 862 S. W. 2d 600; No. 93-7641, 867 S. W. 2d 30; No. 93-8096, 157 Ill. 2d 201, 623 N. E. 2d 329; No. 93-8147, 67 Ohio St. 3d 1485, 621 N. E. 2d 407; No. 93-8358, 67 Ohio St. 3d 1485, 621 N. E. 2d 407; No. 93-8360, 67 Ohio St. 3d 1485, 621 N. E. 2d 407; No. 93-8372, 67 Ohio St. 3d 1485, 621 N. E. 2d 407; No. 93-8501, 335 N. C. 1, 436 S. E. 2d 321; No. 93-8505, 67 Ohio St. 3d 1500, 622 N. E. 2d 649; No. 93-8571, 67 Ohio St. 3d 1487, 621 N. E. 2d 409 (first through eighth cases), 67 Ohio St. 3d 1502, 622 N. E. 2d 651 (ninth case); No. 93-8586, 5 F. 3d 1125; No. 93-8604, 157 Ill. 2d 341, 626 N. E. 2d 138; No. 93-8723, 67 Ohio St. 3d 1509, 622 N. E. 2d 656; No. 93-8825, 68 Ohio St. 3d 1404, 623 N. E. 2d 562; No. 93-8852, 67 Ohio St. 3d 1500, 622 N. E. 2d 649; No. 93-8854, 67 Ohio St. 3d 1485, 621 N. E. 2d 407; No. 93-9025, 9 F. 3d 113; No. 93-9046, 312 S. C. 95, 439 S. E. 2d 278; No. 93-9112, 68 Ohio St. 3d 70, 623 N. E. 2d 75; No. 93-9364, 335 N. C. 301, 439 S. E. 2d 518.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Collins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

*Rehearing Denied*

No. 92-903. POSTERS 'N' THINGS, LTD., ET AL. *v.* UNITED STATES, 511 U. S. 513;

No. 92-1370. BFP *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSN., ET AL., 511 U. S. 531;

No. 93-289. DALTON, SECRETARY OF THE NAVY, ET AL. *v.* SPECTER ET AL., 511 U. S. 462;

No. 93-1257. CATLETT *v.* VIRGINIA, 511 U. S. 1005;

No. 93-1407. PEARSON *v.* UNITED STATES, 511 U. S. 1126;

No. 93-1498. SAKARIA ET AL. *v.* TRANS WORLD AIRLINES, 511 U. S. 1083;

No. 93-7824. TITLEMORE *v.* RAYMOND ET AL., 511 U. S. 1036;

No. 93-7995. EDWARDS *v.* PHOEBE PUTNEY MEMORIAL HOSPITAL ET AL., 511 U. S. 1039;

No. 93-8189. CRAWFORD *v.* CONNELL, 511 U. S. 1073;

No. 93-8230. BACON *v.* DEPARTMENT OF THE AIR FORCE, 511 U. S. 1043;



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- No. 93-8343. *SPYCHALA v. GOMEZ*, 511 U. S. 1089;  
No. 93-8367. *DUNN v. REGENTS OF THE UNIVERSITY OF CALIFORNIA*, 511 U. S. 1090;  
No. 93-8446. *DORADO v. MARYLAND*, 511 U. S. 1092;  
No. 93-8460. *SEAGRAVE v. COUNTY OF LAKE ET AL.*, 511 U. S. 1092;  
No. 93-8480. *DEMPSEY v. RANGAIRE CORP.*, 511 U. S. 1092;  
No. 93-8518. *KOTAS ET UX. v. JOURNAL COMMUNICATIONS ET AL.*, 511 U. S. 1093;  
No. 93-8519. *IN RE PREUSS*, 511 U. S. 1081;  
No. 93-8556. *JACKSON ET UX. v. CITY OF RENO*, 511 U. S. 1094;  
No. 93-8653. *WALLACE v. UNITED STATES*, 511 U. S. 1095;  
and  
No. 93-9003. *RYSKAMP v. UNITED STATES*, 511 U. S. 1148. Petitions for rehearing denied.

No. 93-609. *MORGAN STANLEY & CO., INC., ET AL. v. PACIFIC MUTUAL LIFE INSURANCE CO. ET AL.*, 511 U. S. 658. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 93-8226. *FORD v. ALABAMA*, 511 U. S. 1078;  
No. 93-8405. *CODE v. LOUISIANA*, 511 U. S. 1100; and  
No. 93-8736. *CONKLIN v. ZANT, WARDEN*, 511 U. S. 1100. Petitions for rehearing denied. JUSTICE BLACKMUN dissents from the denial of rehearing. He would grant the petitions for rehearing, grant the petitions for certiorari, and vacate petitioners' death sentences. See *Callins v. Collins*, 510 U. S. 1141, 1143 (1994).

No. 93-8289. *TRAUNIG v. DEPARTMENT OF VETERANS AFFAIRS*, 511 U. S. 1044; and

No. 93-8615. *DOWELL v. WRIGHT ET AL.*, 511 U. S. 1077. Motions for leave to file petitions for rehearing denied.

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*Vacated and Remanded on Appeal*

No. 93-1108. *MCWHERTER, GOVERNOR OF TENNESSEE, ET AL. v. RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., ET AL.*; and

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No. 93-1379. RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., ET AL. *v.* MCWHERTER, GOVERNOR OF TENNESSEE, ET AL. Appeals from D. C. W. D. Tenn. Judgment vacated and cases remanded for further consideration in light of *Johnson v. De Grandy*, *ante*, p. 997. Reported below: 836 F. Supp. 453.

*Certiorari Granted—Vacated and Remanded*

No. 93-828. PEARSON ET AL. *v.* PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN) ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mine Workers v. Bagwell*, *ante*, p. 821. Reported below: 996 F. 2d 1351.

No. 93-1279. REALI ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER. Ct. App. Cal., 3d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Madsen v. Women's Health Center, Inc.*, *ante*, p. 753. Reported below: 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184.

No. 93-1394. TYUS ET AL. *v.* BOSLEY ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson v. De Grandy*, *ante*, p. 997. Reported below: 999 F. 2d 1301.

No. 93-7348. PRICE *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Simmons v. South Carolina*, *ante*, p. 154. Reported below: 334 N. C. 615, 433 S. E. 2d 746.

JUSTICE BLACKMUN, concurring.

Although I concur in the Court's remand of this case for further consideration in light of the recent decision in *Simmons v. South Carolina*, *ante*, p. 154, I write to note that there remains another serious error in this case, one this Court has not reached before and does not reach today.

It is undisputed that petitioner's sentencing jury was given the very instruction found unconstitutional in *McKoy v. North Carolina*, 494 U. S. 433 (1990). This instruction ran afoul of *Mills v. Maryland*, 486 U. S. 367 (1988), by requiring that all jurors agree on the existence of a mitigating circumstance before any

juror could give it effect. The North Carolina Supreme Court concluded, however, that this *McKoy* error was harmless beyond a reasonable doubt. 331 N. C. 620, 418 S. E. 2d 169 (1992). The state court's analysis does not support its conclusion.

The State Supreme Court relied on a poll of the sentencing jurors. In that poll, each juror first was asked:

“Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?” *Id.*, at 626, 418 S. E. 2d, at 172.

Then, for each of 10 mitigating circumstances submitted to the jury, each juror was asked, for example:

“Q: As to the mitigating factors. ‘Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No.’ Is this your answer?”

“A: Yes.

“Q: Do you still assent thereto?”

“A: Yes.” *Ibid.*

The State's Supreme Court ruled that, in this context, the question, “Is this your answer?” could reasonably be understood only as asking each juror “Is this your own individual answer?” *Id.*, at 627, 418 S. E. 2d, at 173. Our concern, however, is “not what the State Supreme Court declares the meaning of the [poll question] to be, but rather what a reasonable juror could have understood the [poll question] as meaning.” *Francis v. Franklin*, 471 U. S. 307, 315–316 (1985). It is equally plausible that a reasonable juror could have interpreted “Is this your answer?” to mean “Is this your, *the jury's*, answer?” Since the jurors had been instructed that they could answer “yes” only if they unanimously agreed, a juror's answer to the poll question easily could have meant, “Yes, that was our answer, because we could not achieve unanimity on the existence of that factor.” Or even if the juror was answering for himself, he could be saying “Yes, that was my answer, but only because I could not get the others unanimously to agree that this mitigating circumstance existed.” Jurors are presumed to follow their instructions. See, e. g., *Yates v. Evatt*, 500 U. S. 391, 403 (1991); *Richardson v. Marsh*, 481 U. S. 200, 211 (1987).

Given the ambiguity of the poll, I “cannot say with any degree of confidence which interpretation [Price’s] jury adopted,” *Mills*, 486 U.S., at 383, and consequently, I cannot conclude that the *McKoy* error was harmless. A finding of harmlessness is warranted only if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967). Because the unanimity instruction preceded and shaped the jury’s consideration of mitigating evidence, it may have contributed to the verdict by directing the jury to “examin[e] the evidence with the wrong question in mind.” *Yates v. Evatt*, 500 U.S., at 413 (SCALIA, J., concurring). The poll tells us nothing about how the juror would have voted—either on a particular mitigating circumstance or on the ultimate life-or-death question—had he been instructed that he could give effect to all the mitigating evidence, as the Constitution requires. Thus, the state court’s analysis does not satisfy the “high standard” of harmlessness for federal constitutional error. See *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O’CONNOR, J., concurring); see also *Clemons v. Mississippi*, 494 U.S. 738 (1990) (remanding a case to state court for “detailed explanation” and analysis of its conclusion of harmlessness).

Because the poll does not demonstrate convincingly, much less beyond a reasonable doubt, that no juror interpreted the unconstitutional instruction to block consideration of mitigating evidence on which the jurors were not unanimous, I do not share the state court’s “confiden[ce]” that the poll “demonstrates unequivocally” that the instruction did not prevent any juror from giving weight to any mitigating evidence. See 331 N. C., at 628, 418 S. E. 2d, at 173. Concern that the *McKoy* instruction may have precluded consideration of relevant mitigating evidence is only fueled by the North Carolina Supreme Court’s acknowledgment “there [wa]s evidence which support[ed] several of the mitigating circumstances not found by the jury.” 331 N. C., at 628, 418 S. E. 2d, at 173. Cf. *McNeil v. North Carolina*, 494 U.S. 1050 (1990) (KENNEDY, J., dissenting from grant of certiorari) (noting that *McKoy* error may be harmless where the defendant did not present mitigating evidence).

It is true that this is the third time we have remanded this case for further consideration in light of an intervening decision, again providing the state court the opportunity to consider

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and to correct constitutional error. See 498 U. S. 802 (1990) (vacated and remanded in light of *McKoy v. North Carolina*, 494 U. S. 433 (1990)); 506 U. S. 1043 (1993) (vacated and remanded in light of *Morgan v. Illinois*, 504 U. S. 719 (1992)). On this remand, if the North Carolina Supreme Court concludes that there is *Simmons* error that requires resentencing, the new sentencing jurors will not receive the now-abandoned *McKoy* instruction, and the case will be purged of any existing nonharmless *McKoy* error. But if petitioner does not receive a new sentencing hearing, I believe the harmlessness of the *McKoy* error deserves this Court's attention on the next round, notwithstanding petitioner's previous visits to this Court.

No. 93-7494. *MORENO v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McFarland v. Scott*, *ante*, p. 849. Reported below: 15 F. 3d 180.

No. 93-7739. *JOINER v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McFarland v. Scott*, *ante*, p. 849. Reported below: 15 F. 3d 1079.

No. 93-8233. *CLAYTON v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McFarland v. Scott*, *ante*, p. 849. Reported below: 19 F. 3d 15.

#### *Miscellaneous Order*

No. 93-8621. *MCDONALD v. NEW MEXICO ET AL.* C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [511 U. S. 1125] denied.

#### *Certiorari Denied*

No. 93-812. *RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION ET AL. v. JENKINS ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 4 F. 3d 1103.

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No. 93-1454. CALDERON, WARDEN, ET AL. *v.* CLAIR. C. A. 9th Cir. Certiorari denied.

No. 92-8482. ESPINOZA *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-5140. NOGUERA *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-6801. MAYFIELD *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-6863. WADER *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7249. PAGE *v.* ILLINOIS. Sup. Ct. Ill.;  
No. 93-7278. MITCHAM *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7376. MIRANDA *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7399. DOUGLAS *v.* CALDERON, WARDEN. Sup. Ct. Cal.;  
No. 93-7414. SIMS *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7442. EDWARDS *v.* CALDERON, WARDEN. Sup. Ct. Cal.;  
No. 93-7631. BACIGALUPO *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7680. MONTIEL *v.* CALIFORNIA. Sup. Ct. Cal.;  
No. 93-7955. RUDD *v.* TEXAS. Ct. Crim. App. Tex.; and  
No. 93-8118. CLARK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 92-8482, 3 Cal. 4th 806, 838 P. 2d 204; No. 93-5140, 4 Cal. 4th 599, 842 P. 2d 1160; No. 93-6801, 5 Cal. 4th 142, 852 P. 2d 331; No. 93-6863, 5 Cal. 4th 610, 854 P. 2d 80; No. 93-7249, 156 Ill. 2d 258, 620 N. E. 2d 339; No. 93-7414, 5 Cal. 4th 405, 853 P. 2d 992; No. 93-7631, 6 Cal. 4th 457, 862 P. 2d 808; No. 93-7680, 5 Cal. 4th 877, 855 P. 2d 1277; No. 93-8118, 5 Cal. 4th 950, 857 P. 2d 1099.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93-1159. WINFIELD ET AL. *v.* KAPLAN ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 335 N. C. 175, 436 S. E. 2d 379.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

In Greensboro, North Carolina, a state trial court entered a preliminary injunction prohibiting antiabortion protesters from picketing, parading, marching, or demonstrating anywhere on respondent's street or within 300 feet of the center line of that street. The North Carolina Court of Appeals affirmed and the

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Supreme Court of North Carolina denied discretionary review. The protesters petitioned this Court for review. When their petition first came before us for consideration, we voted to defer disposition pending the announcement of our judgment in *Madsen v. Women's Health Center, Inc.*, *ante*, p. 753, because of the similarity of the issues presented in the two cases.

In Part III-E of the *Madsen* opinion, announced today, we find unconstitutional an injunctive provision—prohibiting congregating, picketing, patrolling, and demonstrating within 300 feet of the residences of respondents' employees—indistinguishable in relevant respects from the one that remains in effect in the present case. The obviously appropriate course of action, therefore, is to grant the present petition for certiorari, vacate the judgment below, and remand the cause to the North Carolina Court of Appeals for reconsideration in light of *Madsen*. That is what we ordinarily do with petitions that have been held for the decision of cases that, in the event, show the petitions to have merit.

Instead, the Court chooses to deny the petition for certiorari. The only conceivable explanation for this decision is that because the injunction presently under consideration is temporary, the North Carolina courts will have the benefit of our *Madsen* opinion when they come to decide whether a permanent injunction should issue. But if that fact alone justifies denial of the petition, we should have denied it at the outset, rather than held it pending *Madsen*.

No possible resolution of *Madsen* could have shown this case more flatly wrong than the opinion that issued. By holding the petition for *Madsen*, and then, in light of *Madsen*, letting the challenged injunction stand, we send a confusing message to the North Carolina courts. And also, of course, we leave a clear judicial abridgment of petitioners' First Amendment rights in effect. For these reasons, I dissent from the denial of certiorari.

No. 93-7200. *MCCOLLUM v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 334 N. C. 208, 433 S. E. 2d 144.

JUSTICE BLACKMUN, dissenting.

Henry Lee "Buddy" McCollum is sentenced to be executed for his part in a brutal crime. He participated with three other young men in the rape and murder of an 11-year-old girl. Each raped the child, and McCollum helped hold her down while an-

other young man stuffed her panties down her throat with a stick. When I announced in *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (opinion dissenting from denial of certiorari), that I had reached the conclusion that the death penalty, as currently administered, is unconstitutional, JUSTICE SCALIA questioned why I did not choose Buddy McCollum's case as the vehicle to announce that position. *Id.*, at 1142–1143 (SCALIA, J., concurring in denial of certiorari). He seemed to believe that my position would be harder to defend in a case like this one that “cries out for punishment.” 334 N.C. 208, 245, 433 S. E. 2d 144, 165 (1993) (Exum, C. J., concurring in part and dissenting in part). Far from it. The crime indeed is abhorrent, but there is more to the story.

Buddy McCollum is mentally retarded. He has an IQ between 60 and 69 and the mental age of a 9-year-old. He reads on a second-grade level. This factor alone persuades me that the death penalty in his case is unconstitutional. See *Penry v. Lynaugh*, 492 U.S. 302, 350 (1989) (STEVENS, J., concurring in part and dissenting in part) (executions of the mentally retarded are unconstitutional).

The sentencing jury found two aggravating circumstances: that the murder was committed to avoid arrest and that the murder was especially heinous, atrocious, or cruel. It found seven mitigating circumstances: that McCollum was mentally retarded, that he had difficulty thinking clearly under stress, that he was easily influenced by others, that he committed the felony murder under the influence of mental or emotional disturbance, that he had cooperated with the police, that he had no significant history of prior criminal activity, and that he had adapted well to prison. In addition, the trial judge concluded that “[a]ll of the evidence tends to show that [McCollum’s] capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.” App. to Pet. for Cert. 50. McCollum was 19 at the time of the crime.

Along with these compelling mitigating circumstances, the evidence at trial tended to show that Buddy McCollum was far from the most culpable of the four accomplices. He was not the one who initiated the rape, the one who proposed the murder, or the one who actually committed the murder. Nonetheless, he was the only one convicted of murder and the only one sentenced to die.



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North Carolina's death penalty scheme requires appellate proportionality review, N. C. Gen. Stat. § 15A-2000(d)(2) (1988), and the Chief Justice of the North Carolina Supreme Court found himself compelled to conclude that the death penalty for Buddy McCollum was disproportionate. 334 N. C., at 248-250, 433 S. E. 2d, at 167-168 (Exum, C. J., dissenting). North Carolina jurors had never before recommended death for a defendant whom they had found mentally retarded. Only once had jurors recommended death where there was even any evidence of mental retardation. No North Carolina jury ever had recommended death for a felony murderer under 20 years of age. Nor had any jury recommended death in a sexual offense felony murder where there was evidence of the defendant's mental and emotional disturbance, not even where the defendant was the actual perpetrator of an especially heinous, atrocious, or cruel killing.

That our system of capital punishment would single out Buddy McCollum to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed. Our system of capital punishment simply does not accurately and consistently determine which defendants most "deserve" to die.

No. 93-8040. *McFARLAND v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 256.

JUSTICE BLACKMUN, dissenting.

Today in *McFarland v. Scott*, *ante*, p. 849, this Court addressed the right to qualified legal counsel guaranteed to all capital defendants in federal habeas corpus proceedings. See 21 U. S. C. § 848(q)(4)(B). More often than not, however, it is in the proceedings antecedent to federal habeas corpus—the capital trial, and to a lesser extent state postconviction proceedings—that a capital defendant's case is won or lost. Frequently the legal counsel available to capital defendants at these critical stages is woefully inadequate. I therefore write to address the crisis in trial and state postconviction legal representation for capital defendants that forms the backdrop to the federal right to counsel afforded by § 848(q)(4)(B).

Without question, "the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings." Robbins, *Toward a More*

Just and Effective System of Review in State Death Penalty Cases, Report of the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus, 40 Am. U. L. Rev. 1, 16 (1990) (ABA Report). The unique, bifurcated nature of capital trials and the special investigation into a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases. See Green, Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment, 78 Iowa L. Rev. 433, 434 (1993); Coyle, et al., Fatal Defense, 12 Nat. L. J. 30, 44 (June 11, 1990) (Capital-defense attorneys in eight States were disbarred, suspended, or disciplined at rates 3 to 46 times higher than the general attorney-discipline rates).

Two factors contribute to the general unavailability of qualified attorneys to represent capital defendants. The absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense. Many States that regularly impose the death penalty have few, if any, standards governing the qualifications required of court-appointed capital-defense counsel. In 21 U. S. C. §§ 848(q)(5) and (6), Congress has required that attorneys appointed to represent capital defendants in federal habeas corpus proceedings must have five years of experience litigating before the relevant court and three years of felony experience. See *McFarland, ante*, at 854, n. 2. According to a 1990 survey by the National Law Journal, however, Florida, Georgia, Mississippi, Texas, and California have no binding statewide qualification criteria for capital-defense counsel. See Coyle, 12 Nat. L. J., at 32. Capital-defense attorneys in Louisiana must have five years' experience practicing in some area of law, but are not required to have experience in capital defense or any form of criminal practice. *Ibid.*

In addition to the lack of standards, compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital

defense. Louisiana limits the compensation for court-appointed capital-defense counsel to \$1,000 for *all* pretrial preparation and trial proceedings. Kentucky pays a maximum of \$2,500 for the same services. Alabama limits reimbursement for out-of-court preparation in capital cases to a maximum of \$1,000 each for the trial and penalty phases. Ala. Code § 15-12-21(a) (Supp. 1992); Op. Ala. Atty. Gen. No. 91-00206 (Mar. 21, 1991). See generally Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 Ind. L. J. 363, 364-375 (1993).

Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense. A recent survey by the Mississippi Trial Lawyers' Association estimated that capital-defense attorneys in that State are compensated at an average rate of \$11.75 per hour. See Coyle, 12 Nat. L. J., at 32. Compensation rates of \$5 per hour or less are not uncommon. Strasser, *\$1,000 Fee Cap Makes Death Row's 'Justice' A Bargain for the State*, 12 Nat. L. J. 33 (June 11, 1990).<sup>1</sup> The prospect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client.

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<sup>1</sup> Recent improvements have been made, however. The Florida Supreme Court struck down the State's maximum fee of \$3,500 as unconstitutional when applied in such a manner as to impinge on the right to effective counsel in capital cases. *White v. Board of County Comm'rs*, 537 So. 2d 1376 (1989). The court found itself "hard pressed to find any capital case in which the circumstances would not warrant an award of attorneys' fees in excess of the [\$3,500] fee cap." *Id.*, at 1378. South Carolina's Supreme Court also refused, on Sixth Amendment grounds, to enforce the State's \$10 and \$15 per hour and \$5,000 maximum compensation levels in capital cases. *Bailey v. State*, 424 S. E. 2d 503, 508 (1992). The Oklahoma and Arkansas Supreme Courts recently struck down their States' respective compensation caps of \$3,200 and \$1,000 as unconstitutional takings when applied to capital cases. See *State v. Lynch*, 796 P. 2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S. W. 2d 770 (1991).

The practical costs of such ad hoc systems of attorney selection and compensation are well documented. Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute, *e. g.*, *Smith v. State*, 581 So. 2d 497 (Ala. Crim. App. 1990), slept through or otherwise were not present during trial, or failed to investigate or present any mitigating evidence at the penalty phase, *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari). Other indigent defendants have been represented by attorneys who had been admitted to the bar only six months before and never had conducted a criminal trial. *E. g.*, *Paradis v. Arave*, 954 F. 2d 1483, 1490–1491 (CA9 1992), vacated and remanded, 507 U.S. 1026 (1993), relief denied, 20 F. 3d 950, 959 (1994). One Louisiana defendant was convicted of capital murder following a 1-day trial and 20-minute penalty phase proceeding, in which his counsel stipulated to the defendant's age at the time of the crime and rested. *State v. Messiah*, 538 So. 2d 175, 187 (La. 1988), cert. denied, 493 U.S. 1063 (1990). When asked to cite the criminal cases he knew, one defense attorney who failed to challenge his client's racially unrepresentative jury pool could name only two cases: *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dred Scott v. Sandford*, 19 How. 393 (1857). See Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835, 1839, and n. 32 (1994), citing Tr. of Hearing 231 (Apr. 25–27, 1988) in *State v. Birt*, No. 2360 (Super. Ct. Jefferson Cty., Ga. 1988).

The consequences of such poor trial representation for the capital defendant, of course, can be lethal. Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland v. Washington*, 466 U.S. 668 (1984). Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person who happens to be a lawyer." *Id.*, at 685.

The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have

been denied. John Young, for example, was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges. The Court of Appeals for the Eleventh Circuit rejected Young's ineffective-assistance-of-counsel claim on federal habeas, *Young v. Kemp*, 727 F. 2d 1489 (1984), and this Court denied review, 470 U. S. 1009 (1985). Young was executed in 1985. John Smith and his codefendant Rebecca Machetti were sentenced to death by juries selected under the same Georgia statute. Machetti's attorneys successfully challenged the statute under a recent Supreme Court decision, *Taylor v. Louisiana*, 419 U. S. 522 (1975), winning Machetti a new trial and ultimately a life sentence. *Machetti v. Linahan*, 679 F. 2d 236 (CA11 1982). Smith's counsel was unaware of the Supreme Court decision, however, and failed similarly to object at trial. *Smith v. Kemp*, 715 F. 2d 1459 (CA11 1983). Smith was executed in 1983.

Jesus Romero's attorney failed to present any evidence at the penalty phase and delivered a closing argument totaling 29 words. Although the attorney later was suspended on unrelated grounds, Romero's ineffective-assistance claim was rejected by the Court of Appeals for the Fifth Circuit, *Romero v. Lynaugh*, 884 F. 2d 871, 875 (1989), and this Court denied certiorari, 494 U. S. 1012 (1990). Romero was executed in 1992. Larry Heath was represented on direct appeal by counsel who filed a 6-page brief before the Alabama Court of Criminal Appeals. The attorney failed to appear for oral argument before the Alabama Supreme Court and filed a brief in that court containing a 1-page argument and citing a single case. The Eleventh Circuit found no prejudice, *Heath v. Jones*, 941 F. 2d 1126, 1131 (1991), and this Court denied review, 502 U. S. 1077 (1992). Heath was executed in Alabama in 1992.

James Messer, a mentally impaired capital defendant, was represented by an attorney who at the trial's guilt phase presented *no* defense, made no objections, and emphasized the horror of the capital crime in his closing statement. At the penalty phase, the attorney presented no evidence of mental impairment, failed to introduce other substantial mitigating evidence, and again repeatedly suggested in closing that death was the appropriate punishment. The Eleventh Circuit refused to grant relief, *Messer v. Kemp*, 760 F. 2d 1080 (1985) (Johnson, J., dissenting), and this Court denied certiorari, 474 U. S. 1088 (1986). Messer was exe-

cuted in 1988. Even the attorney who could name only *Miranda* and *Dred Scott* twice has survived ineffective-assistance challenges. See *Birt v. Montgomery*, 725 F. 2d 587, 596–601 (CA11) (en banc), cert. denied, 469 U.S. 874 (1984); *Williams v. State*, 258 Ga. 281, 368 S. E. 2d 742 (1988), cert. denied, 492 U.S. 925 (1989).<sup>2</sup> None of these cases inspires confidence that the adversarial system functioned properly or “that the trial ca[n] be relied on as having produced a just result.” *Strickland*, 466 U.S., at 686. Yet, in none of these cases was counsel’s assistance found to be ineffective.

Regardless of the quality of counsel, capital defendants constitutionally are entitled to have *some* “person who happens to be a lawyer . . . present at trial alongside the accused.” *Id.*, at 685. The same cannot be said for state postconviction review. State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in state court. This Court thus far has declined to hold that indigent capital defendants have a right to counsel at this level, based on the assumption that capital defendants generally can obtain volunteer or other counsel to represent them in these state proceedings. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (KENNEDY, J., joined by O’CONNOR, J., concurring in judgment) (In “the case before us . . . no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings”).

Though perhaps true for some jurisdictions, this assumption bears little resemblance to the realities confronting McFarland and other condemned inmates in Texas. A recent study of state postconviction capital representation in Texas sponsored by the State Bar of Texas concluded that the capital-defense situation in that State is “desperate.” The Spangenberg Group, *A Study of Representation in Capital Cases in Texas*, ii (Mar. 1993). According to the Spangenberg Group, “Texas has already reached the crisis stage in capital representation and . . . the problem is substantially worse than that faced by any other state with the death penalty.” *Id.*, at i.

<sup>2</sup>For further discussion of these and other examples of indigent capital defense representation, see, *e.g.*, Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *Yale L.J.* 1835 (1994); ABA Report, at 65–70.

Texas has the second largest death row in the country, with approximately 375 inmates currently facing execution. Since 1976, Texas has executed approximately one third of all the defendants put to death in the United States, NAACP Legal Defense and Educational Fund, Inc., *Death Row, U. S. A.*, 10 (spring 1994), and the pace of executions in Texas is increasing. In June 1993, this Court denied certiorari in an unprecedented 29 capital cases from Texas, including McFarland's. During the ensuing period between June 1 and October 21, 1993, Texas scheduled 39 executions and actually executed 10 capital defendants. All told, the Lone Star State set more than 100 execution dates in 1993, at least 8 of which were set within 45 days of the close of direct review.

Finding qualified defense counsel capable of meeting this demand might be formidable even if an adequate pool of attorneys and adequate funds were available. Capital defendants in Texas, however, have no statutory right to counsel in state postconviction proceedings, receive little benefit from the State's skeletal public defender service, and are not provided even discretionary court-appointed counsel. Although the Texas Code of Criminal Procedure, Arts. 11.07, 26.04, 26.05, gives state courts discretion to appoint and compensate counsel for state habeas corpus proceedings, "this is almost never done." Spangenberg Group, at vii. Funds for experts and other expenses also "are almost never approved." *Ibid.* Indeed, the Texas Bar study found that "[p]resently no funds are allocated for payment of counsel or litigation expenses at the state habeas level." Spangenberg Group, at ii. Capital defendants in state postconviction proceedings must rely almost exclusively on volunteer private counsel—volunteers who are increasingly difficult to find. Texas thus has become "the only death penalty state in which death-sentenced prisoners are not routinely represented in state postconviction proceedings." Brief for American Bar Association as *Amicus Curiae, McFarland v. Scott*, No. 93-6497, p. 3, and n. 9. The lack of attorney compensation and Texas' aggressive practice of "[d]ocket control by execution date," Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 *Tex. Bar J.* 850, 851 (1990), have left an estimated 75 capital defendants in Texas who currently are facing execution dates without any legal representation.

The right to qualified legal counsel in federal habeas corpus proceedings bestowed by § 848(q)(4)(B) is triggered only after a capital defendant has completed his direct review and, generally, some form of state postconviction proceeding. The continuing importance of federal habeas corpus in correcting constitutional errors is well documented. Of the capital cases reviewed in federal habeas corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error. Liebman, More than ‘Slightly Retro:’ The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*, 18 N. Y. U. Rev. L. & Soc. Change 537, 541, n. 15 (1990–1991). The total reversal rate of capital cases at all stages of review during the same time period was estimated at 60% or more. *Id.*, at 541, n. 15; see also *Murray v. Giarratano*, 492 U. S., at 23–24, and n. 13 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting) (citing a federal habeas corpus success rate of 60% to 70% in capital cases, versus 0.25% to 7% in noncapital cases); *id.*, at 14 (KENNEDY, J., joined by O’CONNOR, J., concurring in judgment). This Court itself frequently has granted capital defendants relief in federal habeas corpus proceedings. See, e. g., *Parker v. Dugger*, 498 U. S. 308 (1991); *Yates v. Evatt*, 500 U. S. 391 (1991); *Yates v. Aiken*, 484 U. S. 211 (1988); *Yates v. Aiken*, 474 U. S. 896 (1985); *Penry v. Lynaugh*, 492 U. S. 302 (1989); *Amadeo v. Zant*, 486 U. S. 214 (1988); *Maynard v. Cartwright*, 486 U. S. 356 (1988); *Johnson v. Mississippi*, 486 U. S. 578 (1988); *Hitchcock v. Dugger*, 481 U. S. 393 (1987); *Ford v. Wainwright*, 477 U. S. 399 (1986).

The mere presence of “[s]uch a high incidence of uncorrected error” found in capital habeas corpus proceedings, *Murray v. Giarratano*, 492 U. S., at 24 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting), testifies to the inadequacy of the legal representation afforded at the trial and state postconviction stages. Yet the barriers to relief in federal habeas corpus proceedings are high. Even the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel. The accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review, see, e. g., *Herrera v. Collins*, 506 U. S. 390 (1993); *Sawyer v. Whitley*, 505 U. S. 333 (1992); *Keeney v. Tamayo-Reyes*, 504 U. S. 1 (1992); *Coleman v. Thompson*, 501 U. S. 722 (1991); *McCleskey v. Zant*, 499 U. S. 467 (1991); *Butler v. McKellar*, 494 U. S. 407 (1990); *Teague v. Lane*, 489 U. S.



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288 (1989), make it even less likely that future capital defendants who receive qualified legal counsel in federal habeas actually will obtain relief. And it is the capital defendant who pays the price for the failings of counsel and this review process—generally with his life.

Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this Court curtails federal oversight of state-court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.

Adhering to my belief that the death penalty cannot be imposed fairly within the constraints of our Constitution, *Collins v. Collins*, 510 U. S. 1141, 1143 (1994) (BLACKMUN, J., dissenting), I would grant the petition for certiorari and vacate the death sentence.

*Rehearing Denied*

No. 93-7699. KARIM-PANAHI *v.* UNITED STATES ET AL., 511 U. S. 1109;

No. 93-8295. WARREN *v.* UNITED STATES, 511 U. S. 1110;

No. 93-8401. FROMAL *v.* VIRGINIA STATE BAR DISCIPLINARY BOARD, 511 U. S. 1090;

No. 93-8458. WOODS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 511 U. S. 1092; and

No. 93-8853. WHITLEY *v.* FLORIDA, *ante*, p. 1210. Petitions for rehearing denied.

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JULY 12, 1994

*Dismissal Under Rule 46*

No. 92-1996. ALASKA HOUSING FINANCE CORP. *v.* KURTH. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 980 F. 2d 737.

JULY 28, 1994

*Miscellaneous Order*

No. A-60 (O. T. 1994). AMSDEN ET AL. *v.* BIDEN, CHAIRMAN, SENATE JUDICIARY COMMITTEE, ET AL. Application for injunction, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

JULY 29, 1994

*Dismissal Under Rule 46*

No. 93-9795. TORNOW *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.

AUGUST 1, 1994

*Dismissal Under Rule 46*

No. 93-1812. SEA SAVAGE, INC., ET AL. *v.* CHEVRON U. S. A., INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 13 F. 3d 888.

*Certiorari Denied*

No. 94-5427 (A-100). DREW *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

August 1, 2, 1994

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No. 94-5446 (A-98). *DREW v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 28 F. 3d 460.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

AUGUST 2, 1994

*Appointment of Marshal*

It is ordered by this Court that Dale E. Bosley be, and he is hereby, appointed Marshal of this Court, effective August 1, 1994.

*Miscellaneous Orders*

No. D-1356. *IN RE DISBARMENT OF SEEMAN*. Disbarment entered. [For earlier order herein, see 510 U. S. 1104.]

No. D-1371. *IN RE DISBARMENT OF MCGRATH*. Disbarment entered. [For earlier order herein, see 510 U. S. 1174.]

No. D-1383. *IN RE DISBARMENT OF BUDMAN*. Disbarment entered. [For earlier order herein, see 511 U. S. 1027.]

No. D-1384. *IN RE DISBARMENT OF WELLS*. Disbarment entered. [For earlier order herein, see 511 U. S. 1028.]

No. D-1388. *IN RE DISBARMENT OF KLEIN*. Disbarment entered. [For earlier order herein, see 511 U. S. 1051.]

No. D-1390. *IN RE DISBARMENT OF DUBOW*. Disbarment entered. [For earlier order herein, see 511 U. S. 1066.]

No. D-1393. *IN RE DISBARMENT OF COMICI*. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

No. D-1394. *IN RE DISBARMENT OF FARHAT*. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

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No. D-1395. IN RE DISBARMENT OF MORINGIELLO. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

No. D-1397. IN RE DISBARMENT OF CLOUTIER. Disbarment entered. [For earlier order herein, see 511 U. S. 1125.]

No. D-1398. IN RE DISBARMENT OF SLOAN. Disbarment entered. [For earlier order herein, see 511 U. S. 1139.]

No. D-1402. IN RE DISBARMENT OF GRIFFIN. James H. Griffin, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 6, 1994 [511 U. S. 1140], is hereby discharged.

No. D-1417. IN RE DISBARMENT OF ASBELL. It is ordered that Samuel Asbell, of Camden, 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-1418. IN RE DISBARMENT OF GRIFFITH. It is ordered that John B. Griffith, of Silver Spring, 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-1419. IN RE DISBARMENT OF LASHLEY. It is ordered that Douglas L. Lashley, of Olney, 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-1420. IN RE DISBARMENT OF BERNSTEIN. It is ordered that Harry J. Bernstein, of Belmore, 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-1421. IN RE DISBARMENT OF SLAN. It is ordered that Allan G. Slan, of Rockville, 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.

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No. D-1422. *IN RE DISBARMENT OF MOSELY*. It is ordered that Fred M. Mosely, of East Cleveland, 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-1423. *IN RE DISBARMENT OF OKOCHA*. It is ordered that Nwabueze Vincent Okocha, of Cleveland, 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-1424. *IN RE DISBARMENT OF HOLZMANN*. It is ordered that James Charles Holzmann, of San Diego, 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-1425. *IN RE DISBARMENT OF ABRAMS*. It is ordered that Harold B. Abrams, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1426. *IN RE DISBARMENT OF NOLAN*. It is ordered that Patrick James Nolan, of Sacramento, 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-1427. *IN RE DISBARMENT OF SCHECHTERMAN*. It is ordered that Lawrence Schechterman, of Boca Raton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1428. *IN RE DISBARMENT OF STERNBERG*. It is ordered that Les Paul Sternberg, of Sunrise, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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No. D-1429. IN RE DISBARMENT OF BERNARD. It is ordered that Donald Ray Bernard, of Seabrook, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1430. IN RE DISBARMENT OF FIELD. It is ordered that Carl M. Field, of Cedarhurst, 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-1431. IN RE DISBARMENT OF SCHMIEDER. It is ordered that Robert W. Schmieder, of Belleville, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1432. IN RE DISBARMENT OF THOMPSON. It is ordered that Bruce A. Thompson, of Fair Haven, 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-1433. IN RE DISBARMENT OF CORCES. It is ordered that Charles B. Corces, of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92-2038. ASGROW SEED CO. *v.* WINTERBOER ET AL., DBA DEEBEES. C. A. Fed. Cir. [Certiorari granted, 511 U. S. 1029.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-1543. MCKENNON *v.* NASHVILLE BANNER PUBLISHING CO. C. A. 6th Cir. [Certiorari granted, 511 U. S. 1106.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-1340. UNITED STATES *v.* MEZZANATTO. C. A. 9th Cir. [Certiorari granted, 511 U. S. 1029.] Motion of National Association of Criminal Defense Lawyers et al. for leave to file a brief as *amici curiae* granted.

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No. 93-1631. BENTSEN, SECRETARY OF THE TREASURY *v.* ADOLPH COORS CO. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1203.] Motion of respondent to substitute Coors Brewing Co. in place of Adolph Coors Co. granted.

No. 93-1636. SWINT ET AL. *v.* CHAMBERS COUNTY COMMISSION ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1204.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 93-7901. SCHLUP *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. [Certiorari granted, 511 U. S. 1003.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

*Rehearing Denied*

No. 92-7264. WALKER *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 507 U. S. 964;

No. 93-1329. DiPINTO ET AL. *v.* SPERLING ET AL., 511 U. S. 1082;

No. 93-1377. WARDLAW *v.* PICKETT ET AL., *ante*, p. 1204;

No. 93-1469. FOXWOOD MANAGEMENT CO. ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., *ante*, p. 1204;

No. 93-1620. RUBENS ET AL. *v.* SHINE, JULIANELLE, KARP, BOZELKO & KARAZIN, P. C., 511 U. S. 1142;

No. 93-1652. CALDERON, WARDEN, ET AL. *v.* HAMILTON, *ante*, p. 1220;

No. 93-1654. CRUTCHFIELD *v.* MCGREGOR, *ante*, p. 1205;

No. 93-1730. MICCIO *v.* NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS ET AL., 511 U. S. 1129;

No. 93-1815. BURNS-TOOLE *v.* BYRNE ET AL., *ante*, p. 1207;

No. 93-1868. ORTMAN *v.* OAKLAND COUNTY, MICHIGAN, ET AL., *ante*, p. 1208;

No. 93-7394. MCCLENDON *v.* CALIFORNIA, 511 U. S. 1085;

No. 93-7936. SMITH *v.* UNITED STATES, 511 U. S. 1130;

No. 93-8044. TOEGEMANN *v.* RICH ET AL., 511 U. S. 1055;

No. 93-8272. GAYDOS *v.* CHERTOFF, UNITED STATES ATTORNEY, ET AL., 511 U. S. 1087;

No. 93-8315. RUCHTI *v.* HEDLEY ET AL., 511 U. S. 1088;

No. 93-8368. ASRAR *v.* UNITED STATES, 511 U. S. 1045;

No. 93-8436. REID *v.* CITY OF FLINT ET AL., 511 U. S. 1091;

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No. 93-8439. CLINTON *v.* SMITH, WARDEN, ET AL., 511 U. S. 1091;

No. 93-8494. HAWKINS *v.* GREEN ET AL., 511 U. S. 1093;

No. 93-8510. MARK *v.* UNITED STATES ET AL., 511 U. S. 1144;

No. 93-8530. PAYNE *v.* ESCAMBIA COUNTY SHERIFF, 511 U. S. 1111;

No. 93-8595. KLEINSCHMIDT ET AL. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL., 511 U. S. 1112;

No. 93-8619. LANGE *v.* HEITKAMP ET AL., 511 U. S. 1131;

No. 93-8628. TAVERAS *v.* NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES ET AL., 511 U. S. 1132;

No. 93-8639. JEFFRESS *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, 511 U. S. 1112;

No. 93-8664. BURNETT *v.* FAIRLEY ET AL., 511 U. S. 1132;

No. 93-8695. CARPENTER ET UX. *v.* BLANKENSHIP, 511 U. S. 1133;

No. 93-8718. FROMAL *v.* ROBINS ET AL., 511 U. S. 1133;

No. 93-8727. POOLE *v.* HOLLAND, WARDEN, 511 U. S. 1145;

No. 93-8771. EDWARDS *v.* HARGETT, WARDEN, *ante*, p. 1209;

No. 93-8807. SULE *v.* UNITED STATES, *ante*, p. 1223;

No. 93-8831. BARNES *v.* GARETNER ET AL., *ante*, p. 1210;

No. 93-8861. COOLEY ET UX. *v.* KNAPP ET AL., *ante*, p. 1210;

No. 93-8911. OKOR *v.* UNITED STATES, 511 U. S. 1146;

No. 93-9057. NEWKIRK *v.* SMITH, WARDEN, ET AL., 511 U. S. 1149; and

No. 93-9320. IN RE FRANZ, *ante*, p. 1218. Petitions for rehearing denied.

No. 93-10. CULLEN *v.* TRAINOR, ROBERTSON, SMITS & WADE ET AL., 510 U. S. 859. Motion for leave to file petition for rehearing denied.

No. 93-1443. MAKIN *v.* EVANS ET AL., 511 U. S. 1082. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

AUGUST 3, 1994

*Dismissal Under Rule 46*

No. 93-1904. COLORADO *v.* LEFTWICH ET AL. Sup. Ct. Colo. Certiorari dismissed under this Court's Rule 46. Reported below: 869 P. 2d 1260.



August 3, 4, 1994

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*Miscellaneous Orders*

No. A-79 (O. T. 1994). *RICHLEY v. NORRIS*, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. A-83 (O. T. 1994). *RICHLEY ET AL. v. GAINES ET AL.* Application for stays of execution of sentences of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. A-87 (O. T. 1994). *HOLMES v. NORRIS*, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

*Certiorari Denied*

No. 94-5469 (A-81). *CLINES v. NORRIS*, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this application and this petition.

*Assignment Order*

Pursuant to the provisions of 28 U. S. C. §42, it is ordered that JUSTICE THOMAS be, and he is hereby, assigned to the Eighth Circuit as Circuit Justice pending further order of the Court.

AUGUST 4, 1994

*Rehearing Denied*

No. A-79 (O. T. 1994). *RICHLEY v. NORRIS*, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante* this page. Amendment to the application for stay of execution is treated as a motion for reconsideration and is denied. JUSTICE SCALIA would not treat the amendment as a motion for reconsideration and therefore registers no vote. JUSTICE BREYER took no part in the consideration or decision of this matter.

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No. A-83 (O. T. 1994). *RICHLEY ET AL. v. GAINES ET AL.*, *ante*, p. 1272. Amendment to the application for stays of executions is treated as a motion for reconsideration and is denied. JUSTICE SCALIA would not treat the amendment as a motion for reconsideration and therefore registers no vote. JUSTICE BREYER took no part in the consideration or decision of this matter.

AUGUST 5, 1994

*Certiorari Denied*

No. 94-5016 (A-56). *FIERRO v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this application and this petition. Reported below: 22 F. 3d 1095.

AUGUST 9, 1994

*Dismissal Under Rule 46*

No. 93-1940. *ROYAL SOVEREIGN CORP. ET AL. v. BEVERLY HILLS FAN CO.* C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 21 F. 3d 1558.

AUGUST 11, 1994

*Miscellaneous Order*

No. A-64 (O. T. 1994). *LOUISIANA ET AL. v. HAYS ET AL.*; and No. A-75 (O. T. 1994). *UNITED STATES v. HAYS ET AL.* Applications for stay, presented to JUSTICE SCALIA, and by him referred to the Court, granted, and it is ordered that the judgment of the United States District Court for the Western District of Louisiana, Civil Action No. CV 92-1522S, filed July 25, 1994, is stayed pending the timely filing of statements as to jurisdiction in this Court. Should such statements be so timely filed, this order shall remain in effect pending this Court's action on the appeals. If the judgment should be affirmed, or the appeals dismissed, this stay shall expire automatically. In the event jurisdiction is noted or postponed, this order shall remain in effect pending the sending down of the judgment of this Court. JUSTICE SCALIA would deny the applications.

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AUGUST 18, 1994

*Dismissal Under Rule 46*

No. 94-5107. *MOORE v. REYNOLDS, WARDEN*. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.

AUGUST 24, 1994

*Miscellaneous Orders*

No. A-41 (93-1988). *RABIN v. UNITED STATES INTELLIGENCE ET AL.* C. A. 2d Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. A-42 (O. T. 1994). *BUENO v. COLORADO*. Dist. Ct., Douglas County, Colo. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. D-1389. *IN RE DISBARMENT OF SCHWARTZ*. Disbarment entered. [For earlier order herein, see 511 U. S. 1066.]

No. D-1392. *IN RE DISBARMENT OF BLEDSOE*. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

No. D-1396. *IN RE DISBARMENT OF CAIRO*. Disbarment entered. [For earlier order herein, see 511 U. S. 1104.]

No. D-1399. *IN RE DISBARMENT OF AGAJANIAN*. Disbarment entered. [For earlier order herein, see 511 U. S. 1139.]

No. D-1400. *IN RE DISBARMENT OF PEGG*. Disbarment entered. [For earlier order herein, see 511 U. S. 1139.]

No. D-1401. *IN RE DISBARMENT OF HUNT*. Disbarment entered. [For earlier order herein, see 511 U. S. 1140.]

No. D-1404. *IN RE DISBARMENT OF YAMADA*. Disbarment entered. [For earlier order herein, see 511 U. S. 1140.]

No. D-1405. *IN RE DISBARMENT OF WARNER*. Disbarment entered. [For earlier order herein, see *ante*, p. 1201.]

No. D-1406. *IN RE DISBARMENT OF BRENNAN*. Disbarment entered. [For earlier order herein, see *ante*, p. 1201.]

No. D-1407. *IN RE DISBARMENT OF ANAST*. Disbarment entered. [For earlier order herein, see *ante*, p. 1201.]

No. D-1409. *IN RE DISBARMENT OF BELLER*. Disbarment entered. [For earlier order herein, see *ante*, p. 1202.]

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No. D-1410. IN RE DISBARMENT OF VANDER VORT. Disbarment entered. [For earlier order herein, see *ante*, p. 1217.]

No. D-1412. IN RE DISBARMENT OF LEDERBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 1232.]

No. D-1434. IN RE DISBARMENT OF PERRY. It is ordered that Harold L. Perry, of Oakland, 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-1435. IN RE DISBARMENT OF MCGREEVY. It is ordered that Timothy J. McGreevy, of Sioux Falls, S. D., 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-1436. IN RE DISBARMENT OF SIMS. It is ordered that William Sims, of Buffalo, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1437. IN RE DISBARMENT OF JONES. It is ordered that Fred Everett Jones, of Memphis, Tenn., 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-1438. IN RE DISBARMENT OF KENNEDY. It is ordered that Patrick James Kennedy, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1439. IN RE DISBARMENT OF CRIST. It is ordered that John A. Crist, of Middletown, 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-1440. IN RE DISBARMENT OF OFFSTEIN. It is ordered that Jerrold N. Offstein, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable

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within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1441. *IN RE DISBARMENT OF HAMER*. It is ordered that Brenda Joyce Hamer, of Glendale, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-1442. *IN RE DISBARMENT OF FELDMAN*. It is ordered that Richard Stewart Feldman, of Ushers, 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-1443. *IN RE DISBARMENT OF KAGAN*. It is ordered that Philip I. Kagan, 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-1444. *IN RE DISBARMENT OF GASPERI*. It is ordered that Edward M. Gasperi, of Saratoga Springs, 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-1445. *IN RE DISBARMENT OF SPARROW*. It is ordered that Victor H. Sparrow III, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1446. *IN RE DISBARMENT OF KENDERIAN*. It is ordered that Ronald V. Kenderian, of Alpine, 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-1447. *IN RE DISBARMENT OF CREGAN*. It is ordered that Lawrence Vincent Cregan, of Youngstown, 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.

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No. D-1448. *IN RE DISBARMENT OF CROWLEY*. It is ordered that James Tyner Crowley, of Cleveland, 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-1449. *IN RE DISBARMENT OF LEVINE*. It is ordered that Leslie Ira Levine, of Mt. Kisco, 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.

*Rehearing Denied*

No. 92-8717. *ROBINSON v. TEXAS*, *ante*, p. 1246;

No. 93-880. *MADSEN ET AL. v. WOMEN'S HEALTH CENTER, INC., ET AL.*, *ante*, p. 753;

No. 93-1033. *CHANDLER v. UNITED STATES*, *ante*, p. 1227;

No. 93-1254. *FEDERACION DE MAESTROS DE PUERTO RICO v. PUERTO RICO LABOR RELATIONS BOARD*, 511 U. S. 1069;

No. 93-1348. *ADAMS v. UNITED STATES*, *ante*, p. 1204;

No. 93-1522. *MARAVILLA ET AL. v. UNITED STATES*, *ante*, p. 1219;

No. 93-1732. *GILDER v. AETNA LIFE & CASUALTY*, *ante*, p. 1221;

No. 93-1745. *KILPATRICK v. STATE BAR OF TEXAS*, *ante*, p. 1236;

No. 93-1746. *TWEEDY v. AMERICAN AIRLINES, INC.*, *ante*, p. 1236;

No. 93-1771. *CASILLAN ET AL. v. REGIONAL TRANSPORTATION DISTRICT ET AL.*, *ante*, p. 1221;

No. 93-1778. *SHAW v. UNITED STATES*, *ante*, p. 1222;

No. 93-1797. *INSURANCE COMPANY OF NORTH AMERICA ET AL. v. MORTON INTERNATIONAL, INC.*, *ante*, p. 1245;

No. 93-1798. *ROOD v. PINELLAS COUNTY ET AL.*, *ante*, p. 1237;

No. 93-1799. *ROSENBAUM v. ROSENBAUM ET AL.*, *ante*, p. 1222;

No. 93-1862. *MESSA v. FOLEY, SECRETARY OF DEPARTMENT OF LABOR AND INDUSTRY OF PENNSYLVANIA, ET AL.*, *ante*, p. 1238;

No. 93-5418. *REED v. FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL.*, *ante*, p. 339;

No. 93-6220. *JOHNSON v. ILLINOIS*, *ante*, p. 1227;

No. 93-7060. *WICKLIFFE v. FARLEY, WARDEN, ET AL.*, 510 U. S. 1124;

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- No. 93-7200. *MCCOLLUM v. NORTH CAROLINA*, *ante*, p. 1254;  
No. 93-7631. *BACIGALUPO v. CALIFORNIA*, *ante*, p. 1253;  
No. 93-7680. *MONTIEL v. CALIFORNIA*, *ante*, p. 1253;  
No. 93-7724. *BUCHANAN v. UNITED STATES*, *ante*, p. 1228;  
No. 93-8220. *DUVALL v. ADMINISTRATOR, EASTERN PENNSYLVANIA PSYCHIATRIC INSTITUTE, ET AL.*, 511 U. S. 1074;  
No. 93-8423. *HOPKINS v. UNITED STATES*, *ante*, p. 1229;  
No. 93-8442. *DARDEN-BEY ET AL. v. UNITED STATES*, *ante*, p. 1223;  
No. 93-8478. *TURNER v. LUMADUE*, *ante*, p. 1239;  
No. 93-8485. *JACKSON v. DEPARTMENT OF THE TREASURY*, 511 U. S. 1144;  
No. 93-8490. *GAYDOS v. NATIONAL FIRE INSURANCE CO. ET AL.*, *ante*, p. 1239;  
No. 93-8869. *FREEMAN v. UNITED STATES*, 511 U. S. 1134;  
No. 93-8893. *IN RE MCCURDY*, *ante*, p. 1234;  
No. 93-8924. *JACKSON v. MAKEL, WARDEN*, *ante*, p. 1224;  
No. 93-8925. *IN RE JACKSON*, *ante*, p. 1218;  
No. 93-8970. *PONCE-BRAN v. CALIFORNIA FACULTY ASSN. ET AL.*, *ante*, p. 1241;  
No. 93-8975. *JONES v. WASHINGTON, WARDEN*, *ante*, p. 1241;  
No. 93-9025. *RESNOVER v. CARTER, ATTORNEY GENERAL OF INDIANA, ET AL.*, *ante*, p. 1246;  
No. 93-9040. *ARDITI v. RUNYON, POSTMASTER GENERAL*, *ante*, p. 1224;  
No. 93-9041. *DEVITTO v. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.*, *ante*, p. 1225;  
No. 93-9042. *COOPER ET AL. v. MISSOURI BOARD OF PROBATION AND PAROLE ET AL.*, *ante*, p. 1225;  
No. 93-9120. *MERIT v. UNITED STATES*, *ante*, p. 1212;  
No. 93-9162. *WATTS v. FEDERAL BUREAU OF PRISONS* (two cases), *ante*, p. 1242;  
No. 93-9255. *BUHL v. UNITED STATES*, *ante*, p. 1243;  
No. 93-9365. *ROMANO v. UNITED STATES*, *ante*, p. 1245; and  
No. 93-9433. *IN RE ANDERSEN*, *ante*, p. 1234. Petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these petitions.

No. 93-44. *TURNER BROADCASTING SYSTEM, INC., ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.*, *ante*, p. 622. Petition of Daniels Cablevision for rehearing denied. JUSTICE

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BREYER took no part in the consideration or decision of this petition.

No. 93-1715. JARMUSIK *v.* MERIT SYSTEMS PROTECTION BOARD, 511 U. S. 1143;

No. 93-8482. ELDRIDGE *v.* JOHNSON ET AL., 511 U. S. 1092; and

No. 93-8992. LORAH *v.* DEPARTMENT OF HUMAN RIGHTS, *ante*, p. 1241. Motions for leave to file petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these motions.

*Assignment Order*

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit from September 26, 1994, through June 9, 1995, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court pursuant to 28 U. S. C. § 295.

AUGUST 29, 1994

*Dismissal Under Rule 46*

No. 93-1551. PRESTON ET AL. *v.* FRANTZ ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 11 F. 3d 357.

SEPTEMBER 1, 1994

*Certiorari Denied*

No. 94-5887 (A-156). OTEY *v.* STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. JUSTICE BREYER took no part in the consideration or decision of this application and this petition. Reported below: 34 F. 3d 635.

SEPTEMBER 6, 1994

*Dismissal Under Rule 46*

No. 93-9279. HERNANDEZ *v.* BISCAYNE AQUA-CENTER, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari dismissed under this Court's Rule 46.1. Reported below: 630 So. 2d 620.



September 7, 8, 9, 14, 1994

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SEPTEMBER 7, 1994

*Dismissal Under Rule 46*

No. 94-5240. *WHITAKER v. UNITED STATES*. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 3 F. 3d 1312.

SEPTEMBER 8, 1994

*Miscellaneous Order*

No. 93-404. *GUSTAFSON ET AL. v. ALLOYD CO., INC., FKA ALLOYD HOLDINGS, INC., ET AL.* C. A. 7th Cir. [Certiorari granted, 510 U.S. 1176.] The parties are ordered to file on or before Tuesday, October 11, 1994, supplemental briefs addressing the question whether §12(2) of the Securities Act of 1933 applies to secondary transactions as well as to initial offerings of securities. Oral argument in this case, presently scheduled for October 11, 1994, is postponed. JUSTICE STEVENS and JUSTICE GINSBURG dissent from the entry of the foregoing order.

SEPTEMBER 9, 1994

*Dismissal Under Rule 46*

No. 93-1937. *WACHS ET AL. v. TREVINO, A MINOR, BY AND THROUGH HER NEXT FRIEND, HER GRANDMOTHER, CRUZ*. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.

*Miscellaneous Order*

No. 93-1151. *FEDERAL ELECTION COMMISSION v. NRA POLITICAL VICTORY FUND ET AL.* C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1218.] This case will be heard on oral argument October 11, 1994, in place of No. 93-404, *Gustafson et al. v. Alloyd Co., Inc., et al.*

SEPTEMBER 14, 1994

*Miscellaneous Orders*

No. A-20 (94-5859). *GILES v. SNOW ET AL.* C. A. 11th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

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No. A-72 (O. T. 1994). *MCCURDY v. CRANDELL, WARDEN*. Application for bail, addressed to JUSTICE BREYER and referred to the Court, denied.

No. A-103 (94-5808). *BROCKMAN v. SWEETWATER COUNTY SCHOOL DISTRICT NO. 1*. C. A. 10th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. A-157 (O. T. 1994). *DUFFY ET AL. v. WETZLER ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied. JUSTICE BREYER took no part in the consideration or decision of this application.

No. D-1415. *IN RE DISBARMENT OF MARGOLIS*. Disbarment entered. [For earlier order herein, see *ante*, p. 1232.]

No. D-1427. *IN RE DISBARMENT OF SCHECHTERMAN*. Lawrence Schechterman, of Boca Raton, Fla., 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 August 2, 1994 [*ante*, p. 1268], is hereby discharged.

No. D-1429. *IN RE DISBARMENT OF BERNARD*. Donald Ray Bernard, of Seabrook, Tex., 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 August 2, 1994 [*ante*, p. 1269], is hereby discharged.

No. D-1443. *IN RE DISBARMENT OF KAGAN*. It having been reported to the Court that Philip I. Kagan, of Toms River, N. J., has died, the rule to show cause, heretofore issued on August 24, 1994 [*ante*, p. 1276], is hereby discharged.

No. D-1450. *IN RE DISBARMENT OF KARCH*. It is ordered that Richard L. Karch, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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No. D-1451. *IN RE DISBARMENT OF LINDER*. It is ordered that Robert Alan Linder, of Batavia, 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-1452. *IN RE DISBARMENT OF MITWOL*. It is ordered that Michael Roger Mitwol, of Palm Harbor, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1453. *IN RE DISBARMENT OF ZELMAN*. It is ordered that Allan G. Zelman, of Arlington, Mass., 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-1454. *IN RE DISBARMENT OF ANTHONY*. It is ordered that William D. Anthony, of Pittsburgh, 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-1455. *IN RE DISBARMENT OF WONG*. It is ordered that Allan Yon Kwong Wong, of Somerville, Mass., 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-1456. *IN RE DISBARMENT OF FREEDMAN*. It is ordered that Kenneth B. Freedman, of Stow, Mass., 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.

SEPTEMBER 15, 1994

*Certiorari Denied*

No. 94-6046 (A-192). *GUTIERREZ v. SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION*. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. *Certiorari denied*. JUSTICE STEVENS and JUS-

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TICE GINSBURG would grant the application for stay of execution. JUSTICE BREYER took no part in the consideration or decision of this application and this petition. Reported below: 36 F. 3d 90.

SEPTEMBER 19, 1994

*Dismissal Under Rule 46*

No. 94-201. STEPHENS, COMMISSIONER OF INSURANCE OF KENTUCKY, IN HIS CAPACITY AS LIQUIDATOR OF DELTA AMERICA RE INSURANCE CO. *v.* INSTITUTO DE RESSEGUROS DO BRASIL (IRB). App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari dismissed under this Court's Rule 46. Reported below: 196 App. Div. 2d 250, 608 N. Y. S. 2d 166.

SEPTEMBER 23, 1994

*Certiorari Granted—Vacated and Remanded*

No. 94-218 (A-183). CITY OF BRIDGEPORT, CONNECTICUT, ET AL. *v.* BRIDGEPORT COALITION FOR FAIR REPRESENTATION ET AL. (two cases). C. A. 2d Cir. Certiorari granted, judgments vacated, and cases remanded to the Court of Appeals with instructions to vacate the judgments of the United States District Court for the District of Connecticut and then to remand the cases to the District Court for further consideration in light of *Johnson v. De Grandy*, ante, p. 997. The Clerk is directed to issue the judgment forthwith. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, dismissed as moot. JUSTICE BREYER took no part in the consideration or decision of this petition and this application. Reported below: 26 F. 3d 271 (first case) and 280 (second case).

*Miscellaneous Order*

No. A-190 (O. T. 1994). MILLER, GOVERNOR OF GEORGIA, ET AL. *v.* JOHNSON ET AL.;

No. A-200 (O. T. 1994). ABRAMS ET AL. *v.* JOHNSON ET AL.; and

No. A-203 (O. T. 1994). UNITED STATES *v.* JOHNSON ET AL. Applications for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that the judgment of the United States District Court for the Southern District of Georgia, Civil Action No. 194-008, dated September 12, 1994, is stayed pending the timely filing of statements as to jurisdiction

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in this Court. Should such statements be so timely filed, this order shall remain in effect pending this Court's action on the appeals. If the judgment should be affirmed, or the appeals dismissed, this stay shall expire automatically. In the event jurisdiction is noted, or postponed, this order shall remain in effect pending the sending down of the judgment of this Court. JUSTICE SCALIA took no part in the consideration or decision of these applications.

SEPTEMBER 26, 1994

*Miscellaneous Orders*

No. A-196 (94-5319). CLARK *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D-1411. IN RE DISBARMENT OF KARSCH. Disbarment entered. [For earlier order herein, see *ante*, p. 1217.]

No. D-1414. IN RE DISBARMENT OF WOODSIDE. Jon Lee Woodside, of Portland, Ore., 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 June 27, 1994 [*ante*, p. 1232], is hereby discharged.

No. D-1416. IN RE DISBARMENT OF MEYER. Disbarment entered. [For earlier order herein, see *ante*, p. 1233.]

No. D-1418. IN RE DISBARMENT OF GRIFFITH. Disbarment entered. [For earlier order herein, see *ante*, p. 1267.]

No. D-1422. IN RE DISBARMENT OF MOSELY. Disbarment entered. [For earlier order herein, see *ante*, p. 1268.]

No. D-1423. IN RE DISBARMENT OF OKOCHA. Disbarment entered. [For earlier order herein, see *ante*, p. 1268.]

No. D-1433. IN RE DISBARMENT OF CORCES. Disbarment entered. [For earlier order herein, see *ante*, p. 1269.]

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No. D-1437. IN RE DISBARMENT OF JONES. Fred Everett Jones, of Memphis, Tenn., 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 August 24, 1994 [*ante*, p. 1275], is hereby discharged.

No. D-1457. IN RE DISBARMENT OF GERLIN. It is ordered that William Lance Gerlin, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1458. IN RE DISBARMENT OF COLE. It is ordered that David Patten Cole, of Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1459. IN RE DISBARMENT OF DURUSAU. It is ordered that Patrick L. Durusau, of Conyers, Ga., 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. 92-2038. ASGROW SEED CO. *v.* WINTERBOER ET AL., DBA DEEBEES. C. A. Fed. Cir. [Certiorari granted, 511 U. S. 1029.] Motion of respondents for additional time for oral argument denied.

No. 93-768. MILWAUKEE BREWERY WORKERS' PENSION PLAN *v.* JOS. SCHLITZ BREWING CO. ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1234.] Motion of Central States, Southeast and Southwest Areas Pension Fund for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 93-1121. PLAUT ET AL. *v.* SPENDTHRIFT FARM, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 511 U. S. 1141.] Motions of National Association of Securities and Commercial Law Attorneys, Pacific Mutual Life Insurance Co., and Michael B. Dashjian for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for divided argument granted.

No. 93-1151. FEDERAL ELECTION COMMISSION *v.* NRA POLITICAL VICTORY FUND ET AL. C. A. D. C. Cir. [Certiorari

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granted, *ante*, p. 1218.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE GINSBURG took no part in the consideration or decision of this motion.

No. 93-1199. *STONE v. IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 6th Cir. [Certiorari granted, 511 U. S. 1105.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 93-1260. *UNITED STATES v. LOPEZ*. C. A. 5th Cir. [Certiorari granted, 511 U. S. 1029.] Motion of Coalition to Stop Gun Violence et al. for leave to file a brief as *amici curiae* out of time denied.

No. 93-1456. *U. S. TERM LIMITS, INC., ET AL. v. THORNTON ET AL.*; and

No. 93-1828. *BRYANT, ATTORNEY GENERAL OF ARKANSAS v. HILL ET AL.* Sup. Ct. Ark. [Certiorari granted, *ante*, p. 1218.] Motion of petitioners U. S. Term Limits, Inc., et al. for additional time for oral argument granted, and their motion for divided argument denied. Motion of the Attorney General of Arkansas for additional time for oral argument and for divided argument granted, and 15 additional minutes allotted for that purpose. Motion of respondents for additional time for oral argument granted, and their motion for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and an additional 15 minutes allotted for that purpose.

No. 93-1612. *NATIONSBANK OF NORTH CAROLINA, N. A., ET AL. v. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL.*; and

No. 93-1613. *LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL. v. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL.* C. A. 5th Cir. [Certiorari granted, 511 U. S. 1141.] Motion of the Solicitor General for divided argument granted.

No. 93-1636. *SWINT ET AL. v. CHAMBERS COUNTY COMMISSION ET AL.* C. A. 11th Cir. [Certiorari granted, *ante*, p. 1204.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-1660. *ARIZONA v. EVANS*. Sup. Ct. Ariz. [Certiorari granted, 511 U. S. 1126.] Motion of Washington Legal Foundation

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et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

*Certiorari Granted*

No. 93-1462. CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. *v.* RAMON MORALES. C. A. 9th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 16 F. 3d 1001.

No. 93-1577. QUALITEX CO. *v.* JACOBSON PRODUCTS CO., INC. C. A. 9th Cir. Motions of Dr. Pepper/Seven-Up Corp., International Trademark Association, and American Bar Association for leave to file briefs as *amici curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 13 F. 3d 1297.

No. 93-1783. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* NEWPORT NEWS SHIP-BUILDING & DRY DOCK Co. ET AL. C. A. 4th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 8 F. 3d 175.

No. 93-1823. MISSOURI ET AL. *v.* JENKINS ET AL. (two cases). C. A. 8th Cir. Certiorari granted. Brief of petitioners is to be



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filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 11 F. 3d 755 (first case); 13 F. 3d 1170 (second case).

No. 93-1841. ADARAND CONSTRUCTORS, INC. *v.* PENA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 16 F. 3d 1537.

No. 93-1883. ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* EDWARDS, GUARDIAN AD LITEM FOR EDWARDS, ET AL. C. A. 9th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 12 F. 3d 154.

No. 93-1935. CURTISS-WRIGHT CORP. *v.* SCHOONEJONGEN ET AL. C. A. 3d Cir. Motions of Chamber of Commerce of the United States and National Union Fire Insurance Company of Pittsburgh, Pennsylvania, for leave to file briefs as *amici curiae* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on

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or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 18 F. 3d 1034.

No. 94-226. FLORIDA BAR *v.* WENT FOR IT, INC., ET AL. C. A. 11th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. This Court's Rule 29.2 does not apply. Reported below: 21 F. 3d 1038.

*Certiorari Denied*

No. 94-5004. WILLIAMS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 626.

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*Miscellaneous Order\**

No. 93-1462 (A-204). CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. *v.* RAMON MORALES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1287.] Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the mandate of the United States Court of Appeals for the Ninth Circuit, case No. 92-56262, is stayed pending the sending down of the judgment of this Court.

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\*For the Court's order making allotment of Justices, see *ante*, p. VI.

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REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1289 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.

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OPINION OF INDIVIDUAL JUSTICE  
IN CHAMBERS

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EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.*  
HOPE MEDICAL GROUP FOR WOMEN ET AL.

ON APPLICATION FOR STAY

No. A-124. Decided August 17, 1994

An application to stay the District Court's order is denied. That court enjoined applicants, Louisiana officials, from enforcing a state law prohibiting the use of public funds for abortion except when medically necessary to prevent the mother's death, finding that the law is inconsistent with what the court termed the requirement of Title XIX of the Social Security Act that States participating in the Medicaid program fund abortions for women whose fetuses were conceived by acts of rape or incest. The premise that Title XIX requires participating States to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment has been uniformly supported by those Courts of Appeals that have addressed this question. It is certain that four Justices will not be found to vote for certiorari on this question until there is a Circuit conflict.

JUSTICE SCALIA, Circuit Justice.

Applicants, officers of the State of Louisiana, ask that I stay an order entered by the United States District Court for the Eastern District of Louisiana which enjoins them from enforcing La. Rev. Stat. Ann. § 40:1299.34.5 (West 1992) while at the same time accepting federal Medicaid funds pursuant to Title XIX of the Social Security Act, as added, 79 Stat. 343, 42 U. S. C. § 1396 *et seq.* (1988 ed. and Supp. IV). The District Court stayed its judgment until 5 p.m. on August 19, 1994. Yesterday, the Court of Appeals for the Fifth Circuit unanimously denied the applicants' motion for stay pending appeal.

## Opinion in Chambers

Section 40:1299.34.5 provides in relevant part:

“[N]o public funds . . . shall be used in any way for, to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother.”

The District Court concluded that this statute was inconsistent with what it determined to be the requirement of Title XIX, as modified by the 1994 version of the Hyde Amendment, Pub. L. 103–112, § 509, 107 Stat. 1113, that States participating in the Medicaid program fund medically necessary abortions upon fetuses conceived by acts of rape or incest. Accordingly, it ordered applicants either to cease enforcing § 40:1299.34.5 or to withdraw from participation in the Medicaid program. *Hope Medical Group for Women v. Edwards*, No. 94–1129 (ED La., July 28, 1994).

The practice of the Justices has consistently been to grant a stay only when three conditions obtain. There must be a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the applicants’ position is correct) if the judgment below is not stayed. *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (SCALIA, J., in chambers). Moreover, when a district court judgment is reviewable by a court of appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears “an especially heavy burden,” *Packwood v. Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (REHNQUIST, C. J., in chambers).

Under this standard, I have no authority to stay the judgment here. The only issue potentially worthy of certiorari is the premise underlying the District Court’s decision: that Title XIX requires States participating in the Medicaid program to fund abortions (at least “medically necessary” ones) unless federal funding for those procedures is proscribed by

## Opinion in Chambers

the Hyde Amendment. The Courts of Appeals to address this question have uniformly supported that premise. See *Roe v. Casey*, 623 F. 2d 829, 831, 834 (CA3 1980); *Hodgson v. Board of County Comm'rs of Hennepin*, 614 F. 2d 601, 611 (CA8 1980); *Zbaraz v. Quern*, 596 F. 2d 196, 199 (CA7 1979), cert. denied, 448 U. S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F. 2d 121, 126–127, 134 (CA1), cert. denied, 441 U. S. 952 (1979). We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Accordingly, the application for a stay of the judgment of the District Court for the Eastern District of Louisiana is denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON  
DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1991, 1992 AND 1993

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1991	1992	1993	1991	1992	1993	1991	1992	1993	1991	1992	1993
Number of cases on dockets .....	12	12	12	2,451	2,441	2,442	4,307	4,792	5,332	6,770	7,245	7,786
Number disposed of during term .....	1	1	1	2,072	2,099	2,065	3,755	4,256	4,616	5,828	6,356	6,682
Number remaining on dockets .....	11	11	11	369	342	377	552	536	716	942	889	1,104
										TERMS		
										1991	1992	1993
Cases argued during term .....										127	116	99
Number disposed of by full opinions .....										120	111	93
Number disposed of by per curiam opinions .....										3	<sup>1</sup> 4	6
Number set for reargument .....										4	0	0
Cases granted review this term .....										120	100	<sup>2</sup> 99
Cases reviewed and decided without oral argument .....										75	109	<sup>3</sup> 70
Total cases to be available for argument at outset of following term .....										66	46	<sup>2</sup> 40

<sup>1</sup> Does not include No. 91-2086, dismissed per Rule 46, April 12, 1993.

<sup>2</sup> Includes 93-714, suggestion of mootness.

<sup>3</sup> Includes 92-6259, denied June 14, 1993.

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**FOURTEENTH AMENDMENT.** See **Constitutional Law, I, 2; III, 1, 3; IV.**

**FREEDOM OF SPEECH.** See **Constitutional Law, VI.**

**GEORGIA.** See **Voting Rights Act of 1965, 1.**

**HABEAS CORPUS.** See also **Anti-Drug Abuse Act of 1988.**

*Detainer—Speedy trial.*—A state court’s failure to observe Interstate Agreement on Detainers’ Article IV(c) speedy trial rule is not cognizable under 28 U. S. C. § 2254, where defendant did not object to his trial date when it was set and suffered no prejudice from delay. *Reed v. Farley*, p. 339.

**HEARSAY.** See **Evidence.**

**HOSPITAL MEDICARE REIMBURSEMENT.** See **Social Security.**

**HYDE AMENDMENT.** See **Stays.**

**INCOME TAXES.** See **Taxes.**

**INCULPATORY STATEMENTS.** See **Evidence.**

**INDIAN TRADER STATUTES.**

*State cigarette taxes—Pre-emption.*—State regulations—which impose recordkeeping requirements and quotas on quantity of untaxed cigarettes wholesalers can sell to Indian tribes in order to prevent non-Indians from escaping tax by purchasing such cigarettes—do not violate federal Indian Trader Statutes. Department of Taxation and Finance of N. Y. v. Milhelm Attea & Bros., p. 61.

**INJUNCTIONS.** See **Constitutional Law**, VI, 4; VIII.

**INSANITY DEFENSE REFORM ACT OF 1984.** See **Jury Instructions**.

**INTERNAL REVENUE CODE.** See **Constitutional Law**, III, 2.

**INTERSTATE AGREEMENT ON DETAINERS.** See **Habeas Corpus**.

**INTERSTATE COMMERCE.** See **Constitutional Law**, II; **Taxes**.

**JUDICIAL REVIEW OF PUNITIVE DAMAGES AWARDS.** See **Constitutional Law**, III, 3.

**JURIES.** See also **Constitutional Law**, I, 1; III, 1; VIII.

*Instructions—Federal criminal charges—Consequences of a verdict of “not guilty by reason of insanity.”*—A federal district court is not required to instruct a jury as to consequences to defendant of a verdict of not guilty by reason of insanity, either under Insanity Defense Reform Act of 1984 or as a matter of general federal criminal practice. Shannon v. United States, p. 573.

**LABOR.** See also **Administrative Procedure Act**; **Constitutional Law**, VIII; **Railway Labor Act**.

*National Labor Relations Act—State-law wage and penalty claims—Pre-emption.*—California’s refusal to enforce state-law wage and penalty claims by employees subject to a labor agreement containing an arbitration clause abridges employees’ federal NLRA rights and is pre-empted, and they may seek relief under 42 U. S. C. § 1983. Livadas v. Bradshaw, p. 107.

**LATENT DEFECTS IN SHIP’S CARGO AREAS.** See **Longshore and Harbor Workers’ Compensation Act**.

**LEGAL REPRESENTATION.** See **Anti-Drug Abuse Act of 1988**.

**LONG DISTANCE TELEPHONE CARRIERS.** See **Communications**.

**LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT.**

See also **Administrative Procedure Act**.

*Latent defects—Duty to warn.*—Under § 5 of Act, a vessel’s duty to warn of latent defects in cargo stow and cargo area does not require vessel

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to supervise loading stevedore's operations or to inspect completed stow.  
*Howlett v. Birkdale Shipping Co.*, p. 92.

**LOUISIANA.** See **Stays**.**MASSACHUSETTS.** See **Constitutional Law, II**.**MEDICAID.** See **Stays**.**MEDICAL SCHOOLS.** See **Social Security**.**MEDICARE.** See **Social Security**.**MILK PRICES.** See **Constitutional Law, II**.**MIRANDA RIGHTS.** See **Constitutional Law, VII**.**MURDER.** See **Anti-Drug Abuse Act of 1988; Constitutional Law, I; III, 1**.**MUST-CARRY RULES.** See **Constitutional Law, VI, 1**.**NATIONAL LABOR RELATIONS ACT.** See **Labor**.**NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.** See **Federal Employers' Liability Act**.**NEW YORK.** See **Constitutional Law, V; Indian Trader Statutes**.**OKLAHOMA.** See **Constitutional Law, I, 2**.**OREGON.** See **Constitutional Law, III, 3**.**PRE-EMPTION OF STATE LAW.** See **Indian Trader Statutes; Labor**.**PRIVATE PROPERTY TAKEN FOR PUBLIC USE.** See **Constitutional Law, IV**.**PRIVILEGE AGAINST SELF-INCRIMINATION.** See **Constitutional Law, VII**.**PROPERTY RIGHTS.** See **Constitutional Law, IV**.**PROTESTS.** See **Constitutional Law, VI, 4**.**PROVIDER REIMBURSEMENT.** See **Social Security**.**PUBLIC FUNDS FOR ABORTIONS.** See **Stays**.**PUNITIVE DAMAGES.** See **Constitutional Law, III, 3**.**RACIAL BLOC VOTING.** See **Voting Rights Act of 1965, 2**.**RACIAL DISCRIMINATION.** See **Voting Rights Act of 1965, 2**.

**RAILWAY LABOR ACT.**

*Pre-emption of wrongful discharge action.*—Act does not pre-empt state-law wrongful discharge actions that are independent of a collective-bargaining agreement. *Hawaiian Airlines, Inc. v. Norris*, p. 246.

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**RIGHT TO JURY TRIAL.** See **Constitutional Law**, VIII.

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**RULES OF DECISION.** See **Conflict of Laws**.

**SAVINGS AND LOANS.** See **Conflict of Laws**.

**SCHOOL DISTRICT BOUNDARIES.** See **Constitutional Law**, V.

**SECTION 2.** See **Voting Rights Act of 1965**.

**SECTION 1983.** See **Civil Rights Act of 1871; Labor**.

**SELF-INCRIMINATION.** See **Constitutional Law**, VII; **Evidence**.

**SELF-INCULPATORY STATEMENTS.** See **Evidence**.

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**SIGNAGE BANS.** See **Constitutional Law**, VI, 2.

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**SOCIAL SECURITY.** See also **Stays**.

*Medicare—Reimbursement—Hospital educational costs.*—Secretary of Health and Human Services' interpretation of 42 CFR § 413.85(c) to forbid reimbursement to hospitals for educational costs that were borne in prior years by requesting hospital's affiliated medical school is a reasonable construction of regulatory language. *Thomas Jefferson Univ. v. Shalala*, p. 504.

**SOUTH CAROLINA.** See **Constitutional Law**, III, 1.

**SPEEDY TRIALS.** See **Habeas Corpus**.

**STATEMENTS AGAINST PENAL INTEREST.** See **Evidence**.

**STATE TAXES.** See **Indian Trader Statutes; Taxes**.



**STAYS.**

*State abortion restriction inconsistent with Hyde Amendment.*—Louisiana officials' request for a stay of a District Court order enjoining them from enforcing a state law—which prohibits use of public funds for abortion except where necessary to prevent mother's death—on ground that it is inconsistent with Hyde Amendment requirement that Medicaid fund abortions for women who conceived by acts of rape or incest, is denied. *Edwards v. Hope Medical Group for Women* (SCALIA, J., in chambers), p. 1301.

**STEVEDORE OPERATIONS.** See **Longshore and Harbor Workers' Compensation Act.**

**SUPREME COURT.**

1. Retirement of JUSTICE BLACKMUN, p. VII.
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**TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.** See **Constitutional Law, IV.**

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*State corporate income tax—Constitutionality.*—California's corporate income tax, determined using a worldwide reporting scheme, is not unconstitutional under Due Process Clause or Commerce Clause when applied to foreign-based multinational corporations or to domestic corporations' income earned outside country. *Barclays Bank PLC v. Franchise Tax Board of Cal.*, p. 298.

**TELEPHONES.** See **Communications.**

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**VOTING RIGHTS ACT OF 1965.**

1. *Vote dilution—County commission election.*—Court of Appeals' order that practice in Bleckley County, Georgia, of electing a single county commissioner, rather than a multimember board of commissioners, is sub-

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ject to challenge as dilutive under §2 of Act is reversed. *Holder v. Hall*, p. 874.

2. *Vote dilution—Reapportionment scheme.*—Section 2 was not violated where, in spite of continuing discrimination and racial bloc voting in Florida, minority voters formed effective voting majorities in a number of districts roughly proportional to their respective shares in voting-age population. *Johnson v. De Grandy*, p. 997.

**WAGE CLAIMS.** See **Labor.**

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