UNITED STATES

REPORTS

527

OCT. TERM 1998

UNITED STATES REPORTS

VOLUME 527

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1998

JUNE 10 THROUGH SEPTEMBER 28, 1999

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2001

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

525 U. S. 864, line 16: "701 A. 2d 455" should be "707 A. 2d 455".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
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.

RETIRED

BYRON R. WHITE, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
SETH P. WAXMAN, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.
SHELLEY L. DOWLING, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1998

NEDER *v.* UNITED STATES

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

No. 97–1985. Argued February 23, 1999—Decided June 10, 1999

Petitioner Neder was convicted of filing false federal income tax returns and of federal mail fraud, wire fraud, and bank fraud. At trial, the District Court determined that materiality with regard to the tax and bank fraud charges was not a question for the jury and found that the evidence established that element. The court did not include materiality as an element of either the mail fraud or wire fraud charges. The Eleventh Circuit affirmed. It held that the District Court's failure to submit the materiality element of the tax offense to the jury was error under *United States* v. *Gaudin*, 515 U. S. 506, but that the error was subject to harmless-error analysis and was harmless because materiality was not in dispute and thus the error did not contribute to the verdict. The court also held that materiality is not an element of a "scheme or artifice to defraud" under the mail fraud, wire fraud, and bank fraud statutes, 18 U. S. C. §§ 1341, 1343, 1344, and thus the District Court did not err in failing to submit materiality to the jury.

Held:

1. The harmless-error rule of *Chapman* v. *California*, 386 U. S. 18, applies to a jury instruction that omits an element of an offense. Pp. 7–20.

(a) A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. For all other con-

stitutional errors, reviewing courts must apply harmless-error analysis. An instruction that omits an element of the offense differs markedly from the constitutional violations this Court has found to defy harmless-error review, for it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Omitting an element can easily be analogized to improperly instructing the jury on the element, an error that is subject to harmless-error analysis, *Johnson* v. *United States*, 520 U. S. 461, 469. The conclusion reached here is consistent with *Sullivan* v. *Louisiana*, 508 U. S. 275, on which Neder principally relies. The strand of *Sullivan*'s reasoning that supports his position that harmless-error review is precluded where a constitutional error prevents a jury from rendering a "complete verdict" on every element of an offense cannot be squared with the cases in which this Court has applied harmless-error analysis to instructional errors, see, *e. g.*, *Pope* v. *Illinois*, 481 U. S. 497. The restrictive approach that Neder gleaned from *Connecticut* v. *Johnson*, 460 U. S. 73, a concurring opinion in *Carella* v. *California*, 491 U. S. 263, and language in *Sullivan*—under which an instructional omission, misdescription, or conclusive presumption can be subject to harmless-error analysis only in three rare situations—is also mistaken. Neder underreported $5 million on his tax returns, failed to contest materiality at trial, and does not suggest that he would introduce any evidence bearing upon that issue if so allowed. Reversal without consideration of the error's effect upon the verdict would send the case back for retrial focused not on materiality but on contested issues on which the jury was properly charged. The Sixth Amendment does not require the Court to veer away from settled precedent to reach such a result. Pp. 8–15.

(b) The District Court's failure to submit the tax offense's materiality element to the jury was harmless error. A constitutional error is harmless when it appears "beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman* v. *California*, *supra*, at 24. No jury could find that Neder's failure to report substantial income on his tax returns was not material. The evidence was so overwhelming that he did not even contest that issue. Where, as here, a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. Neder's dispute of this conclusion is simply another form of the argument that the failure to instruct on any element of the crime is not subject to harmless-error analysis. The harmless-error inquiry in this case must be essentially the same as the analysis used in other cases that deal

with errors infringing upon the jury's factfinding role and affecting its deliberative process in ways that are not readily calculable: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error? See, *e. g., Arizona* v. *Fulminante*, 499 U. S. 279. Where an omitted element is supported by uncontroverted evidence, this approach appropriately balances "society's interest in punishing the guilty . . . and the method by which decisions of guilt are made." *Connecticut* v. *Johnson*, *supra*, at 86. Pp. 15–20.

2. Materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes. Pp. 20–25.

(a) Under the framework set forth in *United States* v. *Wells*, 519 U. S. 482, the first step is to examine the statutes' text. The statutes neither define "scheme or artifice to defraud" nor even mention materiality. Thus, based solely on a reading of the text, materiality would not be an element of these statutes. However, a necessary second step in interpreting statutory language provides that "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322. At the time of the mail fraud statute's enactment in 1872 and the later enactments of the wire fraud and bank fraud statutes, the well-settled, common-law meaning of "fraud" required a misrepresentation or concealment of *material* fact. Thus, this Court cannot infer from the absence of a specific reference to materiality that Congress intended to drop that element from the fraud statutes and must *presume* that Congress intended to incorporate materiality unless the statutes otherwise dictate. Contrary to the Government's position, the fact that the fraud statutes sweep more broadly than the common-law crime "false pretenses" does not rebut the presumption that Congress intended to limit criminal liability to conduct that would constitute common-law fraud. *Durland* v. *United States*, 161 U. S. 306, distinguished. Nor has the Government shown that the language of the fraud statutes is inconsistent with a materiality requirement. Pp. 20–25.

(b) The Court of Appeals is to determine in the first instance whether the jury-instruction error was, in fact, harmless. *Carella* v. *California*, *supra*, at 266–267. P. 25.

136 F. 3d 1459, affirmed in part, reversed in part, and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Parts II and IV, in which O'CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in

the judgment, *post*, p. 25. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 30.

Javier H. Rubinstein argued the cause for petitioner. With him on the briefs were *Gary S. Feinerman* and *Noel G. Lawrence.*

Roy W. McLeese III argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, and *Deputy Solicitor General Dreeben.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was tried on charges of violating a number of federal criminal statutes penalizing fraud. It is agreed that the District Court erred in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud. See *United States* v. *Gaudin*, 515 U. S. 506 (1995). We hold that the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18 (1967), applies to this error. We also hold that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes under which petitioner was also charged.

I

In the mid-1980's, petitioner Ellis E. Neder, Jr., an attorney and real estate developer in Jacksonville, Florida, engaged in a number of real estate transactions financed by fraudulently obtained bank loans. Between 1984 and 1986, Neder purchased 12 parcels of land using shell corporations set up by his attorneys and then immediately resold the land at much higher prices to limited partnerships that he con-

*Briefs of *amici curiae* urging reversal were filed for the American Council of Life Insurance et al. by *James F. Fitzpatrick* and *Nancy L. Perkins;* and for the National Association of Criminal Defense Lawyers by *Roger W. Yoerges* and *Lisa Kemler.*

trolled. Using inflated appraisals, Neder secured bank loans that typically amounted to 70% to 75% of the inflated resale price of the land. In so doing, he concealed from lenders that he controlled the shell corporations, that he had purchased the land at prices substantially lower than the inflated resale prices, and that the limited partnerships had not made substantial down payments as represented. In several cases, Neder agreed to sign affidavits falsely stating that he had no relationship to the shell corporations and that he was not sharing in the profits from the inflated land sales. By keeping for himself the amount by which the loan proceeds exceeded the original purchase price of the land, Neder was able to obtain more than $7 million. He failed to report nearly all of this money on his personal income tax returns. He eventually defaulted on the loans.

Neder also engaged in a number of schemes involving land development fraud. In 1985, he obtained a $4,150,000 construction loan to build condominiums on a project known as Cedar Creek. To obtain the loan, he falsely represented to the lender that he had satisfied a condition of the loan by making advance sales of 20 condominium units. In fact, he had been unable to meet the condition, so he secured additional buyers by making their down payments himself. He then had the down payments transferred back to him from the escrow accounts into which they had been placed. Neder later defaulted on the loan without repaying any of the principal. He employed a similar scheme to obtain a second construction loan of $5,400,000, and unsuccessfully attempted to obtain an additional loan in the same manner.

Neder also obtained a consolidated $14 million land acquisition and development loan for a project known as Reddie Point. Pursuant to the loan, Neder could request funds for work actually performed on the project. Between September 1987 and March 1988, he submitted numerous requests based on false invoices, the lender approved the requests,

and he obtained almost $3 million unrelated to any work actually performed.

Neder was indicted on, among other things, 9 counts of mail fraud, in violation of 18 U. S. C. § 1341; 9 counts of wire fraud, in violation of § 1343; 12 counts of bank fraud, in violation of § 1344; and 2 counts of filing a false income tax return, in violation of 26 U. S. C. § 7206(1). The fraud counts charged Neder with devising and executing various schemes to defraud lenders in connection with the land acquisition and development loans, totaling over $40 million. The tax counts charged Neder with filing false statements of income on his tax returns. According to the Government, Neder failed to report more than $1 million in income for 1985 and more than $4 million in income for 1986, both amounts reflecting profits Neder obtained from the fraudulent real estate loans.

In accordance with then-extant Circuit precedent and over Neder's objection, the District Court instructed the jury that, to convict on the tax offenses, it "need not consider" the materiality of any false statements "even though that language is used in the indictment." App. 256. The question of materiality, the court instructed, "is not a question for the jury to decide." *Ibid.* The court gave a similar instruction on bank fraud, *id.*, at 249, and subsequently found, outside the presence of the jury, that the evidence established the materiality of all the false statements at issue, *id.*, at 167. In instructing the jury on mail fraud and wire fraud, the District Court did not include materiality as an element of either offense. *Id.*, at 253–255. Neder again objected to the instruction. The jury convicted Neder of the fraud and tax offenses, and he was sentenced to 147 months' imprisonment, 5 years' supervised release, and $25 million in restitution.

The Court of Appeals for the Eleventh Circuit affirmed the conviction. 136 F. 3d 1459 (1998). It held that the District Court erred under our intervening decision in *United States*

v. *Gaudin,* 515 U. S. 506 (1995), in failing to submit the materiality element of the tax offense to the jury. It concluded, however, that the error was subject to harmless-error analysis and, further, that the error was harmless because "materiality was not in dispute," 136 F. 3d, at 1465, and thus the error "'did not contribute to the verdict obtained,'" *ibid.* (quoting *Yates* v. *Evatt,* 500 U. S. 391, 403 (1991)). The Court of Appeals also held that materiality is not an element of the mail fraud, wire fraud, and bank fraud statutes, and thus the District Court did not err in failing to submit the question of materiality to the jury.

We granted certiorari, 525 U. S. 928 (1998), to resolve a conflict in the Courts of Appeals on two questions: (1) whether, and under what circumstances, the omission of an element from the judge's charge to the jury can be harmless error, and (2) whether materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes.

II

Rule 52(a) of the Federal Rules of Criminal Procedure, which governs direct appeals from judgments of conviction in the federal system, provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Although this Rule by its terms applies to *all* errors where a proper objection is made at trial, we have recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Arizona* v. *Fulminante,* 499 U. S. 279, 309 (1991); see *Chapman* v. *California,* 386 U. S., at 23. Errors of this type are so intrinsically harmful as to require automatic reversal (*i. e.,* "affect substantial rights") without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply Rule 52(a)'s harmless-error analysis and must "disregar[d]" errors that are harmless "beyond a reasonable doubt." *Id.,* at 24.

In this case the Government does not dispute that the District Court erred under *Gaudin* in deciding the materiality element of a § 7206(1) offense itself, rather than submitting the issue to the jury. See Brief for United States 10, and n. 1. We must decide whether the error here is subject to harmless-error analysis and, if so, whether the error was harmless.

A

We have recognized that "most constitutional errors can be harmless." *Fulminante*, *supra*, at 306. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson* v. *United States*, 520 U. S. 461, 468 (1997) (citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (defective reasonable-doubt instruction)).

The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, *supra*, at 310. Such errors "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U. S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U. S., at 577. Put another way, these errors deprive defendants of "basic protections" without which "a criminal

trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Id.*, at 577–578.

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Our decision in *Johnson* v. *United States*, *supra*, is instructive. *Johnson* was a perjury prosecution in which, as here, the element of materiality was decided by the judge rather than submitted to the jury. The defendant failed to object at trial, and we thus reviewed her claim for "plain error." Although reserving the question whether the omission of an element *ipso facto* "'affect[s] substantial rights,'" 520 U. S., at 468–469, we concluded that the error did not warrant correction in light of the "'overwhelming'" and "uncontroverted" evidence supporting materiality, *id.*, at 470. Based on this evidence, we explained, the error did not "'seriously affec[t] the fairness, integrity or public reputation of judicial proceedings.'" *Id.*, at 469 (quoting *United States* v. *Olano*, 507 U. S. 725, 736 (1993)).

That conclusion cuts against the argument that the omission of an element will *always* render a trial unfair. In fact, as this case shows, quite the opposite is true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

We have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense. See, *e. g.*, *Yates* v. *Evatt*, 500 U. S. 391 (1991)

(mandatory rebuttable presumption); *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam)* (mandatory conclusive presumption); *Pope* v. *Illinois*, 481 U. S. 497 (1987) (misstatement of element); *Rose*, *supra* (mandatory rebuttable presumption). In other cases, we have recognized that improperly omitting an element from the jury can "easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to harmless-error analysis." *Johnson*, *supra*, at 469 (citations omitted); see also *California* v. *Roy*, 519 U. S. 2, 5 (1996) *(per curiam)* ("The specific error at issue here—an error in the instruction that defined the crime—is . . . as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission' "). In both cases—misdescriptions and omissions—the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense. The same, we think, can be said of conclusive presumptions, which direct the jury to presume an *ultimate* element of the offense based on proof of certain *predicate* facts (*e. g.*, "You must presume malice if you find an intentional killing"). Like an omission, a conclusive presumption deters the jury from considering any evidence other than that related to the predicate facts (*e. g.*, an intentional killing) and "directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e]" (*e. g.*, malice). *Carella*, 491 U. S., at 266; see *id.*, at 270 (SCALIA, J., concurring in judgment).

The conclusion that the omission of an element is subject to harmless-error analysis is consistent with the holding (if not the entire reasoning) of *Sullivan* v. *Louisiana*, the case upon which Neder principally relies. In *Sullivan*, the trial court gave the jury a defective "reasonable doubt" instruction in violation of the defendant's Fifth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt. See *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. Applying our traditional mode of anal-

ysis, the Court concluded that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," 508 U. S., at 281, and produces "consequences that are necessarily unquantifiable and indeterminate," *id.*, at 282. By contrast, the jury-instruction error here did not "vitiat[e] *all* the jury's findings." *Id.*, at 281; see *id.*, at 284 (REHNQUIST, C. J., concurring). It did, of course, prevent the jury from making a finding on the element of materiality.

Neder argues that *Sullivan*'s alternative reasoning precludes the application of harmless error here. Under that reasoning, harmless-error analysis cannot be applied to a constitutional error that precludes the jury from rendering a verdict of guilty-beyond-a-reasonable-doubt because "the entire premise of *Chapman* review is simply absent." *Id.*, at 280. In the absence of an *actual* verdict of guilty-beyond-a-reasonable-doubt, the Court explained: "[T]he question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Ibid.*; see *Carella*, *supra*, at 268–269 (SCALIA, J., concurring in judgment). Neder argues that this analysis applies with equal force where the constitutional error, as here, prevents the jury from rendering a "complete verdict" on *every* element of the offense. As in *Sullivan*, Neder argues, the basis for harmless-error review "'is simply absent.'" Brief for Petitioner 7.

Although this strand of the reasoning in *Sullivan* does provide support for Neder's position, it cannot be squared with our harmless-error cases. In *Pope*, for example, the trial court erroneously instructed the jury that it could find the defendant guilty in an obscenity prosecution if it found that the allegedly obscene material lacked serious value under "community standards," rather than the correct "reasonable person" standard required by the First Amendment. 481 U. S., at 499–501. Because the jury was not properly

instructed, and consequently did not render a finding, on the *actual* element of the offense, the defendant's trial did not result in a "complete verdict" any more than in this case. Yet we held there that harmless-error analysis was appropriate. *Id.*, at 502–503.

Similarly, in *Carella*, the jury was instructed to presume that the defendant "embezzled [a] vehicle" and "[i]nten[ded] to commit theft" if the jury found that the defendant failed to return a rental car within a certain number of days after the expiration of the rental period. 491 U. S., at 264 (internal quotation marks omitted). Again, the jury's finding of guilt cannot be seen as a "complete verdict" because the conclusive presumption "directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses." *Id.*, at 266. As in *Pope*, however, we held that the unconstitutional conclusive presumption was "subject to the harmless-error rule." 491 U. S., at 266.

And in *Roy*, a federal habeas case involving a state-court murder conviction, the trial court erroneously failed to instruct the jury that it could convict the defendant as an aider and abettor only if it found that the defendant had the "intent or purpose" of aiding the confederate's crime. 519 U. S., at 3 (internal quotation marks and emphasis omitted). Despite that omission, we held that "[t]he case before us is a case for application of the 'harmless error' standard." *Id.*, at 5.

The Government argues, correctly we think, that the absence of a "complete verdict" on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee. The issue here, however, is not whether a jury instruction that omits an element of the offense was error (a point that is uncontested, see *supra*, at 8), but whether the error is subject to harmless-error analysis. We

think our decisions in *Pope*, *Carella*, and *Roy* dictate the answer to that question.

Forced to accept that this Court has applied harmless-error review in cases where the jury did not render a "complete verdict" on every element of the offense, Neder attempts to reconcile our cases by offering an approach gleaned from a plurality opinion in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), an opinion concurring in the judgment in *Carella*, *supra*, and language in *Sullivan*, *supra*. Under this restrictive approach, an instructional omission, misdescription, or conclusive presumption can be subject to harmless-error analysis only in three "rare situations": (1) where the defendant is acquitted of the offense on which the jury was improperly instructed (and, despite the defendant's argument that the instruction affected another count, the improper instruction had no bearing on it); (2) where the defendant admitted the element on which the jury was improperly instructed; and (3) where other facts necessarily found by the jury are the "functional equivalent" of the omitted, misdescribed, or presumed element. See *Sullivan*, *supra*, at 281; *Carella*, *supra*, at 270–271 (SCALIA, J., concurring in judgment); *Johnson*, *supra*, at 87 (plurality opinion). Neder understandably contends that *Pope*, *Carella*, and *Roy* fall within this last exception, which explains why the Court in those cases held that the instructional error could be harmless.

We believe this approach is mistaken for more than one reason. As an initial matter, we are by no means certain that the cases just mentioned meet the "functional equivalence" test as Neder at times articulates it. See Brief for Petitioner 29 ("[A]ppellate courts [cannot be] given even the slightest latitude to review the record to 'fill the gaps' in a jury verdict, as 'minor' as those gaps may seem"). In *Pope*, for example, there was necessarily a "gap" between what the jury did find (that the allegedly obscene material lacked value under "community standards") and what it was re-

quired to find to convict (that the material lacked value under a national "reasonable person" standard). Petitioner's submission would have mandated reversal for a new trial in that case, because a juror in Rockford, Illinois, who found that the material lacked value under community standards, would not necessarily have found that it did so under presumably broader and more tolerant national standards. But since we held that harmless-error analysis was appropriate in *Pope*, that case not only does not support petitioner's approach, but rejects it.

Petitioner's submission also imports into the initial structural-error determination (*i. e.*, whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (*i. e.*, whether an error is harmless). Under our cases, a constitutional error is either structural or it is not. Thus, even if we were inclined to follow a broader "functional equivalence" test (*e. g.*, where other facts found by the jury are "so closely related" to the omitted element "that no rational jury could find those facts without also finding" the omitted element, *Sullivan*, 508 U. S., at 281 (internal quotation marks omitted)), such a test would be inconsistent with our traditional categorical approach to structural errors.

We also note that the present case arose in the legal equivalent of a laboratory test tube. The trial court, following existing law, ruled that the question of materiality was for the court, not the jury. It therefore refused a charge on the question of materiality. But future cases are not likely to be so clear cut. In *Roy*, we said that the error in question could be "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" 519 U. S., at 5. As petitioner concedes, his submission would thus call into question the far more common subcategory of misdescriptions. And it would require a reviewing court in each case to determine just how serious a "misdescription" it was.

Difficult as such issues would be when dealing with the ample volume defining federal crimes, they would be measurably compounded by the necessity for federal courts, reviewing state convictions under 28 U. S. C. § 2254, to ascertain the elements of the offense as defined in the laws of 50 different States.

It would not be illogical to extend the reasoning of *Sullivan* from a defective "reasonable doubt" instruction to a failure to instruct on an element of the crime. But, as indicated in the foregoing discussion, the matter is not *res nova* under our case law. And if the life of the law has not been logic but experience, see O. Holmes, The Common Law 1 (1881), we are entitled to stand back and see what would be accomplished by such an extension in this case. The omitted element was materiality. Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed. We do not think the Sixth Amendment requires us to veer away from settled precedent to reach such a result.

B

Having concluded that the omission of an element is an error that is subject to harmless-error analysis, the question remains whether Neder's conviction can stand because the error was harmless. In *Chapman* v. *California*, 386 U. S. 18 (1967), we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24; see *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986) ("[A]n otherwise valid conviction should not

be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt").

To obtain a conviction on the tax offense at issue, the Government must prove that the defendant filed a tax return "which he does not believe to be true and correct as to every material matter." 26 U. S. C. § 7206(1). In general, a false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States* v. *Gaudin*, 515 U. S., at 509 (quoting *Kungys* v. *United States*, 485 U. S. 759, 770 (1988) (internal quotation marks omitted)). In a prosecution under § 7206(1), several courts have determined that "any failure to report income is material." *United States* v. *Holland*, 880 F. 2d 1091, 1096 (CA9 1989); see 136 F. 3d, at 1465 (collecting cases). Under either of these formulations, no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not "a material matter."[1]

At trial, the Government introduced evidence that Neder failed to report over $5 million in income from the loans he obtained. The failure to report such substantial income incontrovertibly establishes that Neder's false statements were material to a determination of his income tax liability. The evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial. Instead, he defended against the tax charges by arguing that the loan proceeds were not income

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[1] JUSTICE STEVENS says that the failure to charge the jury on materiality is harmless error in this case because the jury verdict "necessarily included a finding on that issue." *Post*, at 26 (opinion concurring in part and concurring in judgment). While the evidence of materiality is overwhelming, it is incorrect to say that the jury made such a finding; the court explicitly directed the jury not to consider the materiality of any false statements.

because he intended to repay the loans, and that he reasonably believed, based on the advice of his accountant and lawyer, that he need not report the proceeds as income. App. 208–211, 235 (closing argument). In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error "did not contribute to the verdict obtained." *Chapman*, *supra*, at 24.

Neder disputes our conclusion that the error in this case was harmless. Relying on language in our *Sullivan* and *Yates* decisions, he argues that a finding of harmless error may be made only upon a determination that the jury rested its verdict on evidence that its instructions allowed it to consider. See *Sullivan*, 508 U. S., at 279; *Yates*, 500 U. S., at 404. To rely on overwhelming record evidence of guilt the jury did not *actually* consider, he contends, would be to dispense with trial by jury and allow judges to direct a guilty verdict on an element of the offense.[2]

But at bottom this is simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis. *Yates* involved constitutionally infirm presumptions on an issue that was the crux of the case—the defendant's intent. But in the case of an omitted element, as the present one, the jury's instructions preclude any consideration of evidence relevant to the omit-

[2] JUSTICE SCALIA, in his opinion concurring in part and dissenting in part, also suggests that if a failure to charge on an uncontested element of the offense may be harmless error, the next step will be to allow a directed verdict against a defendant in a criminal case contrary to *Rose* v. *Clark*, 478 U. S. 570, 578 (1986). Happily, our course of constitutional adjudication has not been characterized by this "in for a penny, in for a pound" approach. We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless-error review.

ted element, and thus there could be no harmless-error analysis. Since we have previously concluded that harmless-error analysis is appropriate in such a case, we must look to other cases decided under *Chapman* for the proper mode of analysis.

The erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, see *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), and the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment, see *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986), are both subject to harmless-error analysis under our cases. Such errors, no less than the failure to instruct on an element in violation of the right to a jury trial, infringe upon the jury's fact-finding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable. We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error? To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, The Riddle of Harmless Error 50 (1970).

We believe that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between "society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made." *Connecticut* v. *Johnson*, 460 U. S., at 86 (plurality opinion). The harmless-error doctrine, we have said, "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial."

Van Arsdall, *supra*, at 681. At the same time, we have recognized that trial by jury in serious criminal cases "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Gaudin*, 515 U. S., at 510–511 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–541 (4th ed. 1873)). In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.

Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.

A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, "become in effect a second jury to determine whether the defendant is guilty." Traynor, *supra*, at 21. Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." *Rose*, 478 U. S., at 577. On the contrary, it "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U. S., at 22. We thus hold that the District Court's failure to submit the

element of materiality to the jury with respect to the tax charges was harmless error.

III

We also granted certiorari in this case to decide whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U. S. C. § 1341), wire fraud (§ 1343), and bank fraud (§ 1344) statutes. The Court of Appeals concluded that the failure to submit materiality to the jury was not error because the fraud statutes do not require that a "scheme to defraud" employ *material* falsehoods. We disagree.

Under the framework set forth in *United States* v. *Wells*, 519 U. S. 482 (1997), we first look to the text of the statutes at issue to discern whether they require a showing of materiality. In this case, we need not dwell long on the text because, as the parties agree, none of the fraud statutes defines the phrase "scheme or artifice to defraud," or even mentions materiality. Although the mail fraud and wire fraud statutes contain different jurisdictional elements (§ 1341 requires use of the mails while § 1343 requires use of interstate wire facilities), they both prohibit, in pertinent part, "any scheme or artifice to defraud" or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises."[3] The bank fraud statute, which was modeled on

[3] Section 1341 provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such

the mail and wire fraud statutes, similarly prohibits any "scheme or artifice to defraud a financial institution" or to obtain any property of a financial institution "by false or fraudulent pretenses, representations, or promises."[4] Thus, based solely on a "natural reading of the full text," *id.*, at 490, materiality would not be an element of the fraud statutes.

That does not end our inquiry, however, because in interpreting statutory language there is a necessary second step. It is a well-established rule of construction that "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U. S.

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matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

Section 1343 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

[4] Section 1344 provides:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice—

"(1) to defraud a financial institution; or

"(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

"shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

730, 739 (1989)); see *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense"). Neder contends that "defraud" is just such a term, and that Congress implicitly incorporated its common-law meaning, including its requirement of materiality,[5] into the statutes at issue.

The Government does not dispute that both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable "fraud" had a well-settled meaning at common law. Nor does it dispute that the well-settled meaning of "fraud" required a misrepresentation or concealment of *material* fact. Indeed, as the sources we are aware of demonstrate, the common law could not have conceived of "fraud" without proof of materiality. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 579 (1996) ("[A]ctionable fraud requires a *material* misrepresentation or omission" (citing Restatement (Second) of Torts § 538 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 108 (5th ed. 1984))); *Smith* v. *Richards*, 13 Pet. 26, 39 (1839) (in an action "to set aside a contract for fraud" a "misrepresentation must be of something material"); see also 1 J. Story, Commentaries on Equity Jurisprudence § 195 (10th ed. 1870) ("In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other

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[5] The Restatement instructs that a matter is material if:

"(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

"(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." Restatement (Second) of Torts § 538 (1977).

party"). Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes.[6] On the contrary, we must *presume* that Congress intended to incorporate materiality "'unless the statute otherwise dictates.'" *Nationwide Mut. Ins.*, *supra*, at 322.[7]

The Government attempts to rebut this presumption by arguing that the term "defraud" would bear its common-law meaning only if the fraud statutes "indicated that Congress had codified the crime of false pretenses or one of the common-law torts sounding in fraud." Brief for United States 37. Instead, the Government argues, Congress chose

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[6] We concluded as much in *Field* v. *Mans*, 516 U. S. 59, 69 (1995):

"'[F]alse pretenses, a false representation, or actual frau[d]' carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has defined them to include. . . . Congress could have enumerated their elements, but Congress's contrary drafting choice did not deprive them of a significance richer than the bare statement of their terms."

[7] The Government argues that because Congress has provided express materiality requirements in other statutes prohibiting fraudulent conduct, the absence of such an express reference in the fraud statutes at issue "'speaks volumes.'" Brief for United States 35 (citing 21 U. S. C. § 843(a)(4)(A)) (prohibiting the furnishing of "false or fraudulent material information" in documents required under federal drug laws); 26 U. S. C. § 6700(a)(2)(A) (criminalizing the making of a statement regarding investment tax benefits that an individual "knows or has reason to kno[w] is false or fraudulent as to any material matter"). These later enacted statutes, however, differ from the fraud statutes here in that they prohibit both "false" and "fraudulent" statements or information. Because the term "false statement" does not imply a materiality requirement, *United States* v. *Wells*, 519 U. S. 482, 491 (1997), the word "material" limits the statutes' scope to material falsehoods. Moreover, these statutes cannot rebut the presumption that Congress intended to incorporate the common-law meaning of the term "fraud" in the mail fraud, wire fraud, and bank fraud statutes. That rebuttal can only come from the text or structure of the fraud statutes themselves. See *Nationwide Mut. Ins.*, 503 U. S., at 322.

to unmoor the mail fraud statute from its common-law analogs by punishing, not the completed fraud, but rather any person "having devised or intending to devise any scheme or artifice to defraud." Read in this light, the Government contends, there is no basis to infer that Congress intended to limit criminal liability to conduct that would constitute "fraud" at common law, and in particular, to *material* misrepresentations or omissions. Rather, criminal liability would exist so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be immaterial, *i. e.*, incapable of influencing the intended victim. See n. 3, *supra.*

The Government relies heavily on *Durland* v. *United States*, 161 U. S. 306 (1896), our first decision construing the mail fraud statute, to support its argument that the fraud statutes sweep more broadly than common-law fraud. But *Durland* was different from this case. There, the defendant, who had used the mails to sell bonds he did not intend to honor, argued that he could not be held criminally liable because his conduct did not fall within the scope of the common-law crime of "false pretenses." We rejected the argument that "the statute reaches only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future." *Id.*, at 312. Instead, we construed the statute to "includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.*, at 313. Although *Durland* held that the mail fraud statute reaches conduct that would not have constituted "false pretenses" at common law, it did not hold, as the Government argues, that the statute encompasses more than common-law fraud.

In one sense, the Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common-law requirements of "justifiable reli-

ance" and "damages," for example, plainly have no place in the federal fraud statutes. See, *e. g.*, *United States* v. *Stewart*, 872 F. 2d 957, 960 (CA10 1989) ("[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); *United States* v. *Rowe*, 56 F. 2d 747, 749 (CA2) (L. Hand, J.) ("Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability"), cert. denied, 286 U. S. 554 (1932). By prohibiting the "scheme to defraud," rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is inconsistent with a materiality requirement.

Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes. Consistent with our normal practice where the court below has not yet passed on the harmlessness of any error, see *Carella*, 491 U. S., at 266–267, we remand this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless.

IV

The judgment of the Court of Appeals respecting the tax fraud counts is affirmed. The judgment of the Court of Appeals on the remaining counts is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Although I do not agree with the Court's analysis of the harmless-error issue in Part II of its opinion, I do join Parts I and III and concur in the judgment.

I

This is an easy case. The federal tax fraud statute, 26 U. S. C. § 7206(1), prohibits the filing of any return that the taxpayer "does not believe to be true and correct as to *every material matter.*"* (Emphasis added.) The Court of Appeals, in accordance with other courts, construed "material matter" to describe "any information necessary to a determination of a taxpayer's income tax liability." 136 F. 3d 1459, 1465 (CA11 1998) (citing *United States* v. *Aramony*, 88 F. 3d 1369, 1384 (CA4 1996); *United States* v. *Klausner*, 80 F. 3d 55, 60 (CA2 1996); *United States* v. *Holland*, 880 F. 2d 1091, 1096 (CA9 1989)). Petitioner has not challenged this legal standard.

The jury found that petitioner knowingly and "falsely reported [his] total income in his 1985 return . . . and in his 1986 return." App. 256 (jury instructions). A taxpayer's "total income" is obviously "information necessary to a determination of a taxpayer's income tax liability." 136 F. 3d, at 1465. The jury verdict, therefore, was not merely the functional equivalent of a finding on any possible materiality issue; it necessarily included a finding on that issue. That being so, the trial judge's failure to give a separate instruction on that issue was harmless error under any test of harmlessness.

But the Court does not rest its decision on this logic. Rather, it finds the instructional error harmless because petitioner "did not, and apparently could not, bring forth

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*Section 7206 provides, in relevant part:

"Any person who—

"(1) Declaration under penalties of perjury.

"Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to *every material matter* . . .

. . . . . .

"shall be guilty of a felony."

facts contesting the omitted element." *Ante,* at 19. I cannot subscribe to this analysis. However the standard for deciding whether a trial error was harmless is formulated, I understand that there may be disagreement over its application in particular cases. The three contrasting opinions in *Arizona* v. *Fulminante,* 499 U. S. 279 (1991), vividly illustrate this point: Justice White stated that the admission of a defendant's coerced confession, by its very nature, could never be harmless, *id.*, at 295–302; JUSTICE KENNEDY stated that such evidence can be harmless but that the appellate court "must appreciate the indelible impact a full confession may have on the trier of fact," *id.*, at 313 (opinion concurring in judgment); and THE CHIEF JUSTICE, joined by JUSTICE SCALIA, stated that the admission of such evidence presents "a classic case of harmless error" when other evidence points strongly toward guilt, *id.*, at 312 (dissenting opinion). There is, nevertheless, a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue. That is why, in my view, the "harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings." *Pope* v. *Illinois,* 481 U. S. 497, 509 (1987) (STEVENS, J., dissenting).

The Court of Appeals' judgment could, and should, be affirmed on the ground that the jury verdict in this case necessarily included a finding that petitioner's tax returns were not "true and correct as to every material matter." I therefore cannot join the analysis in Part II of the Court's opinion, which—without explaining why the jury failed necessarily to find a material omission—states that judges may find elements of an offense satisfied whenever the defendant failed to contest the element or raise evidence sufficient to support a contrary finding. My views on this central issue are thus close to those expressed by JUSTICE SCALIA, but I do not

join his dissenting opinion because it is internally inconsistent and its passion is misdirected.

II

If the Court's tolerance of the trial judge's Sixth Amendment error in this case were, as JUSTICE SCALIA's dissent suggests, *post*, at 30, as serious as malpractice on "the spinal column of American democracy," surely the error would require reversal of the conviction regardless of whether defense counsel made a timely objection. Yet the dissent states that reversal is appropriate only when a defendant made a timely objection to the deprivation. *Post*, at 35 (opinion concurring in part and dissenting in part). It is for that reason that I find tension between the force of JUSTICE SCALIA's eloquent rhetoric and the far narrower rule that he actually espouses.

There is even more tension between that rhetoric and his perception of the proper role of the jury in cases that are far more controversial than the prosecution of white-collar crimes. The history that he recounts provides powerful support for my view that this Court has not been properly sensitive to the importance of protecting the right to have a jury resolve critical issues of fact when there is a special danger that elected judges may listen to the voices of voters rather than witnesses. A First Amendment case and a capital case will illustrate my point.

In *Pope*, we found constitutional error in the conviction of two attendants in an adult bookstore because the trial court had instructed the jury to answer the question whether certain magazines lacked "serious literary, artistic, political, or scientific value" by applying the community standards that prevailed in Illinois. 481 U. S., at 500–501. As the history of many of our now-valued works of art demonstrates, this error would have permitted the jury to resolve the issue against the defendants based on their appraisal of the views of the majority of Illinois' citizens despite the fact that under

a proper instruction the jury would have acquitted if they thought a more discerning minority would have found true artistic value in the publications. Indeed, under the instruction given to the jury in that case, James Joyce would surely have been convicted for selling copies of the first edition of Ulysses in Rockford, Illinois, even though there were a few readers in Paris who immediately recognized the value of his work. The *Pope* Court's conclusion that the unconstitutional instruction might have been harmless entirely ignored the danger that individual distaste for sexually explicit materials may subconsciously influence a judge's evaluation of how a jury would decide a question that it did not actually resolve. It is, in fact, particularly distressing that all of my colleagues appear today to endorse *Pope*'s harmless-error analysis.

Admittedly, that endorsement is consistent with the holding in Part II of the Court's opinion in *Walton* v. *Arizona*, 497 U. S. 639, 647–649 (1990), that a judge may make the factual findings that render a defendant eligible for the death penalty. As I have previously argued, however, that holding was not faithful to the history that was reviewed by "the wise and inspiring voice that spoke for the Court in *Duncan* v. *Louisiana*, [391 U. S. 145 (1968)]." *Id.*, at 709–714 (STEVENS, J., dissenting). Nor was it faithful to the history that JUSTICE SCALIA recounts today. Of course, Blackstone was concerned about judges exposed to the voice of the higher authority personified by the Crown, whereas today the concern is with the impact of popular opinion. It remains clear, however, that the constitutional right to be tried by a jury of one's peers provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).

III

The Court's conclusion that materiality is an element of the offenses defined in 18 U. S. C. §§ 1341, 1343, and 1344 is

obviously correct. In my dissent in *United States* v. *Wells*, 519 U. S. 482, 510 (1997), I pointed out that the vast majority of judges who had confronted the question had placed the same construction on the federal statute criminalizing false statements to federally insured banks, 18 U. S. C. § 1014. I repeat this point to remind the Congress that an amendment to § 1014 would both harmonize these sections and avoid the potential injustice created by the Court's decision in *Wells*.

JUSTICE SCALIA, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion. I do not join Part II, however, and I dissent from the judgment of the Court, because I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless.

I

Article III, § 2, cl. 3, of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy. William Blackstone, the Framers' accepted authority on English law and the English Constitution, described the right to trial by jury in criminal prosecutions as "the grand bulwark of [the Englishman's] liberties . . . secured to him by the great charter." 4 W. Blackstone, Commentaries *349. One of the indictments of the Declaration of Independence against King George III was that he had "subject[ed] us to a Jurisdiction foreign to our Constitu-

tion, and unacknowledged by our Laws" in approving legislation "[f]or depriving us, in many Cases, of the Benefits of Trial by Jury." Alexander Hamilton wrote that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this, the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." The Federalist No. 83, p. 426 (M. Beloff ed. 1987). The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter. Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 870, 875, n. 44 (1994). By comparison, the right to counsel—deprivation of which we have also held to be structural error—is a Johnny-come-lately: Defense counsel did not become a regular fixture of the criminal trial until the mid-1800's. See W. Beaney, Right to Counsel in American Courts 226 (1955).

The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged. And since all crimes require proof of more than one element to establish guilt (involuntary manslaughter, for example, requires (1) the killing (2) of a human being (3) negligently), it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this. It acknowledges that the right to trial by jury was denied in the present case, since one of the elements was not—despite the defendant's protestation—submitted to be passed upon by the jury. But even so, the Court lets the defendant's sentence stand, *because we judges can tell that he is unquestionably guilty.*

Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced "harmless" by judges—a point I shall address in due course—it is obvious that we could not allow judges to validate *this* one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt.* Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows?—20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively—at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt *to themselves*, sitting as jurors. It is not within the power of us Justices to cancel that reservation—neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor (when a trial judge has done so anyway) by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty. The Court's decision today is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).

II

The Court's decision would be wrong even if we ignored the distinctive character of this constitutional violation. The Court reaffirms the rule that it would be structural

error (not susceptible of "harmless-error" analysis) to "'vitiat[e] *all* the jury's findings.'" *Ante*, at 11 (quoting *Sullivan* v. *Louisiana*, 508 U. S. 275, 281 (1993)). A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. See *Carpenters* v. *United States*, 330 U. S. 395, 410 (1947); *Rose* v. *Clark*, 478 U. S. 570, 578 (1986); *Arizona* v. *Fulminante*, 499 U. S. 279, 294 (1991) (White, J., dissenting). The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away—since failure to prove one, no less than failure to prove all, utterly prevents conviction.

The Court never asks, much less answers, this question. Indeed, we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. What if, in the present case, besides keeping the materiality issue for itself, the District Court had also refused to instruct the jury to decide whether the defendant signed his tax return? See 26 U. S. C. § 7206(1). If Neder had never contested that element of the offense, and the record contained a copy of his signed return, would his conviction be automatically reversed in that situation but not in this one, even though he would be just as obviously guilty? We do not know. We know that all elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation. All we know for certain is that the number is somewhere between tuppence and 19 shillings 11, since the Court's only response to my assertion that there is no principled distinction between this case and a directed verdict is that "our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." See *ante*, at 17, n. 2.

The underlying theme of the Court's opinion is that taking the element of materiality from the jury did not render Neder's trial unfair, because the judge certainly reached the "right" result. But the same could be said of a directed verdict against the defendant—which would be *per se* reversible *no matter how overwhelming the unfavorable evidence.* See *Rose* v. *Clark*, *supra*, at 578. The very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right. For example, in *Tumey* v. *Ohio*, 273 U. S. 510 (1927), where we reversed the defendant's conviction because he had been tried before a biased judge, the State argued that "the evidence shows clearly that the defendant was guilty and that he was only fined $100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment." *Id.*, at 535. We rejected this argument out of hand, responding that *"[n]o matter what the evidence was against him*, he had the right to have an impartial judge." *Ibid.* (emphasis added). The amount of evidence against a defendant who has properly preserved his objection, while relevant to determining whether a given error was harmless, has nothing to do with determining whether the error is subject to harmless-error review in the first place.

The Court points out that in *Johnson* v. *United States*, 520 U. S. 461 (1997), we affirmed the petitioner's conviction even though the element of materiality had been withheld from the jury. But the defendant in that case, unlike the defendant here, had not *requested* a materiality instruction. In the context of such unobjected-to error, the mere deprivation of substantial rights "does not, without more," warrant reversal, *United States* v. *Olano*, 507 U. S. 725, 737 (1993), but the appellant must also show that the deprivation "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Johnson*, *supra*, at 469 (quoting *Olano*, *supra*,

at 736) (internal quotation marks omitted). *Johnson* stands for the proposition that, just as the absolute right to trial by jury can be waived, so also the failure to object to its deprivation at the point where the deprivation can be remedied will preclude automatic reversal.[1]

Insofar as it applies to the jury-trial requirement, the structural-error rule does not exclude harmless-error analysis—though it is harmless-error analysis of a peculiar sort, looking not to whether the jury's verdict would have been the *same* without the error, but rather to whether the error did not *prevent* the jury's verdict. The failure of the court to instruct the jury properly—whether by omitting an element of the offense or by so misdescribing it that it is effectively removed from the jury's consideration—*can* be harmless, if the elements of guilt that the jury *did* find necessarily embraced the one omitted or misdescribed. This was clearly spelled out by our unanimous opinion in *Sullivan* v. *Louisiana, supra,* which said that harmless-error review "looks . . . to the basis on which 'the jury *actually rested* its verdict.'" 508 U. S., at 279 (quoting *Yates* v. *Evatt,* 500 U. S. 391, 404 (1991)). Where the facts *necessarily found* by the jury (and not those merely discerned by the appellate court) support the existence of the element omitted or misdescribed in the instruction, the omission or misdescription is harmless.[2] For there is then no "gap" *in the verdict* to

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[1] Contrary to JUSTICE STEVENS' suggestion, *ante,* at 28 (opinion concurring in part and concurring in judgment), there is nothing "internally inconsistent" about believing that a procedural guarantee is fundamental while also believing that it must be asserted in a timely fashion. It is a universally acknowledged principle of law that one who sleeps on his rights—even fundamental rights—may lose them.

[2] JUSTICE STEVENS thinks that the jury findings as to the amounts that petitioner failed to report on his tax returns "necessarily included" a finding on materiality, since "'total income' is *obviously* 'information necessary to a determination of a taxpayer's income tax liability.'" *Ante,* at 26 (emphasis added). If that analysis were valid, we could simply dispense with submitting the materiality issue to the jury in *all* future tax

be filled by the factfinding of judges. This formulation adequately explains the three cases, see *California* v. *Roy*, 519 U. S. 2, 6 (1996) (SCALIA, J., concurring); *Carella* v. *California*, 491 U. S. 263, 270–273 (1989) (SCALIA, J., concurring in judgment); *Pope* v. *Illinois*, 481 U. S. 497, 504 (1987) (SCALIA, J., concurring),[3] that the majority views as "dictat[ing] the answer" to the question before us today. *Ante*, at 13. In casting *Sullivan* aside, the majority does more than merely return to the state of confusion that existed in our prior cases; it throws open the gate for appellate courts to trample over the jury's function.

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cases involving understatement of income; a finding of intentional understatement would be a finding of guilt—no matter how insignificant the understatement might be, and no matter whether it was offset by understatement of deductions as well. But the right to a jury trial on all elements of the offense does not mean the right to a jury trial on only so many elements as are necessary in order logically to deduce the remainder. The jury has the right to apply its own logic (or illogic) to its decision to convict or acquit. At bottom, JUSTICE STEVENS "obviously" represents his judgment that *any* reasonable jury would *have* to think that the misstated amounts were material. Cf. *ante*, at 16, n. 1. It is, in other words, nothing more than a repackaging of the majority's approach, which allows a judge to determine what a jury "would have found" if asked. And it offers none of the protection that JUSTICE STEVENS promises the jury will deliver "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Ante*, at 29 (quoting *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968)).

[3] The Court asserts that this "functional equivalent" test does not explain *Pope*, since "a juror in Rockford, Illinois, who found that the [allegedly obscene] material lacked value under community standards, would not necessarily have found that it did so under presumably broader and more tolerant national standards." *Ante*, at 14. If the jury had been instructed to measure the material by Rockford, Illinois, standards, I might agree. It was instructed, however, to "judge whether the material was obscene by determining how it would be viewed by ordinary adults in the *whole State of Illinois*," 481 U. S., at 499 (emphasis added)—which includes, of course, the city of Chicago, that toddlin' town. A finding of obscenity under that standard amounts to a finding of obscenity under a national ("reasonable person") standard. See *id.*, at 504 (SCALIA, J., concurring).

Asserting that "[u]nder our cases, a constitutional error is either structural or it is not," *ante*, at 14, the Court criticizes the *Sullivan* test for importing a "case-by-case approach" into the structural-error determination. If that were true, it would seem a small price to pay for keeping the appellate function consistent with the Sixth Amendment. But in fact the Court overstates the cut-and-dried nature of identifying structural error. Some structural errors, like the complete absence of counsel or the denial of a public trial, are visible at first glance. Others, like deciding whether the trial judge was biased or whether there was racial discrimination in the grand jury selection, require a more fact-intensive inquiry. Deciding whether the jury made a finding "functionally equivalent" to the omitted or misdescribed element is similar to structural-error analysis of the latter sort.

III

The Court points out that *all* forms of harmless-error review "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable." *Ante*, at 18. In finding, for example, that the jury's verdict would not have been affected by the exclusion of evidence improperly admitted, or by the admission of evidence improperly excluded, a court is speculating on what the jury *would have found.* See, *e. g.*, *Arizona* v. *Fulminante*, 499 U. S., at 296 (Would the verdict have been different if a coerced confession had not been introduced?); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 684 (1986) (Would the verdict have been different if evidence had not been unconstitutionally barred from admission?). There is no difference, the Court asserts, in permitting a similar speculation here. *Ante*, at 18.

If this analysis were correct—if permitting speculation on whether a jury would have changed its verdict logically demands permitting speculation on what verdict a jury would have rendered—we ought to be able to uphold directed ver-

dicts in cases where the defendant's guilt is absolutely clear. In other words, the Court's analysis is simply a repudiation of the principle that depriving the criminal defendant of a jury verdict is *structural error*. *Sullivan* v. *Louisiana* clearly articulated the line between permissible and impermissible speculation that preserves the well-established structural character of the jury-trial right and places a principled and discernible limitation upon judicial intervention: "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in *this* trial was surely unattributable to the error." 508 U. S., at 279 (emphasis added). Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime.

The difference between speculation directed toward *confirming* the jury's verdict *(Sullivan)* and speculation directed toward *making a judgment that the jury has never made* (today's decision) is more than semantic. Consider, for example, the following scenarios. If I order for my wife in a restaurant, there is no sense in which the decision is hers, even if I am sure beyond a reasonable doubt about what she would have ordered. If, however, while she is away from the table, I advise the waiter to stay with an order she initially made, even though he informs me that there has been a change in the accompanying dish, one can still say that my wife placed the order—even if I am wrong about whether she would have changed her mind in light of the new information. Of course, I may predict correctly in both instances simply because I know my wife well. I doubt, however, that a low error rate would persuade my wife that my making a practice of the first was a good idea.

It is this sort of allocation of decisionmaking power that the *Sullivan* standard protects. The right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court. "Confirm-

ing" speculation does not disturb that allocation, but "substituting" speculation does. Make no mistake about the shift in standard: Whereas *Sullivan* confined appellate courts to their proper role of reviewing *verdicts*, the Court today puts appellate courts in the business of reviewing the defendant's *guilt*. The Court does not—it *cannot*—reconcile this new approach with the proposition that denial of the jury-trial right is structural error.

* * *

The recipe that has produced today's ruling consists of one part self-esteem, one part panic, and one part pragmatism. I have already commented upon the first ingredient: What could possibly be so bad about having *judges* decide that a jury would necessarily have found the defendant guilty? Nothing except the distrust of judges that underlies the jury-trial guarantee. As to the ingredient of panic: The Court is concerned that the *Sullivan* approach will invalidate convictions in innumerable cases where the defendant is obviously guilty. There is simply no basis for that concern. The *limited* harmless-error approach of *Sullivan* applies only when specific objection to the erroneous instruction has been made and rejected. In all other cases, the *Olano* plain-error rule governs, which is similar to the *ordinary* harmless-error analysis that the Court would apply. I doubt that the criminal cases in which instructions omit or misdescribe elements of the offense *over the objection of the defendant* are so numerous as to present a massive problem. (If they are, the problem of vagueness in our criminal laws, or of incompetence in our judges, makes the problem under discussion here seem insignificant by comparison.)

And as for the ingredient of pragmatism (if the defendant is unquestionably guilty, why go through the trouble of trying him again?), it suffices to quote Blackstone once again:

> "[H]owever *convenient* [intrusions on the jury right] may appear at first, (as, doubtless, all arbitrary powers, well executed, are the most *convenient*,) yet let it be

> again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." 4 Blackstone, Commentaries *350.

See also *Bollenbach* v. *United States*, 326 U. S. 607, 615 (1946). Formal requirements are often scorned when they stand in the way of expediency. This Court, however, has an obligation to take a longer view. I respectfully dissent.

Syllabus

CITY OF CHICAGO *v.* MORALES ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 97–1121. Argued December 9, 1998—Decided June 10, 1999

Chicago's Gang Congregation Ordinance prohibits "criminal street gang members" from loitering in public places. Under the ordinance, if a police officer observes a person whom he reasonably believes to be a gang member loitering in a public place with one or more persons, he shall order them to disperse. Anyone who does not promptly obey such an order has violated the ordinance. The police department's General Order 92–4 purports to limit officers' enforcement discretion by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership therein, and providing for designated, but publicly undisclosed, enforcement areas. Two trial judges upheld the ordinance's constitutionality, but 11 others ruled it invalid. The Illinois Appellate Court affirmed the latter cases and reversed the convictions in the former. The State Supreme Court affirmed, holding that the ordinance violates due process in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.

Held: The judgment is affirmed.

177 Ill. 2d 440, 687 N. E. 2d 53, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, and V, concluding that the ordinance's broad sweep violates the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 358. The ordinance encompasses a great deal of harmless behavior: In any public place in Chicago, persons in the company of a gang member "shall" be ordered to disperse if their purpose is not apparent to an officer. Moreover, the Illinois Supreme Court interprets the ordinance's loitering definition—"to remain in any one place with no apparent purpose"—as giving officers absolute discretion to determine what activities constitute loitering. See *id.*, at 359. This Court has no authority to construe the language of a state statute more narrowly than the State's highest court. See *Smiley* v. *Kansas*, 196 U. S. 447, 455. The three features of the ordinance that, the city argues, limit the officer's discretion—(1) it does not permit issuance of a dispersal order to anyone who is moving along or who has an apparent purpose; (2) it does not permit an arrest if individuals obey a dispersal order; and (3) no order can issue unless the officer reasonably believes that one of the loiterers is a gang mem-

ber—are insufficient. Finally, the Illinois Supreme Court is correct that General Order 92–4 is not a sufficient limitation on police discretion. See *Smith* v. *Goguen*, 415 U. S. 566, 575. Pp. 60–64.

JUSTICE STEVENS, joined by JUSTICE SOUTER and JUSTICE GINSBURG, concluded in Parts III, IV, and VI:

1. It was not improper for the state courts to conclude that the ordinance, which covers a significant amount of activity in addition to the intimidating conduct that is its factual predicate, is invalid on its face. An enactment may be attacked on its face as impermissibly vague if, *inter alia*, it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty. *Kolender* v. *Lawson*, 461 U. S., at 358. The freedom to loiter for innocent purposes is part of such "liberty." See, *e. g.*, *Kent* v. *Dulles*, 357 U. S. 116, 126. The ordinance's vagueness makes a facial challenge appropriate. This is not an enactment that simply regulates business behavior and contains a scienter requirement. See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499. It is a criminal law that contains no *mens rea* requirement, see *Colautti* v. *Franklin*, 439 U. S. 379, 395, and infringes on constitutionally protected rights, see *id.*, at 391. Pp. 51–56.

2. Because the ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted, it is impermissibly vague. See, *e. g.*, *Coates* v. *Cincinnati*, 402 U. S. 611, 614. The term "loiter" may have a common and accepted meaning, but the ordinance's definition of that term—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose." This vagueness about what loitering is covered and what is not dooms the ordinance. The city's principal response to the adequate notice concern—that loiterers are not subject to criminal sanction until after they have disobeyed a dispersal order—is unpersuasive for at least two reasons. First, the fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. A dispersal order, which is issued only after prohibited conduct has occurred, cannot retroactively provide adequate notice of the boundary between the permissible and the impermissible applications of the ordinance. Second, the dispersal order's terms compound the inadequacy of the notice afforded by the ordinance, which vaguely requires that the officer "order all such persons to disperse and remove themselves from the area," and thereby raises a host of questions as to the duration and distinguishing features of the loiterers' separation. Pp. 56–60.

Syllabus

JUSTICE O'CONNOR, joined by JUSTICE BREYER, concluded that, as construed by the Illinois Supreme Court, the Chicago ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers; in particular, it fails to provide any standard by which police can judge whether an individual has an "*apparent* purpose." This vagueness alone provides a sufficient ground for affirming the judgment below, and there is no need to consider the other issues briefed by the parties and addressed by the plurality. It is important to courts and legislatures alike to characterize more clearly the narrow scope of the Court's holding. Chicago still has reasonable alternatives to combat the very real threat posed by gang intimidation and violence, including, *e. g.*, adoption of laws that directly prohibit the congregation of gang members to intimidate residents, or the enforcement of existing laws with that effect. Moreover, the ordinance could have been construed more narrowly to avoid the vagueness problem, by, *e. g.*, adopting limitations that restrict the ordinance's criminal penalties to gang members or interpreting the term "apparent purpose" narrowly and in light of the Chicago City Council's findings. This Court, however, cannot impose a limiting construction that a state supreme court has declined to adopt. See, *e. g.*, *Kolender* v. *Lawson*, 461 U. S. 352, 355–356, n. 4. The Illinois Supreme Court misapplied this Court's precedents, particularly *Papachristou* v. *Jacksonville*, 405 U. S. 156, to the extent it read them as *requiring* it to hold the ordinance vague in all of its applications. Pp. 64–69.

JUSTICE KENNEDY concluded that, as interpreted by the Illinois Supreme Court, the Chicago ordinance unconstitutionally reaches a broad range of innocent conduct, and, therefore, is not necessarily saved by the requirement that the citizen disobey a dispersal order before there is a violation. Although it can be assumed that disobeying some police commands will subject a citizen to prosecution whether or not the citizen knows why the order is given, it does not follow that any unexplained police order must be obeyed without notice of its lawfulness. The predicate of a dispersal order is not sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to such an order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose. Pp. 69–70.

JUSTICE BREYER concluded that the ordinance violates the Constitution because it delegates too much discretion to the police, and it is not saved by its limitations requiring that the police reasonably believe that the person ordered to disperse (or someone accompanying him) is a gang

member, and that he remain in the public place "with no apparent purpose." Nor does it violate this Court's usual rules governing facial challenges to forbid the city to apply the unconstitutional ordinance in this case. There is no way to distinguish in the ordinance's terms between one application of unlimited police discretion and another. It is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. Contrary to JUSTICE SCALIA's suggestion, the ordinance does not escape facial invalidation simply because it may provide fair warning to some individual defendants that it prohibits the conduct in which they are engaged. This ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide the police. See *Coates* v. *Cincinnati*, 402 U. S. 611, 614. Pp. 70–73.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III, IV, and VI, in which SOUTER and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post*, p. 64. KENNEDY, J., *post*, p. 69, and BREYER, J., *post*, p. 70, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion, *post*, p. 73. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 98.

Lawrence Rosenthal argued the cause for petitioner. With him on the briefs were *Brian L. Crowe*, *Benna Ruth Solomon*, *Timothy W. Joranko*, and *Julian N. Henriques, Jr.*

Harvey Grossman argued the cause for respondents. With him on the brief were *Rita Fry*, *James H. Reddy*, *Richard J. O'Brien, Jr.*, *Barbara O'Toole*, and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Waxman*, *Deputy Solicitor General Underwood*, and *James A. Feldman;* for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, *Robert C. Maier*, and *David M. Gormley*, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.*, of Alabama,

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang

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Bruce M. Botelho of Alaska, *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *John M. Bailey* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *A. B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *D. Michael Fisher* of Pennsylvania, *Carlos Lugo-Fiol* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *Julio A. Brady* of the Virgin Islands, and *Mark O. Earley* of Virginia; for the Center for the Community Interest by *Richard K. Willard* and *Roger L. Conner;* for the Chicago Neighborhood Organizations by *Michele L. Odorizzi* and *Jeffrey W. Sarles;* for the Los Angeles County District Attorney by *Gil Garcetti pro se*, and *Brent Dail Riggs;* for the National District Attorneys Association et al. by *Kristin Linsley Myles*, *Daniel P. Collins*, *William L. Murphy*, and *Wayne W. Schmidt;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for the U. S. Conference of Mayors et al. by *Richard Ruda*, *Miguel A. Estrada*, and *Mark A. Perry.*

Briefs of *amicus curiae* urging affirmance were filed for the Chicago Alliance for Neighborhood Safety et al. by *Stephen J. Schulhofer* and *Randolph N. Stone;* for the Illinois Attorneys for Criminal Justice by *Robert Hirschhorn* and *Steven A. Greenberg;* for the National Association of Criminal Defense Lawyers by *David M. Porter;* for the National Black Police Association et al. by *Elaine R. Jones*, *Theodore M. Shaw*, *George H. Kendall*, *Laura E. Hankins*, *Marc O. Beem*, and *Diane F. Klotnia;* for the National Law Center on Homelessness & Poverty et al. by *Robert M. Bruskin;* and for See Forever/the Maya Angelou Public Charter School et al. by *Louis R. Cohen*, *John Payton*, and *James Forman, Jr.*

members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.[1]

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, "'the burgeoning presence of street gang members in public places has intimidated many law abiding citizens.'" 177 Ill. 2d 440, 445, 687 N. E. 2d 53, 58 (1997). Furthermore, the council stated that gang members "'establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . [m]embers of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present . . . .'" *Ibid.* It further found that "'loitering in public places by

[1] The findings are quoted in full in the opinion of the Supreme Court of Illinois. 177 Ill. 2d 440, 445, 687 N. E. 2d 53, 58 (1997). Some of the evidence supporting these findings is quoted in JUSTICE THOMAS' dissenting opinion. *Post*, at 100–101.

criminal street gang members creates a justifiable fear for the safety of persons and property in the area'" and that "'[a]ggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear.'" Moreover, the council concluded that the city "'has an interest in discouraging all persons from loitering in public places with criminal gang members.'" *Ibid.*

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "'public place'" is a "'criminal street gang membe[r].'" Second, the persons must be "'loitering,'" which the ordinance defines as "'remain[ing] in any one place with no apparent purpose.'" Third, the officer must then order "'all'" of the persons to disperse and remove themselves "'from the area.'" Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance. *Ibid.*[2]

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[2] The ordinance states in pertinent part:

"(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

"(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

"(c) As used in this Section:

"(1) 'Loiter' means to remain in any one place with no apparent purpose.

"(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92–4 to provide guidelines to govern its enforcement.[3] That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department, General Order 92–4, reprinted in App. to Pet. for Cert. 65a. The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers,[4] and establish detailed criteria for defining street gangs and membership in such gangs. *Id.*, at 66a–67a. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the desig-

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individually or collectively engage in or have engaged in a pattern of criminal gang activity.

. . . . .

"(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

"(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

"In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1–4–120 of this Code." Chicago Municipal Code § 8–4–015 (added June 17, 1992), reprinted in App. to Pet. for Cert. 61a–63a.

[3] As the Illinois Supreme Court noted, during the hearings preceding the adoption of the ordinance, "representatives of the Chicago law and police departments informed the city counsel that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordinance itself." 177 Ill. 2d, at 446, 687 N. E. 2d, at 58–59.

[4] Presumably, these officers would also be able to arrest all nongang members who violate the ordinance.

nated areas." *Id.*, at 68a–69a. The city, however, does not release the locations of these "designated areas" to the public.[5]

II

During the three years of its enforcement,[6] the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance.[7] In the ensuing enforcement proceedings, 2 trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid.[8] In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct

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[5] Tr. of Oral Arg. 22–23.

[6] The city began enforcing the ordinance on the effective date of the general order in August 1992 and stopped enforcing it in December 1995, when it was held invalid in *Chicago* v. *Youkhana*, 277 Ill. App. 3d 101, 660 N. E. 2d 34 (1995). Tr. of Oral Arg. 43.

[7] Brief for Petitioner 16. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. City of Chicago, R. Daley & T. Hillard, Gang and Narcotic Related Violent Crime: 1993–1997, p. 7 (June 1998).

The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. Pet. for Cert. 9, n. 5. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Daley & Hillard, at 5. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. Cf. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 Mich. L. Rev. 291, 296 (1998) (describing the "hotly contested debate raging among . . . experts over the causes of the decline in crime in New York City and nationally").

[8] See Poulos, Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, 83 Calif. L. Rev. 379, 384, n. 26 (1995).

is prohibited, and it encourages arbitrary and capricious enforcement by police."[9]

The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case,[10] consolidated and affirmed other pending appeals in accordance with *Youkhana*,[11] and reversed the convictions of respondents Gutierrez, Morales, and others.[12] The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment.[13]

The Illinois Supreme Court affirmed. It held "that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." 177 Ill. 2d, at 447, 687 N. E. 2d, at 59. The court did not reach the contentions that the ordinance "creates a status offense, permits arrests without probable cause or is overbroad." *Ibid.*

In support of its vagueness holding, the court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated

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[9] *Chicago* v. *Youkhana*, Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 45a. The court also concluded that the ordinance improperly authorized arrest on the basis of a person's status instead of conduct and that it was facially overbroad under the First Amendment to the Federal Constitution and Art. I, § 5, of the Illinois Constitution. *Id.*, at 59a.

[10] *Chicago* v. *Youkhana*, 277 Ill. App. 3d 101, 660 N. E. 2d 34 (1995).

[11] *Chicago* v. *Ramsey*, Nos. 1–93–4125 et al. (Ill. App., Dec. 29, 1995), App. to Pet. for Cert. 39a.

[12] *Chicago* v. *Morales*, Nos. 1–93–4039 et al. (Ill. App., Dec. 29, 1995), App. to Pet. for Cert. 37a.

[13] *Chicago* v. *Youkhana*, 277 Ill. App. 3d, at 106, 660 N. E. 2d, at 38; *id.*, at 112, 660 N. E. 2d, at 41; *id.*, at 113, 660 N. E. 2d, at 42.

to cause harm.[14] "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." *Id.*, at 451–452, 687 N. E. 2d, at 60–61. Furthermore, it concluded that the ordinance was "not reasonably susceptible to a limiting construction which would affirm its validity."[15]

We granted certiorari, 523 U. S. 1071 (1998), and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods."[16] The findings in the ordinance explain that it was motivated by these concerns. We have no doubt

[14] "The ordinance defines 'loiter' to mean 'to remain in any one place with no apparent purpose.' Chicago Municipal Code § 8–4–015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." 177 Ill. 2d, at 451–452, 687 N. E. 2d, at 60–61.

[15] It stated: "Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Id.*, at 458, 687 N. E. 2d, at 64.

[16] Brief for Petitioner 14.

that a law that directly prohibited such intimidating conduct would be constitutional,[17] but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. The city correctly points out that imprecise laws can be attacked on their face under two different doctrines.[18] First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983).

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct

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[17] In fact the city already has several laws that serve this purpose. See, *e. g.*, Ill. Comp. Stat., ch. 720 §§ 5/12–6 (1998) (intimidation); 570/405.2 (streetgang criminal drug conspiracy); 147/1 *et seq.* (Illinois Streetgang Terrorism Omnibus Prevention Act); 5/25–1 (mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." Record, Appendix II to plaintiff's Memorandum in Opposition to Motion to Dismiss 182 (Tr. of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

[18] Brief for Petitioner 17.

protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. Cf. *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984); *Gregory* v. *Chicago*, 394 U. S. 111 (1969). Its impact on the social contact between gang members and others does not impair the First Amendment "right of association" that our cases have recognized. See *Dallas* v. *Stanglin*, 490 U. S. 19, 23–25 (1989).

On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[19] We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); see also *Papachristou* v. *Jacksonville*, 405 U. S. 156, 164 (1972).[20]

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[19] See Brief for United States as *Amicus Curiae* 23: "We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." The city appears to agree, at least to the extent that such activities include "social gatherings." Brief for Petitioner 21, n. 13. Both JUSTICE SCALIA, *post*, at 83–86 (dissenting opinion), and JUSTICE THOMAS, *post*, at 102–106 (dissenting opinion), not only disagree with this proposition, but also incorrectly assume (as the city does not, see Brief for Petitioner 44) that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process. See n. 35, *infra*.

[20] Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12. While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the " 'Slavery acts' " provided for a 2-year enslavement period

Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).[21]

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for anyone who "'liveth idly and loiteringly, by the space of three days.'" Note, Homelessness in a Modern Urban Setting, 10 Ford. Urb. L. J. 749, 754, n. 17 (1982). In *Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." 405 U. S., at 161–162. These laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See Recent Developments, Constitutional Attacks on Vagrancy Laws, 20 Stan. L. Rev. 782, 783 (1968). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include "'any runaway, stubborn servant or child'" and "'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.'" T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50–69 (1998). Neither this history nor the scholarly compendia in JUSTICE THOMAS' dissent, *post*, at 102–106, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause.

[21] The freewheeling and hypothetical character of JUSTICE SCALIA's discussion of liberty is epitomized by his assumption that citizens of Chicago, who were once "free to drive about the city" at whatever speed they wished, were the ones who decided to limit that freedom by adopting a speed limit. *Post*, at 73. History tells quite a different story.

In 1903, the Illinois Legislature passed "An Act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads, and highways of the state of Illinois." That statute, with some exceptions, set a speed limit of 15 miles per hour. See *Christy* v. *Elliott*, 216 Ill. 31, 74 N. E. 1035 (1905). In 1900, there were 1,698,575 citizens of Chicago, 1 Twelfth Census of the United States 430 (1900) (Table 6), but

There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. Cf. *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515–517 (1964) (right to travel); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 82–83 (1976) (abortion); *Kolender* v. *Lawson*, 461 U. S., at 355, n. 3, 358–360, and n. 9. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982). It is a criminal law that contains no *mens rea* requirement, see *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979), and infringes on constitutionally protected rights, see *id.*, at 391. When vagueness permeates the text of such a law, it is subject to facial attack.[22]

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only 8,000 cars (both private and commercial) registered in the entire United States. See Ward's Automotive Yearbook 230 (1990). Even though the number of cars in the country had increased to 77,400 by 1905, *ibid.*, it seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit.

[22] The burden of the first portion of JUSTICE SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. See *post*, at 74–83. He first lauds the "clarity of our general jurisprudence" in the method for assessing facial challenges and then states that the clear import of our cases is that, in order to mount a successful facial challenge, a plaintiff must "establish that no set of circumstances exists under which the Act would be valid." See *post*, at 78–79 (emphasis deleted); *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, see *id.*, at 745, n. 3, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.

We need not, however, resolve the viability of *Salerno*'s dictum, because this case comes to us from a state—not a federal—court. When asserting

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. See *Kolender* v. *Lawson*, 461 U. S., at 357. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

IV

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402–403 (1966). The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, 177 Ill. 2d, at 451, 687 N. E. 2d, at 61, but the definition of that term in this ordinance—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how

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a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party *(jus tertii)* standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. See *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955 (1984). When a state court has reached the merits of a constitutional claim, "invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose." *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 243 (1983) (internal quotation marks omitted).

Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases—a proposition which is doubtful—state courts need not apply prudential notions of standing created by this Court. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 618 (1989). JUSTICE SCALIA's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover it contradicts "essential principles of federalism." See Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 284 (1994).

any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?[23]

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm.[24] Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent.[25] However, state

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[23] The Solicitor General, while supporting the city's argument that the ordinance is constitutional, appears to recognize that the ordinance cannot be read literally without invoking intractable vagueness concerns. "[T]he purpose simply to stand on a corner cannot be an 'apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all." Brief for United States as *Amicus Curiae* 12–13.

[24] 177 Ill. 2d, at 452, 687 N. E. 2d, at 61. One of the trial courts that invalidated the ordinance gave the following illustration: "Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone." *Chicago* v. *Youkhana*, Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 48a–49a.

[25] See, *e. g.*, *Tacoma* v. *Luvene*, 118 Wash. 2d 826, 827 P. 2d 1374 (1992) (upholding ordinance criminalizing loitering with purpose to engage in drug-related activities); *People* v. *Superior Court*, 46 Cal. 3d 381, 394–395, 758 P. 2d 1046, 1052 (1988) (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime.[26]

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "[W]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do."[27] We find this response unpersuasive for at least two reasons.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit.[28] If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90

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[26] See, *e. g.*, *State* v. *Richard*, 108 Nev. 626, 627, n. 2, 836 P. 2d 622, 623, n. 2 (1992) (striking down statute that made it unlawful "for any person to loiter or prowl upon the property of another without lawful business with the owner or occupant thereof").

[27] Brief for Petitioner 31.

[28] In this way, the ordinance differs from the statute upheld in *Colten* v. *Kentucky*, 407 U. S. 104, 110 (1972). There, we found that the illegality of the underlying conduct was clear. "Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under . . . Kentucky's statute if he fails to obey an order to move on." *Ibid.*

(1965).[29] Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.[30]

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." *Connally* v. *General Constr. Co.*, 269 U. S. 385 (1926). We remarked in *Connally* that "[b]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id.*, at 395.

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance uncon-

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[29] "Literally read . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration." 382 U. S., at 90.

[30] As we have noted in a similar context: "If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Wright* v. *Georgia*, 373 U. S. 284, 292 (1963).

stitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States* v. *Reese*, 92 U. S. 214, 221 (1876). This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971).

V

The broad sweep of the ordinance also violates "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender* v. *Lawson*, 461 U. S., at 358. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender* v. *Lawson*, 461 U. S., at 360 (internal quotation marks omitted). As we discussed in the context of fair no-

tice, see *supra*, at 56–60, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to decide what activities constitute loitering." 177 Ill. 2d, at 457, 687 N. E. 2d, at 63. We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court.[31] "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *Smiley* v. *Kansas*, 196 U. S. 447, 455 (1905).

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary per-

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[31] This critical fact distinguishes this case from *Boos* v. *Barry*, 485 U. S. 312, 329–330 (1988). There, we noted that the text of the relevant statute, read literally, may have been void for vagueness both on notice and on discretionary enforcement grounds. We then found, however, that the Court of Appeals had "provided a narrowing construction that alleviates both of these difficulties." *Ibid.*

sons to disperse under the ordinance.[32] Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect,[33] or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members.[34] It applies to everyone in the city

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[32] It is possible to read the mandatory language of the ordinance and conclude that it affords the police *no* discretion, since it speaks with the mandatory "shall." However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

[33] JUSTICE THOMAS' dissent overlooks the important distinction between this ordinance and those that authorize the police "to order groups of individuals who threaten the public peace to disperse." See *post,* at 107.

[34] Not all of the respondents in this case, for example, are gang members. The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted

who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. We agree. See *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974). That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city

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"that he knew he was with criminal street gang members." Reply Brief for Petitioner 23, n. 14. In fact, 34 of the 66 respondents in this case were charged in a document that only accused them of being in the presence of a gang member. Tr. of Oral Arg. 34, 58.

safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity."[35] 177 Ill. 2d, at 459, 687 N. E. 2d, at 64. We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." *Houston* v. *Hill*, 482 U. S. 451, 471–472 (1987). However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

Justice O'Connor, with whom Justice Breyer joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code § 8–4–015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to

[35] This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that the ordinance is invalid as a deprivation of substantive due process. For this reason, Justice Thomas, see *post*, at 102–106, and Justice Scalia, see *post*, at 85–86, are mistaken when they assert that our decision must be analyzed under the framework for substantive due process set out in *Washington* v. *Glucksberg*, 521 U. S. 702 (1997).

establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). Of these, "the more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.*, at 358 (quoting *Smith* v. *Goguen*, 415 U. S. 566, 574–575 (1974)). I share Justice Thomas' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." *Post*, at 109 (dissenting opinion). A criminal law, however, must not permit policemen, prosecutors, and juries to conduct "'a standardless sweep . . . to pursue their personal predilections.'" *Kolender* v. *Lawson*, *supra*, at 358 (quoting *Smith* v. *Goguen*, *supra*, at 575).

The ordinance at issue provides:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." App. to Pet. for Cert. 61a.

To "[l]oiter," in turn, is defined in the ordinance as "to remain in any one place with no apparent purpose." *Ibid.* The Illinois Supreme Court declined to adopt a limiting construction of the ordinance and concluded that the ordinance vested "*absolute* discretion to police officers." 177 Ill. 2d 440, 457, 687 N. E. 2d 53, 63 (1997) (emphasis added). This Court is bound by the Illinois Supreme Court's construction of the ordinance. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforce-

ment officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an "*apparent* purpose." Indeed, because any person standing on the street has a general "purpose"—even if it is simply to stand—the ordinance permits police officers to choose which purposes are *permissible*. Under this construction the police do not have to decide that an individual is "threaten[ing] the public peace" to issue a dispersal order. See *post*, at 107 (THOMAS, J., dissenting). Any police officer in Chicago is free, under the Illinois Supreme Court's construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse. Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or "other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8–4–015(c)(5) (1992).

To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place "with no apparent purpose," and the ordinance provides no guidance to the officer on how to make this antecedent decision. Moreover, the requirement that police issue dispersal orders only when they "reasonably believ[e]" that a group of loiterers includes a gang member fails to cure the ordinance's vague aspects. If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued. Cf. *ante*, at 62. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See 177 Ill. 2d, at 453–454, 687 N. E. 2d, at 62.

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree

with Part V of the Court's opinion, which discusses this consideration. See *ante*, at 62 ("[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue"); *ibid.* ("It is true . . . that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members"). Accordingly, there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," see *ibid.*, from laws that target only gang members, see *ibid.*, and from laws that incorporate limits on the area and manner in which the laws may be enforced, see *ante*, at 62–63. In addition, the ordinance here is unlike a law that "directly prohibit[s]" the "'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,'" that "'intimidates residents.'" *Ante*, at 51, 52 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante*, at 52, n. 17. Chicago has even enacted a provision that "enables police officers to fulfill . . . their traditional functions," including "preserving the public peace." See *post*, at 106 (Thomas, J., dissenting). Specifi-

cally, Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." See Chicago Municipal Code § 8–4–010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See App. to Pet. for Cert. 60a–61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. To the extent it relied on our precedents, particularly *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972), as *requiring* it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. See 177 Ill. 2d, at 458–459, 687 N. E. 2d, at 64. This Court has never held that the intent of the drafters determines whether a law is vague. Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. See *Kolender* v. *Lawson*, 461 U. S., at 355–356, n. 4 (noting that the Court has held that "'[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it'" (citations and internal quotation marks omitted)); *New York*

v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982) (noting that where the Court is "dealing with a state statute on direct review of a state-court decision that has construed the statute[,] [s]uch a construction is binding on us"). Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, and V of the Court's opinion and concur in the judgment.

I also share many of the concerns JUSTICE STEVENS expresses in Part IV with respect to the sufficiency of notice under the ordinance. As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct. For this reason it is not necessarily saved by the requirement that the citizen must disobey a police order to disperse before there is a violation.

We have not often examined these types of orders. Cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965). It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official. It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order. The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is con-

gregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose.

JUSTICE BREYER, concurring in part and concurring in the judgment.

The ordinance before us creates more than a "*minor* limitation upon the free state of nature." *Post*, at 74 (SCALIA, J., dissenting) (emphasis added). The law authorizes a police officer to order any person to remove himself from any "location open to the public, whether publicly or privately owned," Chicago Municipal Code §8–4–015(c)(5) (1992), *i. e.*, any sidewalk, front stoop, public park, public square, lakeside promenade, hotel, restaurant, bowling alley, bar, barbershop, sports arena, shopping mall, etc., but with two, and only two, limitations: First, that person must be accompanied by (or must himself be) someone police reasonably believe is a gang member. Second, that person must have remained in that public place "with no apparent purpose." §8–4–015(c)(1).

The first limitation cannot save the ordinance. Though it limits the number of persons subject to the law, it leaves many individuals, gang members and nongang members alike, subject to its strictures. Nor does it limit in any way the range of conduct that police may prohibit. The second limitation is, as the Court, *ante*, at 62, and JUSTICE O'CONNOR, *ante*, at 65–66 (opinion concurring in part and concurring in judgment), point out, not a limitation at all. Since one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words "no apparent purpose" as meaning "no apparent purpose except for . . . ." And it is in the ordinance's delegation to the policeman of open-ended discretion to fill in that blank that the problem lies. To grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a "minor," "limitation upon the free state of nature."

Nor does it violate "our rules governing facial challenges," *post*, at 74 (SCALIA, J., dissenting), to forbid the city to apply the unconstitutional ordinance in this case. The reason *why* the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications. The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than it could apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

JUSTICE SCALIA's examples, *post*, at 81–83, reach a different conclusion because they assume a different basis for the law's constitutional invalidity. A statute, for example, might not provide fair warning to many, but an individual defendant might still have been aware that it prohibited the conduct in which he engaged. Cf., *e. g.*, *Parker* v. *Levy*, 417 U. S. 733, 756 (1974) ("[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit.

One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). But I believe this ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide "sufficient minimal standards to guide law enforcement officers." See *ante*, at 65–66 (O'CONNOR, J., concurring in part and concurring in judgment).

I concede that this case is unlike those First Amendment "overbreadth" cases in which this Court has permitted a facial challenge. In an overbreadth case, a defendant whose conduct clearly falls within the law and may be constitutionally prohibited can nonetheless have the law declared facially invalid to protect the rights of others (whose protected speech might otherwise be chilled). In the present case, the right that the defendants assert, the right to be free from the officer's exercise of unchecked discretion, is more clearly their own.

This case resembles *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), where this Court declared facially unconstitutional on, among other grounds, the due process standard of vagueness an ordinance that prohibited persons assembled on a sidewalk from "conduct[ing] themselves in a manner annoying to persons passing by." The Court explained:

> "It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id.*, at 614 (citation omitted).

The ordinance in *Coates* could not constitutionally be applied whether or not the conduct of the particular defendants was indisputably "annoying" or of a sort that a different, more specific ordinance could constitutionally prohibit. Similarly, here the city might have enacted a different ordinance, or the Illinois Supreme Court might have interpreted this ordinance differently. And the Constitution might well have permitted the city to apply that different ordinance (or this ordinance as interpreted differently) to circumstances like those present here. See *ante*, at 67–68 (O'CONNOR, J., concurring in part and concurring in judgment). But *this* ordinance, as I have said, cannot be constitutionally applied to anyone.

JUSTICE SCALIA, dissenting.

The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the "freedom" of all citizens, but was not unconstitutional.

Similarly, the citizens of Chicago were once free to stand around and gawk at the scene of an accident. At some point Chicagoans discovered that this obstructed traffic and caused more accidents. They did not make the practice unlawful, but they did authorize police officers to order the crowd to disperse, and imposed penalties for refusal to obey such an order. Again, this prophylactic measure infringed upon the "freedom" of all citizens, but was not unconstitutional.

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose—to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated

in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. See Chicago Municipal Code § 8–4–015 (1992). The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure by ignoring our rules governing facial challenges, by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists.

I

Respondents' consolidated appeal presents a facial challenge to the Chicago ordinance on vagueness grounds. When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration. The rationale for our power to review federal legislation for constitutionality, expressed in *Marbury* v. *Madison*, 1 Cranch 137 (1803), was that we *had* to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case.

That limitation was fully grasped by Tocqueville, in his famous chapter on the power of the judiciary in American society:

> "The second characteristic of judicial power is, that it pronounces on special cases, and not upon general principles. If a judge, in deciding a particular point, destroys a general principle by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumes a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.
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> . . . . .
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> "Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule . . . . But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. . . . The political power which the Americans have intrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . . [W]hen a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can

> be accomplished only by the reiterated attacks of judicial functionaries." Democracy in America 73, 75–76 (R. Heffner ed. 1956).

As Justice Sutherland described our system in his opinion for a unanimous Court in *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923):

> "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. . . . If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

And as Justice Brennan described our system in his opinion for a unanimous Court in *United States* v. *Raines*, 362 U. S. 17, 20–22 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies before them. . . . This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of

> constitutional law broader than is required by the precise facts to which it is to be applied.' . . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."

It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion—which a federal court should never issue at all, see *Hayburn's Case*, 2 Dall. 409 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions, see, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?

I must acknowledge, however, that for some of the present century we have done just this. But until recently, at least, we have—except in free-speech cases subject to the doctrine of overbreadth, see, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 769–773 (1982)—*required* the facial challenge to *be* a go-for-broke proposition. That is to say, before declaring a statute to be void in all its applications (something we should not be doing in the first place), we have at least imposed upon the litigant the eminently reasonable requirement that he estab-

lish that the statute was *unconstitutional* in all its applications. (I say that is an eminently reasonable requirement, not only because we should not be holding a statute void in all its applications unless it is unconstitutional in all its applications, but also because *unless* it is unconstitutional in all its applications we do not even know, without conducting an as-applied analysis, whether it is void with regard to the very litigant *before* us—whose case, after all, was the occasion for undertaking this inquiry in the first place.[1])

As we said in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987):

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circum-*

[1] In other words, a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge. See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"); *Parker* v. *Levy*, 417 U. S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

The plurality asserts that in *United States* v. *Salerno*, 481 U. S. 739 (1987), which I discuss in text immediately following this footnote, the Court "entertained" a facial challenge even though "the defendants . . . did not claim that the statute was unconstitutional as applied to them." *Ante*, at 55, n. 22. That is not so. The Court made it absolutely clear in *Salerno* that a facial challenge requires the assertion that "*no set of circumstances exists* under which the Act would be valid," 481 U. S., at 745 (emphasis added). The footnoted statement upon which the plurality relies ("Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case," *id.*, at 745, n. 3) was obviously meant to convey the fact that the defendants were not making, *in addition to their facial challenge*, an alternative as-applied challenge—*i. e.*, asserting that *even if* the statute was not unconstitutional in *all* its applications it was *at least* unconstitutional in its particular application to them.

> *stances exists under which the Act would be valid.* The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (Emphasis added.)[2]

This proposition did not originate with *Salerno*, but had been expressed in a line of prior opinions. See, *e. g.*, *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 796 (1984) (opinion for the Court by STEVENS, J.) (statute not implicating First Amendment rights is invalid on its face if "it is unconstitutional in every conceivable application"); *Schall* v. *Martin*, 467 U. S. 253, 269, n. 18 (1984); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494–495, 497 (1982); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 31–32 (1963); *Raines*, 362 U. S., at 21. And the proposition has been reaffirmed in many cases and opinions since. See, *e. g.*, *Anderson* v. *Edwards*, 514 U. S. 143, 155–156, n. 6 (1995) (unanimous Court); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 699 (1995) (opinion for the Court by STEVENS, J.) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Reno* v. *Flores*, 507 U. S. 292, 301 (1993); *Rust* v. *Sullivan*,

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[2] *Salerno*, a criminal case, repudiated the Court's statement in *Kolender* v. *Lawson*, 461 U. S. 352, 359, n. 8 (1983), to the effect that a facial challenge to a criminal statute could succeed "even when [the statute] could conceivably have had some valid application." *Kolender* seems to have confused the standard for First Amendment overbreadth challenges with the standard governing facial challenges on all other grounds. See *ibid.* (citing the Court's articulation of the standard for *First Amendment overbreadth* challenges from *Hoffman Estates*, *supra*, at 494). As *Salerno* noted, *supra*, at 745, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression. See, *e. g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

500 U. S. 173, 183 (1991); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (opinion of KENNEDY, J.); *Webster* v. *Reproductive Health Servs.*, 492 U. S. 490, 523–524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment); *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11–12 (1988).[3] Unsurprisingly, given the clarity of our general jurisprudence on this point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges.[4]

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[3] The plurality asserts that the *Salerno* standard for facial challenge "has never been the decisive factor in any decision of this Court." *Ante*, at 55, n. 22. It means by that only this: in rejecting a facial challenge, the Court has never contented itself with identifying *only one* situation in which the challenged statute would be constitutional, but has mentioned several. But that is not at all remarkable, and casts no doubt upon the validity of the principle that *Salerno* and these many other cases enunciated. It is difficult to conceive of a statute that would be constitutional in only a single application—and hard to resist mentioning more than one.

The plurality contends that it *does not matter* whether the *Salerno* standard is federal law, since facial challenge is a species of third-party standing, and federal limitations upon third-party standing do not apply in an appeal from a state decision which takes a broader view, as the Illinois Supreme Court's opinion did here. *Ante*, at 55–56, n. 22. This is quite wrong. Disagreement over the *Salerno* rule is not a disagreement over the "standing" question whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can*. The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win: Salerno* says "all" (in addition to his own rights), the plurality says "many." That is not a question of standing but of substantive law. The notion that, if *Salerno* is the federal rule (a federal statute is not totally invalid unless it is invalid in all its applications), it can be *altered* by a state court (a federal statute is totally invalid if it is invalid in *many* of its applications), and that that alteration must be accepted by the Supreme Court of the United States is, to put it as gently as possible, remarkable.

[4] See, *e. g.*, *Abdullah* v. *Commissioner of Ins. of Commonwealth of Mass.*, 84 F. 3d 18, 20 (CA1 1996); *Deshawn E.* v. *Safir*, 156 F. 3d 340, 347 (CA2 1998); *Artway* v. *Attorney Gen. of State of N. J.*, 81 F. 3d 1235, 1252, n. 13 (CA3 1996); *Manning* v. *Hunt*, 119 F. 3d 254, 268–269 (CA4 1997); *Causeway Medical Suite* v. *Ieyoub*, 109 F. 3d 1096, 1104 (CA5), cert. de-

I am aware, of course, that in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the "unconstitutional in every conceivable application" rule, when the statutes at issue concerned hot-button social issues on which "informed opinion" was zealously united. See *Romer* v. *Evans*, 517 U. S. 620, 643 (1996) (SCALIA, J., dissenting) (homosexual rights); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 895 (1992) (abortion rights). But the present case does not even lend itself to such a "political correctness" exception—which, though illogical, is at least predictable. It is not *à la mode* to favor gang members and associated loiterers over the beleaguered law-abiding residents of the inner city.

When our normal criteria for facial challenges are applied, it is clear that the Justices in the majority have transposed the burden of proof. Instead of requiring respondents, who are challenging the ordinance, to show that it is invalid in all its applications, they have required petitioner to show that it is valid in all its applications. Both the plurality opinion and the concurrences display a lively imagination, creating hypothetical situations in which the law's application would (in their view) be ambiguous. But that creative role has been usurped from petitioner, who can defeat respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this:[5] Tony, a member of the Jets criminal street gang, is standing

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nied, 522 U. S. 943 (1997); *Aronson* v. *Akron*, 116 F. 3d 804, 809 (CA6 1997); *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F. 2d 1267, 1283 (CA7 1992), cert. denied, 506 U. S. 1053 (1993); *Woodis* v. *Westark Community College*, 160 F. 3d 435, 438–439 (CA8 1998); *Roulette* v. *Seattle*, 97 F. 3d 300, 306 (CA9 1996); *Public Lands Council* v. *Babbitt*, 167 F. 3d 1287, 1293 (CA10 1999); *Dimmitt* v. *Clearwater*, 985 F. 2d 1565, 1570–1571 (CA11 1993); *Time Warner Entertainment Co.* v. *FCC*, 93 F. 3d 957, 972 (CADC 1996).

[5] With apologies for taking creative license with the work of Messrs. Bernstein, Sondheim, and Laurents. West Side Story, copyright 1959.

alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement—not entirely coherent, but evidently intended to be rude—"Gee, Officer Krupke, krup you." A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents' facial challenge to the ordinance's vagueness.

Of course respondents would still be able to claim that the ordinance was vague as applied to them. But the ultimate demonstration of the inappropriateness of the Court's holding of *facial* invalidity is the fact that it is doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria. For instance, respondent Jose Renteria—who admitted that he was a member of the Satan Disciples gang—was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner 15 to 20 minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others—who admitted they were members of the Vice Lords gang—were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using

the sidewalks. The arresting officer issued a dispersal order, issued *another* dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez—who had previously admitted to the arresting officer his membership in the Latin Kings gang—was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. See Brief for Petitioner 7, n. 5; Brief for United States as *Amicus Curiae* 16, n. 11. Even on the majority's assumption that to avoid vagueness it must be clear to the object of the dispersal order *ex ante* that his conduct is covered by the ordinance, it seems most improbable that any of these as-applied challenges would be sustained. Much less is it possible to say that the ordinance is invalid in *all* its applications.

II

The plurality's explanation for its departure from the usual rule governing facial challenges is seemingly contained in the following statement: "[This] is a criminal law that contains no *mens rea* requirement . . . *and* infringes on constitutionally protected rights . . . . When vagueness permeates the text of *such* a law, it is subject to facial attack." *Ante*, at 55 (emphasis added). The proposition is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without *mens rea* requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial invalidation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates.

But no matter. None of the three factors that the plurality relies upon exists anyway. I turn first to the support for the proposition that there is a constitutionally protected right to loiter—or, as the plurality more favorably describes

it, for a person to "remain in a public place of his choice." *Ante*, at 54. The plurality thinks much of this Fundamental Freedom to Loiter, which it contrasts with such lesser, constitutionally *un*protected, activities as doing (ugh!) *business:* "This is not an ordinance that simply regulates business behavior and contains a scienter requirement. . . . It is a criminal law that contains no *mens rea* requirement . . . and infringes on constitutionally protected rights." *Ante*, at 55 (internal quotation marks omitted). (Poor Alexander Hamilton, who has seen his "commercial republic" devolve, in the eyes of the plurality, at least, into an "indolent republic," see The Federalist No. 6, p. 56; No. 11, pp. 84–91 (C. Rossiter ed. 1961).)

Of course every activity, even scratching one's head, can be called a "constitutional right" if one means by that term nothing more than the fact that the activity is covered (as all are) by the Equal Protection Clause, so that those who engage in it cannot be singled out without "rational basis." See *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). But using the term in that sense utterly impoverishes our constitutional discourse. We would then need a *new* term for those activities—such as political speech or religious worship—that cannot be forbidden even *with* rational basis.

The plurality tosses around the term "constitutional right" in this renegade sense, because there is not the slightest evidence for the existence of a genuine constitutional right to loiter. JUSTICE THOMAS recounts the vast historical tradition of criminalizing the activity. *Post*, at 102–106 (dissenting opinion). It is simply not maintainable that the right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or at the time of adoption of the Fourteenth Amendment. For the plurality, however, the historical practices of our people are nothing more than a speed bump on the road to the "right" result. Its opinion blithely proclaims: "Neither this history nor the scholarly

compendia in JUSTICE THOMAS' dissent, *[ibid.,]* persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause." *Ante*, at 54, n. 20. The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation. But we have, recently at least, sought to limit the damage by tethering the courts' "right-making" power to an objective criterion. In *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997), we explained our "established method" of substantive due process analysis: carefully and narrowly describing the asserted right, and then examining whether that right is manifested in "[o]ur Nation's history, legal traditions, and practices." See also *Collins* v. *Harker Heights*, 503 U. S. 115, 125–126 (1992); *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122–123 (1989); *Moore* v. *East Cleveland*, 431 U. S. 494, 502–503 (1977). The plurality opinion not only ignores this necessary limitation, but it leaps far beyond any substantive-due-process atrocity we have ever committed, by actually placing the burden of proof upon the defendant to establish that loitering is *not* a "fundamental liberty." It never does marshal any support *for* the proposition that loitering *is* a constitutional right, contenting itself with a (transparently inadequate) explanation of why the historical record of laws banning loitering does not positively *contradict* that proposition,[6] and the (transparently erroneous) assertion that the city of Chicago appears to have conceded the

[6] The plurality's explanation for ignoring these laws is that many of them carried severe penalties and, during the Reconstruction era, they had "harsh consequences on African-American women and children." *Ante*, at 54, n. 20. Those severe penalties and those harsh consequences are certainly regrettable, but they in no way lessen (indeed, the harshness of penalty tends to increase) the capacity of these laws to *prove* that loitering was never regarded as a fundamental liberty.

point.[7] It is enough for the Members of the plurality that "history . . . [fails to] persuad[e] us that the right to engage in loitering that is entirely harmless in both purpose and effect is *not* a part of the liberty protected by the Due Process Clause," *ante*, at 54, n. 20 (emphasis added); they apparently think it quite unnecessary for anything to persuade them that it *is*.[8]

It would be unfair, however, to criticize the plurality's failed attempt to establish that loitering is a constitutionally

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[7] *Ante*, at 53, n. 19. The plurality bases its assertion of apparent concession upon a footnote in Part I of petitioner's brief which reads: "Of course, laws regulating social gatherings affect a liberty interest, and thus are subject to review under the rubric of substantive due process . . . . We address that doctrine in Part II below." Brief for Petitioner 21–22, n. 13. If a careless reader were inclined to confuse the term "social gatherings" in this passage with "loitering," his confusion would be eliminated by pursuing the reference to Part II of the brief, which says, in its introductory paragraph: "[A]s we explain below, substantive due process does not support the court's novel holding that the Constitution secures the right to stand still on the public way even when one is not engaged in speech, assembly, or other conduct that enjoys affirmative constitutional protection." *Id.*, at 39.

[8] The plurality says, *ante*, at 64, n. 35, that since it decides the case on the basis of *procedural* due process rather than *substantive* due process, I am mistaken in analyzing its opinion "under the framework for substantive due process set out in *Washington* v. *Glucksberg*." *Ibid.* But I am not analyzing it under that framework. I am simply assuming that when the plurality says (as an essential part of its reasoning) that "the right to loiter for innocent purposes is . . . a part of the liberty protected by the Due Process Clause" it does not believe that the same word ("liberty") means one thing for purposes of substantive due process and something else for purposes of procedural due process. There is no authority for that startling proposition. See *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 572–575 (1972) (rejecting procedural-due-process claim for lack of "liberty" interest, and citing substantive-due-process cases).

The plurality's opinion seeks to have it both ways, invoking the Fourteenth Amendment's august protection of "liberty" in defining the standard of certainty that it sets, but then, in identifying the conduct protected by that high standard, ignoring our extensive case law defining "liberty," and substituting, instead, all "harmless and innocent" conduct, *ante*, at 58.

protected right while saying nothing of the concurrences. The plurality at least makes an attempt. The concurrences, on the other hand, make no pretense at attaching their broad "vagueness invalidates" rule to a liberty interest. As far as appears from JUSTICE O'CONNOR's and JUSTICE BREYER's opinions, *no* police officer may issue *any* order, affecting *any* insignificant sort of citizen conduct (except, perhaps, an order addressed to the unprotected class of "gang members") unless the standards for the issuance of that order are precise. No modern urban society—and probably none since London got big enough to have sewers—could function under such a rule. There are innumerable reasons why it may be important for a constable to tell a pedestrian to "move on"—and even if it were possible to list in an ordinance all of the reasons that are known, many are simply unpredictable. Hence the (entirely reasonable) Rule of the city of New York which reads: "No person shall fail, neglect or refuse to comply with the lawful direction or command of any Police Officer, Urban Park Ranger, Parks Enforcement Patrol Officer or other [Parks and Recreation] Department employee, indicated verbally, by gesture or otherwise." 56 RCNY § 1–03(c)(1) (1996). It is one thing to uphold an "as-applied" challenge when a pedestrian disobeys such an order that is unreasonable—or even when a pedestrian asserting some true "liberty" interest (holding a political rally, for instance) disobeys such an order that is reasonable *but unexplained.* But to say that such a general ordinance permitting "lawful orders" is void *in all its applications* demands more than a safe and orderly society can reasonably deliver.

JUSTICE KENNEDY apparently recognizes this, since he acknowledges that "some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given," including, for example, an order "tell[ing] a pedestrian not to enter a building" when the reason is "to avoid impeding a rescue team." *Ante,* at 69 (opinion concurring in part and concurring in judgment).

But his only explanation of why the present interference with the "right to loiter" does not fall within that permitted scope of action is as follows: "The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance." *Ibid.* I have not the slightest idea what this means. But I *do* understand that the followup explanatory sentence, showing how this principle invalidates the present ordinance, applies equally to the rescue-team example that JUSTICE KENNEDY thinks is constitutional—as is demonstrated by substituting for references to the facts of the present case (shown in italics) references to his rescue-team hypothetical (shown in brackets): "A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a *dispersal order* [order not to enter a building] based on the officer's own knowledge of *the identity or affiliations of other persons with whom the citizen is congregating* [what is going on in the building]; nor may the citizen be able to assess what an officer might conceive to be *the citizen's lack of an apparent purpose* [the impeding of a rescue team]." *Ante*, at 69–70.

III

I turn next to that element of the plurality's facial-challenge formula which consists of the proposition that this criminal ordinance contains no *mens rea* requirement. The first step in analyzing this proposition is to determine what the *actus reus*, to which that *mens rea* is supposed to be attached, consists of. The majority believes that loitering forms part of (indeed, the essence of) the offense, and must be proved if conviction is to be obtained. See *ante*, at 47, 50–51, 53–55, 57–59, 60–61, 62–63 (plurality and majority opinions); *ante*, at 65, 66, 68 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 69–70 (KENNEDY, J., concurring in part and concurring in judgment); *ante*, at 72–73 (BREYER, J., concurring in part and concurring in judgment). That is not what the ordinance provides. The

only part of the ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse; and what he must observe is carefully defined in terms of what the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing. The ordinance does not require that the defendant have been loitering (*i. e.*, have been remaining in one place with no purpose), but rather that the police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the ordinance will come down most heavily upon those who are *actually* loitering (those who *really* have no purpose in remaining where they are); but that activity is not a condition for issuance of the dispersal order.

The *only* act of a defendant that is made punishable by the ordinance—or, indeed, that is even mentioned by the ordinance—is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent—and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." *Ante*, at 47 (emphasis added). No one thinks a defendant could be successfully prosecuted under the ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure to obey a police order is wrongful intent enough.

IV

Finally, I address the last of the three factors in the plurality's facial-challenge formula: the proposition that the ordinance is vague. It is not. Even under the ersatz over-

breadth standard applied in *Kolender* v. *Lawson*, 461 U. S. 352, 358, n. 8 (1983), which allows facial challenges if a law reaches "a substantial amount of constitutionally protected conduct," respondents' claim fails because the ordinance would not be vague in most or even a substantial number of applications. A law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement. See, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972).

The plurality relies primarily upon the first of these aspects. Since, it reasons, "the loitering is the conduct that the ordinance is designed to prohibit," and "an officer may issue an order only after prohibited conduct has already occurred," *ante*, at 58, 59, the order to disperse cannot itself serve "to apprise persons of ordinary intelligence of the prohibited conduct." What counts for purposes of vagueness analysis, however, is not what the ordinance is "designed to prohibit," but what it actually subjects to criminal penalty. As discussed earlier, that consists of nothing but the refusal to obey a dispersal order, as to which there is no doubt of adequate notice of the prohibited conduct. The plurality's suggestion that even the dispersal order *itself* is unconstitutionally vague, because it does not specify *how far to disperse(!)*, see *ante*, at 59, scarcely requires a response.[9] If it were true, it would render unconstitutional for vagueness many of the Presidential proclamations issued under that provision of the United States Code which requires the Pres-

[9] I call it a "suggestion" because the plurality says only that the terms of the dispersal order "compound the inadequacy of the notice," and acknowledges that they "might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear." *Ante*, at 59, 59–60. This notion that a prescription ("Disperse!") which is itself not unconstitutionally vague can somehow contribute to the unconstitutional vagueness of the entire scheme is full of mystery—suspending, as it does, the metaphysical principle that nothing can confer what it does not possess *(nemo dat qui non habet)*.

ident, before using the militia or the Armed Forces for law enforcement, to issue a proclamation ordering the insurgents to disperse. See 10 U. S. C. § 334. President Eisenhower's proclamation relating to the obstruction of court-ordered enrollment of black students in public schools at Little Rock, Arkansas, read as follows: "I . . . command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith." Presidential Proclamation No. 3204, 3 CFR 132 (1954–1958 Comp.). See also Presidential Proclamation No. 3645, 3 CFR 103 (1964–1965 Comp.) (ordering those obstructing the civil rights march from Selma to Montgomery, Alabama, to "disperse . . . forthwith"). See also *Boos* v. *Barry*, 485 U. S. 312, 331 (1988) (rejecting overbreadth/vagueness challenge to a law allowing police officers to order congregations near foreign embassies to disperse); *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965) (rejecting vagueness challenge to the dispersal-order prong of a breach-of-the-peace statute and describing that prong as "narrow and specific").

For its determination of unconstitutional vagueness, the Court relies secondarily—and JUSTICE O'CONNOR's and JUSTICE BREYER's concurrences exclusively—upon the second aspect of that doctrine, which requires sufficient specificity to prevent arbitrary and discriminatory law enforcement. See *ante*, at 60 (majority opinion); *ante*, at 65–66 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 72 (BREYER, J., concurring in part and concurring in judgment). In discussing whether Chicago's ordinance meets that requirement, the Justices in the majority hide behind an artificial construct of judicial restraint. They point to the Supreme Court of Illinois' statement that the "apparent purpose" standard "provides absolute discretion to police officers to decide what activities constitute loitering," 177 Ill. 2d 440, 457, 687 N. E. 2d 53, 63 (1997), and protest that it would be wrong to construe the language of the ordinance more narrowly than did the State's highest court. *Ante*, at

61, 63 (majority opinion); *ante*, at 68 (O'CONNOR, J., concurring in part and concurring in judgment). The "absolute discretion" statement, however, is nothing more than the Illinois Supreme Court's *characterization* of what the language achieved—after that court refused (as I do) to read in any limitations that the words do not fairly contain. It is not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound).

The criteria for issuance of a dispersal order under the Chicago ordinance could hardly be clearer. First, the law requires police officers to "reasonably believ[e]" that one of the group to which the order is issued is a "criminal street gang member." This resembles a probable-cause standard, and the Chicago Police Department's General Order 92–4 (1992)—promulgated to govern enforcement of the ordinance—makes the probable-cause requirement explicit.[10] Under the Order, officers must have probable cause to believe that an individual is a member of a criminal street gang, to be substantiated by the officer's "experience and knowledge of the alleged offenders" and by "specific, documented and reliable information" such as reliable witness testimony or an individual's admission of gang membership or display of distinctive colors, tattoos, signs, or other markings worn by members of particular criminal street gangs. App. to Pet. for Cert. 67a–69a, 71a–72a.

Second, the ordinance requires that the group be "remain-[ing] in any one place with no apparent purpose." JUSTICE O'CONNOR's assertion that this applies to "any person stand-

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[10] "Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 795–796 (1989) (emphasis added) (quoting *Hoffman Estates*, 455 U. S., at 494, n. 5). See also *id.*, at 504 (administrative regulations "will often suffice to clarify a standard with an otherwise uncertain scope").

ing in a public place," *ante*, at 66, is a distortion. The ordinance does not apply to "standing," but to "remain[ing]"—a term which in this context obviously means "[to] endure or persist," see American Heritage Dictionary 1525 (1992). There may be some ambiguity at the margin, but "remain-[ing] in one place" requires more than a temporary stop, and is clear in most of its applications, including all of those represented by the facts surrounding respondents' arrests described *supra*, at 82–83.

As for the phrase "with no apparent purpose": JUSTICE O'CONNOR again distorts this adjectival phrase, by separating it from the word that it modifies. "[A]ny person standing on the street," her concurrence says, "has a general 'purpose'—even if it is simply to stand," and thus "the ordinance permits police officers to choose which purposes are *permissible.*" *Ante*, at 66. But Chicago police officers enforcing the ordinance are not looking for people with no apparent purpose (who are regrettably in oversupply); they are looking for people who "remain in any one place with no apparent purpose"—that is, who remain there without any apparent reason *for remaining there.* That is not difficult to perceive.[11]

The Court's attempt to demonstrate the vagueness of the ordinance produces the following peculiar statement: "The 'no apparent purpose' standard for making [the decision to

[11] JUSTICE BREYER asserts that "one always has some apparent purpose," so that the policeman must "interpret the words 'no apparent purpose' as meaning 'no apparent purpose except for . . . .'" *Ante*, at 70. It is simply not true that "one always has some apparent purpose"—and especially not true that one always has some apparent purpose in remaining at rest, for the simple reason that one often (indeed, perhaps usually) has no *actual* purpose in remaining at rest. Remaining at rest will be a person's normal state, unless he has a purpose which causes him to move. That is why one frequently reads of a person's "wandering aimlessly" (which is worthy of note) but not of a person's "sitting aimlessly" (which is not remarkable at all). And that is why a synonym for "purpose" is "motive": that which causes one *to move.*

issue an order to disperse] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Ante,* at 62. In the Court's view, a person's lack of any purpose in staying in one location is presumably an *objective* factor, and what the ordinance requires as a condition of an order to disperse—the absence of any *apparent* purpose—is a *subjective* factor. This side of the looking glass, just the opposite is true.

Elsewhere, of course, the Court acknowledges the clear, objective commands of the ordinance, and indeed relies upon them to paint it as unfair:

> "In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she 'shall'—order them to disperse." *Ante,* at 60.

Quite so. And the fact that this clear instruction to the officers "reach[es] a substantial amount of innocent conduct," *ibid.*, would be invalidating if that conduct were constitutionally protected against abridgment, such as speech or the practice of religion. Remaining in one place is *not* so protected, and so (as already discussed) it is up to the citizens of Chicago—not us—to decide whether the tradeoff is worth it.[12]

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[12] The Court speculates that a police officer may exercise his discretion to *enforce* the ordinance and *direct* dispersal when (in the Court's view) the ordinance is inapplicable—viz., where there *is* an apparent purpose, but it is an unlawful one. See *ante,* at 62. No one in his right mind

JUSTICE BREYER's concurrence tries to perform the impossible feat of affirming our unquestioned rule that a criminal statute that is so vague as to give constitutionally inadequate notice to *some* violators may nonetheless be enforced against those whose conduct is clearly covered, see *ante*, at 71–72, citing *Parker* v. *Levy*, 417 U. S. 733 (1974), while at the same time asserting that a statute which "delegates too much discretion to a police officer" is invalid in *all* its applications, even where the officer uses his discretion "wisely," *ante*, at 71. But the vagueness that causes notice to be inadequate is the very same vagueness that causes "too much discretion" to be lodged in the enforcing officer. Put another way: A law that gives the policeman clear guidance in all cases gives the public clear guidance in all cases as well. Thus, what JUSTICE BREYER gives with one hand, he takes away with the other. In his view, vague statutes that nonetheless give adequate notice to *some* violators are not unenforceable against those violators because of inadequate notice, but *are* unenforceable against them "because the policeman enjoys too much discretion in *every* case," *ibid.* This is simply contrary to our case law, including *Parker* v. *Levy*, *supra*.[13]

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would read the phrase "without any apparent purpose" to mean anything other than "without any apparent lawful purpose." The implication that acts referred to approvingly in statutory language are "lawful" acts is routine. The Court asserts that the Illinois Supreme Court has forced it into this interpretive inanity because, since it "has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says . . . ." *Ante*, at 63. But the Illinois Supreme Court did not mention this particular interpretive issue, which has nothing to do with giving the ordinance a "limiting" interpretation, and everything to do with giving it its ordinary legal meaning.

[13] The opinion that JUSTICE BREYER relies on, *Coates* v. *Cincinnati*, 402 U. S. 611 (1971), discussed *ante*, at 72–73, did not say that the ordinance there at issue gave adequate notice but did not provide adequate standards for the police. It invalidated that ordinance *on both inadequate-notice and inadequate-enforcement-standard grounds*, because First Amendment rights were implicated. It is common ground, however, that

V

The plurality points out that Chicago already has several laws that reach the intimidating and unlawful gang-related conduct the ordinance was directed at. See *ante*, at 52, n. 17. The problem, of course, well recognized by Chicago's city council, is that the gang members cease their intimidating and unlawful behavior under the watchful eye of police officers, but return to it as soon as the police drive away. The only solution, the council concluded, was to clear the streets of congregations of gangs, their drug customers, and their associates.

JUSTICE O'CONNOR's concurrence proffers the same empty solace of existing laws useless for the purpose at hand, see *ante*, at 67, 67–68, but seeks to be helpful by suggesting some measures *similar* to this ordinance that *would* be constitutional. It says that Chicago could, for example, enact a law that "directly prohibit[s] the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways, that intimidates residents." *Ante*, at 67 (internal quotation marks omitted). (If the majority considers the present ordinance too vague, it would be fun to see what it makes of "a large collection of obviously brazen, insistent, and lawless gang members.") This prescription of the concurrence is largely a quotation from the plurality—which itself answers the concurrence's suggestion that such a law would be helpful by pointing out that the city already "has several laws that serve this purpose." *Ante*, at 52, n. 17 (plurality opinion) (citing extant laws against "intimidation," "streetgang criminal drug conspiracy," and "mob action"). The problem, again, is that the intimidation and lawlessness do not occur when the police are in sight.

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the present case does not implicate the First Amendment, see *ante*, at 52–53 (plurality opinion); *ante*, at 72 (BREYER, J., concurring in part and concurring in judgment).

JUSTICE O'CONNOR's concurrence also proffers another cure: "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." *Ante*, at 66 (the Court agrees that this might be a cure, see *ante*, at 62). But the ordinance already specifies to whom the order can be issued: persons remaining in one place with no apparent purpose in the company of a gang member. And if "remain[ing] in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of nongang members, it surpasses understanding how it ceases to be so vague when applied to gang members *alone*. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.

* * *

The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety. As suggested by their tortured analyses, and by their suggested solutions that bear no relation to the identified constitutional problem, the majority's real quarrel with the Chicago ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. As JUSTICE O'CONNOR's concurrence says with disapprobation, "the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or other location open to the public." *Ante*, at 66 (internal quotation marks omitted).

But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected,

and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the Food and Drug Administration. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

I dissent from the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." *Kolender* v. *Lawson*, 461 U. S. 352, 370 (1983) (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante*, at 53 (plurality opinion), is in no way "'deeply rooted in this Nation's history and tradition,'" *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "[v]ir-

tually overtak[en] certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents." U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. See U. S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence . . . is both physically and psychologically debilitating").

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept. 1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id.*, at 4–5.[1] Many

[1] In 1996 alone, gangs were involved in 225 homicides, which was 28 percent of the total homicides committed in the city. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago: 1993–1997 (June 1998). Nationwide, law enforcement officials estimate

of these criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. See U. S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Research in brief, C. Block & R. Block, Street Gang Crime in Chicago 1 (Dec. 1993); U. S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Journal, J. Howell, Youth Gang Drug Trafficking and Homicide: Policy and Program Implications (Dec. 1997); see also Testimony of Steven R. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI, Hearing on S. 54 before the Senate Committee on the Judiciary, 105th Cong., 1st Sess., 13 (1997) ("While street gangs may specialize in entrepreneurial activities like drug-dealing, their gang-related lethal violence is more likely to grow out of turf conflicts").

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

> "When I walk out my door, these guys are out there . . . .
>
> . . . . .
>
> "They watch you. . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me . . . .
>
> ". . . I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript of Proceedings before the City Council of

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that as many as 31,000 street gangs, with 846,000 members, exist. U. S. Dept. of Justice, Office of Justice Programs, Highlights of the 1996 National Youth Gang Survey (OJJDP Fact Sheet, No. 86, Nov. 1998).

> Chicago, Committee on Police and Fire 66–67 (May 15, 1992) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying: "We used to have a nice neighborhood. We don't have it anymore . . . . I am scared to go out in the daytime. . . . [Y]ou can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id.*, at 93–95. Another long-time resident testified:

> "I have never had the terror that I feel everyday when I walk down the streets of Chicago. . . .
>
> . . . . . .
>
> "I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id.*, at 124–125.

Following these hearings, the council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a. It further found that the mere presence of gang members "intimidate[s] many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process—the council's attempt to address these social ills—that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police

have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it. The plurality, however, concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons—because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante*, at 53, and because it is vague on its face, *ante*, at 55. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U. S., at 721 (quoting *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion)). Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" offend the Due Process Clause. *Glucksberg*, *supra*, at 720–721.

The plurality asserts that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Ante*, at 53. Yet it acknowledges—as it must—that "antiloitering ordinances have long existed in this country." *Ante*, at 53, n. 20; see also 177 Ill. 2d 440, 450, 687 N. E. 2d 53, 60 (1997) (case below) ("Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing 'undesirable persons' from public before they have the opportunity to engage in criminal activity"). In derogation of the framework we articulated only two Terms ago in *Glucksberg*, the plurality asserts that this history fails to "persuad[e] us that the right to engage in loitering that is entirely harmless . . . is not a part of the liberty protected by the Due Process Clause." *Ante*, at 54,

n. 20. Apparently, the plurality believes it sufficient to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated, era. For example, it expresses concern that some antivagrancy laws carried the penalty of slavery. *Ibid.* But this fact is irrelevant to our analysis of whether there is a constitutional right to loiter for innocent purposes. This case does not involve an antiloitering law carrying the penalty of slavery. The law at issue in this case criminalizes the failure to obey a police officer's order to disperse and imposes modest penalties, such as a fine of up to $500 and a prison sentence of up to six months.

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the Fourteenth Amendment's Due Process Clause withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest. See generally C. Ribton-Turner, A History of Vagrants and Vagrancy and Beggars and Begging (reprint 1972) (discussing history of English vagrancy laws); see also *Papachristou* v. *Jacksonville*, 405 U. S. 156, 161–162 (1972) (recounting history of vagrancy laws). The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy.[2] Vagrancy laws

[2] See, *e. g.*, Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 First Laws of the State of North Carolina 508–509 (J. Cushing comp. 1984)); Act for restraining, correcting, suppressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in First Laws of the State of Connecticut 206–210 (J. Cushing comp. 1982)); Act for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons (1788) (reprinted in First Laws of the Commonwealth of Massachusetts 347–349 (J. Cushing comp. 1981)); Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor (1776)

were common in the decades preceding the ratification of the Fourteenth Amendment,[3] and remained on the books long after.[4]

(reprinted in First Laws of the State of Virginia 44–45 (J. Cushing comp. 1982)); Act for the better ordering of the Police of the Town of Providence, of the Work-House in said Town (1796) (reprinted in 2 First Laws of the State of Rhode Island 362–367 (J. Cushing comp. 1983)); Act for the Promotion of Industry, and for the Suppression of Vagrants and Other Idle and Disorderly Persons (1787) (reprinted in First Laws of the State of South Carolina, Part 2, 431–433 (J. Cushing comp. 1981)); An act for the punishment of vagabond and other idle and disorderly persons (1764) (reprinted in First Laws of the State of Georgia 431–433 (J. Cushing comp. 1981)); Laws of the Colony of New York 4, ch. 1021 (1756); 1 Laws of the Commonwealth of Pennsylvania, ch. DLV (1767) (An Act to prevent the mischiefs arising from the increase of vagabonds, and other idle and disorderly persons, within this province); Laws of the State of Vermont § 10 (1797).

[3] See, *e. g.,* Kan. Stat., ch. 161, § 1 (1855); Ky. Rev. Stat., ch. CIV, § 1 (1852); Pa. Laws, ch. 664, § V (1853); N. Y. Rev. Stat., ch. XX, § 1 (1859); Ill. Stat., ch. 30, § CXXXVIII (1857). During the 19th century, this Court acknowledged the States' power to criminalize vagrancy on several occasions. See *Mayor of New York* v. *Miln,* 11 Pet. 102, 148 (1837); *Passenger Cases,* 7 How. 283, 425 (1849) (opinion of Wayne, J.); *Prigg* v. *Pennsylvania,* 16 Pet. 539, 625 (1842).

[4] See generally C. Tiedeman, Limitations of Police Power in the United States 116–117 (1886) ("The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated . . . the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy"). See also R. I. Gen. Stat., ch. 232, § 24 (1872); Ill. Rev. Stat., ch. 38, § 270 (1874); Conn. Gen. Stat., ch. 3, § 7 (1875); N. H. Gen. Laws, ch. 269, § 17 (1878); Cal. Penal Code § 647 (1885); Ohio Rev. Stat., Tit. 1, ch. 8, §§ 6994, 6995 (1886); Colo. Rev. Stat., ch. 36, § 1362 (1891); Del. Rev. Stat., ch. 92, Vol. 12, p. 962 (1861); Ky. Stat., ch. 132, § 4758 (1894); Ill. Rev. Stat., ch. 38, § 270 (1895); Ala. Code, ch. 199, § 5628 (1897); Ariz. Rev. Stat., Tit. 17, § 599 (1901); N. Y. Crim. Code § 887 (1902); Pa. Stat. §§ 21409, 21410 (1920); Ky. Stat. § 4758–1 (1922); Ala. Code, ch. 244, § 5571 (1923); Kan. Rev. Stat. § 21–2402 (1923); Ill. Stat. Ann., § 606 (1924); Ariz. Rev. Stat., ch. 111, § 4868 (1928); Cal. Penal Code, Pt. 1, Tit. 15, ch. 2, § 647 (1929); Pa. Stat. Ann., Tit. 18, § 2032 (Pur-

Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." See *ante*, at 53–54. Of those, only one—decided more than 100 years after the ratification of the Fourteenth Amendment—actually addressed the validity of a vagrancy ordinance. That case, *Papachristou*, *supra*, contains some dicta that can be read to support the fundamental right that the plurality asserts.[5] However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases—it did not look to tradition to define the rights protected by the Due Process Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague. See *id.*, at 162–163. Even assuming, then, that *Papachristou* was correctly decided as an original matter—a doubtful proposi-

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don 1945); Kan. Gen. Stat. Ann. § 21–2409 (1949); N. Y. Crim. Code § 887 (1952); Colo. Rev. Stat. Ann. § 40–8–20 (1954); Cal. Penal Code § 647 (1953); 1 Ill. Rev. Stat., ch. 38, § 578 (1953); Ky. Rev. Stat. § 436.520 (1953); 5 Ala. Code, Tit. 14, § 437 (1959); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1963); Kan. Stat. Ann. § 21–2409 (1964).

[5] The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. See *Williams* v. *Fears*, 179 U. S. 270, 274–275 (1900); *Kent* v. *Dulles*, 357 U. S. 116 (1958). The plurality claims that dicta in those cases articulating a right of free movement, see *Williams*, *supra*, at 274; *Kent*, *supra*, at 125, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127, n. 6 (1989) (plurality opinion).

tion—it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. . . . [We] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore*, 431 U. S., at 544 (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

1

At the outset, it is important to note that the ordinance does not criminalize loitering *per se*. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats—importantly, they have long been vested with the responsibility for preserving the public peace. See, *e. g.*, O. Allen, Duties and Liabilities of Sheriffs

59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, Police Power § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also *peace officers* simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace.[6]

In their role as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 police manual for the city of New York provided:

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[6] See, *e. g.*, Ark. Code Ann. § 12–8–106(b) (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); Del. Code Ann., Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); Ill. Comp. Stat., ch. 65, § 5/11–1–2(a) (1998) ("Police officers in municipalities shall be conservators of the peace"); La. Rev. Stat. Ann. § 40:1379 (West 1992) ("Police employees . . . shall . . . keep the peace and good order"); Mo. Rev. Stat. § 85.561 (1998) ("[M]embers of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); N. H. Rev. Stat. Ann. § 105:3 (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); Ore. Rev. Stat. § 181.110 (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 Pa. Code, Tit. 351, § 5.5–200 (1998) ("The Police Department . . . shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); Tex. Code Crim. Proc. Ann., Art. 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); Vt. Stat. Ann., Tit. 24, § 299 (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); Va. Code Ann. § 15.2–1704(A) (Supp. 1998) ("The police force . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances").

> "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.*" Manual Containing the Rules and Regulations of the Police Department of the City of New York, Rule 414 (emphasis added).

See also J. Crocker, Duties of Sheriffs, Coroners and Constables § 48, p. 33 (2d ed. rev. 1871) ("Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to *suppress every unlawful assembly*, affray or riot which may happen in their presence" (emphasis added)). The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas.[7] Even the ABA Standards for

[7] For example, the following statutes provide a criminal penalty for the failure to obey a dispersal order: Ala. Code § 13A–11–6 (1994); Ariz. Rev. Stat. Ann. § 13–2902(A)(2) (1989); Ark. Code Ann. § 5–71–207(a)(6) (1993); Cal. Penal Code Ann. § 727 (West 1985); Colo. Rev. Stat. § 18–9–107(b) (1997); Del. Code Ann., Tit. 11, § 1321 (1995); Ga. Code Ann. § 16–11–36 (1996); Guam Code Ann., Tit. 9, § 61.10(b) (1996); Haw. Rev. Stat. § 711–1102 (1993); Idaho Code § 18–6410 (1997); Ill. Comp. Stat., ch. 720, § 5/25–1(e) (1998); Ky. Rev. Stat. Ann. §§ 525.060, 525.160 (Baldwin 1990); Me. Rev. Stat. Ann., Tit. 17A, § 502 (1983); Mass. Gen. Laws, ch. 269, § 2 (1992); Mich. Comp. Laws § 750.523 (1991); Minn. Stat. § 609.715 (1998); Miss. Code Ann. § 97–35–7(1) (1994); Mo. Rev. Stat. § 574.060 (1994); Mont. Code Ann. § 45–8–102 (1997); Nev. Rev. Stat. § 203.020 (1995); N. H. Rev. Stat. Ann. §§ 644:1, 644:2(II)(e) (1996); N. J. Stat. Ann. § 2C:33–1(b) (West 1995); N. Y. Penal Law § 240.20(6) (McKinney 1989); N. C. Gen. Stat. § 14–288.5(a) (1999); N. D. Cent. Code § 12.1–25–04 (1997); Ohio Rev. Code Ann. § 2917.13(A)(2) (1997); Okla. Stat., Tit. 21, § 1316 (1991); Ore. Rev. Stat. § 166.025(1)(e) (1997); 18 Pa. Cons. Stat. § 5502 (1983); R. I. Gen. Laws § 11–38–2 (1994); S. C. Code Ann. § 16–7–10(a) (1985); S. D. Codified Laws

Criminal Justice recognize that "[i]n day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given place, and not to 'loiter' . . . . The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily frustrated by ordering him or her to 'move on.'" Standard 1–3.4(d), p. 1.88, and comments (2d ed. 1980, Supp. 1986).[8]

In order to perform their peacekeeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a, Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause"

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§ 22–10–11 (1998); Tenn. Code Ann. § 39–17–305(2) (1997); Tex. Penal Code Ann. § 42.03(a)(2) (1994); Utah Code Ann. § 76–9–104 (1995); Vt. Stat. Ann., Tit. 13, § 901 (1998); Va. Code Ann. § 18.2–407 (1996); V. I. Code Ann., Tit. 5, § 4022 (1997); Wash. Rev. Code § 9A.84.020 (1994); W. Va. Code § 61–6–1 (1997); Wis. Stat. § 947.06(3) (1994).

[8] See also Ind. Code § 36–8–3–10(a) (1993) ("The police department shall, within the city: (1) preserve peace; (2) prevent offenses; (3) detect and arrest criminals; (4) suppress riots, mobs, and insurrections; (5) disperse unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and places . . ."); Okla. Stat., Tit. 19, § 516 (1991) ("It shall be the duty of the sheriff . . . to keep and preserve the peace of their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections . . .").

and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas* v. *United States*, 517 U. S. 690, 695, 700 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists" (citations and internal quotation marks omitted)). In sum, the Court's conclusion that the ordinance is impermissibly vague because it "'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,'" *ante*, at 60, cannot be reconciled with common sense, longstanding police practice, or this Court's Fourth Amendment jurisprudence.

The illogic of the Court's position becomes apparent when it opines that the ordinance's dispersal provision "would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Ante*, at 62 (footnote omitted). See also *ante*, at 67 (O'CONNOR, J., concurring in part and concurring in judgment) (endorsing Court's proposal). With respect, if the Court believes that the ordinance is vague as written, this suggestion would not cure the vagueness problem. First, although the Court has suggested that a scienter requirement may mitigate a vagueness problem "with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982) (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the ordinance's prohibition were lim-

ited to loitering with "an apparently harmful purpose," the criminality of the conduct would continue to depend on its external appearance, rather than the loiterer's state of mind. See Black's Law Dictionary 1345 (6th ed. 1990) (scienter "is frequently used to signify the defendant's guilty knowledge"). For this reason, the proposed alternative would neither satisfy the standard suggested in *Hoffman Estates* nor serve to channel police discretion. Indeed, an ordinance that required officers to ascertain whether a group of loiterers have "an apparently harmful purpose" would require them to exercise *more* discretion, not less. Furthermore, the ordinance in its current form—requiring the dispersal of groups that contain at least one gang member—actually vests less discretion in the police than would a law requiring that the police disperse groups that contain *only* gang members. Currently, an officer must reasonably suspect that one individual is a member of a gang. Under the plurality's proposed law, an officer would be required to make such a determination multiple times.

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds. See *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

2

The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante*, at 60, is similarly untenable. There is nothing "vague" about an order to disperse.[9] While "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972), it is safe to assume that the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply. App. to Pet. for Cert. 61a.

Assuming that we are also obligated to consider whether the ordinance places individuals on notice of what conduct might subject them to such an order, respondents in this facial challenge bear the weighty burden of establishing that the statute is vague in all its applications, "in the sense that no standard of conduct is specified at all." *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971). I subscribe to the view of retired Justice White—"If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face." *Kolender*, 461 U. S., at 370–371 (dissenting opinion). This is certainly such a case. As the Illinois Supreme Court recognized, "persons of ordinary intelligence may maintain a common and accepted

[9] The plurality suggests, *ante*, at 59, that dispersal orders are, by their nature, vague. The plurality purports to distinguish its sweeping condemnation of dispersal orders from *Colten* v. *Kentucky*, 407 U. S. 104 (1972), but I see no principled ground for doing so. The logical implication of the plurality's assertion is that the police can never issue dispersal orders. For example, in the plurality's view, it is apparently unconstitutional for a police officer to ask a group of gawkers to move along in order to secure a crime scene.

meaning of the word 'loiter.'" 177 Ill. 2d, at 451, 687 N. E. 2d, at 61.

JUSTICE STEVENS' contrary conclusion is predicated primarily on the erroneous assumption that the ordinance proscribes large amounts of constitutionally protected and/or innocent conduct. See *ante*, at 55, 56–57, 60. As already explained, *supra*, at 102–106, the ordinance does not proscribe constitutionally protected conduct—there is no fundamental right to loiter. It is also anomalous to characterize loitering as "innocent" conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered "innocent." Similarly, when a term has long been used to describe criminal conduct, the need to subject it to the "more stringent vagueness test" suggested in *Hoffman Estates*, 455 U. S., at 499, dissipates, for there is no risk of a trap for the unwary. The term "loiter" is no different from terms such as "fraud," "bribery," and "perjury." We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise.[10]

The plurality also concludes that the definition of the term loiter—"to remain in any one place with no apparent pur-

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[10] For example, a 1764 Georgia law declared that "all able bodied persons . . . who shall be found loitering . . . , all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employment or honest labor, shall be deemed and adjudged vagabonds," and required the apprehension of "any such vagabond . . . found within any county in this State, wandering, strolling, loitering about" (reprinted in First Laws of the State of Georgia, Part 1, 376–377 (J. Cushing comp. 1981)). See also, *e. g.*, Digest of Laws of Pennsylvania 829 (F. Brightly 8th ed. 1853) ("The following described persons shall be liable to the penalties imposed by law upon vagrants . . . . All persons who shall . . . be found loitering"); Ky. Rev. Stat., ch. CIV, § 1, p. 69 (1852) ("If any able bodied person be found loitering or rambling about, . . . he shall be taken and adjudged to be a vagrant, and guilty of a high misdemeanor").

pose," see 177 Ill. 2d, at 445, 687 N. E. 2d, at 58—fails to provide adequate notice.[11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place . . . would know if he or she had an 'apparent purpose.'" *Ante,* at 56–57. The plurality underestimates the intellectual capacity of the citizens of Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "[i]t is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." See *Smith* v. *Goguen,* 415 U. S. 566, 584 (1974) (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates, supra,* at 497. The answer is unquestionably no.

* * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of

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[11] The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition "'provides absolute discretion to police officers to decide what activities constitute loitering,'" *ante,* at 61 (quoting 177 Ill. 2d, at 457, 687 N. E. 2d, at 63). While we are bound by a state court's construction of a statute, the Illinois court "did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect' . . . . This assessment does not bind us." *Wisconsin* v. *Mitchell,* 508 U. S. 476, 484 (1993).

today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described: "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Transcript 126. By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that JUSTICE STEVENS, *ante*, at 54, elevates above all else—the "'freedom of movement.'" And that is a shame. I respectfully dissent.

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LILLY *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 98–5881. Argued March 29, 1999—Decided June 10, 1999

Petitioner, his brother Mark, and Gary Barker were arrested at the end of a 2-day crime spree, during which they, *inter alia*, stole liquor and guns and abducted Alex DeFilippis, who was later shot and killed. Under police questioning, Mark admitted stealing alcoholic beverages, but claimed that petitioner and Barker stole the guns and that petitioner shot DeFilippis. When Virginia called Mark as a witness at petitioner's subsequent criminal trial, Mark invoked his Fifth Amendment privilege against self-incrimination. The trial court then admitted his statements to the police as declarations of an unavailable witness against penal interest, overruling petitioner's objections that the statements were not against Mark's penal interest because they shifted responsibility for the crimes to Barker and petitioner, and that their admission would violate the Sixth Amendment's Confrontation Clause. Petitioner was convicted of the DeFilippis murder and other crimes. In affirming, the Virginia Supreme Court found that the Confrontation Clause was satisfied because Mark's statements fell within a firmly rooted exception to the hearsay rule. The court also held that the statements were reliable because Mark knew that he was implicating himself as a participant in numerous crimes and because the statements were independently corroborated by other evidence at trial.

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

255 Va. 558, 499 S. E. 2d 522, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, and VI, concluding:

1. This Court has jurisdiction over petitioner's Confrontation Clause claim. He expressly argued the claim in his opening brief to the Virginia Supreme Court; and his arguments based on *Williamson* v. *United States*, 512 U. S. 594, and the Confrontation Clause opinion of *Lee* v. *Illinois*, 476 U. S. 530, in responding to the Commonwealth's position, sufficed to raise the issue in that court. P. 123.

2. The admission of Mark's untested confession violated petitioner's Confrontation Clause rights. Adhering to this Court's general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, the Virginia courts are to consider in the first instance whether this Sixth Amend-

ment violation was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S. 18, 24. Pp. 139–140.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts III, IV, and V that Mark's hearsay statements do not meet the requirements for admission set forth in *Ohio* v. *Roberts*, 448 U. S. 56, 66. Pp. 123–139.

(a) The Confrontation Clause ensures the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding, *Maryland* v. *Craig*, 497 U. S. 836, 845, as by cross-examination of a declarant, see *California* v. *Green*, 399 U. S. 149, 158. Hearsay statements are sufficiently dependable to allow their untested admission against an accused only when (1) the statements fall "within a firmly rooted hearsay exception" or (2) they contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to their reliability. *Roberts*, 448 U. S., at 66. Pp. 123–125.

(b) Statements are admissible under a "firmly rooted" hearsay exception when they fall within a hearsay category whose conditions have proved over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial. *Mattox* v. *United States*, 156 U. S. 237, 244. The simple categorization of a statement as "against penal interest" defines too large a class for meaningful Confrontation Clause review. Such statements are offered into evidence (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. The third category, which includes statements such as Mark's, encompasses statements that are presumptively unreliable, *Lee*, 476 U. S., at 541, even when the accomplice incriminates himself together with the defendant. Accomplice statements that shift or spread blame to a criminal defendant, therefore, fall outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." *White* v. *Illinois*, 502 U. S. 346, 357. Such statements are not within a firmly rooted exception to the hearsay rule. Pp. 125–134.

(c) The Commonwealth contends that this Court should defer to the Virginia Supreme Court's additional determination that Mark's statements were reliable and that the indicia of reliability the court found, coupled with the actions of police during Mark's interrogation, demonstrate that the circumstances surrounding his statements bore "particularized guarantees of trustworthiness," *Roberts*, 448 U. S., at 66, suffi-

cient to satisfy the Confrontation Clause's residual admissibility test. Nothing in this Court's prior opinions, however, suggests that appellate courts should defer to lower court determinations regarding mixed questions of constitutional law such as whether a hearsay statement has sufficient guarantees of trustworthiness. See *Ornelas* v. *United States*, 517 U. S. 690, 697. Thus, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the Clause. Here, the Commonwealth's asserted trustworthiness guarantees are unconvincing. Mark was in custody for his involvement in, and knowledge of, serious crimes. He made his statements under governmental authorities' supervision, and was primarily responding to the officers' leading questions. He also had a natural motive to attempt to exculpate himself and was under the influence of alcohol during the interrogation. Each of these factors militates against finding that his statements were so inherently reliable that cross-examination would have been superfluous. Pp. 135–139.

JUSTICE SCALIA concluded that introducing Mark Lilly's tape-recorded statements to police at trial without making him available for cross-examination is a paradigmatic Confrontation Clause violation. Since the violation is clear, the case need be remanded only for a harmless-error determination. P. 143.

JUSTICE THOMAS, while adhering to his view that the Confrontation Clause extends to any witness who actually testifies at trial and is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions, *White* v. *Illinois*, 502 U. S. 346, 365, agrees with THE CHIEF JUSTICE that the Clause does not impose a blanket ban on the use of accomplice statements that incriminate a defendant and that, since the lower courts did not analyze the confession under the second prong of the *Roberts* inquiry, the plurality should not address that issue here. Pp. 143–144.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR and JUSTICE KENNEDY, concluded:

1. Mark Lilly's confession incriminating petitioner does not satisfy a firmly rooted hearsay exception because the statements in his 50-page confession which are against his penal interest are quite separate from the statements exculpating him and inculpating petitioner, which are not in the least against his penal interest. This case, therefore, does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpates a codefendant. Not only were the confession's incriminating portions not a declaration against penal interest, but these statements were part of a custodial confession of the sort that this Court has viewed with

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special suspicion given a codefendant's strong motivation to implicate the defendant and exonerate himself. *Lee* v. *Illinois*, 476 U. S. 530, 541. A blanket ban on the government's use of accomplice statements that incriminate a defendant sweeps beyond this case's facts and this Court's precedents. Pp. 144–148.

2. The Virginia Supreme Court did not analyze the confession under the second prong of the *Ohio* v. *Roberts*, 448 U. S. 56, inquiry, so the case should be remanded for the Commonwealth to demonstrate that the confession bears "particularized guarantees of trustworthiness" and, if any error is found, to determine whether that error is harmless. Pp. 148–149.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and VI, in which SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined, the opinion of the Court with respect to Part II, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 140. SCALIA, J., *post*, p. 143, and THOMAS, J., *post*, p. 143, filed opinions concurring in part and concurring in the judgment. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 144.

Ira S. Sacks argued the cause for petitioner. With him on the briefs was *Christopher A. Tuck*.

Katherine P. Baldwin, Assistant Attorney General of Virginia, argued the cause for respondent. With her on the brief was *Mark L. Earley*, Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Margaret A. Berger*, *Richard D. Friedman*, and *Steven R. Shapiro;* and for the National Association of Criminal Defense Lawyers et al. by *William S. Geimer*, *Lisa Kemler*, and *Marvin Miller*.

Briefs of *amici curiae* urging affirmance were filed for the State of Nebraska et al. by *Don Stenberg*, Attorney General of Nebraska, *J. Kirk Brown*, Assistant Attorney General, and *Michael C. Stern*, Acting Attorney General of Guam, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Michael C. Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina,

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and VI, and an opinion with respect to Parts III, IV, and V, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

The question presented in this case is whether the accused's Sixth Amendment right "to be confronted with the witnesses against him" was violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused.

I

On December 4, 1995, three men—Benjamin Lee Lilly (petitioner), his brother Mark, and Mark's roommate, Gary Wayne Barker—broke into a home and stole nine bottles of liquor, three loaded guns, and a safe. The next day, the men drank the stolen liquor, robbed a small country store, and shot at geese with their stolen weapons. After their car broke down, they abducted Alex DeFilippis and used his vehicle to drive to a deserted location. One of them shot and killed DeFilippis. The three men then committed two more robberies before they were apprehended by the police late in the evening of December 5.

After taking them into custody, the police questioned each of the three men separately. Petitioner did not mention the murder to the police and stated that the other two men had forced him to participate in the robberies. Petitioner's brother Mark and Barker told the police somewhat different accounts of the crimes, but both maintained that petitioner

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Heidi Heitkamp of North Dakota, *Betty D. Montgomery* of Ohio, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, and *Paul G. Summers* of Tennessee; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

masterminded the robberies and was the one who had killed DeFilippis.

A tape recording of Mark's initial oral statement indicates that he was questioned from 1:35 a.m. until 2:12 a.m. on December 6. The police interrogated him again from 2:30 a.m. until 2:53 a.m. During both interviews, Mark continually emphasized how drunk he had been during the entire spree. When asked about his participation in the string of crimes, Mark admitted that he stole liquor during the initial burglary and that he stole a 12-pack of beer during the robbery of the liquor store. Mark also conceded that he had handled a gun earlier that day and that he was present during the more serious thefts and the homicide.

The police told Mark that he would be charged with armed robbery and that, unless he broke "family ties," petitioner "may be dragging you right in to a life sentence," App. 257. Mark acknowledged that he would be sent away to the penitentiary. He claimed, however, that while he had primarily been drinking, petitioner and Barker had "got some guns or something" during the initial burglary. *Id.*, at 250. Mark said that Barker had pulled a gun in one of the robberies. He further insisted that petitioner had instigated the carjacking and that he (Mark) "didn't have nothing to do with the shooting" of DeFilippis. *Id.*, at 256. In a brief portion of one of his statements, Mark stated that petitioner was the one who shot DeFilippis.

The Commonwealth of Virginia charged petitioner with several offenses, including the murder of DeFilippis, and tried him separately. At trial, the Commonwealth called Mark as a witness, but he invoked his Fifth Amendment privilege against self-incrimination. The Commonwealth therefore offered to introduce into evidence the statements Mark made to the police after his arrest, arguing that they were admissible as declarations of an unavailable witness against penal interest. Petitioner objected on the ground that the statements were not actually against Mark's penal

interest because they shifted responsibility for the crimes to Barker and to petitioner, and that their admission would violate the Sixth Amendment's Confrontation Clause. The trial judge overruled the objection and admitted the tape recordings and written transcripts of the statements in their entirety. The jury found petitioner guilty of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of illegal use of a firearm, for which offenses he received consecutive prison sentences of two life terms plus 27 years. The jury also convicted petitioner of capital murder and recommended a sentence of death, which the court imposed.

The Supreme Court of Virginia affirmed petitioner's convictions and sentences. As is relevant here, the court first concluded that Mark's statements were declarations of an unavailable witness against penal interest; that the statements' reliability was established by other evidence; and, therefore, that they fell within an exception to the Virginia hearsay rule. The court then turned to petitioner's Confrontation Clause challenge. It began by relying on our opinion in *White* v. *Illinois*, 502 U. S. 346 (1992), for the proposition that "'[w]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.'" 255 Va. 558, 574, 499 S. E. 2d 522, 534 (1998) (quoting *White*, 502 U. S., at 356). The Virginia court also remarked:

> "[A]dmissiblity into evidence of the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence." 255 Va., at 575, 499 S. E. 2d, at 534.
>
> "That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the

weight the jury could assign to them and not to their admissibility." *Id.*, at 574, 499 S. E. 2d, at 534.

Our concern that this decision represented a significant departure from our Confrontation Clause jurisprudence prompted us to grant certiorari. 525 U. S. 981 (1998).

II

As an initial matter, the Commonwealth asserts that we should decline to exercise jurisdiction over petitioner's claim because he did not fairly present his Confrontation Clause challenge to the Supreme Court of Virginia. We disagree. Although petitioner focused on state hearsay law in his challenge to the admission of Mark's statements, petitioner expressly argued in his opening brief to that court that the admission of the statements violated his Sixth Amendment right to confrontation. He expanded his Sixth Amendment argument in his reply brief and cited *Lee* v. *Illinois*, 476 U. S. 530 (1986), and *Williamson* v. *United States*, 512 U. S. 594 (1994), in response to the Commonwealth's contention that the admission of the statements was constitutional. These arguments, particularly the reliance on our Confrontation Clause opinion in *Lee*, sufficed to raise in the Supreme Court of Virginia the constitutionality of admitting Mark's statements. See *Taylor* v. *Illinois*, 484 U. S. 400, 406, n. 9 (1988). Indeed, the court addressed petitioner's Confrontation Clause claim without mentioning any waiver problems.

III

In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U. S. Const., Amdt. 6; *Pointer* v. *Texas*, 380 U. S. 400 (1965) (applying Sixth Amendment to the States). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rig-

orous testing in the context of an adversary proceeding before the trier of fact." *Maryland* v. *Craig*, 497 U. S. 836, 845 (1990). When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable,[1] courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.' " *California* v. *Green*, 399 U. S. 149, 158 (1970) (footnote and citation omitted).

In our most recent case interpreting the Confrontation Clause, *White* v. *Illinois*, 502 U. S. 346 (1992), we rejected the suggestion that the Clause should be narrowly construed to apply only to practices comparable to "a particular abuse common in 16th- and 17th-century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial." *Id.*, at 352. This abuse included using out-of-court depositions and " 'confessions of accomplices.' " *Green*, 399 U. S., at 157. Accord, *White*, 502 U. S., at 361, 363 (THOMAS, J., concurring in part and concurring in judgment) (noting that this rule applies even if the confession is "found to be reliable"). Because that restrictive reading of the Clause's term "witnesses" would have virtually eliminated the Clause's role in restricting the admission of hearsay testimony, we considered it foreclosed by our prior cases. Instead, we adhered to our general framework, summarized in *Ohio* v. *Roberts*, 448 U. S. 56 (1980), that the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence

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[1] Petitioner suggests in his merits brief that Mark was not truly "unavailable" because the Commonwealth could have tried and sentenced him before petitioner's trial, thereby extinguishing Mark's Fifth Amendment privilege. We assume, however, as petitioner did in framing his petition for certiorari, that to the extent it is relevant, Mark was an unavailable witness for Confrontation Clause purposes.

falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Id.*, at 66.

Before turning to the dual *Roberts* inquiries, however, we note that the statements taken from petitioner's brother in the early morning of December 6 were obviously obtained for the purpose of creating evidence that would be useful at a future trial. The analogy to the presentation of *ex parte* affidavits in the early English proceedings thus brings the Confrontation Clause into play no matter how narrowly its gateway might be read.

IV

The Supreme Court of Virginia held that the admission of Mark Lilly's confession was constitutional primarily because, in its view, it was against Mark's penal interest and because "the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia." 255 Va., at 575, 449 S. E. 2d, at 534. We assume, as we must, that Mark's statements were against his penal interest as a matter of state law, but the question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law. Accordingly, it is appropriate to begin our analysis by examining the "firmly rooted" doctrine and the roots of the "against penal interest" exception.

We have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court's recognition in *Mattox* v. *United States*, 156 U. S. 237 (1895), that the Framers of the Sixth Amendment "obviously intended to . . . respec[t]" certain unquestionable rules of evidence in drafting the Confrontation Clause. *Id.*, at 243. Justice Brown, writing for the Court in that case, did not question the wisdom of excluding deposition testimony, *ex parte* affidavits and their equivalents. But he reasoned that an unduly strict and "technical" reading of the Clause would

have the effect of excluding other hearsay evidence, such as dying declarations, whose admissibility neither the Framers nor anyone else 100 years later "would have [had] the hardihood . . . to question." *Ibid.*

We now describe a hearsay exception as "firmly rooted" if, in light of "longstanding judicial and legislative experience," *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990), it "rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'" *Roberts*, 448 U. S., at 66 (quoting *Mattox*, 156 U. S., at 244). This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial. *Ibid.* In *White*, for instance, we held that the hearsay exception for spontaneous declarations is firmly rooted because it "is at least two centuries old," currently "widely accepted among the States," and carries "substantial guarantees of . . . trustworthiness . . . [that] cannot be recaptured even by later in-court testimony." 502 U. S., at 355–356, and n. 8. Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carr[y] special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony. *Id.*, at 356.

The "against penal interest" exception to the hearsay rule—unlike other previously recognized firmly rooted exceptions—is not generally based on the maxim that statements made without a motive to reflect on the legal consequences of one's statement, and in situations that are exceptionally conducive to veracity, lack the dangers of inaccuracy that typically accompany hearsay. The exception, rather, is founded on the broad assumption "that a person is unlikely to fabricate a statement against his own interest at

the time it is made." *Chambers* v. *Mississippi,* 410 U. S. 284, 299 (1973).

We have previously noted that, due to the sweeping scope of the label, the simple categorization of a statement as a "'declaration against penal interest' . . . defines too large a class for meaningful Confrontation Clause analysis." *Lee* v. *Illinois*, 476 U. S., at 544, n. 5. In criminal trials, statements against penal interest are offered into evidence in three principal situations: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. It is useful to consider the three categories and their roots separately.

Statements in the first category—voluntary admissions of the declarant—are routinely offered into evidence against the maker of the statement and carry a distinguished heritage confirming their admissibility when so used. See G. Gilbert, Evidence 139–140 (1756); *Lambe's Case*, 2 Leach 552, 168 Eng. Rep. 379 (1791); *State* v. *Kirby*, 1 Strob. 155, 156 (1846); *State* v. *Cowan*, 29 N. C. 239, 246 (1847). Thus, assuming that Mark Lilly's statements were taken in conformance with constitutional prerequisites, they would unquestionably be admissible against him if he were on trial for stealing alcoholic beverages.

If Mark were a codefendant in a joint trial, however, even the use of his confession to prove his guilt might have an adverse impact on the rights of his accomplices. When dealing with admissions against penal interest, we have taken great care to separate using admissions against the declarant (the first category above) from using them against other criminal defendants (the third category).

In *Bruton* v. *United States*, 391 U. S. 123 (1968), two codefendants, Evans and Bruton, were tried jointly and convicted of armed postal robbery. A postal inspector testified

that Evans had orally confessed that he and Bruton had committed the crime. The jury was instructed that Evans' confession was admissible against him, but could not be considered in assessing Bruton's guilt. Despite that instruction, this Court concluded that the introduction of Evans' confession posed such a serious threat to Bruton's right to confront and cross-examine the witnesses against him that he was entitled to a new trial. The case is relevant to the issue before us today, not because of its principal holding concerning the ability or inability of the jury to follow the judge's instruction, but rather because it was common ground among all of the Justices that the fact that the confession was a statement against the penal interest of Evans did not justify its use against Bruton. As Justice White noted at the outset of his dissent, "nothing in that confession which was relevant and material to Bruton's case was admissible against Bruton." *Id.*, at 138.

In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant. Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions, or the sufficiency of the redaction of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person. See *Gray* v. *Maryland*, 523 U. S. 185, 194–195 (1998) (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession); 523 U. S., at 200 (SCALIA, J., dissenting) (stating that codefendant's confessions "may not be considered for the purpose of determining [the defendant's] guilt"); *Richardson*

v. *Marsh,* 481 U. S. 200, 206 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand"); *Cruz* v. *New York*, 481 U. S. 186, 189–190, 193 (1987) (same).

The second category of statements against penal interest encompasses those offered as exculpatory evidence by a defendant who claims that it was the maker of the statement, rather than he, who committed (or was involved in) the crime in question. In this context, our Court, over the dissent of Justice Holmes, originally followed the 19th-century English rule that categorically refused to recognize any "against penal interest" exception to the hearsay rule, holding instead that under federal law only hearsay statements against pecuniary (and perhaps proprietary) interest were sufficiently reliable to warrant their admission at the trial of someone other than the declarant. See *Donnelly* v. *United States*, 228 U. S. 243, 272–277 (1913). Indeed, most States adhered to this approach well into the latter half of the 20th century. See *Chambers,* 410 U. S., at 299 (collecting citations).

As time passed, however, the precise *Donnelly* rule, which barred the admission of other persons' confessions that exculpated the accused, became the subject of increasing criticism. Professor Wigmore, for example, remarked years after *Donnelly:*

> "The only practical consequences of this unreasoning limitation are shocking to the sense of justice; for, in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. . . . It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made

> on the very gallows, by the true culprit now beyond the reach of justice." 5 J. Wigmore, Evidence § 1477, pp. 289–290 (3d ed. 1940).

See also *Scolari* v. *United States*, 406 F. 2d 563, 564 (CA9 1969) (criticizing *Donnelly*); *United States* v. *Annunziato*, 293 F. 2d 373, 378 (CA2 1961) (Friendly, J.) (same); *Hines* v. *Commonwealth*, 136 Va. 728, 117 S. E. 843 (1923) (criticizing *Donnelly* and refusing to incorporate it into state law); Wright, Uniform Rules and Hearsay, 26 U. Cin. L. Rev. 575 (1957).

Finally, in 1973, this Court endorsed the more enlightened view in *Chambers*, holding that the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest—their confessions—when the circumstances surrounding the statements "provid[e] considerable assurance of their reliability." 410 U. S., at 300. Not surprisingly, most States have now amended their hearsay rules to allow the admission of such statements under against-penal-interest exceptions. See 5 J. Wigmore, Evidence § 1476, p. 352, and n. 9 (J. Chadbourn rev. 1974); *id.*, § 1477, at 360, and n. 7; J. Wigmore, Evidence §§ 1476 and 1477, pp. 618–626 (A. Best ed. Supp. 1998). But because hearsay statements of this sort are, by definition, offered by the accused, the admission of such statements does not implicate Confrontation Clause concerns. Thus, there is no need to decide whether the reliability of such statements is so inherently dependable that they would constitute a firmly rooted hearsay exception.

The third category includes cases, like the one before us today, in which the government seeks to introduce "a confession by an accomplice which incriminates a criminal defendant." *Lee*, 476 U. S., at 544, n. 5. The practice of admitting statements in this category under an exception to the hearsay rule—to the extent that such a practice exists in certain jurisdictions—is, unlike the first category or even the second, of quite recent vintage. This category also typically

includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient *ex parte* affidavit system.

Most important, this third category of hearsay encompasses statements that are inherently unreliable. Typical of the ground swell of scholarly and judicial criticism that culminated in the *Chambers* decision, Wigmore's treatise still expressly distinguishes accomplices' confessions that inculpate themselves and the accused as beyond a proper understanding of the against-penal-interest exception because an accomplice often has a considerable interest in "confessing and betraying his cocriminals." 5 Wigmore, Evidence § 1477, at 358, n. 1 (J. Chadbourn rev. 1974). Consistent with this scholarship and the assumption that underlies the analysis in our *Bruton* line of cases, we have over the years "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee*, 476 U. S., at 541. See also *Cruz*, 481 U. S., at 195 (White, J., dissenting) (such statements "have traditionally been viewed with special suspicion"); *Bruton*, 391 U. S., at 136 (such statements are "inevitably suspect").

In *Crawford* v. *United States*, 212 U. S. 183 (1909), this Court stated that even when an alleged accomplice testifies, his confession that "incriminate[s] himself together with defendant . . . ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." *Id.*, at 204. Over 30 years ago, we applied this principle to the Sixth Amendment. We held in *Douglas* v. *Alabama*, 380 U. S. 415 (1965), that the admission of a nontestifying accomplice's confession, which shifted responsibility and implicated the defendant as the triggerman, "plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause." *Id.*, at 419.

In *Lee*, we reaffirmed *Douglas* and explained that its holding "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U. S., at 541. This is so because

> "th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . '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.' " *Ibid.* (quoting *Bruton*, 391 U. S., at 141 (White, J., dissenting)).

Indeed, even the dissenting Justices in *Lee* agreed that "accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant," but instead are likely to be attempts to minimize the declarant's culpability. 476 U. S., at 552–553 (Blackmun, J., dissenting).[2]

We have adhered to this approach in construing the Federal Rules of Evidence. Thus, in *Williamson* v. *United*

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[2] The only arguable exception to this unbroken line of cases arose in our plurality opinion in *Dutton* v. *Evans*, 400 U. S. 74 (1970), in which we held that the admission of an accomplice's spontaneous comment that indirectly inculpated the defendant did not violate the Confrontation Clause. While Justice Stewart's plurality opinion observed that the declarant's statement was "against his penal interest," *id.*, at 89, the Court's judgment did not rest on that point, and in no way purported to hold that statements with such an attribute were presumptively admissible. Rather, the five Justices in the majority emphasized the unique aspects of the case and emphasized that the co-conspirator spontaneously made the statement and "had no apparent reason to lie." *Id.*, at 86–89. See also *id.*, at 98 (Harlan, J., concurring in result).

States, 512 U. S. 594 (1994), without reaching the Confrontation Clause issue, we held that an accomplice's statement against his own penal interest was not admissible against the defendant.[3] We once again noted the presumptive unreliability of the "non-self-inculpatory" portions of the statement: "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.*, at 599–601.

It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." *White*, 502 U. S., at 357. This view is also reflected in several States' hearsay law.[4] Indeed, prior

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[3] Federal Rule of Evidence 804(b)(3) provides an exception to the hearsay rule for the 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 . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

[4] Several States provide statutorily that their against-penal-interest hearsay exceptions do not allow the admission of "[a] statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." Ark. Rule Evid. 804(b)(3) (1997). Accord, Ind. Rule Evid. 803(b)(3) (1999); Me. Rule Evid. 804(b)(3) (1998); Nev. Rev. Stat. § 51.345(2) (Supp. 1996); N. J. Rule Evid. 803(25)(c) (1999); N. D. Cent. Code Rule Evid. § 804(b)(3) (1998); Vt. Rule Evid. 804(b)(3) (1998). See also *State* v. *Myers*, 229 Kan. 168, 172–173, 625 P. 2d 1111, 1115 (1981) ("Under [Kan. Stat. Ann. §] 60–460(*f*) [(1976)], a hearsay confession of one coparticipant in a crime is not admissible against *another coparticipant*"). Several other States have adopted the language of the Federal Rule, see n. 3, *supra*, and adhere to our interpretation of that rule in *Williamson*. See *Smith* v. *State*, 647 A. 2d 1083, 1088 (Del. 1994); *United States* v. *Hammond*, 681 A. 2d 1140, 1146 (Ct. App. D. C. 1996); *State* v. *Smith*, 643 So. 2d 1221, 1221–1222 (La. 1994); *State* v. *Matusky*, 343 Md. 467, 490–492, and n. 15, 682 A. 2d 694, 705–706, and n. 15 (1996); *State* v. *Ford*, 539 N. W. 2d 214, 217 (Minn. 1995); *State* v. *Castle*, 285 Mont. 363, 373–374, 948 P. 2d 688, 694 (1997); *Miles* v. *State*,

to 1995, it appears that even Virginia rarely allowed statements against the penal interest of the declarant to be used at criminal trials. See, *e. g.*, *Ellison* v. *Commonwealth*, 219 Va. 404, 247 S. E. 2d 685 (1978). That Virginia relaxed that portion of its hearsay law when it decided *Chandler* v. *Commonwealth*, 249 Va. 270, 455 S. E. 2d 219 (1995), and that it later apparently concluded that all statements against penal interest fall within "a 'firmly rooted' exception to the hearsay rule in Virginia," 255 Va., at 575, 499 S. E. 2d, at 534, is of no consequence. The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.[5]

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918 S. W. 2d 511, 515 (Tex. Crim. App. 1996); *In re Anthony Ray, Mc.*, 200 W. Va. 312, 321, 489 S. E. 2d 289, 298 (1997). Still other States have virtually no against-penal-interest exception at all. See Ala. Rule Evid. 804(b)(3) (1998) (no such exception); Ga. Code Ann. § 24–3–8 (1995) (exception only if declarant is deceased and statement was not made with view toward litigation); *State* v. *Skillicorn*, 944 S. W. 2d 877, 884–885 (Mo.) (no exception), cert. denied, 522 U. S. 999 (1997).

[5] Our holdings in *Bruton* v. *United States*, 391 U. S. 123 (1968), *Cruz* v. *New York*, 481 U. S. 186 (1987), *Gray* v. *Maryland*, 523 U. S. 185 (1998), and *Lee* v. *Illinois*, 476 U. S. 530 (1986), were all premised, explicitly or implicitly, on the principle that accomplice confessions that inculpate a criminal defendant are not *per se* admissible (and thus necessarily fall outside a firmly rooted hearsay exception), no matter how much those statements also incriminate the accomplice. If "genuinely" or "equally" inculpatory confessions of accomplices were—as THE CHIEF JUSTICE's concurrence suggests is possible, *post*, at 146—*per se* admissible against criminal defendants, then the confessions in each of those cases would have been admissible, for each confession inculpated the accomplice equally in the crimes at issue. But the Court in *Lee* rejected the dissent's position that a nontestifying accomplice's confessions that are "unambiguously" against the accomplice's penal interest are *per se* admissible, see 476 U. S., at 552 (Blackmun, J., dissenting) and we ruled in *Bruton*, *Cruz*, and *Gray* that such equally self-inculpatory statements are inadmissible against criminal defendants. Today we merely reaffirm these holdings

V

Aside from its conclusion that Mark's statements were admissible under a firmly rooted hearsay exception, the Supreme Court of Virginia also affirmed the trial court's holding that the statements were "reliabl[e] . . . in the context of the facts and circumstances under which [they were] given" because (i) "Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes" and (ii) "[e]lements of [his] statements were independently corroborated" by other evidence offered at trial. *Id.*, at 574, 499 S. E. 2d, at 534. See also App. 18 (trial court's decision). The Commonwealth contends that we should defer to this "fact-intensive" determination. It further argues that these two indicia of reliability, coupled with the facts that the police read Mark his *Miranda* rights and did not promise him leniency in exchange for his statements, demonstrate that the circumstances surrounding his statements bore "particularized guarantees of trustworthiness," *Roberts*, 448 U. S., at 66, sufficient to satisfy the Confrontation Clause's residual admissibility test.[6]

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and make explicit what was heretofore implicit: A statement (like Mark's) that falls into the category summarized in *Lee*—"a confession by an accomplice which incriminates a criminal defendant," 476 U. S., at 544, n. 5—does not come within a firmly rooted hearsay exception.

This, of course, does not mean, as THE CHIEF JUSTICE, *post*, at 147–148 (opinion concurring in judgment), and JUSTICE THOMAS, *post*, at 143 (opinion concurring in part and concurring in judgment), erroneously suggest, that the Confrontation Clause imposes a "blanket ban on the government's use of [nontestifying] accomplice statements that incriminate a defendant." Rather, it simply means that the government must satisfy the second prong of the *Ohio* v. *Roberts*, 448 U. S. 56 (1980), test in order to introduce such statements. See Part V, *infra*.

[6] Although THE CHIEF JUSTICE contends that we should remand this issue to the Supreme Court of Virginia, see *post*, at 148–149, it would be inappropriate to do so because we granted certiorari on this issue, see Pet. for Cert. i, and the parties have fully briefed and argued the issue. The

The residual "trustworthiness" test credits the axiom that a rigid application of the Clause's standard for admissibility might in an exceptional case exclude a statement of an unavailable witness that is incontestably probative, competent, and reliable, yet nonetheless outside of any firmly rooted hearsay exception. Cf. *id.*, at 63; *Mattox*, 156 U. S., at 243–244. When a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's residual "trustworthiness" test allows the admission of the declarant's statements. *Wright*, 497 U. S., at 820.

Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that "[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles" governing the factual circumstances necessary to satisfy the protections of the Bill of Rights. *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996) (holding that appellate courts should review reasonable suspicion and probable-cause determinations *de novo*). We, of course, accept the Virginia courts' determination that Mark's statements were reliable for purposes of state hearsay law, and, as should any appellate court, we review the

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"facts and circumstances" formula, recited above, that the Virginia courts already employed in reaching their reliability holdings is virtually identical to the *Roberts* "particularized guarantees" test, which turns as well on the "surrounding circumstances" of the statements. *Idaho* v. *Wright*, 497 U. S. 805, 820 (1990). Furthermore, as will become clear, the Commonwealth fails to point to any fact regarding this issue that the Supreme Court of Virginia did not explicitly consider and that requires serious analysis.

presence or absence of historical facts for clear error. But the surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor (otherwise the declarant would be testifying) or any other factor uniquely suited to the province of trial courts. For these reasons, when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause.

The Commonwealth correctly notes that "the presumption of unreliability that attaches to codefendants' confessions . . . may be rebutted." *Lee*, 476 U. S., at 543. We have held, in fact, that any inherent unreliability that accompanies co-conspirator statements made during the course and in furtherance of the conspiracy is *per se* rebutted by the circumstances giving rise to the long history of admitting such statements. See *Bourjaily* v. *United States*, 483 U. S. 171, 182–184 (1987). Nonetheless, the historical underpinnings of the Confrontation Clause and the sweep of our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Applying these principles, the Commonwealth's asserted guarantees of trustworthiness fail to convince us that Mark's confession was sufficiently reliable as to be admissible without allowing petitioner to cross-examine him. That other evidence at trial corroborated portions of Mark's statements is irrelevant. We have squarely rejected the notion that "evidence corroborating the truth of a hearsay statement

may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.'" *Wright*, 497 U. S., at 822. In *Wright*, we concluded that the admission of hearsay statements by a child declarant violated the Confrontation Clause even though the statements were admissible under an exception to the hearsay rule recognized in Idaho, and even though they were corroborated by other evidence. We recognized that it was theoretically possible for such statements to possess "'particularized guarantees of trustworthiness'" that would justify their admissibility, but we refused to allow the State to "bootstrap on" the trustworthiness of other evidence. "To be admissible under the Confrontation Clause," we held, "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Ibid.*

Nor did the police's informing Mark of his *Miranda* rights render the circumstances surrounding his statements significantly more trustworthy. We noted in rejecting a similar argument in *Lee* that a finding that a confession was "voluntary for Fifth Amendment purposes . . . does not bear on the question of whether the confession was also free from any desire, motive, or impulse [the declarant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement" in the crimes at issue. 476 U. S., at 544. By the same token, we believe that a suspect's consciousness of his *Miranda* rights has little, if any, bearing on the likelihood of truthfulness of his statements. When a suspect is in custody for his obvious involvement in serious crimes, his knowledge that anything he says may be used against him militates against depending on his veracity.

The Commonwealth's next proffered basis for reliability—that Mark knew he was exposing himself to criminal liability—merely restates the fact that portions of his statements were technically against penal interest. And as we have ex-

plained, such statements are suspect insofar as they inculpate other persons. "[T]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson*, 512 U. S., at 599. Accord, *Lee*, 476 U. S., at 545. Similarly, the absence of an express promise of leniency to Mark does not enhance his statements' reliability to the level necessary for their untested admission. The police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage.

It is abundantly clear that neither the words that Mark spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. Mark was in custody for his involvement in, and knowledge of, serious crimes and made his statements under the supervision of governmental authorities. He was primarily responding to the officers' leading questions, which were asked without any contemporaneous cross-examination by adverse parties. Thus, Mark had a natural motive to attempt to exculpate himself as much as possible. See *id.*, at 544–545; *Dutton* v. *Evans*, 400 U. S. 74, 98 (1970) (Harlan, J., concurring in result). Mark also was obviously still under the influence of alcohol. Each of these factors militates against finding that his statements were so inherently reliable that cross-examination would have been superfluous.

VI

The admission of the untested confession of Mark Lilly violated petitioner's Confrontation Clause rights. Adhering to our general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, we leave it to the Virginia courts

to consider in the first instance whether this Sixth Amendment error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S. 18, 24 (1967). See also *Lee*, 476 U. S., at 547. Accordingly, the judgment of the Supreme Court of Virginia is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE BREYER, concurring.

As currently interpreted, the Confrontation Clause generally forbids the introduction of hearsay into a trial unless the evidence "falls within a firmly rooted hearsay exception" or otherwise possesses "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). *Amici* in this case, citing opinions of Justices of this Court and the work of scholars, have argued that we should reexamine the way in which our cases have connected the Confrontation Clause and the hearsay rule. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 2–3; see also, *e. g.*, *White* v. *Illinois*, 502 U. S. 346, 358 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998); A. Amar, The Constitution and Criminal Procedure 129 (1997); Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557 (1992).

The Court's effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage, compare *Roberts*, *supra*, with *California* v. *Green*, 399 U. S. 149, 155–156 (1970), while the Confrontation Clause itself has ancient origins that predate the hearsay rule, see *Salinger* v. *United States*, 272 U. S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions"). The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and

16th- and 17th-century British statutes, cases, and treatises. See The Bible, Acts 25:16; W. Shakespeare, Richard II, act i, sc. 1; W. Shakespeare, Henry VIII, act ii, sc. 1; 30 C. Wright & K. Graham, Federal Practice and Procedure § 6342, p. 227 (1997) (quoting statutes enacted under King Edward VI in 1552 and Queen Elizabeth I in 1558); cf. *Case of Thomas Tong*, Kelyng J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (out-of-court confession may be used against the confessor, but not against his co-conspirators); M. Hale, History of the Common Law of England 163–164 (C. Gray ed. 1971); 3 W. Blackstone, Commentaries *373. As traditionally understood, the right was designed to prevent, for example, the kind of abuse that permitted the Crown to convict Sir Walter Raleigh of treason on the basis of the out-of-court confession of Lord Cobham, a co-conspirator. See 30 Wright & Graham, *supra*, § 6342, at 258–269.

Viewed in light of its traditional purposes, the current, hearsay-based Confrontation Clause test, *amici* argue, is both too narrow and too broad. The test is arguably too narrow insofar as it authorizes the admission of out-of-court statements prepared as testimony for a trial when such statements happen to fall within some well-recognized hearsay rule exception. For example, a deposition or videotaped confession sometimes could fall within the exception for vicarious admissions or, in THE CHIEF JUSTICE's view, the exception for statements against penal interest. See *post*, at 145–146. See generally *White*, *supra*, at 364–365 (THOMAS, J., concurring in part and concurring in judgment); Friedman, *supra*, at 1025; Amar, *supra*, at 129; Berger, *supra*, at 596–602; Brief for American Civil Liberties Union et al. as *Amici Curiae* 16–20. But why should a modern Lord Cobham's out-of-court confession become admissible simply because of a fortuity, such as the conspiracy having continued through the time of police questioning, thereby bringing the confession within the "well-established" exception for the vicarious admissions of a co-conspirator? Cf. *Dutton* v. *Evans*, 400

U. S. 74, 83 (1970) (plurality opinion). Or why should we, like Walter Raleigh's prosecutor, deny a plea to "let my Accuser come face to face," with words (now related to the penal interest exception) such as, "The law presumes, a man will not accuse himself to accuse another"? *Trial of Sir Walter Raleigh,* 2 How. St. Tr. 19 (1816).

At the same time, the current hearsay-based Confrontation Clause test is arguably too broad. It would make a constitutional issue out of the admission of *any* relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute, or was made long before the crime occurred and without relation to the prospect of a future trial. It is not obvious that admission of a business record, which is hearsay because the business was not "regularly conducted," or admission of a scrawled note, "Mary called," dated many months before the crime, violates the defendant's basic *constitutional* right "to be confronted with the witnesses against him." Yet one cannot easily fit such evidence within a traditional hearsay exception. Nor can one fit it within this Court's special exception for hearsay with "'particularized guarantees of trustworthiness'"; and, in any event, it is debatable whether the Sixth Amendment principally protects "trustworthiness," rather than "confrontation." See *White, supra,* at 363 (THOMAS, J., concurring in part and concurring in judgment); cf. *Maryland* v. *Craig,* 497 U. S. 836, 862 (1990) (SCALIA, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation").

We need not reexamine the current connection between the Confrontation Clause and the hearsay rule in this case, however, because the statements at issue violate the Clause regardless. See *ante,* at 139. I write separately to point out that the fact that we do not reevaluate the link in this

case does not end the matter. It may leave the question open for another day.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

During a custodial interrogation, Mark Lilly told police officers that petitioner committed the charged murder. The prosecution introduced a tape recording of these statements at trial without making Mark available for cross-examination. In my view, that is a paradigmatic Confrontation Clause violation. See *White* v. *Illinois*, 502 U. S. 346, 364–365 (1992) (THOMAS, J., concurring in part and concurring in judgment) ("The federal constitutional right of confrontation extends to any witness who actually testifies at trial" and "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). Since the violation is clear, the case need be remanded only for a harmless-error determination. I therefore join Parts I, II, and VI of the Court's opinion and concur in the judgment.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join Parts I and VI of the Court's opinion and concur in the judgment. Though I continue to adhere to my view that the Confrontation Clause "extends to any witness who actually testifies at trial" and "is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (opinion concurring in part and concurring in judgment), I agree with THE CHIEF JUSTICE that the Clause does not impose a "blanket ban on the government's use of accomplice statements that incriminate a defendant," *post*, at 147.

Such an approach not only departs from an original understanding of the Confrontation Clause but also freezes our jurisprudence by making trial court decisions excluding such statements virtually unreviewable. I also agree with THE CHIEF JUSTICE that the lower courts did not "analyz[e] the confession under the second prong of the *Roberts* inquiry," *post*, at 148, and therefore see no reason for the plurality to address an issue upon which those courts did not pass.

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

The plurality today concludes that all accomplice confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule under *Ohio* v. *Roberts*, 448 U. S. 56 (1980). See *ante*, at 134. It also concludes that appellate courts should independently review the government's proffered guarantees of trustworthiness under the second half of the *Roberts* inquiry. See *ante*, at 137. I disagree with both of these conclusions, but concur in the judgment reversing the decision of the Supreme Court of Virginia.

I

The plurality correctly states the issue in this case in the opening sentence of its opinion: Whether petitioner's Confrontation Clause rights were violated by admission of an accomplice's confession "that contained some statements against the accomplice's penal interest and others that inculpated the accused." *Ante*, at 120. The confession of the accomplice, Mark Lilly, covers 50 pages in the Joint Appendix, and the interviews themselves lasted about an hour. The statements of Mark Lilly which are against his penal interest—and would probably show him as an aider and abettor—are quite separate in time and place from other statements

exculpating Mark and incriminating his brother, petitioner Benjamin Lilly, in the murder of Alexander DeFilippis.[1]

Thus one is at a loss to know why so much of the plurality's opinion is devoted to whether a declaration against penal interest is a "firmly rooted exception" to the hearsay rule under *Ohio* v. *Roberts*, *supra*. Certainly, we must accept the Virginia court's determination that Mark's statements as a whole were declarations against penal interest for purposes of the Commonwealth's hearsay rule. See *ante*, at 125. Simply labeling a confession a "declaration against penal interest," however, is insufficient for purposes of *Roberts*, as this exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee* v. *Illinois*, 476 U. S. 530, 544, n. 5 (1986). The plurality tries its hand at systematizing this class, see *ante*, at 127, but most of its housecleaning is unwarranted and results in a complete ban on the government's use of accomplice confessions that inculpate a codefendant. Such a categorical holding has no place in this case because the relevant portions of Mark Lilly's confession were simply not "declarations against penal interest" as that term is understood in the law of evidence. There may be close cases where the declaration against penal interest portion is closely tied in with the portion incriminating the de-

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[1] Mark identifies Ben as the one who murdered Alexander DeFilippis in the following colloquy:

"M. L. I don't know, you know, dude shoots him.

"G. P. When you say 'dude shoots him' which one are you calling a dude here?

"M. L. Well, Ben shoots him.

"G. P. Talking about your brother, what did he shoot him with?

"M. L. Pistol.

"G. P. How many times did he shoot him?

"M. L. I heard a couple of shots go off, I don't know how many times he hit him." App. 258.

A similar colloquy occurred in the second interview. See *id.*, at 312–313.

fendant, see 2 J. Strong, McCormick on Evidence § 319 (4th ed. 1992), but this is not one of them. Mark Lilly's statements inculpating his brother in the murder of DeFilippis are not in the least against Mark's penal interest.

This case therefore does not raise the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpates a codefendant, and our precedent does not compel the broad holding suggested by the plurality today. Cf. *Williamson* v. *United States*, 512 U. S. 594, 618–619 (1994) (KENNEDY, J., concurring) (explaining and providing examples of self-serving and more neutral declarations against penal interest). Indeed, several Courts of Appeals have admitted custodial confessions that equally inculpate both the declarant and the defendant,[2] and I see no reason for us to preclude consideration of these or similar statements as satisfying a firmly rooted hearsay exception under *Roberts*.

Not only were the incriminating portions of Mark Lilly's confession not a declaration against penal interest, but these statements were part of a custodial confession of the sort that this Court has viewed with "special suspicion" given a codefendant's "'strong motivation to implicate the defendant and to exonerate himself.'" *Lee*, *supra*, at 541 (citations omitted). Each of the cases cited by the plurality to support its broad conclusion involved accusatory statements taken by law enforcement personnel with a view to prosecution. See *Douglas* v. *Alabama*, 380 U. S. 415, 416–417 (1965); *Lee*, *supra*, at 532–536; cf. *Bruton* v. *United States*, 391 U. S. 123, 124–125 (1968); *Williamson*, *supra*, at 596–597. These cases

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[2] See, *e. g.*, *United States* v. *Keltner*, 147 F. 3d 662, 670 (CA8 1998) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"); *Earnest* v. *Dorsey*, 87 F. 3d 1123, 1134 (CA10 1996) ("entire statement inculpated both [defendant] and [declarant] equally" and "neither [attempted] to shift blame to his co-conspirators nor to curry favor from the police or prosecutor").

did not turn solely on the fact that the challenged statement inculpated the defendant, but were instead grounded in the Court's suspicion of untested custodial confessions. See, *e. g.*, *Lee*, *supra*, at 544–545. The plurality describes *Dutton* v. *Evans*, 400 U. S. 74 (1970), as an "exception" to this line of cases, *ante*, at 132, n. 2, but that case involved an accomplice's statement to a fellow prisoner, see 400 U. S., at 77–78, not a custodial confession.

The Court in *Dutton* held that the admission of an accomplice's statement to a fellow inmate did not violate the Confrontation Clause under the facts of that case, see *id.*, at 86–89, and I see no reason to foreclose the possibility that such statements, even those that inculpate a codefendant, may fall under a firmly rooted hearsay exception. The Court in *Dutton* recognized that statements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant. *Id.*, at 89. Several federal courts have similarly concluded that such statements fall under a firmly rooted hearsay exception.[3] *Dutton* is thus no "exception," but a case wholly outside the "unbroken line" of cases, see *ante*, at 132, n. 2, in which custodial confessions laying blame on a codefendant have been found to violate the Confrontation Clause. The custodial confession in this case falls under the coverage of this latter set of cases, and I would not extend the holding here any further.

The plurality's blanket ban on the government's use of accomplice statements that incriminate a defendant thus sweeps beyond the facts of this case and our precedent,

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[3] See, *e. g.*, *United States* v. *York*, 933 F. 2d 1343, 1362–1364 (CA7 1991) (finding federal declaration against penal interest exception firmly rooted in case involving accomplice's statements made to two associates); *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (exception firmly rooted in case involving statements made to declarant's girlfriend and stepfather); *United States* v. *Katsougrakis*, 715 F. 2d 769, 776 (CA2 1983) (no violation in admitting accomplice's statements to friend).

ignoring both the exculpatory nature of Mark's confession and the circumstances in which it was given. Unlike the plurality, I would limit our holding here to the case at hand, and decide only that Mark Lilly's custodial confession laying sole responsibility on petitioner cannot satisfy a firmly rooted hearsay exception.

II

Nor do I see any reason to do more than reverse the decision of the Supreme Court of Virginia and remand the case for the Commonwealth to demonstrate that Mark's confession bears "particularized guarantees of trustworthiness" under *Roberts*, 448 U. S., at 66. The Supreme Court of Virginia held only that Mark Lilly's confession was admissible under a state-law exception to its hearsay rules and then held that this exception was firmly rooted for Confrontation Clause purposes. See 255 Va. 558, 573–574, 499 S. E. 2d 522, 533–534 (1998). Neither that court nor the trial court analyzed the confession under the second prong of the *Roberts* inquiry, and the discussion of reliability cited by the Court, see *ante*, at 122–123, 135, pertained only to whether the confession should be admitted under state hearsay rules, not under the Confrontation Clause. Following our normal course, I see no reason for this Court to reach an issue upon which the lower courts did not pass. See *National College Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"). Thus, both this issue and the harmless-error question should be sent back to the Virginia courts. See *ante*, at 139–140.

The lack of any reviewable decision in this case makes especially troubling the plurality's conclusion that appellate courts must independently review a lower court's determination that a hearsay statement bears particularized guarantees of trustworthiness. Deciding whether a particular statement bears the proper indicia of reliability under our Confrontation Clause precedent "may be a mixed question of fact and law," but the mix weighs heavily on the "fact" side.

We have said that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991) (citation omitted).

These factors counsel in favor of deference to trial judges who undertake the second prong of the *Roberts* inquiry. They are better able to evaluate whether a particular statement given in a particular setting is sufficiently reliable that cross-examination would add little to its trustworthiness. Admittedly, this inquiry does not require credibility determinations, but we have already held that deference to district courts does not depend on the need for credibility determinations. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985).

Accordingly, I believe that in the setting here, as in *Anderson*, "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." See *id.*, at 574–575. It is difficult to apply any standard in this case because none of the courts below conducted the second part of the *Roberts* inquiry. I would therefore remand this case to the Supreme Court of Virginia to carry out the inquiry, and, if any error is found, to determine whether that error is harmless.

Syllabus

DICKINSON, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS *v.* ZURKO ET AL.

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

No. 98–377. Argued March 24, 1999—Decided June 10, 1999

In reviewing a Patent and Trademark Office (PTO) decision to deny respondents' patent application, the Federal Circuit analyzed the PTO's factual finding using a "clearly erroneous" standard of review, which generally governs appellate review of district court findings of fact (court/court review), rather than the less stringent standards set forth in the Administrative Procedure Act (APA), which permit a court to set aside agency findings of fact found to be arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence (court/agency review), 5 U. S. C. § 706. The court found the PTO's factual finding to be clearly erroneous.

Held: The Federal Circuit must use the framework set forth in § 706 when reviewing PTO findings of fact. Pp. 154–165.

(a) Absent an exception, a reviewing court must apply the APA's court/agency review standards to agency factual findings. The Federal Circuit bases such an exception on 5 U. S. C. § 559, which provides that the APA does "not limit or repeal additional requirements . . . recognized by law." In its view, at the time the APA was adopted in 1946, the Court of Customs and Patent Appeals (CCPA), a Federal Circuit predecessor, applied a court/court standard that was stricter than ordinary court/agency review standards, and this special tradition of strict review amounted to an "additional requirement" that trumps § 706's requirements. However, a close examination of the CCPA's cases reviewing PTO decisions do not reflect a well-established court/court standard. The presence of the phrases "clear case of error," "clearly wrong," and "manifest error" in those cases does not conclusively signal such review. The relevant linguistic conventions were less firmly established before the APA's adoption than they are today, with courts sometimes using words such as "clearly erroneous" to describe less strict court/agency review and words such as "substantial evidence" to describe stricter court/court review. The absence of the words "substantial evidence" in the CCPA's cases is not especially significant, since standardization of that term began to take hold only after Congress started using it in various federal statutes. Further, not one of the CCPA's opinions actually uses the words "clear error" or "clearly erroneous," which are terms

Syllabus

of art signaling court/court review. Most of them use "manifest error," which is not now such a term of art. At the same time, this Court's precedent undermines the claim that "clearly wrong" or "manifest error" signal court/court review. Although the Court in *Morgan* v. *Daniels*, 153 U. S. 120, used language that could be read as setting forth a court/court standard, the Court's reasoning makes clear that it meant its words to stand for a court/agency standard. The CCPA's cases reveal a similar pattern, using words such as "clearly wrong" and "manifest error" with explanations indicating that they had court/agency, not court/court, review in mind. Pp. 154–161.

(b) Several policy reasons that the Federal Circuit believes militate against using APA review standards—that a change will be disruptive to the bench and bar; that the change will create an anomaly in which a disappointed patent applicant who seeks review directly in the Federal Circuit will be subject to court/agency review, while one who first seeks review in a district court will have any further appeal reviewed under a court/court standard; and that stricter review produces better agency factfinding—are unconvincing. Pp. 161–165.

142 F. 3d 1447, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and GINSBURG, JJ., joined, *post*, p. 170.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Edward C. DuMont*, *William Kanter*, *Bruce G. Forrest*, *Albin F. Drost*, *Karen A. Buchanan*, and *Kenneth R. Corsello*.

Ernest Gellhorn argued the cause for respondents. With him on the brief were *Jeffrey S. Lubbers*, *Ann G. Weymouth*, *Janice M. Mueller*, and *Russell Wong*.*

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*Briefs of *amici curiae* urging reversal were filed for Intellectual Property Professors by *John F. Duffy* and *Thomas G. Field, Jr.;* and for Theis Research, Inc., by *Paul R. Johnson*.

Briefs of *amici curiae* urging affirmance were filed for the Biotechnology Industry Organization by *Scott F. Partridge*, *Bob E. Shannon*, and *Scott K. Field;* for the Houston Intellectual Property Law Association by *Jeffrey W. Tayon;* for the International Trademark Association by *Albert Robin;* for the New York Intellectual Property Law Association by *Bruce*

JUSTICE BREYER delivered the opinion of the Court.

The Administrative Procedure Act (APA) sets forth standards governing judicial review of findings of fact made by federal administrative agencies. 5 U. S. C. § 706. We must decide whether § 706 applies when the Federal Circuit reviews findings of fact made by the Patent and Trademark Office (PTO). We conclude that it does apply, and the Federal Circuit must use the framework set forth in that section.

I

Section 706, originally enacted in 1946, sets forth standards that govern the "Scope" of court "review" of, *e. g.*, agency factfinding (what we shall call court/agency review). It says that a

> "reviewing court shall—
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> . . . . .
>
> "(2) hold unlawful and set aside agency . . . findings . . . found to be—
>
> "(A) arbitrary, capricious, [or] an abuse of discretion, or . . .
>
> . . . . .
>
> "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . .
>
> . . . . .

M. Wexler and *Howard B. Barnaby;* for the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia by *Lynn Eccleston*, *David W. Long,* and *Harold Wegner;* for Pharmaceutical Research and Manufacturers of America by *Gerald J. Mossinghoff;* and for John P. Sutton, *pro se.*

Briefs of *amici curiae* were filed for the Dallas-Fort Worth Intellectual Property Law Association by *D. Scott Hemingway;* and for Intellectual Property Creators et al. by *David Roy Pressman*, *pro se.*

> "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ."

Federal Rule of Civil Procedure 52(a) sets forth standards that govern appellate court review of findings of fact made by a district court judge (what we shall call court/court review). It says that the appellate court shall set aside those findings only if they are "clearly erroneous." Traditionally, this court/court standard of review has been considered somewhat stricter (*i. e.*, allowing somewhat closer judicial review) than the APA's court/agency standards. 2 K. Davis & R. Pierce, Administrative Law Treatise § 11.2, p. 174 (3d ed. 1994) (hereinafter Davis & Pierce).

The Court of Appeals for the Federal Circuit believes that it should apply the "clearly erroneous" standard when it reviews findings of fact made by the PTO. *In re Zurko*, 142 F. 3d 1447, 1459 (1998) (case below). The Commissioner of Patents, the PTO's head, believes to the contrary that ordinary APA court/agency standards apply. See, *e. g.*, *In re Kemps*, 97 F. 3d 1427, 1430–1431 (CA Fed. 1996); *In re Napier*, 55 F. 3d 610, 614 (CA Fed. 1995); *In re Brana*, 51 F. 3d 1560, 1568–1569 (CA Fed. 1995).

The case before us tests these two competing legal views. Respondents applied for a patent upon a method for increasing computer security. The PTO patent examiner concluded that respondents' method was obvious in light of prior art, and so it denied the application. See 35 U. S. C. § 103 (1994 ed., Supp. III). The PTO's review board (the Board of Patent Appeals and Interferences) upheld the examiner's decision. Respondents sought review in the Federal Circuit, where a panel treated the question of what the prior art teaches as one of fact, and agreed with respondents that the PTO's factual finding was "clearly erroneous." *In re Zurko*, 111 F. 3d 887, 889, and n. 2 (1997).

The Federal Circuit, hoping definitively to resolve the review-standard controversy, then heard the matter en banc.

After examining relevant precedents, the en banc court concluded that its use of the stricter court/court standard was legally proper. The Solicitor General, representing the Commissioner of Patents, sought certiorari. We granted the writ in order to decide whether the Federal Circuit's review of PTO factfinding must take place within the framework set forth in the APA.

II

The parties agree that the PTO is an "agency" subject to the APA's constraints, that the PTO's finding at issue in this case is one of fact, and that the finding constitutes "agency action." See 5 U. S. C. § 701 (defining "agency" as an "authority of the Government of the United States"); § 706 (applying APA "Scope of review" provisions to "agency action"). Hence a reviewing court must apply the APA's court/agency review standards in the absence of an exception.

The Federal Circuit rests its claim for an exception upon § 559. That section says that the APA does "not limit or repeal additional requirements . . . recognized by law." In the Circuit's view: (1) at the time of the APA's adoption, in 1946, the Court of Customs and Patent Appeals (CCPA), a Federal Circuit predecessor, applied a court/court "clearly erroneous" standard; (2) that standard was stricter than ordinary court/agency review standards; and (3) that special tradition of strict review consequently amounted to an "additional requirement" that under § 559 trumps the requirements imposed by § 706.

Recognizing the importance of maintaining a uniform approach to judicial review of administrative action, see, *e. g.*, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 489 (1951); 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), we have closely examined the Federal Circuit's claim for an exception to that uniformity. In doing so, we believe that respondents must show more than a possibility of a height-

ened standard, and indeed more than even a bare preponderance of evidence in their favor. Existence of the additional requirement must be clear. This is suggested both by the phrase "recognized by law" and by the congressional specification in the APA that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." § 12, 60 Stat. 244, 5 U. S. C. § 559. A statutory intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations. The APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement "recognized" only as ambiguous. In any event, we have examined the 89 cases which, according to respondents and supporting *amici*, embody the pre-APA standard of review. See App. to Brief for New York Intellectual Property Law Association as *Amicus Curiae* 1a–6a (collecting cases), and we conclude that those cases do not reflect a well-established stricter court/court standard of judicial review for PTO factfinding, which circumstance fatally undermines the Federal Circuit's conclusion.

The 89 pre-APA cases all involve CCPA review of a PTO administrative decision, which either denied a patent or awarded priority to one of several competing applicants. See 35 U. S. C. § 59a (1934 ed.) (granting CCPA review authority over PTO decisions); 35 U. S. C. § 141 (current grant of review authority to the Federal Circuit). The major consideration that favors the Federal Circuit's view consists of the fact that 23 of the cases use words such as "clear case of error" or "clearly wrong" to describe the CCPA's review standard, while the remainder use words such as "manifest error," which might be thought to mean the same thing. See App. to Brief for New York Intellectual Property Law Association as *Amicus Curiae* 1a–6a. When the CCPA decided many of these cases during the 1930's and early 1940's,

legal authorities had begun with increasing regularity to use the term "clearly erroneous" to signal court/court review, Fed. Rule Civ. Proc. 52(a) (adopted in 1937), and the term "substantial evidence" to signal less strict court/agency review. Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 88 (1944) (describing congressional debates in which members argued for and against applying the "clearly erroneous" standard to agency review "precisely because it would give administrative findings less finality than they enjoyed under the 'substantial evidence' rule").

Yet the presence of these phrases is not conclusive. The relevant linguistic conventions were less firmly established before adoption of the APA than they are today. At that time courts sometimes used words such as "clearly erroneous" to describe less strict court/agency review standards. See, *e. g.*, *Polish National Alliance* v. *NLRB*, 136 F. 2d 175, 181 (CA7 1943); *New York Trust Co.* v. *SEC*, 131 F. 2d 274, 275 (CA2 1942), cert. denied, 318 U. S. 786 (1943); *Hall* v. *Commissioner*, 128 F. 2d 180, 182 (CA7 1942); *First National Bank of Memphis* v. *Commissioner*, 125 F. 2d 157 (CA6 1942) *(per curiam); NLRB* v. *Algoma Plywood & Veneer Co.*, 121 F. 2d 602, 606 (CA7 1941). Other times they used words such as "substantial evidence" to describe stricter court/court review (including appeals in patent infringement cases challenging *district court* factfinding). See, *e. g.*, *Cornell* v. *Chase Brass & Copper Co.*, 142 F. 2d 157, 160 (CA2 1944); *Dow Chemical Co.* v. *Halliburton Oil Well Cementing Co.*, 139 F. 2d 473, 475 (CA6 1943), aff'd, 324 U. S. 320 (1945); *Gordon Form Lathe Co.* v. *Ford Motor Co.*, 133 F. 2d 487, 496–497 (CA6), aff'd, 320 U. S. 714 (1943); *Electro Mfg. Co.* v. *Yellin*, 132 F. 2d 979, 981 (CA7 1943); *Ajax Hand Brake Co.* v. *Superior Hand Brake Co.*, 132 F. 2d 606, 609 (CA7 1943); *Galion Iron Works & Mfg. Co.* v. *Beckwith Machinery Co.*, 105 F. 2d 941, 942 (CA3 1939). Indeed, this Court itself on at least one occasion used the words "substantial evidence"

to explain why it would not disturb a *trial court's* factual findings. *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 261 (1936); see also *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 420 (1937) (accepting trial court's findings of fact because they have "substantial support in the record").

Nor is the absence of the words "substantial evidence" in the CCPA's cases especially significant. Before the APA, the use of that term to describe court/agency review proceeded by fits and starts, with the standardization of the term beginning to take hold only after Congress began using it (or the like) in various federal statutes. For example, this Court first used the phrase "substantial evidence" in the agency context to describe its approach to the Interstate Commerce Commission's (ICC's) factual findings, *ICC* v. *Union Pacific R. Co.*, 222 U. S. 541, 548 (1912), even though the underlying statute simply authorized a court of competent jurisdiction to suspend or set aside orders of the Commission, § 12, 36 Stat. 551. The Court did not immediately grant the Federal Trade Commission the same leeway it granted the ICC, see *FTC* v. *Curtis Publishing Co.*, 260 U. S. 568, 580 (1923), even though the underlying Act used language to which the phrase "substantial evidence" might have applied, see § 5, 38 Stat. 720 (the "findings of the commission as to the facts, if supported by testimony, shall be conclusive"). As the words "substantial evidence" began to appear more often in statutes, the Court began to use those same words in describing review standards, sometimes supplying the modifier "substantial" when Congress had left it out. See, *e. g.*, *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938); see Stason, "Substantial Evidence" in Administrative Law, 89 U. Pa. L. Rev. 1026, 1026–1028 (1941) (collecting statutes); see also *Dobson* v. *Commissioner*, 320 U. S. 489, 499 (1943) (speaking generally of the "theoretical and practical reason[s] for . . . [crediting] administrative decisions"). The patent statutes, however, did not and do not

use the term "substantial evidence" or any other term to describe the standard of court review. 35 U. S. C. §§ 61, 62 (1934 ed.). Indeed, it apparently remains disputed to this day (a dispute we need not settle today) precisely which APA standard—"substantial evidence" or "arbitrary, capricious, abuse of discretion"—would apply to court review of PTO factfinding. See 5 U. S. C. § 706(2)(E) (applying the term "substantial evidence" where agency factfinding takes place "on the record"); see also *Association of Data Processing Service Orgs., Inc.* v. *Board of Governors of Federal Reserve System*, 745 F. 2d 677, 683–684 (CADC 1984) (Scalia, J.) (finding no difference between the APA's "arbitrary, capricious" standard and its "substantial evidence" standard as applied to court review of agency factfinding.)

Further, not one of the 89 opinions actually uses the precise words "clear error" or "clearly erroneous," which are terms of art signaling court/court review. Most of the 89 opinions use words like "manifest error," which is not now such a term of art.

At the same time, precedent from this Court undermines the Federal Circuit's claim that the phrases "clearly wrong" or "manifest error" signal court/court review. The Federal Circuit traced its standard of review back to *Morgan* v. *Daniels*, 153 U. S. 120 (1894), which it characterized as the foundation upon which the CCPA later built its review standards. 142 F. 3d, at 1453–1454. We shall describe that case in some detail.

Morgan arose out of a Patent Office interference proceeding—a proceeding to determine which of two claimants was the first inventor. The Patent Office decided the factual question of "priority" in favor of one claimant; the Circuit Court, deciding the case "without any additional testimony," 153 U. S., at 122, reversed the Patent Office's factual finding and awarded the patent to the other claimant. This Court in turn reversed the Circuit Court, thereby restoring the Patent Office decision.

"What," asked Justice Brewer for the Court, "is the rule which should control the [reviewing] court in the determination of this case?" *Ibid.* Is it that the Patent Office decision "should stand unless the testimony shows beyond any reasonable doubt that the plaintiff was the first inventor"? *Id.*, at 123. The Court then cited two cases standing for such a "reasonable doubt" standard. *Ibid.* (citing *Cantrell* v. *Wallick*, 117 U. S. 689, 695 (1886), and *Coffin* v. *Ogden*, 18 Wall. 120, 124 (1874)). The Court found the two cases "closely in point." 153 U. S., at 123. Justice Brewer wrote that a person "challenging the priority awarded by the Patent Office . . . should . . . be held to *as strict* proof. " *Ibid.* (emphasis added). The Court, pointing out that the Circuit Court had used language "not quite so strong" (namely, "a clear and undoubted preponderance of proof"), thought that the Circuit Court's standard sounded more like the rule used by "an appellate court in reviewing findings of fact made by the trial court." *Ibid.* The Court then wrote:

> "*But this is something more than a mere appeal.* It is an application to the court to set aside the action of one of the executive departments of the government. . . . A new proceeding is instituted in the courts . . . to set aside the conclusions reached by the administrative department . . . . It is . . . not to be sustained by a mere preponderance of evidence. . . . It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the patent office was a finality upon every matter of fact." *Id.*, at 124 (emphasis added).

The Court, in other words, reasoned strongly that a court/court review standard is *not* proper; that standard is too strict; a somewhat weaker standard of review is appropriate.

We concede that the Court also used language that could be read as setting forth a court/court standard of review. It said, for example, that the

> "Patent Office [decision] must be accepted as controlling upon that question of fact . . . unless the contrary is established by testimony which . . . *carries thorough conviction*. . . . [I]f doubtful, the decision of the Patent Office must control." *Id.*, at 125 (emphasis added).

It added that the testimony was "not . . . sufficient to produce *a clear conviction* that the Patent Office made a mistake." *Id.*, at 129 (emphasis added). But the Court did not use the emphasized words today; it used those words more than 100 years ago. And its reasoning makes clear that it meant those words to stand for a court/agency review standard, a standard weaker than the standard used by "an appellate court in reviewing findings of fact made by the trial court." *Id.*, at 123.

The opinions in the 89 CCPA cases, cataloged in the Appendix to this opinion, reveal the same pattern. They use words such as "manifest error" or "clearly wrong." But they use those words to explain why they give so much, not so little, deference to agency factfinding. And, their further explanations, when given, indicate that they had court/agency, not court/court, review in mind.

In nearly half of the cases, the CCPA explains why it uses its "manifest error" standard by pointing out that the PTO is an expert body, or that the PTO can better deal with the technically complex subject matter, and that the PTO consequently deserves deference. In more than three-fourths of the cases the CCPA says that it should defer to PTO factfinding because two (and sometimes more) PTO tribunals had reviewed the matter and agreed about the factual finding. These reasons are reasons that courts and commentators have long invoked to justify deference to agency factfinding. See *Universal Camera*, 340 U. S., at 496–497 (intraagency

agreement); *NLRB* v. *Link-Belt Co.*, 311 U. S. 584, 597 (1941) (expertise); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146 (1939) (expertise); *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 98 (1913) (expertise); Stern, 58 Harv. L. Rev., at 81–82 (expertise); 2 Davis & Pierce § 11.2, at 178–181 (intraagency agreement). They are not the reasons courts typically have given for deferring to factfinding made by a lower court judge. See, *e. g.*, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 623 (1993); Stern, *supra*, at 82–83 (trial court advantages lie in, *e. g.*, evaluation of witness, not comparative expertise). And we think it also worth noting, in light of the pre-APA movement toward standardization discussed above, *supra*, at 157, that the CCPA began to refer more frequently to technical complexity and agency expertise as time marched closer to 1946. Out of the 45 cases in our sample decided between 1929 and 1936, 40% (18 of 45) specifically referred to technical complexity. That percentage increased to 57% (25 of 44) for the years 1937 to 1946.

Given the CCPA's explanations, the review standard's origins, and the nondeterminative nature of the phrases, we cannot agree with the Federal Circuit that in 1946, when Congress enacted the APA, the CCPA "recognized" the use of a stricter court/court, rather than a less strict court/agency, review standard for PTO decisions. Hence the Federal Circuit's review of PTO findings of fact cannot amount to an "additional requiremen[t] . . . recognized by law." 5 U. S. C. § 559.

III

The Federal Circuit also advanced several policy reasons which in its view militate against use of APA standards of review. First, it says that both bench and bar have now become used to the Circuit's application of a "clearly erroneous" standard that implies somewhat stricter court/court review. It says that change may prove needlessly disrup-

tive. 142 F. 3d, at 1457–1458. Supporting *amici* add that it is better that the matter remain "'settled than that it be settled right.'" Brief for Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia as *Amicus Curiae* 23 (quoting *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986)).

This Court, however, has not previously settled the matter. The Federal Circuit's standard would require us to create § 559 precedent that itself could prove disruptive by too readily permitting other agencies to depart from uniform APA requirements. And in any event we believe the Circuit overstates the difference that a change of standard will mean in practice.

This Court has described the APA court/agency "substantial evidence" standard as requiring a court to ask whether a "reasonable mind might accept" a particular evidentiary record as "adequate to support a conclusion." *Consolidated Edison*, 305 U. S., at 229. It has described the court/court "clearly erroneous" standard in terms of whether a reviewing judge has a "definite and firm conviction" that an error has been committed. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). And it has suggested that the former is somewhat less strict than the latter. *Universal Camera*, 340 U. S., at 477, 488 (analogizing "substantial evidence" test to review of jury findings and stating that appellate courts must respect agency expertise). At the same time the Court has stressed the importance of not simply rubber-stamping agency factfinding. *Id.*, at 490. The APA requires meaningful review; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted. *Ibid.*

The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used. The court/agency standard, as we have said, is somewhat less strict than the court/court standard. But the dif-

ference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome. Cf. *International Brotherhood of Electrical Workers* v. *NLRB*, 448 F. 2d 1127, 1142 (CADC 1971) (Leventhal, J., dissenting) (wrongly believing—and correcting himself—that he had found the "case dreamed of by law school professors" where the agency's findings, though "clearly erroneous," were "nevertheless" supported by "substantial evidence").

The difficulty of finding such a case may in part reflect the basic similarity of the reviewing task, which requires judges to apply logic and experience to an evidentiary record, whether that record was made in a court or by an agency. It may in part reflect the difficulty of attempting to capture in a form of words intangible factors such as judicial confidence in the fairness of the factfinding process. *Universal Camera*, *supra*, at 489; Jaffe, Judicial Review: "Substantial Evidence on the Whole Record," 64 Harv. L. Rev. 1233, 1245 (1951). It may in part reflect the comparatively greater importance of case-specific factors, such as a finding's dependence upon agency expertise or the presence of internal agency review, which factors will often prove more influential in respect to outcome than will the applicable standard of review.

These features of review underline the importance of the fact that, when a Federal Circuit judge reviews PTO factfinding, he or she often will examine that finding through the lens of patent-related experience—and properly so, for the Federal Circuit is a specialized court. That comparative expertise, by enabling the Circuit better to understand the basis for the PTO's finding of fact, may play a more important role in assuring proper review than would a theoretically somewhat stricter standard.

Moreover, if the Circuit means to suggest that a change of standard could somehow immunize the PTO's fact-related "reasoning" from review, 142 F. 3d, at 1449–1450, we disagree. A reviewing court reviews an agency's reasoning to determine whether it is "arbitrary" or "capricious," or, if bound up with a record-based factual conclusion, to determine whether it is supported by "substantial evidence." *E. g., SEC* v. *Chenery Corp.*, 318 U. S. 80, 89–93 (1943).

Second, the Circuit and its supporting *amici* believe that a change to APA review standards will create an anomaly. An applicant denied a patent can seek review either directly in the Federal Circuit, see 35 U. S. C. § 141, or indirectly by first obtaining direct review in federal district court, see § 145. The first path will now bring about Federal Circuit court/agency review; the second path might well lead to Federal Circuit court/court review, for the Circuit now reviews federal district court factfinding using a "clearly erroneous" standard. *Gould* v. *Quigg*, 822 F. 2d 1074, 1077 (1987). The result, the Circuit claims, is that the outcome may turn upon which path a disappointed applicant takes; and it fears that those applicants will often take the more complicated, time-consuming indirect path in order to obtain stricter judicial review of the PTO's determination.

We are not convinced, however, that the presence of the two paths creates a significant anomaly. The second path permits the disappointed applicant to present to the court evidence that the applicant did not present to the PTO. *Ibid.* The presence of such new or different evidence makes a factfinder of the district judge. And nonexpert judicial factfinding calls for the court/court standard of review. We concede that an anomaly might exist insofar as the district judge does no more than review PTO factfinding, but nothing in this opinion prevents the Federal Circuit from adjusting related review standards where necessary. Cf. *Fregeau* v. *Mossinghoff*, 776 F. 2d 1034, 1038 (CA Fed. 1985) (harmonizing review standards).

Finally, the Circuit reasons that its stricter court/court review will produce better agency factfinding. It says that the standard encourages the creation of "administrative records that more fully describe the metes and bounds of the patent grant" and "help avoid situations where board fact finding on matters such as anticipation or the factual inquiries underlying obviousness become virtually unreviewable." 142 F. 3d, at 1458. Neither the Circuit nor its supporting *amici*, however, have explained convincingly why direct review of the PTO's patent denials demands a stricter fact-related review standard than is applicable to other agencies. Congress has set forth the appropriate standard in the APA. For the reasons stated, we have not found circumstances that justify an exception.

For these reasons, the judgment of the Federal Circuit is reversed. We remand the case for further proceedings consistent with this opinion.

So ordered.

APPENDIX TO OPINION OF THE COURT

Review of 89 Pre-APA CCPA Patent Cases Reciting "Clear" or "Manifest" Error Standard

Cases Referring to both Technical Complexity/Agency Expertise and the Agreement (Disagreement) Within the Agency

Stern v. *Schroeder*, 17 C. C. P. A. 670, 674, 36 F. 2d 515, 517 (1929)

In re Ford, 17 C. C. P. A. 893, 894, 38 F. 2d 525, 526 (1930)

In re Demarest, 17 C. C. P. A. 904, 906, 38 F. 2d 895, 896 (1930)

In re Wietzel, 17 C. C. P. A. 1079, 1082, 39 F. 2d 669, 671 (1930)

In re Anhaltzer, 18 C. C. P. A. 1181, 1184, 48 F. 2d 657, 658 (1931)

Dorer v. *Moody*, 18 C. C. P. A. 1188, 1190, 48 F. 2d 388, 389 (1931)
In re Hornsey, 18 C. C. P. A. 1222, 1224, 48 F. 2d 911, 912 (1931)
Rowe v. *Holtz*, 19 C. C. P. A. 970, 974, 55 F. 2d 468, 470–471 (1932)
In re Fessenden, 19 C. C. P. A. 1048, 1050–1051, 56 F. 2d 669, 670 (1932)
Martin v. *Friendly*, 19 C. C. P. A. 1181, 1182–1183, 58 F. 2d 421, 422 (1932)
In re Dubilier, 20 C. C. P. A. 809, 815, 62 F. 2d 374, 377 (1933)
In re Alden, 20 C. C. P. A. 1083, 1084–1085, 65 F. 2d 136, 137 (1933)
Farmer v. *Pritchard*, 20 C. C. P. A. 1096, 1101, 65 F. 2d 165, 168 (1933)
In re Pierce, 20 C. C. P. A. 1170, 1175, 65 F. 2d 271, 274 (1933)
Angell v. *Morin*, 21 C. C. P. A. 1018, 1024, 69 F. 2d 646, 649 (1934)
Daley v. *Trube*, 24 C. C. P. A. 964, 971, 88 F. 2d 308, 312 (1937)
Coast v. *Dubbs*, 24 C. C. P. A. 1023, 1031–1032, 88 F. 2d 734, 739 (1937)
Bryson v. *Clarke*, 25 C. C. P. A. 719, 721, 92 F. 2d 720, 722 (1937)
Brand v. *Thomas*, 25 C. C. P. A. 1053, 1055, 96 F. 2d 301, 302 (1938)
Creed v. *Potts*, 25 C. C. P. A. 1084, 1089, 96 F. 2d 317, 321 (1938)
In re Cassidy, 25 C. C. P. A. 1282, 1285, 97 F. 2d 93, 95 (1938)
Krebs v. *Melicharek*, 25 C. C. P. A. 1362, 1365–1366, 97 F. 2d 477, 479 (1938)
Parker v. *Ballantine*, 26 C. C. P. A. 799, 804, 101 F. 2d 220, 223 (1939) (disagreement)

Reed v. *Edwards*, 26 C. C. P. A. 901, 904, 101 F. 2d 550, 552 (1939)
Hill v. *Casler*, 26 C. C. P. A. 930, 932, 102 F. 2d 219, 221 (1939)
Tears v. *Robinson*, 26 C. C. P. A. 1391, 1392, 104 F. 2d 813, 814 (1939)
In re Bertsch, 27 C. C. P. A. 760, 763–764, 107 F. 2d 828, 831 (1939)
In re Wuertz, 27 C. C. P. A. 1039, 1046, 110 F. 2d 854, 857 (1940)
In re Kaplan, 27 C. C. P. A. 1072, 1075, 110 F. 2d 670, 672 (1940)
Prahl v. *Redman*, 28 C. C. P. A. 937, 940, 117 F. 2d 1018, 1021 (1941)
In re Bertsch, 30 C. C. P. A. 813, 815–816, 132 F. 2d 1014, 1016 (1942)
In re Stacy, 30 C. C. P. A. 972, 974, 135 F. 2d 232, 233 (1943)
Poulsen v. *McDowell*, 31 C. C. P. A. 1006, 1011, 142 F. 2d 267, 270 (1944)
Pinkerton v. *Stahly*, 32 C. C. P. A. 723, 728, 144 F. 2d 881, 885 (1944)

Cases Referring to Technical Complexity/Agency Expertise

In re Engelhardt, 17 C. C. P. A. 1244, 1251, 40 F. 2d 760, 764 (1930)
In re McDonald, 18 C. C. P. A. 1099, 1102, 47 F. 2d 802, 804 (1931)
In re Hermans, 18 C. C. P. A. 1211, 1212, 48 F. 2d 386, 387 (1931)
In re Batcher, 19 C. C. P. A. 1275, 1278, 59 F. 2d 461, 463 (1932)
In re Carlton, 27 C. C. P. A. 1102, 1105, 111 F. 2d 190, 192 (1940)
Farnsworth v. *Brown*, 29 C. C. P. A. 740, 749, 124 F. 2d 208, 214 (1941)

In re Ubbelhode, 29 C. C. P. A. 1042, 1046, 128 F. 2d 453, 456 (1942)
In re Cohen, 30 C. C. P. A. 876, 880, 133 F. 2d 924, 926 (1943)
In re Ruzicka, 32 C. C. P. A. 1165, 1169, 150 F. 2d 550, 553 (1945)
In re Allbright, 33 C. C. P. A. 760, 764, 152 F. 2d 984, 986 (1946)

Cases Referring to Agreement Within the Agency

Beidler v. *Caps,* 17 C. C. P. A. 703, 705, 36 F. 2d 122, 123 (1929)
Stern v. *Schroeder,* 17 C. C. P. A. 690, 696–697, 36 F. 2d 518, 521–522 (1929)
Janette v. *Folds,* 17 C. C. P. A. 879, 881, 38 F. 2d 361, 362 (1930)
In re Moulton, 17 C. C. P. A. 891, 892, 38 F. 2d 359, 360 (1930)
In re Banner, 17 C. C. P. A. 1086, 1090, 39 F. 2d 690, 692 (1930)
In re Walter, 17 C. C. P. A. 982, 983, 39 F. 2d 724 (1930)
Pengilly v. *Copeland,* 17 C. C. P. A. 1143, 1145, 40 F. 2d 995, 996 (1930)
Thompson v. *Pettis,* 18 C. C. P. A. 755, 757, 44 F. 2d 420, 421 (1930)
In re Kochendorfer, 18 C. C. P. A. 761, 763, 44 F. 2d 418, 419 (1930)
In re Dickerman, 18 C. C. P. A. 766, 768, 44 F. 2d 876, 877 (1930)
Bennett v. *Fitzgerald,* 18 C. C. P. A. 1201, 1202, 48 F. 2d 917, 918 (1931)
In re Doherty, 18 C. C. P. A. 1278, 1280, 48 F. 2d 952, 953 (1931)
In re Murray, 19 C. C. P. A. 766, 767–768, 53 F. 2d 540, 541 (1931)
In re Breer, 19 C. C. P. A. 929, 931, 55 F. 2d 485, 486 (1932)

Robbins v. *Steinbart*, 19 C. C. P. A. 1069, 1072, 57 F. 2d 378, 379 (1932)
Henry v. *Harris*, 19 C. C. P. A. 1092, 1096–1097, 56 F. 2d 864, 866 (1932)
Fageol v. *Midboe*, 19 C. C. P. A. 1117, 1122, 56 F. 2d 867, 870 (1932)
Gamble v. *Church*, 19 C. C. P. A. 1145, 1146, 57 F. 2d 761, 762 (1932)
Thompson v. *Fawick*, 20 C. C. P. A. 953, 956, 64 F. 2d 125, 127 (1933)
Evans v. *Clocker*, 20 C. C. P. A. 956, 960, 64 F. 2d 137, 139 (1933)
In re Bloch, 20 C. C. P. A. 1180, 1183, 65 F. 2d 268, 269 (1933)
In re Snyder, 21 C. C. P. A. 720, 722, 67 F. 2d 493, 495 (1933)
Osgood v. *Ridderstrom*, 21 C. C. P. A. 1176, 1182, 71 F. 2d 191, 195 (1934)
Urschel v. *Crawford*, 22 C. C. P. A. 727, 730, 73 F. 2d 510, 511 (1934)
Marine v. *Wright*, 22 C. C. P. A. 946, 948–949, 74 F. 2d 996, 997 (1935)
Berman v. *Rondelle*, 22 C. C. P. A. 1049, 1052, 75 F. 2d 845, 847 (1935)
Tomlin v. *Dunlap*, 24 C. C. P. A. 1108, 1114, 88 F. 2d 727, 731 (1937)
Lasker v. *Kurowski*, 24 C. C. P. A. 1253, 1256, 90 F. 2d 132, 134 (1937)
In re Taylor, 25 C. C. P. A. 709, 711, 92 F. 2d 705, 706 (1937)
In re Adamson, 25 C. C. P. A. 726, 729–730, 92 F. 2d 717, 720 (1937)
Adams v. *Stuller*, 25 C. C. P. A. 865, 870, 94 F. 2d 403, 406 (1938)
Ellis v. *Maddox*, 25 C. C. P. A. 1045, 1053, 96 F. 2d 308, 314 (1938)
Kauffman v. *Etten*, 25 C. C. P. A. 1127, 1134, 97 F. 2d 134, 139 (1938)

Kindelmann v. *Morsbach*, 25 C. C. P. A. 1344, 1349, 97 F. 2d 796, 799–800 (1938)
King v. *Young*, 26 C. C. P. A. 762, 771, 100 F. 2d 663, 670 (1938)
Meuer v. *Schellenger*, 26 C. C. P. A. 1430, 1434, 104 F. 2d 949, 952 (1939)
McBride v. *Teeple*, 27 C. C. P. A. 961, 972, 109 F. 2d 789, 797, cert. denied, 311 U. S. 649 (1940)
Vickery v. *Barnhart*, 28 C. C. P. A. 979, 982, 118 F. 2d 578, 581 (1941)
Shumaker v. *Paulson*, 30 C. C. P. A. 1136, 1138, 136 F. 2d 686, 688 (1943)
Paulson v. *Hyland*, 30 C. C. P. A. 1150, 1152, 136 F. 2d 695, 697 (1943)
Dreyer v. *Haffcke*, 30 C. C. P. A. 1278, 1280, 137 F. 2d 116, 117 (1943)

Cases Referring to Neither Technical Complexity/Agency Expertise nor Agreement Within the Agency

In re Schmidt, 26 C. C. P. A. 773, 777, 100 F. 2d 673, 676 (1938)
Hamer v. *White*, 31 C. C. P. A. 1186, 1189, 143 F. 2d 987, 990 (1944)
Kenyon v. *Platt*, 33 C. C. P. A. 748, 752, 152 F. 2d 1006, 1009 (1946)
Beall v. *Ormsby*, 33 C. C. P. A. 959, 967, 154 F. 2d 663, 668 (1946)

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether, at the time of the enactment of the Administrative Procedure Act (APA or Act) over 50 years ago, judicial review of factfinding by the Patent and Trademark Office (PTO) under the "clearly erroneous" standard was an "additional requiremen[t] . . . recognized by law." 5 U. S. C. § 559. It is undisputed that, until today's decision,

both the patent bench and the patent bar had concluded that the stricter "clearly erroneous" standard was indeed such a requirement placed upon the PTO.* Agency factfinding was thus reviewed under this stricter standard; in my view, properly so, since the APA by its plain text was intended to bring some uniformity to judicial review of agencies by *raising* the minimum standards of review and not by *lowering* those standards which existed at the time. Section 12 of the APA, which was ultimately codified as § 559, provided that "[n]othing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." Pub. L. 404, 79th Cong., 60 Stat. 244. As a result, we must decide whether the "clearly erroneous" standard was indeed otherwise recognized by law in 1946.

This case therefore turns on whether the 89 or so cases identified by the Court can be read as establishing a requirement placed upon agencies that was more demanding than the uniform minimum standards created by the APA. In making this determination, I would defer, not to agencies in general as the Court does today, but to the Court of Appeals for the Federal Circuit, the specialized Article III court charged with review of patent appeals. In this case the unanimous en banc Federal Circuit and the patent bar both agree that these cases recognized the "clearly erroneous" standard as an "additional requirement" placed on the PTO beyond the APA's minimum procedures. I see no reason to reject their sensible and plausible resolution of the issue.

Nor do I agree with the Court, *ante*, at 154–155, that either the plain language of § 559 or the original § 12 impose any sort of "clear statement rule" on the common law. Sec-

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*It appears that even the PTO acquiesced in this interpretation for almost 50 years after the enactment of the APA. See Brief for Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* 7, and n. 13 (the PTO first argued for the applicability of the APA's standards of review to its patentability factfinding before the Federal Circuit in 1995).

tion 12 of the APA expressly stated that requirements which predated the APA and were "otherwise recognized by law" were unaffected by the Act. If Congress had meant "otherwise recognized by law" to mean "clearly recognized by law," it certainly could have said so, but did not. I also reject the notion that § 559's separate *textual* requirement that *subsequent* statutes superseding or modifying the APA must do so "expressly," 5 U. S. C. § 559, should be read to impose a *nontextual* clear statement rule for the *antecedent* common-law requirements that the APA supplemented. There is no tension whatsoever between the goals of preserving more rigorous common-law requirements at the time of enactment and ensuring that future statutes would not repeal by implication the APA's uniform supplementary procedures.

I therefore dissent for the reasons given by the Court of Appeals.

Syllabus

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 98–387. Argued April 27, 1999—Decided June 14, 1999

Title 18 U. S. C. § 1304 and an implementing Federal Communications Commission (FCC) regulation prohibit, *inter alia*, radio and television broadcasters from carrying advertising about privately operated commercial casino gambling, regardless of the station's or casino's location. In *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, this Court upheld the constitutionality of § 1304 as applied to advertising of Virginia's lottery by a broadcaster in North Carolina, where no such lottery was authorized. Petitioners—representing New Orleans area broadcasters—wish to run advertisements for private commercial casinos that are lawful and regulated in Louisiana and Mississippi, and they filed this suit for a declaration that § 1304 and the FCC's regulation violate the First Amendment as applied to them. The District Court utilized the test for assessing commercial speech restrictions set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566, and granted the Government's cross-motion for summary judgment. The Court of Appeals affirmed.

Held: Section 1304 may not be applied to advertisements of lawful private casino gambling that are broadcast by petitioners' radio or television stations located in Louisiana, where such gambling is legal. Pp. 183–196.

(a) *Central Hudson*'s four-part test asks (1) whether the speech at issue concerns lawful activity and is not misleading and (2) whether the asserted governmental interest is substantial; and, if so, (3) whether the regulation directly advances the governmental interest asserted and (4) whether it is not more extensive than is necessary to serve that interest. The four parts of the *Central Hudson* test are not entirely discrete; all are important and, to a certain extent, interrelated. While some advocate a more straightforward and stringent test, *Central Hudson*, as applied in the Court's more recent commercial speech cases, provides an adequate basis for decision in this case. Pp. 183–184.

(b) All parties agree that petitioners' proposed broadcasts constitute commercial speech, and that they would satisfy the first part of the *Central Hudson* test: Their content is not misleading and concerns lawful activities, *i. e.*, private casino gambling in Louisiana and Mississippi.

In addition, the interests asserted by the Government are "substantial": (1) reducing the social costs associated with casino and other forms of gambling and (2) assisting States that restrict or prohibit casino and other forms of gambling. However, that conclusion is by no means self-evident, since, in the judgment of both Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations. The Court cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Government. See, *e. g.*, *Edenfield* v. *Fane*, 507 U. S. 761, 768. Considering both the quality of the asserted interests and the information sought to be suppressed, the crosscurrents in the scope and application of § 1304 become more difficult to defend. Pp. 184–187.

(c) As applied to petitioners' case, § 1304 cannot satisfy the third and fourth parts of the *Central Hudson* test. With regard to the Government's first asserted interest—alleviating casino gambling's social costs by limiting demand—the operation of § 1304 and its regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it. See *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 488. For example, federal law prohibits a broadcaster from carrying advertising about privately operated commercial casino gambling regardless of the station's or casino's location, but exempts advertising about state-run casinos, certain occasional commercial casino gambling, and tribal casino gambling even if the broadcaster is located in, or broadcasts to, a jurisdiction with the strictest of antigambling policies. Coupled with the FCC's interpretation and enforcement of the statute, it appears that the Government is committed to prohibiting certain accurate product information, not commercial enticements of all kinds, and then only for certain brands of *casino* gambling. The most significant difference identified by the Government between tribal and other classes of casino gambling is that the former are heavily regulated; but Congress' failure to institute such direct regulation of private casino gambling undermines the asserted justifications for the speech restriction before the Court. There may be valid reasons for imposing commercial regulations on non-Indian businesses that differ from those imposed on tribal enterprises, but it does not follow that those differences justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors. For the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct. To the extent that federal law distinguishes among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government presents no sound reason why such

Syllabus

lines bear any meaningful relationship to the Government's asserted interest. Pp. 188–194.

(d) Considering the manner in which § 1304 and its exceptions operate and the scope of the speech proscribed, the Government's second asserted interest—"assisting" States with policies that disfavor private casinos—provides no more convincing basis for upholding the regulation than the first. Even assuming that the state policies on which the Federal Government seeks to embellish are more coherent and pressing than their federal counterpart, § 1304 sacrifices an intolerable amount of truthful speech about lawful conduct when compared to the diverse policies at stake and the social ills that one could reasonably hope such a ban to eliminate. Pp. 194–195.

149 F. 3d 334, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post,* p. 196. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 197.

Bruce J. Ennis, Jr., argued the cause for petitioners. With him on the briefs were *Ashton R. Hardy, Nory Miller,* and *Donald B. Verrilli, Jr.*

Deputy Solicitor General Underwood argued the cause for respondents. With her on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Wallace, Matthew D. Roberts, Anthony J. Steinmeyer,* and *Christopher J. Wright.**

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*Briefs of *amici curiae* urging reversal were filed for the American Advertising Federation by *Richard E. Wiley* and *Daniel E. Troy;* for the American Gaming Association by *John G. Roberts, Jr., David G. Leitch,* and *Frank J. Fahrenkopf, Jr.;* for the Association of National Advertisers, Inc., by *John J. Walsh, Steven G. Brody,* and *Gilbert H. Weil;* for the Institute for Justice by *William H. Mellor, Clint Bolick,* and *Scott G. Bullock;* for the National Association of Broadcasters et al. by *P. Cameron DeVore, Gregory J. Kopta,* and *Jack N. Goodman;* and for the Washington Legal Foundation by *David H. Remes, Patricia A. Barald, Daniel J. Popeo,* and *Richard A. Samp.*

Gerald S. Rourke filed a brief for Valley Broadcasting Co. et al. as *amici curiae.*

JUSTICE STEVENS delivered the opinion of the Court.

Federal law prohibits some, but by no means all, broadcast advertising of lotteries and casino gambling. In *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993), we upheld the constitutionality of 18 U. S. C. § 1304 as applied to broadcast advertising of Virginia's lottery by a radio station located in North Carolina, where no such lottery was authorized. Today we hold that § 1304 may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal.

I

Through most of the 19th and the first half of the 20th centuries, Congress adhered to a policy that not only discouraged the operation of lotteries and similar schemes, but forbade the dissemination of information concerning such enterprises by use of the mails, even when the lottery in question was chartered by a state legislature.[1] Consistent with this Court's earlier view that commercial advertising was unprotected by the First Amendment, see *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942), we found that the notion that "lotteries . . . are supposed to have a demoralizing influence upon the people" provided sufficient justification for excluding circulars concerning such enterprises from the federal postal system, *Ex parte Jackson*, 96 U. S.

[1] See, *e. g.*, Act of Mar. 2, 1895, 28 Stat. 963 (prohibiting the transportation in interstate or foreign commerce, and the mailing of, tickets and advertisements for lotteries and similar enterprises); Act of Mar. 2, 1827, § 6, 4 Stat. 238 (restricting the participation of postmasters and assistant postmasters in the lottery business); Act of July 27, 1868, § 13, 15 Stat. 196 (prohibiting the mailing of any letters or circulars concerning lotteries or similar enterprises); Act of July 12, 1876, § 2, 19 Stat. 90 (repealing an 1872 limitation of the mails prohibition to letters and circulars concerning "illegal" lotteries); Anti-Lottery Act of 1890, § 1, 26 Stat. 465 (extending the mails prohibition to newspapers containing advertisements or prize lists for lotteries or gift enterprises).

727, 736–737 (1878). We likewise deferred to congressional judgment in upholding the similar exclusion for newspapers that contained either lottery advertisements or prize lists. *In re Rapier*, 143 U. S. 110, 134–135 (1892); see generally *Edge*, 509 U. S., at 421–422; *Lottery Case*, 188 U. S. 321 (1903). The current versions of these early antilottery statutes are now codified at 18 U. S. C. §§ 1301–1303.

Congress extended its restrictions on lottery-related information to broadcasting as communications technology made that practice both possible and profitable. It enacted the statute at issue in this case as § 316 of the Communications Act of 1934, 48 Stat. 1088. Now codified at 18 U. S. C. § 1304 ("Broadcasting lottery information"), the statute prohibits radio and television broadcasting, by any station for which a license is required, of

> "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes."

The statute provides that each day's prohibited broadcasting constitutes a separate offense punishable by a fine, imprisonment for not more than one year, or both. *Ibid.* Although § 1304 is a criminal statute, the Solicitor General informs us that, in practice, the provision traditionally has been enforced by the Federal Communications Commission (FCC), which imposes administrative sanctions on radio and television licensees for violations of the agency's implementing regulation. See 47 CFR § 73.1211 (1998); Brief for Respondents 3. Petitioners now concede that the broadcast ban in § 1304 and the FCC's regulation encompasses advertising for privately owned casinos—a concession supported by the broad language of the statute, our precedent, and the

FCC's sound interpretation. See *FCC* v. *American Broadcasting Co.*, 347 U. S. 284, 290–291, and n. 8 (1954).

During the second half of this century, Congress dramatically narrowed the scope of the broadcast prohibition in § 1304. The first inroad was minor: In 1950, certain not-for-profit fishing contests were exempted as "innocent pastimes . . . far removed from the reprehensible type of gambling activity which it was paramount in the congressional mind to forbid." S. Rep. No. 2243, 81st Cong., 2d Sess., 2 (1950); see Act of Aug. 16, 1950, ch. 722, 64 Stat. 451, 18 U. S. C. § 1305.

Subsequent exemptions were more substantial. Responding to the growing popularity of state-run lotteries, in 1975 Congress enacted the provision that gave rise to our decision in *Edge*. 509 U. S., at 422–423; Act of Jan. 2, 1975, 88 Stat. 1916, 18 U. S. C. § 1307; see also § 1953(b)(4). With subsequent modifications, that amendment now exempts advertisements of state-conducted lotteries from the nationwide postal restrictions in §§ 1301 and 1302, and from the broadcast restriction in § 1304, when "broadcast by a radio or television station licensed to a location in . . . a State which conducts such a lottery." § 1307(a)(1)(B); see also §§ 1307(a)(1)(A), (b)(1). The § 1304 broadcast restriction remained in place, however, for stations licensed in States that do not conduct lotteries. In *Edge*, we held that this remaining restriction on broadcasts from nonlottery States, such as North Carolina, supported the "laws against gambling" in those jurisdictions and properly advanced the "congressional policy of balancing the interests of lottery and nonlottery States." 509 U. S., at 428.

In 1988, Congress enacted two additional statutes that significantly curtailed the coverage of § 1304. First, the Indian Gaming Regulatory Act (IGRA), 102 Stat. 2467, 25 U. S. C. § 2701 *et seq.*, authorized Native American tribes to conduct various forms of gambling—including casino gambling—pursuant to tribal-state compacts if the State permits

such gambling "for any purpose by any person, organization, or entity." § 2710(d)(1)(B). The IGRA also exempted "any gaming conducted by an Indian tribe pursuant to" the Act from both the postal and transportation restrictions in 18 U. S. C. §§ 1301–1302, and the broadcast restriction in § 1304. 25 U. S. C. § 2720. Second, the Charity Games Advertising Clarification Act of 1988, 18 U. S. C. § 1307(a)(2), extended the exemption from §§ 1301–1304 for state-run lotteries to include any other lottery, gift enterprise, or similar scheme—not prohibited by the law of the State in which it operates—when conducted by: (i) any governmental organization; (ii) any not-for-profit organization; or (iii) a commercial organization as a promotional activity "clearly occasional and ancillary to the primary business of that organization." There is no dispute that the exemption in § 1307(a)(2) applies to casinos conducted by state and local governments. And, unlike the 1975 broadcast exemption for advertisements of and information concerning state-conducted lotteries, the exemptions in both of these 1988 statutes are not geographically limited; they shield messages from § 1304's reach in States that do not authorize such gambling as well as those that do.

A separate statute, the 1992 Professional and Amateur Sports Protection Act, 28 U. S. C. § 3701 *et seq.*, proscribes most sports betting and advertising thereof. Section 3702 makes it unlawful for a State or tribe "to sponsor, operate, advertise, promote, license, or authorize by law or compact"—or for a person "to sponsor, operate, advertise, or promote, pursuant to the law or compact" of a State or tribe—any lottery or gambling scheme based directly or indirectly on competitive games in which amateur or professional athletes participate. However, the Act also includes a variety of exemptions, some with obscured congressional purposes: (i) gambling schemes conducted by States or other governmental entities at any time between January 1, 1976, and August 31, 1990; (ii) gambling schemes authorized by

statutes in effect on October 2, 1991; (iii) gambling "conducted exclusively in casinos" located in certain municipalities if the schemes were authorized within 1 year of the effective date of the Act and, for "commercial casino gaming scheme[s]," that had been in operation for the preceding 10 years pursuant to a state constitutional provision and comprehensive state regulation applicable to that municipality; and (iv) gambling on parimutuel animal racing or jai-alai games. § 3704(a); see also 18 U. S. C. §§ 1953(b)(1)–(3) (regarding interstate transportation of wagering paraphernalia). These exemptions make the scope of § 3702's advertising prohibition somewhat unclear, but the prohibition is not limited to broadcast media and does not depend on the location of a broadcast station or other disseminator of promotional materials.

Thus, unlike the uniform federal antigambling policy that prevailed in 1934 when 18 U. S. C. § 1304 was enacted, federal statutes now accommodate both progambling and antigambling segments of the national polity.

II

Petitioners are an association of Louisiana broadcasters and its members who operate FCC-licensed radio and television stations in the New Orleans metropolitan area. But for the threat of sanctions pursuant to § 1304 and the FCC's companion regulation, petitioners would broadcast promotional advertisements for gaming available at private, for-profit casinos that are lawful and regulated in both Louisiana and neighboring Mississippi.[2] According to an FCC official, however, "[u]nder appropriate conditions, some broadcast signals from Louisiana broadcasting stations may be heard

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[2] See, *e. g.*, La. Rev. Stat. Ann. §§ 27:2, 27:15B(1), 27:42–27:43, 27:44(4), 27:44(10)–27:44(12) (West 1999); Miss. Code Ann. §§ 75–76–3, 97–33–25 (1972); see also La. Rev. Stat. Ann. §§ 27:202B–27:202D, 27:205(4), 27:205(12)–27:205(14), 27:210B (West 1999).

in neighboring states including Texas and Arkansas," 3 Record 628, where private casino gambling is unlawful.

Petitioners brought this action against the United States and the FCC in the District Court for the Eastern District of Louisiana, praying for a declaration that § 1304 and the FCC's regulation violate the First Amendment as applied to them, and for an injunction preventing enforcement of the statute and the rule against them. After noting that all parties agreed that the case should be decided on their cross-motions for summary judgment, the District Court ruled in favor of the Government. 866 F. Supp. 975, 976 (1994). The court applied the standard for assessing commercial speech restrictions set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980), and concluded that the restrictions at issue adequately advanced the Government's "substantial interest (1) in protecting the interest of nonlottery states and (2) in reducing participation in gambling and thereby minimizing the social costs associated therewith." 866 F. Supp., at 979. The court pointed out that federal law does not prohibit the broadcast of all information about casinos, such as advertising that promotes a casino's amenities rather than its "gaming aspects," and observed that advertising for state-authorized casinos in Louisiana and Mississippi was actually "abundant." *Id.*, at 980.

A divided panel of the Court of Appeals for the Fifth Circuit agreed with the District Court's application of *Central Hudson*, and affirmed the grant of summary judgment to the Government. 69 F. 3d 1296, 1298 (1995). The panel majority's description of the asserted governmental interests, although more specific, was essentially the same as the District Court's:

> "First, section 1304 serves the interest of assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate. The sec-

> ond asserted governmental interest lies in discouraging public participation in commercial gambling, thereby minimizing the wide variety of social ills that have historically been associated with such activities." *Id.*, at 1299.

The majority relied heavily on our decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), see 69 F. 3d, at 1300–1302, and endorsed the theory that, because gambling is in a category of "vice activity" that can be banned altogether, "advertising of gambling can lay no greater claim on constitutional protection than the underlying activity," *id.*, at 1302. In dissent, Chief Judge Politz contended that the many exceptions to the original prohibition in § 1304—and that section's conflict with the policies of States that had legalized gambling—precluded justification of the restriction by either an interest in supporting anticasino state policies or "an independent federal interest in discouraging public participation in commercial gambling." *Id.*, at 1303–1304.

While the broadcasters' petition for certiorari was pending in this Court, we decided *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996). Because the opinions in that case concluded that our precedent both preceding and following *Posadas* had applied the *Central Hudson* test more strictly, 517 U. S., at 509–510 (opinion of STEVENS, J.); *id.*, at 531–532 (O'CONNOR, J., concurring in judgment)—and because we had rejected the argument that the power to restrict speech about certain socially harmful activities was as broad as the power to prohibit such conduct, see *id.*, at 513–514 (opinion of STEVENS, J.); see also *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 482–483, n. 2 (1995)—we granted the broadcasters' petition, vacated the judgment of the Court of Appeals, and remanded the case for further consideration. 519 U. S. 801 (1996).

On remand, the Fifth Circuit majority adhered to its prior conclusion. 149 F. 3d 334 (1998). The majority recognized

that at least part of the *Central Hudson* inquiry had "become a tougher standard for the state to satisfy," 149 F. 3d, at 338, but held that § 1304's restriction on speech sufficiently advanced the asserted governmental interests and was not "broader than necessary to control participation in casino gambling," *id.*, at 340. Because the Court of Appeals for the Ninth Circuit reached a contrary conclusion in *Valley Broadcasting Co.* v. *United States*, 107 F. 3d 1328, cert. denied, 522 U. S. 1115 (1998), as did a Federal District Court in *Players Int'l, Inc.* v. *United States*, 988 F. Supp. 497 (NJ 1997), we again granted the broadcasters' petition for certiorari. 525 U. S. 1097 (1999). We now reverse.

III

In a number of cases involving restrictions on speech that is "commercial" in nature, we have employed *Central Hudson*'s four-part test to resolve First Amendment challenges:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U. S., at 566.

In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Edenfield* v. *Fane*, 507 U. S. 761, 770 (1993); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 71, and n. 20 (1983).

The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, inter-

related: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three. Partly because of these intricacies, petitioners as well as certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech.[3] As the opinions in *44 Liquormart* demonstrate, reasonable judges may disagree about the merits of such proposals. It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground. See *United States* v. *Raines*, 362 U. S. 17, 21 (1960). In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

IV

All parties to this case agree that the messages petitioners wish to broadcast constitute commercial speech, and that these broadcasts would satisfy the first part of the *Central Hudson* test: Their content is not misleading and concerns lawful activities, *i. e.*, private casino gambling in Louisiana and Mississippi. As well, the proposed commercial messages would convey information—whether taken favorably or unfavorably by the audience—about an activity that is the subject of intense public debate in many communities. In addition, petitioners' broadcasts presumably would dissemi-

[3] See, *e. g.*, Pet. for Cert. 23; Brief for Petitioners 10; Reply Brief for Petitioners 18–20; *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 526–528 (1996) (THOMAS, J., concurring); Kozinski & Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627 (1990); Brief for Association of National Advertisers, Inc., as *Amicus Curiae* 3–4; Brief for American Advertising Federation as *Amicus Curiae* 2.

nate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition. Thus, even if the broadcasters' interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 764–765 (1976); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 96–97 (1977); *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975).

The second part of the *Central Hudson* test asks whether the asserted governmental interest served by the speech restriction is substantial. The Solicitor General identifies two such interests: (1) reducing the social costs associated with "gambling" or "casino gambling," and (2) assisting States that "restrict gambling" or "prohibit casino gambling" within their own borders.[4] Underlying Congress' statutory scheme, the Solicitor General contends, is the judgment that gambling contributes to corruption and organized crime; underwrites bribery, narcotics trafficking, and other illegal conduct; imposes a regressive tax on the poor; and "offers a false but sometimes irresistible hope of financial advancement." Brief for Respondents 15–16. With respect to casino gambling, the Solicitor General states that many of the associated social costs stem from "pathological" or "compulsive" gambling by approximately 3 million Americans, whose behavior is primarily associated with "continuous play" games, such as slot machines. He also observes that compulsive gambling has grown along with the expansion of legalized gambling nationwide, leading to billions of dollars in economic costs; injury and loss to these

[4] Brief for Respondents 12, 15, 28. We will concentrate on the Government's contentions as to "casino gambling": They are the focus of the Government's argument and are more closely linked to the speech regulation at issue, thereby providing a more likely basis for upholding § 1304 as applied to these broadcasters and their proposed messages.

gamblers as well as their families, communities, and government; and street, white-collar, and organized crime. *Id.*, at 16–20.

We can accept the characterization of these two interests as "substantial," but that conclusion is by no means self-evident. No one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills recited above, or in assisting like-minded States to do the same. Cf. *Edge*, 509 U. S., at 428. But in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits.[5] Despite its awareness of the potential

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[5] Some form of gambling is legal in nearly every State. Government Lodging 192. Thirty-seven States and the District of Columbia operate lotteries. *Ibid.;* National Gambling Impact Study Commission, Staff Report: Lotteries 1 (1999). As of 1997, commercial casino gambling existed in 11 States, see North American Gaming Report 1997, Int'l Gaming & Wagering Bus., July 1997, pp. S4–S31, and at least 5 authorize state-sponsored video gambling, see Del. Code Ann., Tit. 29, §§ 4801, 4803(f)–(g), 4820 (1974 and Supp. 1997); Ore. Rev. Stat. § 461.215 (1998); R. I. Gen. Laws § 42–61.2–2(a) (1998); S. D. Const., Art. III, § 25 (1999); S. D. Comp. Laws Ann. §§ 42–7A–4(4), (11A) (1991); W. Va. Code § 29–22A–4 (1999). Also as of 1997, about half the States in the Union hosted Class III Indian gaming (which may encompass casino gambling), including Louisiana, Mississippi, and four other States that had private casinos. United States General Accounting Office, Casino Gaming Regulation: Roles of Five States and the National Indian Gaming Commission 4–6 (May 1998) (including Indian casino gaming in five States without approved compacts); cf. National Gambling Impact Study Commission, Staff Report: Native American Gaming 2 (1999) (hereinafter Native American Gaming) (noting that 14 States have on-reservation Indian casinos, and that those casinos are the only casinos in 8 States). One count by the Bureau of Indian Affairs tallied 60 tribes that advertise their casinos on television and radio. Government Lodging 408, 435–437 (3 App. in *Player's Int'l, Inc.* v. *United States*, No. 98–5127 (CA3)). By the mid-1990's, tribal casino-style gambling generated over $3 billion in gaming revenue—increasing its share to 18%

social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities. See, *e. g.*, 18 U. S. C. §§ 1307, 1953(b); 25 U. S. C. §§ 2701–2702, 2710(d); 28 U. S. C. § 3704(a). That Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States. Indeed, in *Edge* we identified the federal interest furthered by § 1304's partial broadcast ban as the "congressional policy of balancing the interests of lottery and nonlottery States." 509 U. S., at 428. Whatever its character in 1934 when § 1304 was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal.

Of course, it is not our function to weigh the policy arguments on either side of the nationwide debate over whether and to what extent casino and other forms of gambling should be legalized. Moreover, enacted congressional policy and "governmental interests" are not necessarily equivalents for purposes of commercial speech analysis. See *Bolger*, 463 U. S., at 70–71. But we cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General. See *Edenfield*, 507 U. S., at 768; *44 Liquormart*, 517 U. S., at 531 (O'Connor, J., concurring in judgment). Even though the Government has identified substantial interests, when we consider both their quality and the information sought to be suppressed, the crosscurrents in the scope and application of § 1304 become more difficult for the Government to defend.

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of all casino gaming revenue, matching the total for the casinos in Atlantic City, New Jersey, and reaching about half the figure for Nevada's casinos. See Native American Gaming 2; Government Lodging 407, 423–429.

V

The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech 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. Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U. S., at 564. We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin*, 514 U. S., at 487, quoting *Edenfield*, 507 U. S., at 771.

The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U. S., at 480 (internal quotation marks omitted); see *44 Liquormart*, 517 U. S., at 529, 531 (O'Connor, J., concurring in judgment). On the whole, then, the challenged regulation should indicate that its proponent "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417 (1993), quoting *Fox*, 492 U. S., at 480.

As applied to petitioners' case, § 1304 cannot satisfy these standards. With regard to the first asserted interest—

alleviating the social costs of casino gambling by limiting demand—the Government contends that its broadcasting restrictions directly advance that interest because "promotional" broadcast advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs. Additionally, the Government believes that compulsive gamblers are especially susceptible to the pervasiveness and potency of broadcast advertising. Brief for Respondents 33–36. Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce. See n. 5, *supra*. And, as the Court of Appeals recognized, the Government fails to "connect casino gambling and compulsive gambling with broadcast advertising for casinos"—let alone broadcast advertising for non-Indian commercial casinos. 149 F. 3d, at 339.[6]

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[6] The Government cites several secondary sources and declarations that it put before the Federal District Court in New Jersey and, as an alternative to affirming the judgment below, requests a remand so that it may have another chance to build a record in the Fifth Circuit. Remand is inappropriate for several reasons. First, the Government had ample opportunity to enter the materials it thought relevant after we vacated the Fifth Circuit's first ruling and remanded for reconsideration in light of *44 Liquormart*. Second, the Government's evidence did not convince the New Jersey court that § 1304 could be constitutionally applied in circumstances similar to this case, see *Players Int'l, Inc.* v. *United States*, 988

We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government's case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it. See *Rubin*, 514 U. S., at 488. Under current law, a broadcaster may not carry advertising about privately operated commercial casino gambling, regardless of the location of the station or the casino. 18 U. S. C. § 1304; 47 CFR § 73.1211(a) (1998). On the other hand, advertisements for tribal casino gambling authorized by state compacts—whether operated by the tribe or by a private party pursuant to a management contract—are subject to no such broadcast ban, even if the broadcaster is located in, or broadcasts to, a jurisdiction with the strictest of antigambling policies. 25 U. S. C. § 2720. Government-operated, nonprofit, and "occasional and ancillary" commercial casinos are likewise exempt. 18 U. S. C. § 1307(a)(2).

The FCC's interpretation and application of §§ 1304 and 1307 underscore the statute's infirmity. Attempting to enforce the underlying purposes and policy of the statute, the FCC has permitted broadcasters to tempt viewers with claims of "Vegas-style excitement" at a commercial "casino," if "casino" is part of the establishment's proper name and the advertisement can be taken to refer to the casino's amenities,

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F. Supp. 497, 502–503, 506–507 (1997), and most of the sources that the Government cited in the New Jersey litigation were also presented to the Fifth Circuit, see Supplemental Brief for Appellees in No. 94–30732 (CA5), pp. iv–v. Indeed, the Government presented sources to the Fifth Circuit not provided to the New Jersey court, and the Fifth Circuit relied on material that the Government had not proffered. In any event, as we shall explain, additional evidence to support the Government's factual assertions in this Court cannot justify the scheme of speech restrictions currently in effect.

rather than directly promote its gaming aspects.[7] While we can hardly fault the FCC in view of the statute's focus on the suppression of certain types of information, the agency's practice is squarely at odds with the governmental interests asserted in this case.

From what we can gather, the Government is committed to prohibiting accurate product information, not commercial enticements of all kinds, and then only when conveyed over certain forms of media and for certain types of gambling—indeed, for only certain brands of *casino* gambling—and despite the fact that messages about the availability of such gambling are being conveyed over the airwaves by other speakers.

Even putting aside the broadcast exemptions for arguably distinguishable sorts of gambling that might also give rise to social costs about which the Federal Government is concerned—such as state lotteries and parimutuel betting on horse and dog races, § 1307(a)(1)(B); 28 U. S. C. § 3704(a)—the Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos. The Government cites revenue needs of States and tribes that conduct casino gambling, and notes that net revenues generated by the tribal casinos are dedicated to the welfare of the tribes and their members. See 25 U. S. C. §§ 2710(b)(2)(B), (d)(1)(A)(ii), (2)(A). Yet the Government admits that tribal casinos offer precisely the same types of gambling as private casinos. Further, the Solicitor General does not maintain that government-operated casino gaming is any different, that States cannot derive revenue from taxing private casinos, or that any one class

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[7] See, *e. g.*, *Letter to DR Partners*, 8 FCC Rcd. 44 (1992); *In re WTMJ, Inc.*, 8 FCC Rcd. 4354 (1993) (disapproving of the phrase "Vegas style games"); see also 2 Record 493, 497–498 (Mass Media Bureau letter to Forbes W. Blair, Apr. 10, 1987) (concluding that a proposed television commercial stating that the "odds for fun are high" at the sponsor's establishment would be lawful); *id.*, at 492, 500–501.

of casino operators is likely to advertise in a meaningfully distinct manner from the others. The Government's suggestion that Indian casinos are too isolated to warrant attention is belied by a quick review of tribal geography and the Government's own evidence regarding the financial success of tribal gaming. See n. 5, *supra.* If distance were determinative, Las Vegas might have remained a relatively small community, or simply disappeared like a desert mirage.

Ironically, the most significant difference identified by the Government between tribal and other classes of casino gambling is that the former is "heavily regulated." Brief for Respondents 38. If such direct regulation provides a basis for believing that the social costs of gambling in tribal casinos are sufficiently mitigated to make their advertising tolerable, one would have thought that Congress might have at least experimented with comparable regulation before abridging the speech rights of federally *un*regulated casinos. While Congress' failure to institute such direct regulation of private casino gambling does not necessarily compromise the constitutionality of § 1304, it does undermine the asserted justifications for the restriction before us. See *Rubin,* 514 U. S., at 490–491. There surely are practical and nonspeech-related forms of regulation—including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements—that could more directly and effectively alleviate some of the social costs of casino gambling.

We reached a similar conclusion in *Rubin.* There, we considered the effect of conflicting federal policies on the Government's claim that a speech restriction materially advanced its interest in preventing so-called "strength wars" among competing sellers of certain alcoholic beverages. We concluded that the effect of the challenged restriction on commercial speech had to be evaluated in the context of the entire regulatory scheme, rather than in isolation,

and we invalidated the restriction based on the "overall irrationality of the Government's regulatory scheme." *Id.*, at 488. As in this case, there was "little chance" that the speech restriction could have directly and materially advanced its aim, "while other provisions of the same Act directly undermine[d] and counteract[ed] its effects." *Id.*, at 489. Coupled with the availability of other regulatory options which could advance the asserted interests "in a manner less intrusive to [petitioners'] First Amendment rights," we found that the Government could not satisfy the *Central Hudson* test. *Id.*, at 490–491.

Given the special federal interest in protecting the welfare of Native Americans, see *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 216–217 (1987), we recognize that there may be valid reasons for imposing commercial regulations on non-Indian businesses that differ from those imposed on tribal enterprises. It does not follow, however, that those differences also justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors. For the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct. *44 Liquormart*, 517 U. S., at 509–511 (opinion of STEVENS, J.); see *id.*, at 531–532 (O'CONNOR, J., concurring in judgment); *Rubin*, 514 U. S., at 483, n. 2. It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone. *Fox*, 492 U. S., at 480. And to the extent that the purpose and operation of federal law distinguishes among information about tribal, governmental, and private casinos based on the identity of their owners or operators, the Government presents no sound reason why such lines bear any meaningful relationship to the particular interest asserted: minimizing casino gambling and its social costs by way of a (partial) broadcast ban. *Discovery Network*, 507 U. S., at 424, 428. Even under the degree of scrutiny that we have

applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment. Cf. *Carey* v. *Brown*, 447 U. S. 455, 465 (1980); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, 784–785 (1978).

The second interest asserted by the Government—the derivative goal of "assisting" States with policies that disfavor private casinos—adds little to its case. We cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any *state* interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar *federal* interest.

Furthermore, even assuming that the state policies on which the Federal Government seeks to embellish are more coherent and pressing than their federal counterpart, § 1304 sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate. The Government argues that petitioners' speech about private casino gambling should be prohibited in Louisiana because, "under appropriate conditions," 3 Record 628, citizens in neighboring States like Arkansas and Texas (which hosts tribal, but not private, commercial casino gambling) might hear it and make rash or costly decisions. To be sure, in order to achieve a broader objective such regulations may incidentally, even deliberately, restrict a certain amount of speech not thought to contribute significantly to the dangers with which the Government is concerned. See *Fox*, 492 U. S., at 480; cf. *Edge*, 509 U. S., at 429–430.[8] But Congress' choice here was neither a rough

[8] As we stated in *Edge:* "[A]pplying the restriction to a broadcaster such as [respondent] directly advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policies of lottery States like Virginia . . . . [W]e judge the validity of the restriction in this case by the relation it bears to the general problem of accom-

approximation of efficacy, nor a reasonable accommodation of competing state and private interests. Rather, the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all. Considering the manner in which § 1304 and its exceptions operate and the scope of the speech it proscribes, the Government's second asserted interest provides no more convincing basis for upholding the regulation than the first.

VI

Accordingly, respondents cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct. *Edenfield*, 507 U. S., at 767. Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, see *Edge*, 509 U. S., at 428, this might be a different case. But under current federal law, as applied to petitioners and the messages that they wish to convey, the broadcast prohibition in 18 U. S. C. § 1304 and 47 CFR § 73.1211 (1998) violates the

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modating the policies of both lottery and nonlottery States." 509 U. S., at 429–430. The Government points out that *Edge* hypothesized that Congress "might have" held fast to a more consistent and broader antigambling policy by continuing to ban all radio or television advertisements for state-run lotteries, even by stations licensed in States with legalized lotteries. *Id.*, at 428. That dictum does not support the validity of the speech restriction in this case. In that passage, we identified the actual federal interest at stake; we did not endorse any and all nationwide bans on nonmisleading broadcast advertising related to lotteries. As the Court explained, "Instead of favoring either the lottery or the nonlottery State, Congress opted to" accommodate the policies of both; and it was "[t]his congressional policy of balancing the interests of lottery and nonlottery States" that was "the substantial governmental interest that satisfie[d] *Central Hudson*." *Ibid.*

First Amendment. The judgment of the Court of Appeals is therefore

Reversed.

CHIEF JUSTICE REHNQUIST, concurring.

Title 18 U. S. C. § 1304 regulates broadcast advertising of lotteries and casino gambling. I agree with the Court that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies," *ante,* at 190, that it violates the First Amendment. But, as the Court observes:

> "There surely are practical and nonspeech-related forms of regulation—including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements—that could more directly and effectively alleviate some of the social costs of casino gambling." *Ante,* at 192.

Were Congress to undertake substantive regulation of the gambling industry, rather than simply the manner in which it may broadcast advertisements, "exemptions and inconsistencies" such as those in § 1304 might well prove constitutionally tolerable. "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U. S. 483, 489 (1955) (citations omitted).

But when Congress regulates commercial speech, the *Central Hudson* test imposes a more demanding standard

of review. I agree with the Court that that standard has not been met here, and I join its opinion.

JUSTICE THOMAS, concurring in the judgment.

I continue to adhere to my view that "[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not be applied because "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518 (1996) (opinion concurring in part and concurring in judgment). Accordingly, I concur only in the judgment.

Syllabus

CUNNINGHAM *v.* HAMILTON COUNTY, OHIO

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

No. 98–727. Argued April 19, 1999—Decided June 14, 1999

When petitioner, an attorney representing a plaintiff, failed to comply with certain discovery orders, the Magistrate Judge granted the respondent's motion for sanctions against petitioner under Federal Rule of Civil Procedure 37(a)(4). The District Court affirmed the sanctions order and also disqualified petitioner as counsel. Although the District Court proceedings were ongoing, petitioner immediately appealed the order affirming the sanctions award. Because federal appellate court jurisdiction is ordinarily limited to appeals from "final decisions of the district courts," 28 U. S. C. § 1291, the Sixth Circuit dismissed for lack of jurisdiction. It held that the sanctions order was not immediately appealable under the collateral order doctrine, which provides that certain orders may be appealed, notwithstanding the absence of final judgment, but only when they are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action, *e. g., Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42. The court found these conditions unsatisfied because the issues involved in petitioner's appeal were not completely separate from the merits. Regarding petitioner's disqualification, the court held that a nonparticipating attorney, like a participating attorney, ordinarily must await final disposition of the underlying case before filing an appeal. It avoided deciding whether the order was effectively unreviewable absent an immediate appeal, but saw no reason why, after final judgment in the underlying case, a sanctioned attorney should be unable to appeal a sanctions order.

Held: An order imposing sanctions on an attorney pursuant to Rule 37(a)(4) is not a "final decision" under § 1291, even where the attorney no longer represents a party in the case. Although the Rule 37 sanction imposed on petitioner would not ordinarily be considered a "final decision" because it neither ended the litigation nor left the court only to execute its judgment, see, *e. g., Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 798, this Court has interpreted § 1291 to permit jurisdiction over appeals that meet the conditions of the collateral order doctrine. Respondent conceded that the sanctions order was conclusive, so at least one of those conditions is presumed to have been satisfied.

Appellate review of a Rule 37(a) sanctions order, however, cannot remain completely separate from the merits. See, *e. g., Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 521–522. Here, some of the sanctions were based on the fact that petitioner provided partial responses and objections to some of the defendants' discovery requests. To evaluate whether those sanctions were appropriate, an appellate court would have to assess the completeness of her responses. Such an inquiry would differ only marginally from an inquiry into the merits. Petitioner's argument that a sanctions order is effectively unreviewable on appeal from a final judgment suffers from at least two flaws. First, it ignores the identity of interests between the attorney and client. The effective congruence of those interests counsels against treating attorneys like other nonparties, since attorneys assume an ethical obligation to serve their clients' interests even where they might have a personal interest in seeking vindication from the sanctions order. See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 434–435. Second, unlike a contempt order, a Rule 37(a) sanctions order lacks any prospective effect and is not designed to compel compliance. To permit an immediate appeal would undermine the very purposes of Rule 37(a), which was designed to protect courts and opposing parties from delaying or harassing tactics during discovery, and would undermine trial judges' discretion to structure a sanction in the most effective manner. Finally, a Rule 37 sanction's appealability should not turn on an attorney's continued participation, as such a rule could not be easily administered and may be subject to abuse. Although a sanctions order may sometimes impose hardship on an attorney, solutions other than an expansive interpretation of § 1291's "final decision" requirement remain available. Pp. 203–210.

144 F. 3d 418, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 210.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Jonathan D. Schiller* and *Teresa L. Cunningham.*

John J. Arnold argued the cause for respondent. With him on the brief were *Carl J. Stich* and *Shannon M. Reynolds.*

JUSTICE THOMAS delivered the opinion of the Court.

Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." 28 U. S. C. § 1291. This case presents the question whether an order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) is a final decision. We hold that it is not, even where, as here, the attorney no longer represents a party in the case.

I

Petitioner, an attorney, represented Darwin Lee Starcher in a federal civil rights suit filed against respondent and other defendants. Starcher brought the suit after his son, Casey, committed suicide while an inmate at the Hamilton County Justice Center.[1] The theory of the original complaint was that the defendants willfully ignored their duty to care for Casey despite his known history of suicide attempts.

A Magistrate Judge oversaw discovery. On May 29, 1996, petitioner was served with a request for interrogatories and documents; responses were due within 30 days after service. See Fed. Rules Civ. Proc. 33(b)(3), 34(b). This deadline, however, passed without compliance. The Magistrate Judge ordered the plaintiff "by 4:00 p.m. on July 12, 1996 to make full and complete responses" to defendants' requests for interrogatories and documents and further ordered that four witnesses—Rex Smith, Roxanne Dieffenbach, and two individual defendants—be deposed on July 25, 1996. *Starcher* v. *Correctional Medical Systems, Inc.*, No. C1–95–815 (SD Ohio, July 11, 1996), p. 2.

Petitioner failed to heed the Magistrate Judge's commands. She did not produce the requested documents, gave incomplete responses to several of the interrogatories, and objected to several others. Flouting the Magistrate Judge's

[1] Starcher died sometime after he initiated the suit, and Casey's sister became the new administrator of Casey's estate.

order, she noticed the deposition of Rex Smith on July 22, 1996, not July 25, and then refused to withdraw this notice despite reminders from defendants' counsel. And even though the Magistrate Judge had specified that the individual defendants were to be deposed only if plaintiff had complied with his order to produce "full and complete" responses, she filed a motion to compel their appearance. Respondent and other defendants then filed motions for sanctions against petitioner.

At a July 19 hearing, the Magistrate Judge granted the defendants' motions for sanctions. In a subsequent order, he found that petitioner had violated the discovery order and described her conduct as "egregious." App. to Pet. for Cert. 9a. Relying on Federal Rule of Civil Procedure 37(a)(4), the Magistrate Judge ordered petitioner to pay the Hamilton County treasurer $1,494, representing costs and fees incurred by the Hamilton County prosecuting attorney as counsel for respondent and one individual defendant.[2] He took care to specify, however, that he had not held a contempt hearing and that petitioner was never found to be in contempt of court.

The District Court affirmed the Magistrate Judge's sanctions order. The court noted that the matter "ha[d] already consumed an inordinate amount of the Court's time" and described the Magistrate's job of overseeing discovery as a "task assum[ing] the qualities of a full time occupation." App. to Pet. for Cert. 10a. It found that "[t]he Magistrate Judge did not err in concluding that sanctions were appropriate" and that "the amount of the Magistrate Judge's award was not contrary to law." *Id.*, at 11a. The District Court also granted several defendants' motions to disqualify petitioner as counsel for plaintiff due to the fact that she was a material witness in the case.

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[2] He also ordered petitioner to pay $2,432 as costs and fees incurred by other defendants in the case. Those sanctions were later satisfied pursuant to a settlement agreement and are not at issue in this appeal.

Although proceedings in the District Court were ongoing, petitioner immediately appealed the District Court's order affirming the Magistrate Judge's sanctions award to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, over a dissent, dismissed the appeal for lack of jurisdiction. *Starcher* v. *Correctional Medical Systems, Inc.*, 144 F. 3d 418 (1998). It considered whether the sanctions order was immediately appealable under the collateral order doctrine, which provides that certain orders may be appealed, notwithstanding the absence of final judgment, but only when they "are conclusive, . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995) (citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949)). In the Sixth Circuit's view, these conditions were not satisfied because the issues involved in petitioner's appeal were not "completely separate" from the merits. 144 F. 3d, at 424. As for the fact that petitioner had been disqualified as counsel, the court held that "a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal." *Id.*, at 425. It avoided deciding whether the order was effectively unreviewable absent an immediate appeal but saw "no reason why, after final resolution of the underlying case . . . a sanctioned attorney should be unable to appeal the order imposing sanctions." *Ibid.*

The Federal Courts of Appeals disagree over whether an order of Rule 37(a) sanctions against an attorney is immediately appealable under § 1291. Compare, *e. g.*, *Eastern Maico Distributors, Inc.* v. *Maico-Fahrzeugfabrik, G.m.b.h.*, 658 F. 2d 944, 946–951 (CA3 1981) (order not immediately appealable), with *Telluride Management Solutions, Inc.* v. *Telluride Investment Group*, 55 F. 3d 463, 465 (CA9 1995) (order immediately appealable). We granted a writ of cer-

tiorari, limited to this question, 525 U. S. 1098 (1999), and now affirm.[3]

II

Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from "final decisions" of the district courts. It descends from the Judiciary Act of 1789, where "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 798 (1989) (quoting 1 Stat. 84); see generally Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539, 548–551 (1932) (discussing history of final judgment rule in the United States). In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. See, *e. g.*, *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 712 (1996); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 867 (1994); *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 430 (1985). As we explained in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368 (1981), the final judgment rule serves several salutary purposes:

> "It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from

[3] Petitioner also sought review of the Sixth Circuit's decision to apply its appealability ruling to petitioner rather than to apply that ruling only prospectively. We declined to review this question.

> the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration." *Id.*, at 374 (citations and internal quotation marks omitted).

Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 521–522 (1988) (quoting *Catlin* v. *United States*, 324 U. S. 229, 233 (1945)).

The Rule 37 sanction imposed on petitioner neither ended the litigation nor left the court only to execute its judgment. Thus, it ordinarily would not be considered a final decision under § 1291. See, *e. g.*, *Midland Asphalt Corp.*, *supra*, at 798; *Richardson-Merrell*, *supra*, at 430. However, we have interpreted the term "final decision" in § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. *E. g.*, *Quackenbush*, *supra*, at 711–715; *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 142–147 (1993); *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–530 (1985); *Cohen*, *supra*, at 545–547. "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, *supra*, at 42.[4]

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[4] Most of our collateral order decisions have considered whether an order directed at a party to the litigation is immediately appealable. *E. g.*, *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468–469 (1978). Petitioner, of course, was an attorney representing the plaintiff in the case. It is nevertheless clear that a decision does not automatically become final merely because it is directed at someone other than a plaintiff or defendant. See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 434–435 (1985) (rejecting, as outside collateral order doctrine, immediate appeal of order disqualifying counsel). For example, we have repeatedly held that a wit-

Respondent conceded that the sanctions order was conclusive, Brief in Opposition 11, so at least one of the collateral order doctrine's conditions is presumed to have been satisfied. We do not think, however, that appellate review of a sanctions order can remain completely separate from the merits. See *Van Cauwenberghe*, *supra*, at 527–530; *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978). In *Van Cauwenberghe*, for example, we held that the denial of a motion to dismiss on the ground of *forum non conveniens* was not a final decision. We reasoned that consideration of the factors underlying that decision such as "the relative ease of access to sources of proof" and "the availability of witnesses" required trial courts to "scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." 486 U. S., at 528. Similarly, in *Coopers & Lybrand*, we held that a determination that an action may not be maintained as a class action also was not a final decision, noting that such a determination was enmeshed in the legal and factual aspects of the case. 437 U. S., at 469.

Much like the orders at issue in *Van Cauwenberghe* and *Coopers & Lybrand*, a Rule 37(a) sanctions order often will be inextricably intertwined with the merits of the action. An evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response. See, *e. g.*, *Thomas E. Hoar, Inc.* v. *Sara Lee Corp.*, 882 F. 2d 682, 687 (CA2 1989) (adequacy of responses); *Outley*

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ness subject to a discovery order, but not held in contempt, generally may not appeal the order. See, *e. g.*, *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72, 76 (1988); *United States* v. *Ryan*, 402 U. S. 530, 533–534 (1971); *Cobbledick* v. *United States*, 309 U. S. 323, 327–330 (1940); *Webster Coal & Coke Co.* v. *Cassatt*, 207 U. S. 181, 186–187 (1907); *Alexander* v. *United States*, 201 U. S. 117, 121 (1906).

v. *New York*, 837 F. 2d 587, 590–591 (CA2 1988) (importance of incomplete answers to interrogatories); *Evanson* v. *Union Oil Company of Cal.*, 619 F. 2d 72, 74 (Temp. Emerg. Ct. App. 1980) (truthfulness of responses). Some of the sanctions in this case were based on the fact that petitioner provided partial responses and objections to some of the defendants' discovery requests. To evaluate whether those sanctions were appropriate, an appellate court would have to assess the completeness of petitioner's responses. See Fed. Rule Civ. Proc. 37(a)(3) ("For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond"). Such an inquiry would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine. Perhaps not every discovery sanction will be inextricably intertwined with the merits, but we have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral. See, *e. g.*, *Digital Equipment Corp.*, 511 U. S., at 868; *Richardson-Merrell*, 472 U. S., at 439.

Even if the merits were completely divorced from the sanctions issue, the collateral order doctrine requires that the order be effectively unreviewable on appeal from a final judgment. Petitioner claims that this is the case. In support, she relies on a line of decisions holding that one who is not a party to a judgment generally may not appeal from it. See, *e. g.*, *Karcher* v. *May*, 484 U. S. 72, 77 (1987). She also posits that contempt orders imposed on witnesses who disobey discovery orders are immediately appealable and argues that the sanctions order in this case should be treated no differently.

Petitioner's argument suffers from at least two flaws. It ignores the identity of interests between the attorney and client. Unlike witnesses, whose interests may differ substantially from the parties', attorneys assume an ethical obligation to serve their clients' interests. *Evans* v. *Jeff D.*, 475

U. S. 717, 728 (1986). This obligation remains even where the attorney might have a personal interest in seeking vindication from the sanctions order. See *Richardson-Merrell*, *supra*, at 434–435. In *Richardson-Merrell*, we held that an order disqualifying an attorney was not an immediately appealable final decision. 472 U. S., at 429–440; see also *Flanagan* v. *United States*, 465 U. S. 259, 263–269 (1984) (order disqualifying attorney in criminal case not a "final decision" under § 1291). We explained that "[a]n attorney who is disqualified for misconduct may well have a personal interest in pursuing an immediate appeal, an interest which need not coincide with the interests of the client. As a matter of professional ethics, however, the decision to appeal should turn entirely on the client's interest." *Richardson-Merrell*, *supra*, at 435 (citing ABA Model Rules of Professional Conduct 1.7(b), 2.1 (1985)). This principle has the same force when an order of discovery sanctions is imposed on the attorney alone. See *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F. 2d 1303, 1305 (CA9 1984) (Kennedy, J.). The effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal. Cf. *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72, 78 (1988).

Petitioner's argument also overlooks the significant differences between a finding of contempt and a Rule 37(a) sanctions order. "Civil contempt is designed to force the contemnor to comply with an order of the court." *Willy* v. *Coastal Corp.*, 503 U. S. 131, 139 (1992). In contrast, a Rule 37(a) sanctions order lacks any prospective effect and is not designed to compel compliance. Judge Adams captured the essential distinction between the two types of orders when he noted that an order such as civil contempt

> "is not simply to deter harassment and delay, but to effect some discovery conduct. A non-party's interest in resisting a discovery order is immediate and usually sep-

> arate from the parties' interests in delay. Before final judgment is reached, the non-party either will have surrendered the materials sought or will have suffered incarceration or steadily mounting fines imposed to compel the discovery. If the discovery is held unwarranted on appeal only after the case is resolved, the non-party's injury may not be possible to repair. Under Rule 37(a), no similar situation exists. The objective of the Rule is the prevention of delay and costs to other litigants caused by the filing of groundless motions. An attorney sanctioned for such conduct by and large suffers no inordinate injury from a deferral of appellate consideration of the sanction. He need not in the meantime surrender any rights or suffer undue coercion." *Eastern Maico Distributors*, 658 F. 2d, at 949–950 (citation and footnote omitted).

To permit an immediate appeal from such a sanctions order would undermine the very purposes of Rule 37(a), which was designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process.[5]

[5] In 1970, the prerequisites for imposing sanctions were redesigned "to encourage judges to be more alert to abuses occurring in the discovery process." Advisory Committee's Notes on Fed. Rule Civ. Proc. 37(a)(4), 28 U. S. C., p. 748. Before 1970, the Rule required a court, after granting a motion to compel discovery but before imposing sanctions, to find the losing party to have acted without substantial justification. At that time, courts rarely exercised this authority to impose sanctions. See W. Glaser, Pretrial Discovery and the Adversary System 154 (1968). While the amended Rule retained the substantial justification requirement, the placement of the requirement was changed so that the Rule provided that the district court, upon granting the motion to compel, "shall" impose the sanction unless it found that the losing party's conduct was "substantially justified." The change in placement signaled a shift in presumption about the appropriateness of sanctions for discovery abuses. See Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. L. & Soc. Probs. 623, 642 (1972) ("The Advisory Committee reversed the presumption in Rule 37(a)(4) in order to encourage the awarding of expenses and fees wherever applicable").

Immediate appeals of such orders would undermine trial judges' discretion to structure a sanction in the most effective manner. They might choose not to sanction an attorney, despite abusive conduct, in order to avoid further delays in their proceedings. Not only would such an approach ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, see *Firestone Tire & Rubber Co.*, 449 U. S., at 374, it also could forestall resolution of the case as each new sanction would give rise to a new appeal. The result might well be the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent.

Petitioner finally argues that, even if an attorney ordinarily may not immediately appeal a sanction order, special considerations apply when the attorney no longer represents a party in the case. Like the Sixth Circuit, we do not think that the appealability of a Rule 37 sanction imposed on an attorney should turn on the attorney's continued participation. Such a rule could not be easily administered. For example, it may be unclear precisely when representation terminates, and questions likely would arise over when the 30-day period for appeal would begin to run under Federal Rule of Appellate Procedure 4. The rule also could be subject to abuse if attorneys and clients strategically terminated their representation in order to trigger a right to appeal with a view to delaying the proceedings in the underlying case. While we recognize that our application of the final judgment rule in this setting may require nonparticipating attorneys to monitor the progress of the litigation after their work has ended, the efficiency interests served by limiting immediate appeals far outweigh any nominal monitoring costs borne by attorneys. For these reasons, an attorney's continued participation in a case does not affect whether a sanctions order is "final" for purposes of § 1291.

We candidly recognize the hardship that a sanctions order may sometimes impose on an attorney. Should these hard-

ships be deemed to outweigh the desirability of restricting appeals to "final decisions," solutions other than an expansive interpretation of § 1291's "final decision" requirement remain available. Congress may amend the Judicial Code to provide explicitly for immediate appellate review of such orders. See, *e. g.*, 28 U. S. C. §§ 1292(a)(1)–(3). Recent amendments to the Judicial Code also have authorized this Court to prescribe rules providing for the immediate appeal of certain orders, see §§ 1292(e), 2072(c), and "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Swint*, 514 U. S., at 48 (footnote omitted). Finally, in a particular case, a district court can reduce any hardship by reserving until the end of the trial decisions such as whether to impose the sanction, how great a sanction to impose, or when to order collection.

* * *

For the foregoing reasons, we conclude that a sanctions order imposed on an attorney is not a "final decision" under § 1291 and, therefore, affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KENNEDY, concurring.

This case comes to our argument docket, of course, so that we may resolve a split of authority in the Circuits on a jurisdictional issue, not because there is any division of opinion over the propriety of the underlying conduct. Cases involving sanctions against attorneys all too often implicate allegations that, when true, bring the law into great disrepute. Delays and abuses in discovery are the source of widespread injustice; and were we to hold sanctions orders against attorneys to be appealable as collateral orders, we would risk compounding the problem for the reasons suggested by JUS-

TICE THOMAS in his opinion for the Court. Trial courts must have the capacity to ensure prompt compliance with their orders, especially when attorneys attempt to abuse the discovery process to gain a tactical advantage.

It should be noted, however, that an attorney ordered to pay sanctions is not without a remedy in every case. If the trial court declines to stay enforcement of the order and the result is an exceptional hardship itself likely to cause an injustice, a petition for writ of mandamus might bring the issue before the Court of Appeals to determine if the trial court abused its discretion in issuing the order or denying the stay. See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 435 (1985). In addition, if a contempt order is entered and there is no congruence of interests between the person subject to the order and a party to the underlying litigation, the order may be appealable. See *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F. 2d 1303, 1305–1306 (CA9 1984). In *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U. S. 72, 76 (1988), a case involving a nonparty witness, we said: "The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action."

The case before us, however, involves an order for sanctions and nothing more. I join the opinion of the Court and its holding that the order is not appealable under the collateral order doctrine.

Syllabus

WEST, SECRETARY OF VETERANS AFFAIRS *v.* GIBSON

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

No. 98–238. Argued April 26, 1999—Decided June 14, 1999

In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination in the Federal Government, 42 U. S. C. § 2000e–16, to authorize the Equal Employment Opportunity Commission (EEOC) to enforce that prohibition through "appropriate remedies, including reinstatement or hiring . . . with or without back pay," § 2000e–16(b), and to empower courts to entertain an action by a complainant still aggrieved after final agency action, § 2000e–16(c). In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which, among other things, permits victims of intentional discrimination to recover compensatory damages "[i]n an action . . . under [§ 2000e–16]," § 1981a(a)(1), and adds that any party in such an action may demand a jury trial, § 1981a(c). Thereafter, the EEOC began to grant compensatory damages awards in Federal Government employment discrimination cases. Respondent Gibson filed a complaint charging that the Department of Veterans Affairs had discriminated against him by denying him a promotion on the basis of his gender. The EEOC found in his favor and awarded him the promotion plus backpay. Gibson later filed this suit asking for compensatory damages and other relief, but the District Court dismissed the complaint. The Seventh Circuit reversed, rejecting the Department's argument that, because Gibson had failed to exhaust his administrative remedies with respect to an award of compensatory damages, he could not bring that claim in court. In the Seventh Circuit's view, the EEOC lacked the legal power to award compensatory damages; consequently there was no administrative remedy to exhaust.

Held:

1. The EEOC possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII. Read literally, the language of the 1972 Title VII extension and the CDA is consistent with a grant of that authority. Section 2000e–16(b) empowers the EEOC to enforce § 2000e–16(a) through a "remedy" that is "appropriate." Although § 2000e–16(b) explicitly mentions only equitable remedies—reinstatement, hiring, and backpay—the preceding word "including" makes clear that the authori-

zation is not limited to the remedies specified. See *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 189. The 1972 Title VII extension's choice of examples is not surprising, for in 1972 (and until the 1991 CDA) Title VII itself authorized only equitable remedies. Words in statutes can enlarge or contract their scope as required by other changes in the law or the world. See, *e. g., Browder* v. *United States*, 312 U. S. 335, 339–340. The meaning of the word "appropriate" permits its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change wrought by the 1991 CDA are appropriate now. Examining the purposes of the 1972 Title VII extension shows that this is the correct reading. Section 717's general purpose is to remedy discrimination in federal employment by creating a system that requires resort to administrative relief prior to court action to encourage quicker, less formal, and less expensive resolution of disputes. To deny that an EEOC compensatory damages award is, statutorily speaking, "appropriate" would undermine this remedial scheme. This point is reinforced by the CDA's history, which says nothing about limiting the EEOC's ability to use the new damages remedy or in any way suggests that it would be desirable to distinguish the new Title VII remedy from the old ones. Respondent's arguments in favor of depriving the EEOC of the power to award compensatory damages—that the CDA's reference to an "action" refers to a judicial case, not to an administrative proceeding; that an EEOC compensatory damages award would not involve a jury trial, as authorized by the CDA; and that any waiver of the Government's sovereign immunity to permit the EEOC to award compensatory damages must be construed narrowly—are unconvincing. Pp. 217–223.

2. Respondent's claims that he can proceed in District Court on alternative grounds include matters that fall outside the scope of the question presented in the Government's petition for certiorari. The case is remanded so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them. P. 223.

137 F. 3d 992, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 224.

Barbara McDowell argued the cause for petitioner. With her on the briefs were *Solicitor General Waxman*, *Acting*

Assistant Attorney General Ogden, Deputy Solicitor General Underwood, Marleigh D. Dover, and *Steven I. Frank.*

Timothy M. Kelly argued the cause and filed a brief for respondent.*

JUSTICE BREYER delivered the opinion of the Court.

The question in this case is whether the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964, 84 Stat. 121, 42 U. S. C. § 2000e *et seq.* We conclude that the EEOC does have that authority.

I

A

Title VII of the Civil Rights Act of 1964 forbids employment discrimination. In 1972 Congress extended Title VII so that it applies not only to employment in the private sector, but to employment in the Federal Government as well. See Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U. S. C. § 2000e–16. This 1972 Title VII extension, found in § 717 of Title VII, has three relevant subsections.

The first subsection, § 717(a), sets forth the basic Federal Government employment antidiscrimination standard. It says that

> "[a]ll personnel actions affecting employees or applicants for employment [of specified Government agencies and departments] shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–16(a).

**Mark D. Roth* and *Joseph F. Henderson* filed a brief for the American Federation of Government Employees, AFL–CIO, as *amicus curiae* urging reversal.

Edward H. Passman and *Paula A. Brantner* filed a brief for the National Employment Lawyers Association as *amicus curiae.*

The second subsection, § 717(b), provides the EEOC with the power to enforce the standard. It says (among other things) that

> "the Equal Employment Opportunity Commission *shall have authority to enforce the provisions of subsection (a) . . . through appropriate remedies*, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section . . . ." 42 U. S. C. § 2000e–16(b) (emphasis added).

The third subsection, § 717(c), concerns a court's authority to enforce the standard. It says that, after an agency or the EEOC takes final action on a complaint (or fails to take action within a certain time),

> "an employee or applicant [who is still] aggrieved . . . may file a civil action as provided in section [706, dealing with discrimination by private employers], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U. S. C. § 2000e–16(c).

In 1991 Congress again amended Title VII. The amendment relevant here permits victims of intentional employment discrimination (whether within the private sector or the Federal Government) to recover compensatory damages. See Civil Rights Act of 1991, 105 Stat. 1072, 42 U. S. C. § 1981a(a)(1). The relevant portion of that amendment, which we shall call the Compensatory Damages Amendment (CDA), says:

> "In an action brought by a complaining party under section 706 [dealing with discrimination by private employers] or 717 [dealing with discrimination by the Federal Government] against a respondent who engaged in unlawful intentional discrimination . . . , the complaining party may recover compensatory . . . damages . . . ." 42 U. S. C. § 1981a(a)(1).

The CDA also sets forth certain conditions and exceptions. It imposes, for example, a cap on compensatory damages (of up to $300,000 for large employers, § 1981a(b)(3)(D)). And it adds: "If a complaining party seeks compensatory . . . damages under this section . . . any party may demand a trial by jury . . . ." § 1981a(c). Once the CDA became law, the EEOC began to grant compensatory damages awards in Federal Government employment discrimination cases. Compare 29 CFR pt. 1613, App. A (1990) (no reference to compensatory damages in preamendment list of EEOC remedies), with, *e. g.*, *Jackson* v. *Runyon*, EEOC Appeal No. 01923399, p. 3 (Nov. 12, 1992) ("[T]he Civil Rights Act of 1991 . . . makes compensatory damages available to federal sector complainants in the administrative process").

B

Respondent, Michael Gibson, filed a complaint with the Department of Veterans Affairs charging that the Department had discriminated against him by denying him a promotion on the basis of his gender. The Department found against Gibson. The EEOC, however, subsequently found in Gibson's favor and awarded the promotion plus backpay. Three months later Gibson filed a complaint in Federal District Court, asking the court to order the Department to comply immediately with the EEOC's order and also to pay compensatory damages. Complaint ¶ 17 (App. 28). The Department then voluntarily complied with the EEOC's order, but it continued to oppose Gibson's claim for compensatory damages.

Eventually, the District Court dismissed Gibson's compensatory damages claim. On appeal, the Department supported the District Court's dismissal with the argument that Gibson had failed to exhaust his administrative remedies in respect to his compensatory damages claim; hence, he could not bring that claim in court. *Gibson* v. *Brown*, 137 F. 3d 992, 994 (CA7 1998). The Seventh Circuit, however, re-

versed the District Court's dismissal. It rejected the Department's argument because, in its view, the EEOC lacked the legal power to award compensatory damages; consequently there was no administrative remedy to exhaust. *Id.*, at 995–998.

Because the Circuits have disagreed about whether the EEOC has the power to award compensatory damages, compare *Fitzgerald* v. *Secretary, Dept. of Veterans Affairs*, 121 F. 3d 203, 207 (CA5 1997) (EEOC may award compensatory damages), with *Crawford* v. *Babbitt*, 148 F. 3d 1318, 1326 (CA11 1998) (EEOC cannot award compensatory damages), and 137 F. 3d, at 996–998 (same), we granted certiorari in order to decide that question.

II

The language, purposes, and history of the 1972 Title VII extension and the 1991 CDA convince us that Congress has authorized the EEOC to award compensatory damages in Federal Government employment discrimination cases. Read literally, the language of the statutes is consistent with a grant of that authority. The relevant portion of the Title VII extension, namely, § 717(b), says that the EEOC "shall have authority" to enforce § 717(a) "through *appropriate* remedies, including reinstatement or hiring of employees with or without back pay." 42 U. S. C. § 2000e–16(b). After enactment of the 1991 CDA, an award of compensatory damages is a "remedy" that is "appropriate."

We recognize that § 717(b) explicitly mentions certain equitable remedies, namely, reinstatement, hiring, and backpay, and it does not explicitly refer to compensatory damages. But the preceding word "including" makes clear that the authorization is not limited to the specified remedies there mentioned; and the 1972 Title VII extension's choice of examples is not surprising, for in 1972 (and until 1991) Title VII itself authorized only equitable remedies. See Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5(g) (pri-

vate sector discrimination); Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U. S. C. § 2000e–16 (federal sector discrimination).

Section 717's language, however, does not freeze the scope of the word "appropriate" as of 1972. Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic. See, *e. g.*, *Browder* v. *United States,* 312 U. S. 335, 339–340 (1941) (new, unforeseen "use" of passport); see also *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 172–173 (1968) (cable television as "communications"); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, 395–396 (1968) (old statutory language read to reflect technological change).

The meaning of the word "appropriate" permits its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now. The word "including" makes clear that "appropriate remedies" are not limited to the examples that follow that word. See *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 189 (1941). And in context the word "appropriate" most naturally refers to forms of relief that Title VII itself authorizes—at least where that relief is of a kind that agencies typically can provide. Thus, Congress' decision in the 1991 CDA to permit a "complaining party" to "recover compensatory damages" in "an action brought under section . . . 717," by adding compensatory damages to Title VII's arsenal of remedies, could make that form of relief "appropriate" under § 717(b) as well.

An examination of the purposes of the 1972 Title VII extension shows that this permissible reading of the language is also the correct reading. Section 717's general purpose is to remedy discrimination in federal employment. It does so in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to

court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court. See 42 U. S. C. § 2000e–16(c) (court action permitted only where complainant disagrees with final agency disposition or, if complainant pursued discretionary appeal to EEOC, with EEOC disposition; or if either agency or EEOC disposition is delayed); *Brown* v. *GSA*, 425 U. S. 820, 833 (1976) (discussing § 717's "rigorous administrative exhaustion requirements"); see also 29 CFR § 1614.105(a) (1998) (requiring complainant initially to notify agency and make effort to resolve matter informally); § 1614.106(d)(2) (requiring agency investigation prior to EEOC consideration).

To deny that an EEOC compensatory damages award is, statutorily speaking, "appropriate" would undermine this remedial scheme. It would force into court matters that the EEOC might otherwise have resolved. And by preventing earlier resolution of a dispute, it would increase the burdens of both time and expense that accompany efforts to resolve hundreds, if not thousands, of such disputes each year. See Equal Employment Opportunity Commission, Federal Sector Report on EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1997, pp. 19, 61 (1998) (28,947 Federal Government employment discrimination claims filed in 1997; 7,112 claims appealed to EEOC); Reply Brief for Petitioner 12–13, n. 9 (estimating "hundreds" of cases each year that involve claims for compensatory damages).

The history of the CDA reinforces this point. The CDA's sponsors and supporters spoke frequently of the need to create a new remedy in order, for example, to "help make victims whole." H. R. Rep. No. 102–40, pt. 1, pp. 64–65 (1991); see also Civil Rights Act of 1991, § 2, 105 Stat. 1071, 42 U. S. C. § 1981 note (congressional finding that "additional remedies under Federal law are needed to deter . . . intentional discrimination in the workplace"); *id.*, § 3 (one purpose

of Act is "to provide appropriate remedies for intentional discrimination . . . in the workplace"); 137 Cong. Rec. 28636–28638, 28663–28667, 28676–28680 (1991) (introduction and discussion of Danforth/Kennedy Amendment No. 1274, in relevant part permitting recovery of compensatory damages); *id.*, at 28880–28881 (statements of Sen. Warner and Sen. Kennedy) (clarifying that Danforth/Kennedy amendment covers federal employees and suggesting amendment to this effect). But the CDA's sponsors and supporters said nothing about limiting the EEOC's ability to use the new Title VII remedy or suggesting that it would be desirable to distinguish the new Title VII remedy from old Title VII remedies in that respect. This total silence is not surprising. What reason could there be for Congress, anxious to have the EEOC consider as a preliminary matter every other possible remedy, not to want the EEOC similarly to consider compensatory damages as well?

Respondent makes three important arguments in favor of a more limited interpretation of the statutes—an interpretation that would deprive the EEOC of the power to award compensatory damages. First, respondent points out that the CDA says nothing about the EEOC, or EEOC proceedings, but rather states only that a complaining party may recover compensatory damages "in *an action* brought under section . . . 717." 42 U. S. C. § 1981a(a)(1) (emphasis added). And the word "action" often refers to judicial cases, not to administrative "proceedings." See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 60–62 (1980) (distinguishing civil "actions" from administrative "proceedings").

Had Congress thought it important so to limit the scope of the CDA, however, it could easily have cross-referenced § 717(c), the civil action subsection itself, rather than cross-referencing the whole of § 717, which includes authorization for the EEOC to enforce the section through "appropriate remedies." Regardless, the question, as we see it, is

whether, by using the word "action," Congress intended to deny that compensatory damages is "*appropriate*" administrative relief within the terms of § 717(b). In light of the previous discussion, see *supra*, at 217–220, we do not believe the simple use of the word "action" in the context of a cross-reference to the whole of § 717 indicates an intent to deprive the EEOC of that authority.

Second, in an effort to explain why Congress might have wanted to impose a special EEOC-related limitation in respect to compensatory damages, respondent points to the language in the CDA that says: "If a complaining party seeks compensatory . . . damages under this section . . . *any party* may demand a trial by jury." 42 U. S. C. § 1981a(c) (emphasis added). Respondent notes that an EEOC compensatory damages award would not involve a jury. And an agency cannot proceed to court under § 717(c) because that subsection makes a court action available only to an aggrieved complaining party, not to the agency. § 2000e–16(c). Thus, respondent concludes that the CDA must implicitly forbid any such EEOC award, for that award would take place without the jury trial that § 1981a(c) guarantees.

This argument, however, draws too much from too little. One easily can read the jury trial provision in § 1981a(c) as simply guaranteeing either party a jury trial in respect to compensatory damages *if* a complaining party proceeds to court under § 717(c). The words "under this section" in § 1981a(c) support that interpretation, for "this section," § 1981a, refers primarily to court proceedings. And there is no reason to believe Congress intended more. The history of the jury trial provision suggests that Congress saw the provision primarily as a benefit to complaining parties, not to the Government. See, *e. g.*, 137 Cong. Rec., at 29051–29052 (statement of Sen. Leahy) (for "the first time, women and the disabled could recover damages and have jury trials for claims of intentional discrimination"); *id.*, at 30668 (state-

ment of Rep. Ford) (provision will "provid[e] all victims of intentional discrimination a right to trial by jury"); see also, *e. g.*, *id.*, at 29053–29054 (statement of Sen. Wallop) (discussing "economically devastating lawsuits"); *id.*, at 29041 (statement of Sen. Bumpers) (relating fears about "runaway jur[ies]"). The fact that Congress permits an employee to file a complaint in court, but forbids the agency to challenge an adverse EEOC decision in court, also suggests that Congress was not inordinately and unusually concerned with invoking special judicial safeguards to protect the Government.

Finally, respondent argues that insofar as the law permits the EEOC to award compensatory damages, it waives the Government's sovereign immunity, and we must construe any such waiver narrowly. See *Lane* v. *Peña*, 518 U. S. 187, 192 (1996); *Lehman* v. *Nakshian*, 453 U. S. 156, 160–161 (1981). There is no dispute, however, that the CDA waives sovereign immunity in respect to an award of compensatory damages. Whether, in light of that waiver, the CDA permits the EEOC to consider the same matter at an earlier phase of the employment discrimination claim is a distinct question concerning how the waived damages remedy is to be administered. Because the relationship of this kind of administrative question to the goals and purposes of the doctrine of sovereign immunity may be unclear, ordinary sovereign immunity presumptions may not apply. In the Secretary's view here, for example, the EEOC's preliminary consideration, by lowering the costs of resolving disputes, does not threaten, but helps to protect, the public fisc. Regardless, if we must apply a specially strict standard in such a case, which question we need not decide, that standard is met here. We believe that the statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the stricter standard.

For these reasons, we conclude that the EEOC possesses the legal authority to enforce § 717 through an award of compensatory damages.

III

Respondent asks us to affirm on alternative grounds the Seventh Circuit's judgment permitting his case to proceed in the District Court. The Seventh Circuit considered whether Gibson had "asked the EEOC for compensatory damages." 137 F. 3d, at 994. It added that if "he did, then the government's failure-to-exhaust argument obviously is a non-starter." *Ibid.* But the Court of Appeals concluded that Gibson did not "put the EEOC on notice that he was seeking compensatory damages." *Ibid.* Respondent claims that he can proceed in District Court because he did satisfy the law's exhaustion requirements, even if the EEOC has the legal power to award compensatory damages and even if he did not give notice to the EEOC that he sought compensatory damages. He argues that is so because (1) the requirement of notice for exhaustion purposes is unusually weak in respect to compensatory damages, (2) he did request a "monetary cash award," and (3) special circumstances estop the Government from asserting a "no exhaustion" claim in this case.

These matters fall outside the scope of the question presented in the Government's petition for certiorari. See *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253–254 (1999) *(per curiam)*. We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them.

* * *

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.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The rules governing this case are clear and well established, or at least had been before the majority's unsettling opinion today. Relief may not be awarded against the United States unless it has waived its sovereign immunity. See *Department of Army* v. *Blue Fox, Inc.*, 525 U. S. 255 (1999). The waiver must be expressed in unequivocal statutory text and cannot be implied. *Id.*, at 261; *Lane* v. *Peña*, 518 U. S. 187, 192 (1996). Even when the United States has waived its immunity, the waiver must be "strictly construed, in terms of its scope, in favor of the sovereign," *Blue Fox*, *supra*, at 261; accord, *Lane*, *supra*, at 192, for "'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied,'" *Lehman* v. *Nakshian*, 453 U. S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U. S. 270, 276 (1957). Not only do these rules reserve authority over the public fisc to the branch of Government with which the Constitution has placed it, they also form an important part of the background of settled legal principles upon which Congress relied in enacting various statutes authorizing suits against the United States, such as the Tucker Act, 28 U. S. C. § 1491; § 10(a) of the Administrative Procedure Act, 5 U. S. C. § 702; and the Federal Tort Claims Act, 28 U. S. C. § 2671 *et seq.* The rules governing waivers of sovereign immunity make clear that the Equal Employment Opportunity Commission (EEOC) may not award or authorize compensatory damages against the United States unless it is permitted to do so by a statutory provision which waives the United States' immunity to the awards in clear and unambiguous terms.

Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–16(b), which authorizes the EEOC to enforce federal compliance with Title VII "through appropriate remedies, including reinstatement or hiring of employees

with or without back pay," effects a waiver of the United States' sovereign immunity for some purposes. Unlike other similar statutes, however, the provision does not mention awards of compensatory damages. Compare § 717(b) with 2 U. S. C. §§ 1311(b)(1)(B), 1405(g) (1994 ed., Supp. III). A waiver of immunity to other types of relief does not provide the unequivocal statement required to establish a waiver of immunity to damages awards. See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) ("Though [11 U. S. C. § 106(c)], too, waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims"); *Lane*, *supra*, at 192.

Nor does the statutory grant of authority to the EEOC to enforce Title VII through appropriate remedies include, in unequivocal terms or even by necessary implication, the power to award or authorize compensatory damages. Even if the phrase "appropriate remedies" had been intended, as the majority maintains, to incorporate relief authorized for violations of Title VII under other statutory provisions, it is not obvious that the phrase's meaning would have been intended also to "expand" to include remedies that were not available at the time § 717 was adopted. *Ante*, at 218.

It is far from clear, moreover, that the phrase was intended to incorporate other statutory provisions at all. Unlike other subsections of § 717, see § 717(d) (incorporating various provisions relating to judicial actions), § 717(b) does not make an explicit reference to other statutory provisions. In addition, the specific examples given by the statute of appropriate remedies—reinstatement or hiring of employees with or without backpay—are equitable in nature. See *United States* v. *Burke*, 504 U. S. 229, 238 (1992). The interpretive canons of *noscitur a sociis* and *ejusdem generis* suggest the appropriate remedies authorized by § 717(b) are remedies of the same nature as reinstatement, hiring, and backpay—*i. e.*, equitable remedies. The phrase "appropriate remedies," furthermore, connotes the remedial discre-

tion which is the hallmark of equity. A plausible, and perhaps even the best, interpretation of § 717(b), then, is that it grants administrative authority to determine which of the traditional forms of equitable relief are appropriate in any given case of discrimination. Whether or not this is the better reading, it should suffice to establish beyond dispute that the statute does not authorize awards of compensatory damages in express and unequivocal terms. As a consequence, § 717(b) cannot provide the required waiver of the United States' sovereign immunity.

Unlike § 717(b), 42 U. S. C. § 1981a does authorize awards of compensatory damages against the United States. Although it is clear the statute authorizes courts to award damages, however, § 1981a does not so much as mention the EEOC, much less empower it to award or authorize money damages. It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums. See, *e. g.*, *McElrath* v. *United States*, 102 U. S. 426, 440 (1880) ("[The Government] can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits"); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 54, n. 6 (1944) ("The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court"); *Case* v. *Terrell*, 11 Wall. 199, 201 (1871) (The United States' consent to suit in the Court of Claims does not extend to other federal courts).

The majority's attempt to read 42 U. S. C. § 1981a(a)(1) to authorize administrative awards of compensatory damages is not persuasive. Section 1981a(a)(1) provides:

> "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . ."

The provision authorizes an award of compensatory damages in an "action" brought under § 717; the word "action" is often used to distinguish judicial cases from administrative "proceedings." See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 60–62 (1980). Unlike § 717(b), which authorizes administrative proceedings, § 717(c) authorizes "civil action[s]" in court. It is most natural, therefore, to understand the phrase "an action brought by a complaining party under section . . . 717" as a reference to a judicial action under § 717(c) but not to an administrative proceeding under § 717(b). Compensatory awards are authorized under § 1981a(a)(1), moreover, "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964." Section 706(g) authorizes a "court" to grant equitable relief for violations of Title VII. This provision, as incorporated through § 717(d), applies only in "civil actions" brought under § 717(c); it does not apply in proceedings before the EEOC or any other agency. Section 1981a(a)(1)'s express reference to § 706(g) confirms that compensatory damages are available only in judicial actions.

Other provisions of § 1981a also make clear that the statute authorizes compensatory damages only in judicial actions. Section 1981a(c) provides that "[i]f a complaining party seeks compensatory . . . damages under this section—(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations [on damages awards] described in subsection (b)(3) of this section." It cannot be disputed that this provision contemplates a jury trial overseen by a court. With due respect to the majority, the provision does not guarantee a jury trial to either party "*if* a complaining party proceeds to court under § 717(c)," *ante*, at 221; it provides that either party may obtain a jury trial "[i]f a complaining party seeks compensatory . . . damages," § 1981a(c).

While falling short of embracing the argument as its own, the majority flirts with the contention that allowing agencies rather than juries to award compensatory damages lowers

the costs of resolving employment disputes and protects the public fisc. It is not clear to me that juries would be less protective of the fisc than would one group of Government employees who deem themselves empowered by agency interpretation to award Government funds to fellow employees. When a Government employee seeks damages from the Government itself, there may be advantages in insisting upon the expertise of a trial court with experience in awarding damages in all types of cases, with the additional safeguards of trial in a forum of high visibility, trial by jury if either party chooses to ask for it, and appellate review. These factors are disregarded by the majority, which seems instead to suggest that the nature and convenience of administrative proceedings will by necessity provide a financial advantage to the Government.

In all events, speculation does not suffice to overcome the rule that waivers of sovereign immunity must be clear and express. An unequivocal waiver of the United States' sovereign immunity to administrative awards of compensatory damages cannot be found in the relevant statutory provisions. To the extent the majority relies on textual analysis, it establishes at most (if at all) that the statutes might be read to authorize such awards, not that the statutes must be so read. To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane,* 518 U. S., at 192; accord, *Nordic Village,* 503 U. S., at 37 ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report"). With respect, I dissent.

Syllabus

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL. *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

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

No. 98–369. Argued March 23, 1999—Decided June 17, 1999

The day after enacting the Inspector General Act (IGA), which created an Office of Inspector General (OIG) in the National Aeronautics and Space Administration (NASA) and other federal agencies, Congress enacted the Federal Service Labor-Management Relations Statute (FSLMRS), which, *inter alia*, permits union participation at an employee examination conducted "by a representative of the agency" if the employee believes that the examination will result in disciplinary action and requests such representation, 5 U. S. C. § 7114(a)(2)(B). When NASA's OIG (NASA–OIG) began investigating a NASA employee's activities, a NASA–OIG investigator interviewed the employee and permitted, *inter alios*, the employee's union representative to attend. The union subsequently filed a charge with the Federal Labor Relations Authority (Authority), alleging that NASA and its OIG had committed an unfair labor practice when the investigator limited the union representative's participation in the interview. In ruling for the union, the Administrative Law Judge concluded that the OIG investigator was a "representative" of NASA within § 7114(a)(2)(B)'s meaning, and that the investigator's behavior had violated the employee's right to union representation. On review, the Authority agreed and granted relief against both NASA and NASA–OIG. The Eleventh Circuit granted the Authority's application for enforcement of its order.

Held: A NASA–OIG investigator is a "representative" of NASA when conducting an employee examination covered by § 7114(a)(2)(B). Pp. 233–246.

(a) Contrary to NASA's and NASA–OIG's argument, ordinary tools of statutory construction, combined with the Authority's position, lead to the conclusion that the term "representative" is not limited to a representative of the "entity" that collectively bargains with the employee's union. By its terms, § 7114(a)(2)(B) refers simply to representatives of "the agency," which, all agree, means NASA. The Authority's conclusion is consistent with the FSLMRS and, to the extent the statute and congressional intent are unclear, the Court may rely on the Authority's reasonable judgment. See, *e. g.*, *Federal Employees* v. *Depart-*

ment of Interior, 526 U. S. 86, 98–100. The Court rejects additional reasons that NASA and NASA–OIG advance for their narrow reading. Pp. 233–237.

(b) The IGA does not preclude, and in fact favors, treating OIG personnel as representatives of the agencies they are duty-bound to audit and investigate. The IGA created no central office or officer to supervise, direct, or coordinate the work of all OIG's and their respective staffs. Other than congressional committees and the President, each Inspector General has no supervisor other than the head of the agency of which the OIG is part. Congress certainly intended that the OIGs would enjoy a great deal of autonomy, but an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. See 5 U. S. C. App. §§ 2, 4(a), 6(a)(2). Any potentially divergent interests of the OIGs and their parent agencies—*e. g.*, an OIG has authority to initiate and conduct investigations and audits without interference from the agency head, § 3(a)—do not make NASA–OIG any less a NASA representative when it investigates a NASA employee. Furthermore, not all OIG examinations subject to § 7114(a)(2)(B) will implicate an actual or apparent conflict of interest with the rest of the agency; and in many cases honest cooperation can be expected between an OIG and agency management. Pp. 237–243.

(c) NASA's and NASA–OIG's additional policy arguments against applying § 7114(a)(2)(B) to OIG investigations—that enforcing § 7114(a)(2)(B) in situations similar to this case would undermine NASA–OIG's ability to maintain the confidentiality of investigations, and that the Authority has construed § 7114(a)(2)(B) so broadly in other instances that it will impair NASA–OIG's ability to perform its responsibilities—are ultimately unpersuasive. It is presumed that Congress took account of the relevant policy concerns when it decided to enact the IGA and, on that statute's heels, § 7114(a)(2)(B). Pp. 243–245.

(d) That the investigator in this case was acting as a NASA representative for § 7114(a)(2)(B) purposes makes it appropriate to charge NASA–OIG, as well as its parent agency, with responsibility for ensuring that investigations are conducted in compliance with the FSLMRS. P. 246.

120 F. 3d 1208, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post*, p. 246.

David C. Frederick argued the cause for petitioners. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Underwood*, *William Kanter*, and *Howard S. Scher*.

David M. Smith argued the cause for respondent Federal Labor Relations Authority. With him on the brief was *Ann M. Boehm*. *Stuart A. Kirsch* argued the cause for respondent American Federation of Government Employees, AFL–CIO. With him on the brief were *Mark D. Roth*, *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold*.*

JUSTICE STEVENS delivered the opinion of the Court.

On October 12, 1978, Congress enacted the Inspector General Act (IGA), 5 U. S. C. App. § 1 *et seq.*, p. 1381, which created an Office of Inspector General (OIG) in each of several federal agencies, including the National Aeronautics and Space Administration (NASA). The following day, Congress enacted the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U. S. C. § 7101 *et seq.*, which provides certain protections, including union representation, to a variety of federal employees. The question presented by this case is whether an investigator employed in NASA's Office of Inspector General (NASA–OIG) can be considered a "representative" of NASA when examining a NASA employee, such that the right to union representation in the FSLMRS may be invoked. § 7114(a)(2)(B). Although certain arguments of policy may support a negative answer to that question, the plain text of the two statutes, buttressed by administrative deference and Congress' countervailing policy concerns, dictates an affirmative answer.

I

In January 1993, in response to information supplied by the Federal Bureau of Investigation (FBI), NASA's OIG con-

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**Gregory O'Duden* and *Barbara A. Atkin* filed a brief for the National Treasury Employees Union as *amicus curiae* urging affirmance.

ducted an investigation of certain threatening activities of an employee of the George C. Marshall Space Flight Center in Huntsville, Alabama, which is also a component of NASA. A NASA–OIG investigator contacted the employee to arrange for an interview and, in response to the employee's request, agreed that both the employee's lawyer and union representative could attend. The conduct of the interview gave rise to a complaint by the union representative that the investigator had improperly limited his participation. The union filed a charge with the Federal Labor Relations Authority (Authority) alleging that NASA and its OIG had committed an unfair labor practice. See §§ 7116(a)(1), (8).

The Administrative Law Judge (ALJ) ruled for the union with respect to its complaint against NASA–OIG. See App. to Pet. for Cert. 71a. The ALJ concluded that the OIG investigator was a "representative" of NASA within the meaning of § 7114(a)(2)(B), and that certain aspects of the investigator's behavior had violated the right to union representation under that section. *Id.*, at 64a–65a, 69a–70a. On review, the Authority agreed that the NASA–OIG investigator prevented the union representative from actively participating in the examination and (1) ordered both NASA and NASA–OIG to cease and desist (a) requiring bargaining unit employees to participate in OIG interviews under § 7114(a)(2)(B) without allowing active participation of a union representative, and (b) likewise interfering with, coercing, or restraining employees in exercising their rights under the statute; and (2) directed NASA to (a) order NASA–OIG to comply with § 7114(a)(2)(B), and (b) post appropriate notices at the Huntsville facility. *NASA*, 50 F. L. R. A. 601, 602, 609, 622–623 (1995).

NASA and NASA–OIG petitioned for review, asking whether the NASA–OIG investigator was a "representative" of NASA, and whether it was proper to grant relief against NASA as well as its OIG. The Court of Appeals upheld the Authority's rulings on both questions and granted the

Authority's application for enforcement of its order. 120 F. 3d 1208, 1215–1217 (CA11 1997). Because of disagreement among the Circuit Courts over the applicability of § 7114(a)(2)(B) in such circumstances, see *FLRA* v. *United States Dept. of Justice*, 137 F. 3d 683 (CA2 1997); *United States Dept. of Justice* v. *FLRA*, 39 F. 3d 361 (CADC 1994); *Defense Criminal Investigative Serv.* v. *FLRA*, 855 F. 2d 93 (CA3 1988), we granted certiorari. 525 U. S. 960 (1998).

II

The FSLMRS provides, in relevant part,

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> . . . . .
>
> "(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> "(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> "(ii) the employee requests representation." 5 U. S. C. § 7114(a).

In this case it is undisputed that the employee reasonably believed the investigation could result in discipline against him, that he requested union representation, that NASA is the relevant "agency," and that, if the provision applies, a violation of § 7114(a)(2)(B) occurred. The contested issue is whether a NASA–OIG investigator can be considered a "representative" of NASA when conducting an employee examination covered by § 7114(a)(2)(B).

NASA and its OIG argue that, when § 7114(a)(2)(B) is read in context and compared with the similar right to union representation protected in the private sector by the National Labor Relations Act (NLRA), the term "representative"

refers only to a representative of agency management—"*i. e.*, the entity that has a collective bargaining relationship with the employee's union." Brief for Petitioners 13. Neither NASA nor NASA–OIG has such a relationship with the employee's union at the Huntsville facility, see 5 U. S. C. § 7112(b)(7) (excluding certain agency investigators and auditors from "appropriate" bargaining units), and so the investigator in this case could not have been a "representative" of the relevant "entity."

By its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain "entit[ies]" within the agency in question. It simply refers to representatives of "the agency," which, all agree, means NASA. Cf. § 7114(a)(2) (referring to employees "in the unit" and an exclusive representative "of an appropriate unit in an agency"). Thus, relying on prior rulings, the Authority found no basis in the FSLMRS or its legislative history to support the limited reading advocated by NASA and its OIG. The Authority reasoned that adopting their proposal might erode the right by encouraging the use of investigative conduits outside the employee's bargaining unit, and would otherwise frustrate Congress' apparent policy of protecting certain federal employees when they are examined and justifiably fear disciplinary action. 50 F. L. R. A., at 615, and n. 12. That is, the risk to the employee is not necessarily related to which component of an agency conducts the examination. See App. to Pet. for Cert. 65a (information obtained by NASA–OIG is referred to agency officials for administrative or disciplinary action).

In resolving this issue, the Authority was interpreting the statute Congress directed it to implement and administer. 5 U. S. C. § 7105. The Authority's conclusion is certainly consistent with the FSLMRS and, to the extent the statute and congressional intent are unclear, we may rely on the Authority's reasonable judgment. See *Federal Employees* v. *Department of Interior*, 526 U. S. 86, 98–100 (1999); *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 644–645 (1990).

Despite the text of the statute and the Authority's views, NASA and NASA–OIG advance three reasons for their narrow reading. First, the language at issue is contained in a larger section addressing rights and duties related to collective bargaining; indeed, 5 U. S. C. § 7114 is entitled "Representation rights and duties." Thus, other subsections define the union's right to exclusive representation of employees in the bargaining unit, § 7114(a)(1); its right to participate in grievance proceedings, § 7114(a)(2)(A); and its right and duty to engage in good-faith collective bargaining with the agency, §§ 7114(a)(4), (b). That context helps explain why the right granted in § 7114(a)(2)(B) is limited to situations in which the employee "reasonably believes that the examination may result in disciplinary action"—a condition restricting the right to union presence or participation in investigatory examinations that do not threaten the witness' employment. We find nothing in this context, however, suggesting that an examination that obviously presents the risk of employee discipline is nevertheless outside the coverage of the section because it is conducted by an investigator housed in one office of NASA rather than another. On this point, NASA's internal organization is irrelevant.

Second, the phrase "representative of the agency" is used in two other places in the FSLMRS where it may refer to representatives of agency management acting in their capacity as actual or prospective parties to a collective-bargaining agreement. One reference pertains to grievances, § 7114(a)(2)(A), and the other to the bargaining process itself, § 7103(a)(12) (defining "collective bargaining"). NASA and NASA–OIG submit that the phrase at issue should ordinarily retain the same meaning wherever used in the same statute, and we agree. But even accepting NASA's and NASA–OIG's characterization of §§ 7114(a)(2)(A) and 7103(a)(12), the fact that some "representative[s] of the agency" may perform functions relating to grievances and bargaining does not mean that other personnel who conduct

examinations covered by § 7114(a)(2)(B) are not also fairly characterized as agency "representative[s]." As an organization, an agency must rely on a variety of representatives to carry out its functions and, though acting in different capacities, each may be acting for, and on behalf of, the agency.

Third, NASA and NASA–OIG assert that their narrow construction is supported by the history and purpose of § 7114(a)(2)(B). As is evident from statements by the author of the provision [1] as well as similar text in *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251 (1975), this section of the FSLMRS was patterned after that decision. In *Weingarten*, we upheld the National Labor Relations Board's conclusion that an employer's denial of an employee's request to have a union representative present at an investigatory interview, which the employee reasonably believed might result in disciplinary action, was an unfair labor practice. *Id.*, at 252–253, 256. We reasoned that the Board's position was consistent with the employee's right under § 7 of the NLRA to engage in concerted activities. *Id.*, at 260. Given that history, NASA and its OIG contend that the comparable provision in the FSLMRS should be limited to investigations by representatives of that part of agency management with responsibility for collectively bargaining with the employee's union.

This argument ignores the important difference between the text of the NLRA and the text of the FSLMRS. That the general protection afforded to employees by § 7 of the NLRA provided a sufficient basis for the Board's recognition of a novel right in the private sector, see *id.*, at 260–262,

[1] Congressman Udall, whose substitute contained the section at issue, explained that the "provisions concerning investigatory interviews reflect the . . . holding in" *Weingarten.* 124 Cong. Rec. 29184 (1978); Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (Committee Print compiled for the House Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service), Ser. No. 96–7, p. 926 (1979) (hereinafter FSLMRS Leg. Hist.); see *NASA*, 50 F. L. R. A. 601, 606 (1995).

266–267, does not justify the conclusion that the text of the FSLMRS—which expressly grants a comparable right to employees in the public sector—should be narrowly construed to cover some, but not all, interviews conducted by agency representatives that have a disciplinary potential. Congress' specific endorsement of a Government employee's right to union representation by incorporating it in the text of the FSLMRS gives that right a different foundation than if it were merely the product of an agency's attempt to elaborate on a more general provision in light of broad statutory purposes.[2] The basis for the right to union representation in this context cannot compel the uncodified limitation proposed by NASA and its OIG.

Employing ordinary tools of statutory construction, in combination with the Authority's position on the matter, we have no difficulty concluding that § 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union.

III

Much of the disagreement in this case involves the interplay between the FSLMRS and the IGA. On NASA's and NASA–OIG's view, a proper understanding of the IGA precludes treating OIG personnel as "representative[s]" of the agencies they are duty-bound to audit and investigate. They add that the Authority has no congressional mandate or expertise with respect to the IGA, and thus we owe the Authority no deference on this score. It is unnecessary for us to defer, however, because a careful review of the relevant IGA provisions plainly favors the Authority's position.

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[2] See *id.*, at 608, n. 5 (Congress recognized that the right to union representation might evolve differently in the federal and private sectors); H. R. Conf. Rep. No. 95–1717, p. 156 (1978), FSLMRS Leg. Hist. 824; cf. *Karahalios* v. *Federal Employees*, 489 U. S. 527, 534 (1989) (the FSLMRS "is not a carbon copy of the NLRA").

Section 2 of the IGA explains the purpose of the Act and establishes "an office of Inspector General" in each of a list of identified federal agencies, thereby consolidating audit and investigation responsibilities into one agency component. It provides:

> "In order to create independent and objective units—
>
> "(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);
>
> "(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and
>
> "(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;
>
> "there is hereby established in each of such establishments an office of Inspector General." 5 U. S. C. App. § 2, p. 1381.

NASA is one of more than 20 "establishment[s]" now listed in § 11(2).[3]

Section 3 of the IGA provides that each of the offices created by § 2 shall be headed by an Inspector General appointed by the President, and confirmed by the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public adminis-

[3] Such establishments are described as "agencies" in other federal legislation, such as the FSLMRS. See 5 U. S. C. §§ 101–105, 7103(a)(3). Note also that other OIG's were created by subsequent amendments to the IGA and may be structured differently than those OIGs, such as NASA's, discussed in the text. See, *e. g.*, 5 U. S. C. App. §§ 8, 8E, 8G.

tration, or investigations." § 3(a). Each of these Inspectors General "shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head," but shall not be subject to supervision by any lesser officer. *Ibid.* Moreover, an Inspector General's seniors within the agency may not "prevent or prohibit" the Inspector General from initiating or conducting any audit or investigation. *Ibid.;* see also § 6(a)(2). The President retains the power to remove an Inspector General from office. § 3(b).

Section 4 contains a detailed description of the duties of each Inspector General with respect to the agency "within which his Office is established." § 4(a). Those duties include conducting audits and investigations, recommending new policies, reviewing legislation, and keeping the head of the agency and the Congress "fully and currently informed" through such means as detailed, semiannual reports. §§ 4(a)(1)–(5). Pursuant to § 5, those reports must be furnished to the head of the agency, who, in turn, must forward them to the appropriate committee or subcommittee of Congress with such comment as the agency head deems appropriate. § 5(b)(1); see also § 5(d). Section 6 grants the Inspectors General specific authority in a variety of areas to facilitate the mission of their offices. Accordingly, Inspectors General possess discretion to conduct investigations "relating to the administration of the programs and operations of the applicable" agency, § 6(a)(2); the ability to request information and assistance from Government agencies, § 6(a)(3); access to the head of the agency, § 6(a)(6); and the power to hire employees, enter into contracts, and spend congressionally appropriated funds, §§ 6(a)(7), (9); see also § 3(d). Finally, § 9(a)(1)(P) provides for the transfer of the functions previously performed by NASA's "'Management Audit Office' and the 'Office of Inspections and Security'" to NASA–OIG.

The IGA created no central office or officer to supervise, direct, or coordinate the work of all OIG's and their respective staffs. Other than congressional committees (which are the recipients of the reports prepared by each Inspector General) and the President (who has the power to remove an Inspector General), each Inspector General has no supervising authority—except the head of the agency of which the OIG is a part. There is no "OIG–OIG." Thus, for example, NASA–OIG maintains an office at NASA's Huntsville facility, which reports to NASA–OIG in Washington, and then to the NASA Administrator, who is the head of the agency. § 11(1); 50 F. L. R. A., at 602.[4] In conducting their work, Congress certainly intended that the various OIG's would enjoy a great deal of autonomy. But unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. See 5 U. S. C. App. §§ 2, 4(a), 6(a)(2). In common parlance, the investigators employed in NASA's OIG are unquestionably "representatives" of NASA when acting within the scope of their employment.

Minimizing the significance of this statutory plan, NASA and NASA–OIG emphasize the potentially divergent interests of the OIG's and their parent agencies. To be sure, OIG's maintain authority to initiate and conduct investigations and audits without interference from the head of the agency. § 3(a). And the ability to proceed without consent from agency higher-ups is vital to effectuating Congress' intent and maintaining an opportunity for objective inquiries into bureaucratic waste, fraud, abuse, and mismanagement.[5]

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[4] At oral argument, NASA and NASA–OIG indicated that the Administrator's general supervision authority includes the ability to require its Inspector General to comply with, *inter alia*, equal employment opportunity regulations. Tr. of Oral Arg. 5.

[5] See § 2; S. Rep. No. 95–1071, pp. 1, 5–7, 9 (1978); H. R. Rep. No. 95–584, pp. 2, 5–6 (1977).

But those characteristics do not make NASA–OIG any less a representative of NASA when it investigates a NASA employee. That certain officials within an agency, based on their views of the agency's best interests or their own, might oppose an OIG investigation does not tell us whether the investigators are "representatives" of the agency during the course of their duties. As far as the IGA is concerned, NASA–OIG's investigators are employed by, act on behalf of, and operate for the benefit of NASA.

Furthermore, NASA and NASA–OIG overstate the inherent conflict between an OIG and its agency. The investigation in this case was initiated by NASA's OIG on the basis of information provided by the FBI, but nothing in the IGA indicates that, if the information had been supplied by the Administrator of NASA rather than the FBI, NASA–OIG would have had any lesser obligation to pursue an investigation. See §§ 4(a)(1), (d), 7; S. Rep. No. 95–1071, p. 26 (1978). The statute does not suggest that one can determine whether the OIG personnel engaged in such an investigation are "representatives" of NASA based on the source of the information prompting an investigation. Therefore, it must be NASA's and NASA–OIG's position that even when an OIG conducts an investigation in response to a specific request from the head of an agency, an employee engaged in that assignment is not a "representative" of the agency within the meaning of § 7114(a)(2)(B) of the FSLMRS. Such management-prompted investigations are not rare.[6]

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[6] See, *e. g.*, *United States INS*, 46 F. L. R. A. 1210, 1226–1231 (1993), review den. *sub nom. American Federation of Govt. Employees, AFL–CIO, Local 1917* v. *FLRA*, 22 F. 3d 1184 (CADC 1994); *United States Dept. of Justice, INS*, 46 F. L. R. A. 1526, 1549 (1993), review granted *sub nom. United States Dept. of Justice* v. *FLRA*, 39 F. 3d 361 (CADC 1994); *Department of Defense, Defense Criminal Investigative Serv.*, 28 F. L. R. A. 1145, 1157–1159 (1987), enf'd *sub nom. Defense Criminal Investigative Serv.* v. *FLRA*, 855 F. 2d 93 (CA3 1988); see also *Martin* v. *United States*, 20 Cl. Ct. 738, 740–741 (1990).

Thus, not all OIG examinations subject to § 7114(a)(2)(B) will implicate an actual or apparent conflict of interest with the rest of the agency; and in many cases we can expect honest cooperation between an OIG and management-level agency personnel. That conclusion becomes more obvious when the practical operation of OIG interviews and § 7114(a)(2)(B) rights are considered. The IGA grants Inspectors General the authority to subpoena documents and information, but not witnesses. 5 U. S. C. App. § 6(a)(4). Nor does the IGA allow an OIG to discipline an agency employee, as all parties to this case agree. There may be other incentives for employee cooperation with OIG investigations, but formal sanctions for refusing to submit to an OIG interview cannot be pursued by the OIG alone. Such limitations on OIG authority enhance the likelihood and importance of cooperation between the agency and its OIG. See generally §§ 6(a)(3), (b)(1)–(2) (addressing an Inspector General's authority to request assistance from others in the agency, and their duty to respond); §§ 4(a)(5), (d); 50 F. L. R. A., at 616; App. to Pet. for Cert. 65a (noting information sharing between NASA–OIG and other agency officials). Thus, if the NASA–OIG investigator in this case told the employee that he would face dismissal if he refused to answer questions, 120 F. 3d, at 1210, n. 2, the investigator invoked NASA's authority, not his own.[7]

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[7] In fact, a violation of § 7114(a)(2)(B) seems less likely to occur when the agency and its OIG are not acting in concert. Under the Authority's construction of the FSLMRS, when an employee within the unit makes a valid request for union representation, an OIG investigator does *not* commit an unfair labor practice by (1) halting the examination, or (2) offering the employee a choice between proceeding without representation and discontinuing the examination altogether. *United States Dept. of Justice, Bureau of Prisons*, 27 F. L. R. A. 874, 879–880 (1987); see also *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 258–260 (1975). Disciplining an employee for his or her choice to demand union participation or to discontinue an examination would presumably violate the statute, but such responses require more authority than Congress granted the OIG's in the IGA.

Considering NASA–OIG's statutorily defined role within the agency, we cannot conclude that the proper operation of the IGA requires nullification of § 7114(a)(2)(B) in all OIG examinations.

IV

Although NASA's and NASA–OIG's narrow reading of the phrase "representative of the agency" is supported by the text of neither the FSLMRS nor the IGA, they also present broader—but ultimately unpersuasive—arguments of policy to defeat the application of § 7114(a)(2)(B) to OIG investigations.

First, NASA and NASA–OIG contend that enforcing § 7114(a)(2)(B) in situations similar to this case would undermine NASA–OIG's ability to maintain the confidentiality of investigations, particularly those investigations conducted jointly with law enforcement agencies. Cf. 5 U. S. C. App. §§ 5(e)(1)(C), (e)(2) (restricting OIG disclosure of information that is part of an ongoing criminal investigation). NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties. That possibility is, however, always present: NASA and NASA–OIG identify no legal authority restricting an employee's ability to discuss the matter with others. Furthermore, an employee cannot demand the attendance of a union representative when an OIG examination does not involve reasonably apparent potential discipline for that employee. Interviewing an employee who may have information relating to agency maladministration, but who is not himself under suspicion, ordinarily will not trigger the right to union representation. Thus, a variety of OIG investigations and interviews—and many in which confidentiality concerns are heightened—will not implicate § 7114(a)(2)(B) at all. Though legitimate, NASA's and NASA–OIG's confidentiality concerns are not weighty enough to justify a

nontextual construction of § 7114(a)(2)(B) rejected by the Authority.

Second, NASA and its OIG submit that, in other instances, the Authority has construed § 7114(a)(2)(B) so broadly that it will impair NASA–OIG's ability to perform its investigatory responsibilities. The Authority responds that it has been sensitive to agencies' investigative needs in other cases, and that union representation is unrelated to OIG independence from agency interference. Whatever the propriety of the Authority's rulings in other cases, NASA and NASA–OIG elected not to challenge the Authority's conclusion that the NASA–OIG examiner's attempt to limit union representative participation constituted an unfair labor practice. To resolve the question presented in this case, we need not agree or disagree with the Authority's various rulings regarding the scope of § 7114(a)(2)(B), nor must we consider whether the outer limits of the Authority's interpretation so obstruct the performance of an OIG's statutory responsibilities that the right must be more confined in this context.[8]

In any event, the right Congress created in § 7114(a)(2)(B) vindicates obvious countervailing federal policies. It provides a procedural safeguard for employees who are under investigation by their agency, and the mere existence of the right can only strengthen the morale of the federal work force. The interest in fair treatment for employees under

[8] The same can be said of NASA's and NASA–OIG's concerns that the reach of § 7114(a)(2)(B) will become the subject of collective bargaining between agencies and unions, or hinder joint or independent FBI investigations of federal employees. See *United States Nuclear Regulatory Comm'n* v. *FLRA*, 25 F. 3d 229 (CA4 1994) (adopting the agency's position that it could not bargain over certain procedures by which its OIG conducts investigatory interviews); 50 F. L. R. A., at 616, n. 13 (distinguishing FBI investigations). The process by which the scope of § 7114(a)(2)(B) may properly be determined, and the application of that section to law enforcement officials with a broader charge, present distinct questions not now before us.

investigation is equally strong whether they are being questioned by employees in NASA's OIG or by other representatives of the agency. And, as we indicated in *Weingarten*, representation is not the equivalent of obstruction. See 420 U. S., at 262–264. In many cases the participation of a union representative will facilitate the factfinding process and a fair resolution of an agency investigation—or at least Congress must have thought so.

Whenever a procedural protection plays a meaningful role in an investigation, it may impose some burden on the investigators or agency managers in pursuing their mission. We must presume, however, that Congress took account of the policy concerns on both sides of the balance when it decided to enact the IGA and, on the heels of that statute, § 7114(a)(2)(B).[9]

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[9] The dissent does not dispute much of our analysis; it indicates that NASA–OIG is an "ar[m]" of NASA "work[ing] to promote overall agency concerns." *Post*, at 260. The dissent's premise is that the Authority determined that the phrase "representative of the agency" means "representative of . . . agency [management]," and that this issue is now uncontested. See *post*, at 246–247, 248–259, 262. But see *post*, at 251, n. 3. Putting aside the fact that NASA's and NASA–OIG's construction of the statute—however one interprets their argument—is very much in dispute, see Brief for Respondent American Federation of Government Employees, AFL–CIO 26–32; Brief for Respondent FLRA 23–25, 31, and the rule that litigants cannot bind us to an erroneous interpretation of federal legislation, see *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253 (1999), we have ignored neither the actual rationale of the Authority's decision in this case nor NASA's and NASA–OIG's arguments before this Court. Focusing on its plain reasoning, we cannot fairly read the Authority's decision as turning on whether NASA "management" was involved. The Authority emphasized that FSLMRS rights do not depend on "the organizational entity within the agency to whom the person conducting the examination reports"; and in discussing NASA–OIG's role within the agency, the Authority's decision repeatedly refers to NASA headquarters together with its components—that is, to the agency as a whole. 50 F. L. R. A., at 615–616; *id.*, at 621 (noting "the investigative role that OIG's perform for the agency" and concluding that NASA–OIG "represents" not only its own interests, "but ultimately NASA [headquarters] and its subcomponent of-

V

Finally, NASA argues that it was error for the Authority to make NASA itself, as well as NASA's OIG, a party to the enforcement order because NASA has no authority over the manner in which NASA–OIG conducts its investigations. However, our conclusion that the investigator in this case was acting as a "representative" of NASA for purposes of § 7114(a)(2)(B) makes it appropriate to charge NASA–OIG, as well as the parent agency to which it reports and for which it acts, with responsibility for ensuring that such investigations are conducted in compliance with the FSLMRS. NASA's Administrator retains general supervisory authority over NASA's OIG, 5 U. S. C. App. § 3(a), and the remedy imposed by the Authority does not require NASA to interfere unduly with OIG prerogatives. NASA and NASA–OIG offer no convincing reason to believe that the Authority's remedy is inappropriate in view of the IGA, or that it will be ineffective in protecting the limited right of union representation secured by § 7114(a)(2)(B). See generally 5 U. S. C. §§ 706, 7123(c).

The judgment of the Court of Appeals is

Affirmed.

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

In light of the independence guaranteed Inspectors General by the Inspector General Act of 1978, 5 U. S. C. App. § 1 *et seq.*, p. 1381, investigators employed in the Office of Inspector General (OIG) will not represent agency management in the typical case. There is no basis for concluding, as the Federal Labor Relations Authority (Authority)

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fices"). Nowhere did the Authority rely on the assertion that OIG's act as "agency management's agent," a term coined by the dissent. *Post*, at 253.

did, that in this case the investigator from OIG for the National Aeronautics and Space Administration *was* a "representative of the agency" within the meaning of 5 U. S. C. § 7114(a)(2)(B). I respectfully dissent.

I

The National Aeronautics and Space Administration is headquartered in Washington, D. C. Among other agency subcomponents are the George C. Marshall Space Flight Center (Marshall Center), located in Huntsville, Alabama, and the Office of Inspector General, which is headquartered in Washington, D. C., but maintains offices in all of the agency's other subcomponents, including the Marshall Center. In January 1993, the Federal Bureau of Investigation received information that an employee of the Marshall Center, who is referred to in the record only as "P," was suspected of spying upon and threatening various co-workers. The FBI referred the matter directly to NASA's OIG, and an investigator for that Office who was stationed at the Marshall Center was assigned the case. He contacted P, who agreed to be interviewed so long as his attorney and a union representative were present; the investigator accepted P's conditions. App. to Pet. for Cert. 61a. At the interview, OIG's investigator read certain ground rules, which provided, *inter alia,* that the union representative was "'not to interrupt the question and answer process.'" *Ibid.*[1] The union filed an unfair labor practice charge, claiming that the interview was not conducted in accordance with the requirements of 5 U. S. C. § 7114(a)(2)(B), as the Authority has interpreted that provision. The Authority's General Counsel issued a complaint to that effect, and the Authority found that

[1] It appears that OIG's inspector informed P that he would face dismissal if he did not answer the questions put to him. See 120 F. 3d 1208, 1210, n. 2 (CA11 1997).

NASA headquarters and NASA's OIG had committed unfair labor practices. On review, the Court of Appeals for the Eleventh Circuit granted the Authority's application for enforcement of its order. 120 F. 3d 1208 (1997).

As the Court correctly recognizes, *ante*, at 233, several points are not in dispute at this stage of the litigation. The fact that P requested union representation and reasonably believed that disciplinary action might be taken against him on the basis of information developed during the examination has never been in dispute in this case. See *NASA*, 50 F. L. R. A. 601, 606, n. 4 (1995). Although petitioners contested the matter before the Authority, on review in the Eleventh Circuit, they conceded that OIG's investigator conducted the interview of P in a way that did not comport with what § 7114(a)(2)(B) requires. See 120 F. 3d, at 1211. And all parties agree that the relevant "agency" for purposes of § 7114(a)(2)(B) is NASA. One other point is not disputed—the "representative" to which § 7114(a)(2)(B) refers must represent agency management, not just the agency in some general sense as the Court suggests, *ante*, at 233–234, 240. See 50 F. L. R. A., at 614 (" '[R]epresentative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency"); *id.*, at 615 (" 'We doubt that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit' ") (quoting *Defense Criminal Investigative Serv.* v. *FLRA*, 855 F. 2d 93, 99 (CA3 1988)); Brief for Respondent FLRA 16 ("The Authority has determined that the phrase 'representative of the agency' should not be so narrowly construed as to exclude management personnel, such as the OIG, who are located in other components of the agency"); *id.*, at 21; Reply Brief for Petitioners 1 ("[A] 'representative of the agency' in Section 7114(a)(2)(B) must be a representative of agency *management*").

Since an agency's stated reasons for decision are important in any case reviewing agency action, I summarize in some detail what the Authority actually said in this case. It began by stating its conclusion:

> "We reach this conclusion based upon our determination that: (1) the term 'representative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the IG Act are not irreconcilable." 50 F. L. R. A., at 614.

The Authority headed its discussion of its first determination "Section 7114(a)(2)(B) Covers the Actions of Management Personnel Employed in Other Subcomponents of the Agency." *Id.*, at 615. This statement appears to suggest OIG itself is part of agency management. But the remainder of the Authority's discussion appears to advance a different theory—one that OIG serves as agency management's *agent* because OIG inspectors ultimately report to NASA's Administrator, see *ibid.* (OIG's investigator, "although employed in a separate component from the MSFC, is an employee of and ultimately reports to the head of NASA"), and because OIG provides information to management that sometimes results in discipline to union employees, *ibid.* ("OIG not only provides investigatory information to NASA [headquarters] but also to other NASA subcomponent offices"); see also *id.*, at 616 (Congress would regard an OIG investigator as a representative of the agency because "[t]he information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disci-

plinary actions taken against unit employees").[2] The Authority recognized that the Inspector General Act grants an Inspector General, or IG, "a degree of freedom and independence from the parent agency." *Id.*, at 615. It thought, however, that the Inspector General's autonomy "becomes nonexistent" when the IG's investigation concerns allegations of misconduct by agency employees in connection with their work and the information obtained during the investigation possibly would be shared with agency management. *Ibid.* As it further explained: "[I]n some circumstances, NASA, OIG *performs an investigatory role* for NASA [headquarters] and its subcomponents, specifically [the Marshall Center]." *Id.*, at 616 (emphasis added). Moreover, the Authority reasoned, the Inspector General "plays an integral role in assisting the agency and its subcomponent offices in meeting the agency's objectives." *Id.*, at 617. In light of all this, the Authority concluded:

> "Plainly, the IG represents and safeguards the entire agency's interests when it investigates the actions of the agency's employees. Such activities support, rather than threaten, broader agency interests and make the IG a participant, with other agency components, in meeting various statutory obligations, including the agency's labor relations obligations under the Statute." *Ibid.*

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[2] The Authority also relied on a policy ground here. It asserted that there was "no basis in the Statute or its legislative history to make the existence of [the representational rights provided by § 7114] dependent upon the organizational entity within the agency to whom the person conducting the examination reports." 50 F. L. R. A., at 615. It elaborated, in a footnote, that "[i]f such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees." *Id.*, at 615, n. 12.

II

The Authority's recognition that § 7114(a)(2)(B) protections are only triggered when an investigation is conducted by, or on behalf of, agency management, is important and hardly surprising. See, *e. g.*, 50 F. L. R. A., at 614 ("section 7114(a)(2)(B) should not be so narrowly construed as to exclude *management personnel* employed in other subcomponents of the agency" (emphasis added)); Brief for Respondent FLRA 21 ("The Authority's conclusion that the word 'representative,' or phrase 'representative of the agency,' includes *management personnel* in other subcomponents of the 'agency' is entirely consistent with the language of the [Federal Service Labor-Management Relations Statute]" (emphasis added)). It is important because the Court seems to think it enough that NASA's OIG represent NASA in some broad and general sense. But as the Authority's own opinion makes clear, that is not enough—NASA's OIG must represent NASA's management to qualify as a "representative of the agency" within the meaning of § 7114(a)(2)(B). The Authority's position is hardly surprising in that the Federal Service Labor-Management Relations Statute (FSLMRS) plainly means just that.[3] The FSLMRS governs labor-management relations in the federal sector. Section 7114(a)(2)(B) is captioned "[r]epresentation rights and duties," and every employee right contained therein flows from the collective-bargaining relationship.[4] As petitioners note,

[3] Although it is significant that the Authority recognized below and recognizes here that the statutory phrase "representative of the agency" refers to a representative of agency management, I do not, as the Court asserts, *ante*, at 245–246, n. 9, rest the argument on the premise that the point is conceded. Rather, in light of the context in which the phrase appears, and in light of the very subject matter of the statute, the phrase plainly has that meaning.

[4] Section 7114(a)(1) details what "[a] labor organization which has been accorded exclusive recognition" is entitled to and must do; § 7114(a)(2) indicates when an exclusive representative may be present at discussions or examinations conducted by agency management; § 7114(a)(3) requires

in each of the three instances where the FSLMRS refers to an agency representative, it does so in the context of the collective-bargaining relationship between management and labor. See §§ 7103(a)(12), 7114(a)(2)(A), 7114(a)(2)(B).[5]

Investigators within NASA's OIG might be "representatives of the agency" in two ways. First, if NASA's Inspector General and NASA's OIG itself were part of agency management, I suppose that employees of the Office necessarily would be representatives of agency management. But, to the extent that the Authority meant to hold that, there is no

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agency management annually to inform its employees of their rights under § 7114(a)(2)(B); § 7114(a)(4) obligates management and the exclusive representative to bargain in good faith for purposes of arriving at a collective-bargaining agreement; § 7114(a)(5) provides that the rights of an exclusive representative do not limit an employee's right to seek other representation, for example, legal counsel; § 7114(b) speaks to the duty of good faith imposed on management and the exclusive representative under § 7114(a)(4); and § 7114(c) requires the head of the agency to approve all collective-bargaining agreements.

[5] I disagree with the Court as to the proper reading of petitioners' argument that the phrase "representative of the agency" refers only to the entity that has a collective-bargaining relationship with a union. I do not take petitioners to mean that OIG's representative did not represent the "agency," NASA, for the simple reason that only Space Center management had a collective-bargaining relationship with P's union. If that were truly petitioners' view, its later argument that OIG cannot represent NASA because the IG is substantially independent from the agency head would not make sense—it would be enough for petitioners to argue that OIG is not under the control of the Marshall Center's management. Rather, as petitioners make clear in their reply brief, they are simply arguing that "a 'representative of the agency' must be a representative of agency management, as opposed to just another employee." Reply Brief for Petitioners 2, and n. 4. It appears that they would agree, in accordance with the Authority's precedent, see, *e. g., Air Force Logistics Command*, 46 F. L. R. A. 1184, 1186 (1993); *Department of Health and Human Services*, 39 F. L. R. A. 298, 311–312 (1991), that NASA headquarters also qualifies as agency management under the FSLMRS, even though it lacks a direct collective-bargaining relationship with a union, because it directs its subordinate managers who have such a collective-bargaining relationship.

basis for its conclusion. OIG has no authority over persons employed within the agency outside of its Office and similarly has no authority to direct agency personnel outside of the Office. Inspectors General, moreover, have no authority under the Inspector General Act to punish agency employees, to take corrective action with respect to agency programs, or to implement any reforms in agency programs that they might recommend on their own. See generally *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. Off. Legal Counsel 54, 55 (1989); Congressional Research Service, Report for Congress, Statutory Offices of Inspector General: A 20th Anniversary Review 7 (Nov. 1998). The Inspector General is charged with, *inter alia*, investigating suspected waste, fraud, and abuse, see 5 U. S. C. App. §§ 2, 4, 6, and making policy recommendations (which the agency head is not obliged to accept), see §§ 4(a)(3), (4), but the Inspector General Act bars the Inspector General from participating in the performance of agency management functions, see § 9(a). Moreover, OIG is not permitted to be party to a collective-bargaining relationship. See 5 U. S. C. § 7112(b)(7) (prohibiting "any employee primarily engaged in investigation or audit functions" from participating in a bargaining unit).

Investigators within NASA's OIG might "represent" the agency if they acted as agency management's representative—essentially, if OIG was agency management's agent or somehow derived its authority from agency management when investigating union employees. And something akin to an agency theory appears to be the primary basis for the Authority's decision. The agency theory does have a textual basis—§ 7114(a)(2)(B)'s term "representative," as is relevant in this context, can mean "standing for or in the place of another: acting for another or others: constituting the agent for another esp[ecially] through delegated authority," or "one that represents another as agent, deputy, substitute, or delegate usu[ally] being invested with the authority of the princi-

pal." Webster's Third New International Dictionary 1926–1927 (1976); see also Webster's New International Dictionary 2114 (2d ed. 1957) ("[b]eing, or acting as, the agent for another, esp. through delegated authority"). The agency notion, though, is counterintuitive, given that, as the majority acknowledges, *ante*, at 238, the stated purpose of the Inspector General Act was to establish "*independent* and objective units" within agencies to conduct audits and investigations, see 5 U. S. C. App. § 2 (emphasis added).

To be sure, NASA's OIG is a subcomponent of NASA and the Inspector General is subject to the "general supervision," § 3(a), of NASA's Administrator (or of the "officer next in rank below" the Administrator, *ibid.*).[6] But, as the Fourth Circuit has observed, it is hard to see how this "general supervision" amounts to much more than "nominal" supervision. See *NRC* v. *FLRA*, 25 F. 3d 229, 235 (1994). NASA's Inspector General does not depend upon the Administrator's approval to obtain or to keep her job. NASA's Inspector General must be appointed by the President and confirmed by the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." 5 U. S. C. App. § 3(a). Only the President, and not NASA's Administrator, may remove the Inspector General, and even then the President must provide Congress with his reasons for doing so. § 3(b).[7] In addition, the Administrator has no

[6] The Act provides that the Inspector General "shall not report to, or be subject to supervision by," any other agency officer. 5 U. S. C. App. § 3(a).

[7] The Court, *ante*, at 240, does not report the full story with respect to Inspector General supervision. We were told at oral argument that Executive Order 12993, 3 CFR 171 (1996), governs the procedures to be followed in those instances where the Inspector General and NASA's Administrator are in conflict. Tr. of Oral Arg. 51–52. Complaints against an Inspector General are referred to a body known as the "Integrity Committee," which is composed "of at least the following members": an official of the FBI, who serves as Chair of the Integrity Committee; the Special

control over who works for the Inspector General. Inspectors General have the authority to appoint an Assistant Inspector General for Auditing and another Assistant Inspector General for Investigations, §§ 3(d)(1), (2), may "select, appoint, and employ such officers and employees as may be necessary," § 6(a)(7), and also are authorized to employ experts and consultants and enter into contracts for audits, studies, and other necessary services, see §§ 6(a)(8), (9); see generally P. Light, Monitoring Government: Inspectors General and the Search for Accountability 175–185 (1993) (describing the "unprecedented freedom" that IG's have under the Inspector General Act in organizing their offices and how IG's have enhanced their independence by exercising their statutory authority in this regard to the fullest).

Inspectors General do not derive their authority to conduct audits and investigate agency affairs from agency management. They are authorized to do so directly under the Inspector General Act. 5 U. S. C. App. § 2(1). Neither NASA's Administrator, nor any other agency official, may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." § 3(a). The Administrator also may not direct the Inspector General to undertake a particular investigation; the Inspector General Act commits to the IG's discretion the decision whether to investigate or report upon the agency's programs and operations. § 6(a)(2). The Authority's counsel argued to the contrary, but could not provide a single example of an instance where an agency head

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Counsel of the Office of Special Counsel; the Director of the Office of Government Ethics; and three or more Inspectors General, representing both the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency. The Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, or his designee, serves as an advisor to the Integrity Committee with respect to its responsibilities and functions under the Executive Order.

has directed an Inspector General to conduct an investigation in a particular manner. Tr. of Oral Arg. 40, see also *id.*, at 46–48 (counsel for respondent American Federation of Government Employees (AFGE) also unable to provide an example of agency head direction of OIG investigation). The Authority's counsel also could not support his assertion that agency heads have the power to direct the Inspector General to comply with laws such as the FSLMRS. *Id.*, at 41–43.

Inspectors General, furthermore, are provided a broad range of investigatory powers under the Act. They are given access to "all records, reports, audits, reviews, documents, papers, recommendations, or other material" of the agency. 5 U. S. C. App. § 6(a)(1). They may issue subpoenas to obtain such information if necessary, and any such subpoena is enforceable by an appropriate United States district court. § 6(a)(4).[8] The Inspector General also may "administer to or take from any person an oath, affirmation, or affidavit, whenever necessary." § 6(a)(5). Inspectors General do not have the statutory authority to compel an employee's attendance at an interview. But if an employee refuses to attend an interview voluntarily, the Inspector General may request assistance, § 6(a)(3), and the agency head "shall . . . furnish . . . information or assistance" to OIG, § 6(b)(1).

NASA's Inspector General does, as the Authority claimed, provide information developed in the course of her audits and investigations to the Administrator. §§ 2(3), 4(a)(5). But she has outside reporting obligations as well. Inspectors General must prepare semiannual reports to Congress "summarizing the activities of the Office." § 5. Those reports first are delivered to the agency head, § 5(b), and the Administrator may add comments to the report, § 5(b)(1), but

[8] The Inspector General, however, does not have the authority to subpoena documents and information from other federal agencies. See 5 U. S. C. App. §§ 6(a)(4), 6(b)(1).

the Administrator may not prevent the report from going to Congress and may not change or order the Inspector General to change his report. Moreover, the Inspector General must notify the Attorney General directly, *without notice to other agency officials*, upon discovery of "reasonable grounds to believe there has been a violation of Federal criminal law." § 4(d).

As a practical matter, the Inspector General's independence from agency management is understood by Members of Congress and Executive Branch officials alike. This understanding was on display at the recent congressional hearing on the occasion of the Inspector General Act's 20th anniversary. For example, Senator Thompson, Chairman of the Senate Government Affairs Committee, stated that "[t]he overarching question we need to explore is whether the Executive Branch is providing IGs with support and attention adequate to ensure their independence and effectiveness." Hearings on "The Inspector General Act: 20 Years Later" before the Senate Committee on Governmental Affairs, 105th Cong., 2d Sess., 2 (1998). He further explained that "[t]he IGs . . . are paid to give [Congress] an independent and objective version [of] events." *Ibid.* Senator Glenn, then the ranking minority member, opined that "the IG's first responsibility continues to be program and fiscal integrity; they are not 'tools' of management." *Id.*, at 7.

At those hearings, testimony was received from several Inspectors General. June Gibbs Brown, the Inspector General for the United States Department of Health and Human Services, praised Secretary Shalala for "never, not even once, [seeking] to encroach on [her] independence." *Id.*, at 4. In her written testimony, she offered: "A key component of OIG independence is our direct communication with the Members and staff of the Congress. Frankly, I suspect that no agency head relishes the fact that IGs have, by law, an independent relationship with oversight Committees. Information can and must go directly from the Inspectors Gen-

eral to the Hill, without prior agency and administration clearance." *Id.*, at 45. The testimony of Susan Gaffney, the Inspector General for the United States Department of Housing and Urban Development, revealed that agency managers know all too well that the Inspector General is independent of agency management:

> "[I]t is to me somewhat jolting, maybe shocking, that the current Secretary of HUD has exhibited an extremely hostile attitude toward the independence of the HUD OIG, and, as I have detailed in my written testimony, he has, in fact, let this hostility lead to a series of attacks and dirty tricks against the HUD OIG." *Id.*, at 6.

In her written testimony, Ms. Gaffney further explained that, while, "[i]deally, the relationship between an IG and the agency head is characterized by mutual respect, a common commitment to the agency mission, and a thorough understanding and acceptance of the vastly different roles of the IG and the agency head," the current Secretary, in her view, was "uncomfortable with the concept of an independent Inspector General who is not subject to his control and who has a dual reporting responsibility." *Id.*, at 48–49.

The Authority essentially provided four reasons why OIG represented agency management in this case: because OIG is a subcomponent of NASA and subject to the "general supervision" of its Administrator; because it provides information obtained during the course of its investigations to NASA headquarters and its subcomponents; because that information is sometimes used for administrative and disciplinary purposes; and because OIG's functions support broader agency objectives. In my view, the fact that OIG is housed in the agency and subject to supervision (an example of which neither the Authority nor the Court can provide) is an insufficient basis upon which to rest the conclusion that OIG's employees are "representatives" of agency management. It is hard to see how OIG serves as agency management's agent

or representative when the Inspector General is given the discretion to decide whether, when, and how to conduct investigations. See 5 U. S. C. App. §§ 3(a), 6(a).[9]

The fact that information obtained in the course of OIG interviews is shared with agency management and sometimes forms the basis for employee discipline is similarly unimpressive. The Court suggests that when this happens, OIG and agency management act in "concert." *Ante*, at 242, n. 7. The truth of the matter is that upon receipt of information from OIG, agency management has the *discretion* to impose discipline but it need not do so. And OIG has no determinative role in agency management's decision. See 5 U. S. C. App. § 9(a) (Inspector General may not participate in the performance of agency management functions). Although OIG may provide information developed in the course of an investigation to agency management, so, apparently, does the FBI, the DEA, and local police departments. See, *e. g.*, 63 Fed. Reg. 8682 (1998) (FBI's disclosure policy); 62 Fed. Reg. 36572 (1997) (Immigration and Naturalization Service (INS) Alien File and Central Index System); 62 Fed. Reg. 26555 (1997) (INS Law Enforcement Support Center

[9] The Court posits, *ante*, at 241, that "nothing in the [Inspector General Act] indicates that, if the information had been supplied by the Administrator of NASA rather than the FBI, NASA–OIG would have had any lesser obligation to pursue an investigation." It appears shocked at the proposition that petitioners might think that "even when an OIG conducts an investigation in response to a specific request from the head of an agency, an employee engaged in that assignment is not a 'representative' of the agency within the meaning of [5 U. S. C.] § 7114(a)(2)(B)." *Ibid.* The answer to the Court is quite simple. So far as the Inspector General Act reveals, OIG has no obligation to pursue any particular investigation. And presumably the Court would agree that if NASA's Administrator referred a matter to the FBI or the Drug Enforcement Administration (DEA) (who also, we are told, rely on agency management to compel an employee's appearance at an interview, Reply Brief for Petitioners 5–6), those independent agencies would not "represent" the agency. I fail to see how it is different when the investigatory unit, although independent from agency management, is housed within the agency.

Database); 61 Fed. Reg. 54219 (1996) (DEA); 60 Fed. Reg. 56648 (1995) (Secret Service, Bureau of Alcohol, Tobacco, and Firearms, and other Treasury components); 60 Fed. Reg. 18853 (1995) (United States Marshals Service (USMS)); 54 Fed. Reg. 42060 (1989) (FBI, USMS, and various Department of Justice record systems); see also 31 CFR § 1.36 (1998) (listing routine uses and other exemptions in disclosure of Treasury agencies' records). Surely it would not be reasonable to consider an FBI agent to be a "representative" of agency management just because information developed in the course of his investigation of a union employee may be provided to agency management. Merely providing information does not establish an agency relationship between management and the provider.

Similarly, the fact that OIG may promote broader agency objectives does not mean that it acts as management's agent. To be sure, as the Court points out, *ante*, at 240, OIG's mission is to conduct audits and investigations of the *agency's* programs and operations. See 5 U. S. C. App. §§ 2, 4(a). But just because two arms of the same agency work to promote overall agency concerns does not make one the other's representative. In any event, OIG serves more than just agency concerns. It also provides the separate function of keeping Congress aware of agency developments, a function that is of substantial assistance to the congressional oversight function.

The Court mentions, *ante*, at 242, that the Inspector General lacks the authority to compel witnesses to appear at an interview as if that provided support for the Authority's decision. Perhaps it is of the view that because the Inspector General must rely upon the agency head to compel an employee's attendance at an interview, management's authority is somehow imputed to OIG, or OIG somehow derives its authority from the agency. This proposition seems dubious at best. The Inspector General is provided the authority to investigate under the Inspector General Act, and is

given power to effectuate her responsibilities through, *inter alia*, requesting assistance as may be necessary in carrying out her duties. 5 U. S. C. App. § 6(a)(3). The head of the agency must furnish information and assistance to the IG, "insofar as is practicable and not in contravention" of law. § 6(b)(1). Perhaps, then, when agency management directs an employee to appear at an OIG interview, *management* acts as OIG's agent.

The proposition seems especially dubious in this case, as P *agreed* to be interviewed. The record does not reveal that NASA's management compelled him to attend the interview nor does it reveal that P was threatened with discipline if he did not attend the interview. The Eleventh Circuit, to be sure, indicated that OIG's investigator threatened P with discipline if he did not answer the questions put to him. But that threat, assuming it indeed was made, had little to do with attendance and more to do with the conduct of the interview. As the Authority has interpreted § 7114(a)(2)(B), as the Court notes, *ante*, at 242, n. 7, no unfair labor practice is committed if an employee who requests representation is given the choice of proceeding without representation and discontinuing the interview altogether. Perhaps it could be argued that by threatening P with discipline if he did not answer the questions put to him, rather than giving P the choice of proceeding without representation, that OIG's investigator invoked agency management's authority to compel (continued) attendance. Along those lines, respondent AFGE contends that OIG's representative must have been acting for agency management by threatening P with discipline because only NASA's Administrator and his delegates, 5 U. S. C. § 302(b)(1); 42 U. S. C. § 2472(a), have the authority to discipline agency employees. Brief for Respondent AFGE 15–16. If OIG's investigator did mention that P could face discipline, he was either simply stating a fact or clearly acting ultra vires. OIG has no authority to discipline or otherwise control agency employees. Since the mere in-

vocation of agency management's authority is not enough to vest that authority with OIG's investigator, the argument, then, must be that it was reasonable for P to believe that OIG's investigator might have the ability to exercise agency management's authority. That is a question we simply cannot answer on this record. And more important, I do not think that § 7114(a)(2)(B) can be read to have its applicability turn on an after-the-fact assessment of interviewees' subjective perceptions, or even an assessment of their reasonable beliefs.

* * *

In light of the Inspector General's independence—guaranteed by statute and commonly understood as a practical reality—an investigator employed within NASA's OIG will not, in the usual course, represent NASA's management within the meaning of § 7114(a)(2)(B). Perhaps there are exceptional cases where, under some unusual combination of facts, investigators of the OIG might be said to represent agency management, as the statute requires. Cf. *FLRA* v. *United States Dept. of Justice*, 137 F. 3d 683, 690–691 (CA2 1997) ("So long as the OIG agent is questioning an employee for bona fide purposes within the authority of the [Inspector General Act] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a 'representative' of the employee's agency for purposes of section 7114(a)(2)(B)"), cert. pending, No. 98–667. This case, however, certainly does not present such facts. For the foregoing reasons, I respectfully dissent.

Syllabus

STRICKLER *v.* GREENE, WARDEN

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

No. 98–5864. Argued March 3, 1999—Decided June 17, 1999

The Commonwealth of Virginia charged petitioner with capital murder and related crimes. Because an open file policy gave petitioner access to all of the evidence in the prosecutor's files, petitioner's counsel did not file a pretrial motion for discovery of possible exculpatory evidence. At the trial, Anne Stoltzfus gave detailed eyewitness testimony about the crimes and petitioner's role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with Stoltzfus, and letters written by Stoltzfus to the detective, that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty, and he was sentenced to death. The Virginia Supreme Court affirmed. In subsequent state habeas corpus proceedings, petitioner advanced an ineffective-assistance-of-counsel claim based, in part, on trial counsel's failure to file a motion under *Brady* v. *Maryland*, 373 U. S. 83, for disclosure of all exculpatory evidence known to the prosecution or in its possession. In response, the Commonwealth asserted that such a motion was unnecessary because of the prosecutor's open file policy. The trial court denied relief. The Virginia Supreme Court affirmed. Petitioner then filed a federal habeas petition and was granted access to the exculpatory Stoltzfus materials for the first time. The District Court vacated petitioner's capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose those materials and that petitioner had not, in consequence, received a fair trial. The Fourth Circuit reversed because petitioner had procedurally defaulted his *Brady* claim by not raising it at his trial or in the state collateral proceedings. In addition, the Fourth Circuit concluded that the claim was, in any event, without merit.

Held: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. Pp. 280–296.

(a) There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The record in this case unquestionably

establishes two of those components. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial statement to the detective that the incident seemed a trivial episode suffices to establish the impeaching character of the undisclosed documents. Moreover, with respect to some of those documents, there is no dispute that they were known to the Commonwealth but not disclosed to trial counsel. It is the third component—whether petitioner has established the necessary prejudice—that is the most difficult element of the claimed *Brady* violation here. Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, this Court must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, see 373 U. S., at 87, their suppression did not give rise to sufficient prejudice to overcome the procedural default. Pp. 280–282.

(b) Petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government. See *Murray* v. *Carrier*, 477 U. S. 478, 488, and *Amadeo* v. *Zant*, 486 U. S. 214, 222. *Gray* v. *Netherland*, 518 U. S. 152, and *McCleskey* v. *Zant*, 499 U. S. 467, distinguished. This Court need not decide whether any one or two of the foregoing factors would be sufficient to constitute cause, since the combination of all three surely suffices. Pp. 282–289.

(c) However, in order to obtain relief, petitioner must convince this Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles* v. *Whitley*, 514 U. S. 419, 434. Here, other evidence in the record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached or her testimony excluded entirely. Notwithstanding the obvious significance

of that testimony, therefore, petitioner cannot show prejudice sufficient to excuse his procedural default. Pp. 289–296.

149 F. 3d 1170, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, GINSBURG, and BREYER, JJ., joined in full, in which KENNEDY and SOUTER, JJ., joined as to Part III, and in which THOMAS, J., joined as to Parts I and IV. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined as to Part II, *post*, p. 296.

Miguel A. Estrada argued the cause for petitioner. With him on the briefs were *Barbara L. Hartung*, *Mark E. Olive*, and *John H. Blume*.

Pamela A. Rumpz, Assistant Attorney General of Virginia, argued the cause for respondent. With her on the brief was *Mark L. Earley*, Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.†

The District Court for the Eastern District of Virginia granted petitioner's application for a writ of habeas corpus and vacated his capital murder conviction and death sentence on the grounds that the Commonwealth had failed to disclose important exculpatory evidence and that petitioner had not, in consequence, received a fair trial. The Court of Appeals for the Fourth Circuit reversed because petitioner had not raised his constitutional claim at his trial or in state collateral proceedings. In addition, the Fourth Circuit concluded that petitioner's claim was, "in any event, without merit." App. 418, n. 8.[1] Finding the legal question presented by this

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**Gerald T. Zerkin* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

†JUSTICE THOMAS joins Parts I and IV of this opinion. JUSTICE KENNEDY joins Part III.

[1] The opinion of the Court of Appeals is unreported. The judgment order is reported, *Strickler* v. *Pruett*, 149 F. 3d 1170 (CA4 1998). The opinion of the District Court is also unreported.

case considerably more difficult than the Fourth Circuit, we granted certiorari, 525 U. S. 809 (1998), to consider (1) whether the Commonwealth violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), and its progeny; (2) whether there was an acceptable "cause" for petitioner's failure to raise this claim in state court; and (3), if so, whether he suffered prejudice sufficient to excuse his procedural default.

I

In the early evening of January 5, 1990, Leanne Whitlock, an African-American sophomore at James Madison University, was abducted from a local shopping center and robbed and murdered. In separate trials, both petitioner and Ronald Henderson were convicted of all three offenses. Henderson was convicted of first-degree murder, a noncapital offense, whereas petitioner was convicted of capital murder and sentenced to death.[2]

At both trials, a woman named Anne Stoltzfus testified in vivid detail about Whitlock's abduction. The exculpatory material that petitioner claims should have been disclosed before trial includes documents prepared by Stoltzfus, and notes of interviews with her, that impeach significant portions of her testimony. We begin, however, by noting that, even without the Stoltzfus testimony, the evidence in the record was sufficient to establish petitioner's guilt on the murder charge. Whether petitioner would have been convicted of capital murder and received the death sentence if she had not testified, or if she had been sufficiently impeached, is less clear. To put the question in context, we review the trial testimony at some length.

The Testimony at Trial

At about 4:30 p.m. on January 5, 1990, Whitlock borrowed a 1986 blue Mercury Lynx from her boyfriend, John Dean,

[2] Petitioner was tried in May 1990. Henderson fled the Commonwealth and was later apprehended in Oregon. He was tried in March 1991.

who worked in the Valley Shopping Mall in Harrisonburg, Virginia. At about 6:30 or 6:45 p.m., she left her apartment, intending to return the car to Dean at the mall. She did not return the car and was not again seen alive by any of her friends or family.

Petitioner's mother testified that she had driven petitioner and Henderson to Harrisonburg on January 5. She also testified that petitioner always carried a hunting knife that had belonged to his father. Two witnesses, a friend of Henderson's and a security guard, saw petitioner and Henderson at the mall that afternoon. The security guard was informed around 3:30 p.m. that two men, one of whom she identified at trial as petitioner, were attempting to steal a car in the parking lot. She had them under observation during the remainder of the afternoon but lost sight of them at about 6:45.

At approximately 7:30 p.m., a witness named Kurt Massie saw the blue Lynx at a location in Augusta County about 25 miles from Harrisonburg and a short distance from the cornfield where Whitlock's body was later found. Massie identified petitioner as the driver of the vehicle; he also saw a white woman in the front seat and another man in the back. Massie noticed that the car was muddy, and that it turned off Route 340 onto a dirt road.

At about 8 p.m., another witness saw the Lynx at Buddy's Market, with two men sitting in the front seat. The witness did not see anyone else in the car. At approximately 9 p.m., petitioner and Henderson arrived at Dice's Inn, a bar in Staunton, Virginia, where they stayed for about four or five hours. They danced with several women, including four prosecution witnesses: Donna Kay Tudor, Nancy Simmons, Debra Sievers, and Carolyn Brown. While there, Henderson gave Nancy Simmons a watch that had belonged to Whitlock. Petitioner spent most of his time with Tudor, who was later arrested for grand larceny based on her possession of the blue Lynx.

These four women all testified that Tudor had arrived at Dice's at about 8 p.m. Three of them noticed nothing unusual about petitioner's appearance, but Tudor saw some blood on his jeans and a cut on his knuckle. Tudor also testified that she, Henderson, and petitioner left Dice's together after it closed to search for marijuana. Henderson was driving the blue Lynx, and petitioner and Tudor rode in back. Tudor related that petitioner was leaning toward Henderson and talking with him; she overheard a crude conversation that could reasonably be interpreted as describing the assault and murder of a black person with a "rock crusher." Tudor stated that petitioner made a statement that implied that he had killed someone, so the person "wouldn't give him no more trouble." App. 99. Tudor testified that while she, petitioner, and Henderson were driving around, petitioner took out his knife and threatened to stab Henderson because he was driving recklessly. Petitioner then began driving.

At about 4:30 or 5 a.m. on January 6, petitioner drove Henderson to Kenneth Workman's apartment in Timberville.[3] Henderson went inside to get something, and petitioner and Tudor drove off without waiting for him. Workman testified that Henderson had blood on his pants and stated he had killed a black person.

Petitioner and Tudor then drove to a motel in Blue Ridge. A day or two later they went to Virginia Beach, where they spent the rest of the week. Petitioner gave Tudor pearl earrings that Whitlock had been wearing when she was last seen. Tudor saw Whitlock's driver's license and bank card in the glove compartment of the car. Tudor testified that petitioner unsuccessfully attempted to use Whitlock's bank card when they were in Virginia Beach.

When petitioner and Tudor returned to Augusta County, they abandoned the blue Lynx. On January 11, the police identified the car as Dean's, and found petitioner's and Tu-

[3] Workman was called as a defense witness.

dor's fingerprints on both the inside and the outside of the car. They also found shoe impressions that matched the soles of shoes belonging to petitioner. Inside the car, they retrieved a jacket that contained identification papers belonging to Henderson.

The police also recovered a bag at petitioner's mother's house that Tudor testified she and petitioner had left when they returned from Virginia Beach. The bag contained, among other items, three identification cards belonging to Whitlock and a black "tank top" shirt that was later found to have human blood and semen stains on it. Tr. 707.

On January 13, a farmer called the police to advise them that he had found Henderson's wallet; a search of the area led to the discovery of Whitlock's frozen, nude, and battered body. A 69-pound rock, spotted with blood, lay nearby. Forensic evidence indicated that Whitlock's death was caused by "multiple blunt force injuries to the head." App. 109. The location of the rock and the human blood on the rock suggested that it had been used to inflict these injuries. Based on the contents of Whitlock's stomach, the medical examiner determined that she died fewer than six hours after she had last eaten.[4]

A number of Caucasian hair samples were found at the scene, three of which were probably petitioner's. Given the weight of the rock, the prosecution argued that one of the killers must have held the victim down while the other struck her with the murder weapon.

Donna Tudor's estranged husband, Jay Tudor, was called by the defense and testified that in March she had told him that she was present at the murder scene and that petitioner did not participate in the murder. Jay Tudor's testimony was inconsistent in several respects with that of other witnesses. For example, he testified that several days elapsed

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[4] Whitlock's roommate testified that Whitlock had dinner at 6 p.m. on January 5, 1990, just before she left for the mall to return Dean's car.

between the time that petitioner, Henderson, and Donna Tudor picked up Whitlock and the time of Whitlock's murder.

Anne Stoltzfus' Testimony

Anne Stoltzfus testified that on two occasions on January 5 she saw petitioner, Henderson, and a blonde girl inside the Harrisonburg mall, and that she later witnessed their abduction of Whitlock in the parking lot. She did not call the police, but a week and a half after the incident she discussed it with classmates at James Madison University, where both she and Whitlock were students. One of them called the police. The next night a detective visited her, and the following morning she went to the police station and told her story to Detective Claytor, a member of the Harrisonburg City Police Department. Detective Claytor showed her photographs of possible suspects, and she identified petitioner and Henderson "with absolute certainty" but stated that she had a slight reservation about her identification of the blonde woman. *Id.*, at 56.

At trial, Stoltzfus testified that, at about 6 p.m. on January 5, she and her 14-year-old daughter were in the Music Land store in the mall looking for a compact disc. While she was waiting for assistance from a clerk, petitioner, whom she described as "Mountain Man," and the blonde girl entered.[5]

[5] She testified to their appearances in great detail. She stated that petitioner had "a kind of multi layer look." He wore a grey T-shirt with a Harley Davidson insignia on it. The prosecutor showed Stoltzfus the shirt, stained with blood and semen, that the police had discovered at petitioner's mother's house. He asked if it were the same shirt she saw petitioner wearing at the mall. She replied, "That could have been it." App. 37, 39. Henderson "had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort." *Id.*, at 37. The woman "had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face." *Id.*, at 60.

Because petitioner was "revved up" and "very impatient," she was frightened and backed up, bumping into Henderson (whom she called "Shy Guy"), and thought she felt something hard in the pocket of his coat. *Id.*, at 36–37.

Stoltzfus left the store, intending to return later. At about 6:45, while heading back toward Music Land, she again encountered the threesome: "Shy Guy" walking by himself, followed by the girl, and then "Mountain Man" yelling "Donna, Donna, Donna." The girl bumped into Stoltzfus and then asked for directions to the bus stop.[6] The three then left.

At first Stoltzfus tried to follow them because of her concern about petitioner's behavior, but she "lost him" and then headed back to Music Land. The clerk had not returned, so she and her daughter went to their car. While driving to another store, they saw a shiny dark blue car. The driver was "beautiful," "well dressed and she was happy, she was singing . . . ." *Id.*, at 41. When the blue car was stopped behind a minivan at a stop sign, Stoltzfus saw petitioner for the third time.

She testified:

> "'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of the van and . . . was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was standing . . . . [T]hen we left [and before the van and a white pickup truck could turn] 'Mountain Man' came out again . . . ." *Id.*, at 42–43.

After first going to the passenger side of the pickup truck, petitioner came back to the black girl's car, "pounded on" the passenger window, shook the car, yanked the door open and jumped in. When he motioned for "Blonde Girl" and "Shy

[6] Stoltzfus stated that the girl caught a button in Stoltzfus' "open weave sweater, which is why I remember her attire." *Id.*, at 39.

Guy" to get in, the driver stepped on the gas and "just laid on the horn" but she could not go because there were people walking in front of the car. The horn "blew a long time" and petitioner

> "started hitting her . . . on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him." *Id.,* at 44–45.

Stoltzfus pulled her car up parallel to the blue car, got out for a moment, got back in, and leaned over to ask repeatedly if the other driver was "O.K." The driver looked "frozen" and mouthed an inaudible response. Stoltzfus started to drive away and then realized "the only word that it could possibly be, was help." *Id.,* at 47. The blue car then drove slowly around her, went over the curb with its horn honking, and headed out of the mall. Stoltzfus briefly followed, told her daughter to write the license number on a "3x4 [inch] index card,"[7] and then left for home because she had an empty gas tank and "three kids at home waiting for supper." *Id.,* at 48–49.

At trial Stoltzfus identified Whitlock from a picture as the driver of the car and pointed to petitioner as "Mountain Man." When asked if pretrial publicity about the murder had influenced her identification, Stoltzfus replied "absolutely not." She explained:

> "[F]irst of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an

[7] "I said to my fourteen[-year-]old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, 'No Kids Alone 243,' and I said remember, 243 is my age." *Id.,* at 48.

> emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification." *Id.*, at 58.

The Commonwealth did not produce any other witnesses to the abduction. Stoltzfus' daughter did not testify.

The Stoltzfus Documents

The materials that provide the basis of petitioner's *Brady* claim consist of notes taken by Detective Claytor during his interviews with Stoltzfus, and letters written by Stoltzfus to Claytor. They cast serious doubt on Stoltzfus' confident assertion of her "exceptionally good memory." Because the content of the documents is critical to petitioner's procedural and substantive claims, we summarize their content.

Exhibit 1[8] is a handwritten note prepared by Detective Claytor after his first interview with Stoltzfus on January 19, 1990, just two weeks after the crime. The note indicates that she could not identify the black female victim. The only person Stoltzfus apparently could identify at this time was the white female. *Id.*, at 306.

Exhibit 2 is a document prepared by Detective Claytor some time after February 1. It contains a summary of his interviews with Stoltzfus conducted on January 19 and January 20, 1990.[9] At that time "she was not sure whether she could identify the white males but felt sure she could identify the white female."

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[8] These materials were originally attached to an affidavit submitted with petitioner's motion for summary judgment on his federal petition for habeas corpus. Because both the District Court and the Court of Appeals referred to the documents by their exhibit numbers, we have done the same.

[9] As the District Court pointed out, however, it omits reference to the fact that Stoltzfus originally said that she could not identify the victim—a fact recorded in his handwritten notes. *Id.*, at 387.

Exhibit 3 is entitled "Observations" and includes a summary of the abduction.

Exhibit 4 is a letter written by Stoltzfus to Claytor three days after their first interview "to clarify some of my confusion for you." The letter states that she had not remembered being at the mall, but that her daughter had helped jog her memory. Her description of the abduction includes the comment: "I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. . . . Then the guy I saw came running up to the black girl's window. Were those 2 memories the same person?" *Id.*, at 316. In a postscript she noted that her daughter "doesn't remember seeing the 3 people get into the black girl's car . . . ." *Ibid.*

Exhibit 5 is a note to Claytor captioned "My Impressions of 'The Car,' " which contains three paragraphs describing the size of the car and comparing it with Stoltzfus' Volkswagen Rabbit, but not mentioning the license plate number that she vividly recalled at the trial. *Id.*, at 317–318.

Exhibit 6 is a brief note from Stoltzfus to Claytor dated January 25, 1990, stating that after spending several hours with John Dean, Whitlock's boyfriend, "looking at current photos," she had identified Whitlock "beyond a shadow of a doubt."[10] *Id.*, at 318. The District Court noted that by the time of trial her identification had been expanded to include a description of her clothing and her appearance as a college kid who was "singing" and "happy." *Id.*, at 387–388.

Exhibit 7 is a letter from Stoltzfus to Detective Claytor, dated January 16, 1990, in which she thanks him for his "patience with my sometimes muddled memories." She states that if the student at school had not called the police, "I never would have made any of the associations that you helped me make." *Id.*, at 321.

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[10] Stoltzfus' trial testimony made no mention of her meeting with Dean.

In Exhibit 8, which is undated and summarizes the events described in her trial testimony, Stoltzfus commented:

> "So where is the 3x4 card? . . . It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU. . . . Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag." *Id.*, at 326.

There is a dispute between the parties over whether petitioner's counsel saw Exhibits 2, 7, and 8 before trial. The prosecuting attorney conceded that he himself never saw Exhibits 1, 3, 4, 5, and 6 until long after petitioner's trial, and they were not in the file he made available to petitioner.[11] For purposes of this case, therefore, we assume that petitioner proceeded to trial without having seen Exhibits 1, 3, 4, 5, and 6.[12]

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[11] The prosecutor recalled that Exhibits 2, 7, and 8 had been in his open file, *id.*, at 365–368, but the lawyer who represented Henderson at his trial swore that they were not in the file, *id.*, at 330; the recollection of petitioner's trial counsel was somewhat equivocal. Lead defense counsel was sure he had not seen the documents, *id.*, at 300, while petitioner's other lawyer signed an affidavit to the effect that he does "remember the information contained in [the documents]" but "cannot recall if I have seen these specific documents," *id.*, at 371.

[12] Although the parties have not advanced an explanation for the nondisclosure of the documents, perhaps it was an inadvertent consequence of the fact that Harrisonburg is in Rockingham County and the trial was conducted by the Augusta County prosecutor. We note, however, that the prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles* v. *Whitley*, 514 U. S. 419, 437 (1995). Thus, the Commonwealth, through its prosecutor, is charged with knowledge of the Stoltzfus materials for purposes of *Brady* v. *Maryland*, 373 U. S. 83 (1963).

State Proceedings

Petitioner was tried in Augusta County, where Whitlock's body was found, on charges of capital murder, robbery, and abduction. Because the prosecutor maintained an open file policy, which gave petitioner's counsel access to all of the evidence in the Augusta County prosecutor's files,[13] petitioner's counsel did not file a pretrial motion for discovery of possible exculpatory evidence.[14] In closing argument, petitioner's lawyer effectively conceded that the evidence was sufficient to support the robbery and abduction charges, as well as the lesser offense of first-degree murder, but argued that the evidence was insufficient to prove that petitioner was guilty of capital murder. *Id.*, at 192–193.

The judge instructed the jury that petitioner could be found guilty of the capital charge if the evidence established beyond a reasonable doubt that he "jointly participated in the fatal beating" and "was an active and immediate partici-

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[13] In the federal habeas proceedings, the prosecutor gave the following sworn answer to an interrogatory requesting him to state what materials were disclosed by him to defense counsel pursuant to *Brady:* "I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness statements in the file." App. 368. Petitioner's trial counsel had shared the prosecutor's understanding of the "open file" policy. In an affidavit filed in the state habeas proceeding, they stated that they "thoroughly investigated" petitioner's case. "In this we were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files . . . . As a result of this cooperation, they introduced nothing at trial of which we were previously unaware." *Id.*, at 223.

[14] In its pleadings on state habeas, the Commonwealth explained: "From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed *all* the evidence the Commonwealth intended to present. . . . Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal *[Brady]* motion." *Id.*, at 212–213.

pant in the act or acts that caused the victim's death." *Id.*, at 160–161. The jury found petitioner guilty of abduction, robbery, and capital murder. *Id.*, at 200–201. After listening to testimony and arguments presented during the sentencing phase, the jury made findings of "vileness" and "future dangerousness," and unanimously recommended the death sentence that the judge later imposed.

The Virginia Supreme Court affirmed the conviction and sentence. *Strickler* v. *Commonwealth*, 241 Va. 482, 404 S. E. 2d 227 (1991). It held that the trial court had properly instructed the jury on the "joint perpetrator" theory of capital murder and that the evidence, viewed most favorably in support of the verdict, amply supported the prosecution's theory that both petitioner and Henderson were active participants in the actual killing.[15]

In December 1991, the Augusta County Circuit Court appointed new counsel to represent petitioner in state habeas corpus proceedings. State habeas counsel advanced an

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[15] "The Commonwealth's theory of the case was that Strickler and Henderson had acted jointly to accomplish the actual killing. It contended at trial, and argues on appeal, that the physical evidence points to a violent struggle between the assailants and the victim, in which Strickler's hair had actually been torn out by the roots. Although Leanne had been beaten and kicked, none of her injuries would have been sufficient to immobilize her until her skull was crushed with the 69-pound rock. Because, the Commonwealth's argument goes, the rock had been dropped on her head at least twice, while she was on the ground, leaving two bloodstained depressions in the frozen earth, it would have been necessary that she be held down by one assailant while the other lifted the rock and dropped it on her head.

"The weight and dimensions of the 69-pound bloodstained rock, which was introduced in evidence as an exhibit, made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down. The bloodstains on Henderson's jacket as well as on Strickler's clothing further tended to corroborate the Commonwealth's theory that the two men had been in the immediate presence of the victim's body when the fatal blows were struck and, hence, had jointly participated in the killing." *Strickler*, 241 Va., at 494, 404 S. E. 2d, at 235.

ineffective-assistance-of-counsel claim based, in part, on trial counsel's failure to file a motion under *Brady* v. *Maryland*, 373 U. S. 83 (1963), "to have the Commonwealth disclose to the defense all exculpatory evidence known to it—or in its possession." App. 205–206. In answer to that claim, the Commonwealth asserted that such a motion was unnecessary because the prosecutor had maintained an open file policy.[16] The Circuit Court dismissed the petition, and the State Supreme Court affirmed. *Strickler* v. *Murray*, 249 Va. 120, 452 S. E. 2d 648 (1995).

Federal Habeas Corpus Proceedings

In March 1996, petitioner filed a federal habeas corpus petition in the Eastern District of Virginia. The District Court entered a sealed, *ex parte* order granting petitioner's counsel the right to examine and to copy all of the police and prosecution files in the case. Record, Doc. No. 20. That order led to petitioner's counsel's first examination of the Stoltzfus materials, described *supra*, at 273–275.

Based on the discovery of those exhibits, petitioner for the first time raised a direct claim that his conviction was invalid because the prosecution had failed to comply with the rule of *Brady* v. *Maryland*. The District Court granted the Commonwealth's motion to dismiss all claims except for petitioner's contention that the Commonwealth violated *Brady*, that he received ineffective assistance of counsel,[17] and that he was denied due process of law under the Fifth and Fourteenth Amendments. In its order denying the Commonwealth's motion to dismiss, the District Court found that petitioner had "demonstrated cause for his failure to raise this claim earlier [because] [d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceeding." App. 287.

[16] See n. 14, *supra*.

[17] Petitioner later voluntarily dismissed this claim. App. 384.

After reviewing the Stoltzfus materials, and making the assumption that the three disputed exhibits had been available to the defense, the District Court concluded that the failure to disclose the other five was sufficiently prejudicial to undermine confidence in the jury's verdict. *Id.,* at 396. It granted summary judgment to petitioner and granted the writ.

The Court of Appeals vacated in part and remanded. It held that petitioner's *Brady* claim was procedurally defaulted because the factual basis for the claim was available to him at the time he filed his state habeas petition. Given that he knew that Stoltzfus had been interviewed by Harrisonburg police officers, the court opined that "reasonably competent counsel would have sought discovery in state court" of the police files, and that in response to this "simple request, it is likely the state court would have ordered the production of the files." App. 421. Therefore, the Court of Appeals reasoned, it could not address the *Brady* claim unless petitioner could demonstrate both cause and actual prejudice.

Under Fourth Circuit precedent a party "cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence." App. 423 (citing *Stockton* v. *Murray*, 41 F. 3d 920, 925 (1994)). Having already decided that the claim was available to reasonably competent counsel, the Fourth Circuit stated that the basis for finding procedural default also foreclosed a finding of cause. Moreover, the Court of Appeals reasoned, petitioner could not fault his trial lawyers' failure to make a *Brady* claim because they reasonably relied on the prosecutor's open file policy. App. 423–424.[18]

As an alternative basis for decision, the Court of Appeals also held that petitioner could not establish prejudice be-

[18] For reasons we do not entirely understand, the Court of Appeals thus concluded that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for postconviction counsel to do so.

cause "the Stoltzfus materials would have provided little or no help . . . in either the guilt or sentencing phases of the trial." *Id.*, at 425. With respect to guilt, the court noted that Stoltzfus' testimony was not relevant to petitioner's argument that he was only guilty of first-degree murder rather than capital murder because Henderson, rather than he, actually killed Whitlock. With respect to sentencing, the court concluded that her testimony "was of no import" because the findings of future dangerousness and vileness rested on other evidence. Finally, the court noted that even if it could get beyond the procedural default, the *Brady* claim would fail on the merits because of the absence of prejudice. App. 425, n. 11. The Court of Appeals, therefore, reversed the District Court's judgment and remanded the case with instructions to dismiss the petition.

II

The first question that our order granting certiorari directed the parties to address is whether the Commonwealth violated the *Brady* rule. We begin our analysis by identifying the essential components of a *Brady* violation.

In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States* v. *Agurs*, 427 U. S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States* v. *Bagley*, 473 U. S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, at 682; see also *Kyles* v. *Whitley*, 514 U. S. 419, 433–434 (1995). Moreover, the rule encompasses evidence "known only to po-

lice investigators and not to the prosecutor." *Id.*, at 438. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U. S., at 437.

These cases, together with earlier cases condemning the knowing use of perjured testimony,[19] illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence[20]—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the ac-

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[19] See, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935) *(per curiam)*; *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942); *Napue* v. *Illinois*, 360 U. S. 264, 269–270 (1959).

[20] Consider, for example, this comment in the dissenting opinion in *Kyles* v. *Whitley:* "It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt." 514 U. S., at 460 (opinion of SCALIA, J.).

cused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Two of those components are unquestionably established by the record in this case. The contrast between (a) the terrifying incident that Stoltzfus confidently described in her testimony and (b) her initial perception of that event "as a trivial episode of college kids carrying on" that her daughter did not even notice, suffices to establish the impeaching character of the undisclosed documents.[21] Moreover, with respect to at least five of those documents, there is no dispute about the fact that they were known to the Commonwealth but not disclosed to trial counsel. It is the third component—whether petitioner has established the prejudice necessary to satisfy the "materiality" inquiry—that is the most difficult element of the claimed *Brady* violation in this case.

Because petitioner acknowledges that his *Brady* claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a *Brady* claim in the state courts, and unless those documents were "material" for *Brady* purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default.

III

Respondent expressly disavows any reliance on the fact that petitioner's *Brady* claim was not raised at trial. Brief

[21] We reject respondent's contention that these documents do not fall under *Brady* because they were "inculpatory." Brief for Respondent 41. Our cases make clear that *Brady*'s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *United States* v. *Bagley*, 473 U. S. 667, 676 (1985).

for Respondent 17–18, n. 6. He states that the Commonwealth has consistently argued "that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not." *Ibid.* Despite this concession, it is appropriate to begin the analysis of the "cause" issue by explaining why petitioner's reasons for failing to raise his *Brady* claim at trial are acceptable under this Court's cases.

Three factors explain why trial counsel did not advance this claim: The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy;[22] and trial counsel were not aware of the factual basis for the claim. The first and second factors—*i. e.*, the nondisclosure and the open file policy—are both fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim.[23] As we explained in *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), it is just such factors that ordinarily establish the existence of cause for a procedural default.[24]

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[22] While the precise dimensions of an "open file policy" may vary from jurisdiction to jurisdiction, in this case it is clear that the prosecutor's use of the term meant that his entire prosecution file was made available to the defense. App. 368; see also n. 13, *supra*.

[23] We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.

[24] "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed* v. *Ross*, 468 U. S., at 16, or that 'some interference by officials,' *Brown* v. *Allen*, 344 U. S. 443, 486 (1953), made compliance impracticable, would constitute cause under this stand-

If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray* we expressly noted that "the standard for cause should not vary depending on the timing of a procedural default." *Id.*, at 491.

Respondent contends, however, that the prosecution's maintenance of an open file policy that did not include all it was purported to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to state habeas counsel. He presses two factors to support this assertion. First, he argues that an examination of Stoltzfus' trial testimony,[25] as well as a letter published in a local newspaper,[26] made it clear that she had had several interviews with Detective Claytor. Second, the fact that the Federal District Court entered an order allowing discovery of the Harrisonburg police files indicates that diligent counsel could

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ard." *Murray,* 477 U. S., at 488; see also *Amadeo* v. *Zant*, 486 U. S. 214, 221–222 (1988).

[25] Stoltzfus testified to meeting with Claytor at least three times. App. 55–56.

[26] In her letter, which appeared on July 18, 1990 (after petitioner's trial) in the Harrisonburg Daily News-Record, Stoltzfus stated: "It never occurred to me that I was witnessing an abduction. In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture." *Id.*, at 250. Stoltzfus also gave a pretrial interview to a reporter with the Roanoke Times that conflicted in some respects with her trial testimony, principally because she identified the blonde woman at the mall as Tudor. *Id.*, at 373.

have obtained a similar order from the state court. We find neither factor persuasive.

Although it is true that petitioner's lawyers—both at trial and in post-trial proceedings—must have known that Stoltzfus had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that Stoltzfus sent to the detective, existed and had been suppressed.[27] Indeed, if respondent is correct that Exhibits 2, 7, and 8 were in the prosecutor's "open file," it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld. The prosecutor must have known about the newspaper articles and Stoltzfus' meetings with Claytor, yet he did not believe that his prosecution file was incomplete.

Furthermore, the fact that the District Court entered a broad discovery order even before federal habeas counsel had advanced a *Brady* claim does not demonstrate that a state court also would have done so.[28] Indeed, as we understand Virginia law and respondent's position, petitioner would not have been entitled to such discovery in state ha-

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[27] The defense could not discover copies of these notes from Stoltzfus herself, because she refused to speak with defense counsel before trial. *Id.*, at 370.

[28] The parties have been unable to provide, and the record does not illuminate, the factual basis on which the District Court entered the discovery order. It was granted *ex parte* and under seal and furnished broad access to any records relating to petitioner. District Court Record, Doc. No. 20. The Fourth Circuit has since found that federal district courts do not possess the authority to issue *ex parte* discovery orders in habeas proceedings. *In re Pruett*, 133 F. 3d 275, 280 (1997). We express no opinion on the Fourth Circuit's decision on this question. However, we note that it is unlikely that petitioner would have been granted in state court the sweeping discovery that led to the Stoltzfus materials, since Virginia law limits discovery available during state habeas. Indeed, it is not even clear that he had a right to such discovery in federal court. See n. 29, *infra*.

beas proceedings without a showing of good cause.[29] Even pursuant to the broader discovery provisions afforded at trial, petitioner would not have had access to these materials under Virginia law, except as modified by *Brady*.[30] Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support. Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them. The presumption, well established by "'tradition and experience,'" that prosecutors have fully "'discharged their official duties,'" *United States* v. *Mezzanatto*, 513 U. S. 196, 210 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert consti-

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[29] Virginia law provides that "no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding." Va. Sup. Ct. Rule 4:1(b)(5)(3)(b) (1998); see also *Yeatts* v. *Murray*, 249 Va. 285, 289, 455 S. E. 2d 18, 21 (1995). Respondent acknowledges that petitioner was not entitled to discovery under Virginia law. Brief for Respondent 25.

[30] See Va. Sup. Ct. Rule 3A:11 (1998). This rule expressly excludes from defendants "the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except [for scientific reports of the accused or alleged victim]." The Virginia Supreme Court found that petitioner had been afforded all the discovery he was entitled to on direct review. "Limited discovery is permitted in criminal cases by the Rules of Court. . . . Strickler had the benefit of all the discovery to which he was entitled under the Rules. Those rights do not extend to general production of evidence, except in the limited areas prescribed by Rule 3A:11." *Strickler* v. *Commonwealth*, 241 Va. 482, 491, 404 S. E. 2d 227, 233 (1991).

tutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

Respondent's position on the "cause" issue is particularly weak in this case because the state habeas proceedings confirmed petitioner's justification for his failure to raise a *Brady* claim. As already noted, when he alleged that trial counsel had been incompetent because they had not advanced such a claim, the warden responded by pointing out that there was no need for counsel to do so because they "were voluntarily given full disclosure of everything known to the government."[31] Given that representation, petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial.[32]

Respondent also argues that our decisions in *Gray* v. *Netherland*, 518 U. S. 152 (1996), and *McCleskey* v. *Zant*, 499 U. S. 467 (1991), preclude the conclusion that the cause for petitioner's default was adequate. In both of those cases, however, the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier. See *Gray*, 518 U. S., at 161; *McCleskey*, 499 U. S., at 498–499. In the context of a *Brady* claim, a defendant cannot conduct the "rea-

[31] This statement is quoted in full at n. 14, *supra*. Respondent argues that this representation is not dispositive because it was made in his motion to dismiss and therefore cannot excuse the failure to include a *Brady* claim in the petitioner's original state habeas pleading. We find the timing of the statement irrelevant, since the warden's response merely summarizes the Commonwealth's "open file" policy, instituted by the prosecution at the inception of the case.

[32] Furthermore, in its opposition to petitioner's motion during state habeas review for funds for an investigator, the Commonwealth argued: "Strickler's Petition contains 139 separate habeas claims. By requesting appointment of an investigator 'to procure the necessary factual basis to support certain of Petitioner's claims' (Motion, p. 1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees." App. 242.

In light of these assertions, we fail to see how the Commonwealth believes petitioner could have shown "good cause" sufficient to get discovery on a *Brady* claim in state habeas.

sonable and diligent investigation" mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State.[33]

The controlling precedents on "cause" are *Murray* v. *Carrier*, 477 U. S., at 488, and *Amadeo* v. *Zant*, 486 U. S. 214 (1988). As we explained in the latter case:

> "If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents." *Id.*, at 222.[34]

There is no suggestion that tactical considerations played any role in petitioner's failure to raise his *Brady* claim in state court. Moreover, under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U. S., at 110.

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[33] We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them. Although *Gray* involved a procedurally defaulted *Brady* claim, in that case, the Court found that the petitioner had made "no attempt to demonstrate cause or prejudice for his default." *Gray*, 518 U. S., at 162.

[34] It is noteworthy that both of the reasons on which we relied in *McCleskey* to distinguish *Amadeo* also apply to this case: "This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition." 499 U. S., at 501–502.

In summary, petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received "everything known to the government."[35] We need not decide in this case whether any one or two of these factors would be sufficient to constitute cause, since the combination of all three surely suffices.

IV

The differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issue of prejudice. Unlike the Fourth Circuit, we do not believe that "the Stolzfus *[sic]* materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial." App. 425. Without a doubt, Stoltzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial.

That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its ab-

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[35] Because our opinion does not modify *Brady,* we reject respondent's contention that we announce a "new rule" today. See *Bousley* v. *United States,* 523 U. S. 614 (1998).

sence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U. S., at 434.

The Court of Appeals' negative answer to that question rested on its conclusion that, without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect. As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.*, at 434–435. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435.

The District Judge decided not to hold an evidentiary hearing to determine whether Exhibits 2, 7, and 8 had been disclosed to the defense, because he was satisfied that the "potentially devastating impeachment material" contained in the other five warranted the entry of summary judgment in petitioner's favor. App. 392. The District Court's conclusion that the admittedly undisclosed documents were sufficiently important to establish a violation of the *Brady* rule was supported by the prosecutor's closing argument. That argument relied on Stoltzfus' testimony to demonstrate petitioner's violent propensities and to establish that he was the instigator and leader in Whitlock's abduction and, by inference, her murder. The prosecutor emphasized the importance of Stoltzfus' testimony in proving the abduction:

> "[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened." App. 169.

Given the record evidence involving Henderson,[36] the District Court concluded that, without Stoltzfus' testimony, the jury might have been persuaded that Henderson, rather than petitioner, was the ringleader. He reasoned that a "reasonable probability of conviction" of first-degree, rather than capital, murder sufficed to establish the materiality of the undisclosed Stoltzfus materials and, thus, a *Brady* violation. App. 396.

The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. Petitioner did, for example, introduce substantial mitigating evidence about abuse he had suffered as a child at the hands of his stepfather.[37] As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles*, 514 U. S., at 434.

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[36] The District Court summarized the evidence against Henderson. "Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans." App. 395.

[37] At sentencing, the trial court discussed the mitigation evidence: "On the charge of capital murder . . . it is difficult . . . to sit here and listen to the testimony of [petitioner's mother] and Mr. Strickler's two sisters and not feel a great, great deal of sympathy for, for any person who has a childhood and a life like Mr. Strickler has had. He was in no way responsible for the circumstances of his birth. He was brutalized from the minute he's, almost from the minute he was born and certainly with his . . . limitations and his ability with which he was born, it would have been extremely difficult for him to, to help himself. And difficult, when you look at a case like that to feel but anything but sympathy for him." Sentencing Hearing, 20 Record 57–58.

Even if Stoltzfus and her testimony had been entirely discredited, the jury might still have concluded that petitioner was the leader of the criminal enterprise because he was the one seen driving the car by Kurt Massie near the location of the murder and the one who kept the car for the following week.[38] In addition, Tudor testified that petitioner threatened Henderson with a knife later in the evening.

More importantly, however, petitioner's guilt of capital murder did not depend on proof that he was the dominant partner: Proof that he was an equal participant with Henderson was sufficient under the judge's instructions.[39] Accordingly, the strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.[40]

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[38] As the trial court stated at petitioner's sentencing hearing: "The facts in this case which support this jury verdict are one that Mr. Strickler was . . . in control of this situation. He was in control at the shopping center in Harrisonburg. He was in control when the car went into the field up here on the 340 north of Waynesboro. He was in control thereafter, he ended up with the car. There is no question who . . . was in control of this entire situation." *Id.*, at 22.

[39] The judge gave the following instruction at petitioner's trial: "You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death." *Strickler* v. *Commonwealth*, 241 Va., at 493–494, 404 S. E. 2d, at 234–235. The Virginia Supreme Court affirmed the propriety of this instruction on petitioner's direct appeal. *Id.*, at 495, 404 S. E. 2d, at 235.

[40] It is also consistent with the fact that Henderson was convicted of first-degree murder but acquitted of capital murder after his jury, unlike petitioner's, was instructed that they could convict him of capital murder only if they found that he had "'inflict[ed] the fatal blows.'" Henderson's jury was instructed, "'One who is present aiding and abetting the actual killing, but who does not inflict the fatal blows that cause death is a principle [sic] in the second degree, and may not be found guilty of capital murder. Before you can find the defendant guilty of capital murder, the evidence must establish beyond a reasonable doubt that the defendant was

Furthermore, there was considerable forensic and other physical evidence linking petitioner to the crime.[41] The weight and size of the rock,[42] and the character of the fatal injuries to the victim,[43] are powerful evidence supporting the conclusion that two people acted jointly to commit a brutal murder.

We recognize the importance of eyewitness testimony; Stoltzfus provided the only disinterested, narrative account of what transpired on January 5, 1990. However, Stoltzfus' vivid description of the events at the mall was not the only evidence that the jury had before it. Two other eyewit-

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an active and immediate participant in the acts that caused the death.'" 2 App. in No. 97–29 (CA4), p. 777.

Henderson's trial took place before the Virginia Supreme Court affirmed the trial instruction, and the "joint perpetrator" theory it embodied, given at petitioner's trial. *Strickler* v. *Commonwealth*, 241 Va., at 494, 404 S. E. 2d, at 235. Petitioner's trial judge rejected one of petitioner's proffered instructions, which would have required the Commonwealth to prove that "the defendant was the person who actually delivered the blow that killed Leanne Whitlock." *Ibid.* Petitioner's trial judge recused himself from presiding over Henderson's trial, indicating that he had already formed his own opinion about what had happened the night of Whitlock's murder. 21 Record 2.

[41] For example, the police recovered hairs on a bra and shirt found with Whitlock's body that "were microscopically alike in all identifiable characteristics" to petitioner's hair. App. 135. The shirt recovered from the car at Strickler's mother's house had human blood on it. Petitioner's fingerprints were found on the outside and inside of the car taken from Whitlock. *Id.*, at 128–129. Tudor testified that petitioner's pants had blood on them, and he had a cut on his knuckle. *Id.*, at 95.

[42] The trial judge thought the shape of the rock so significant to the jury's conclusion that he instructed the lawyers to have "detailed, high quality photographs taken of [the rock] . . . and I want it put in the record of the case." Sentencing Hearing, 20 Record 53.

[43] The Deputy Chief Medical Examiner, who performed the autopsy, testified that the object that produced the fractures in Whitlock's skull caused "severe lacerations to the brain," and any two of the four fractures would have been fatal. App. 112.

nesses, the security guard and Henderson's friend, placed petitioner and Henderson at the Harrisonburg Valley Shopping Mall on the afternoon of Whitlock's murder. One eyewitness later saw petitioner driving Dean's car near the scene of the murder.

The record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached. The jury was instructed on two predicates for capital murder: robbery with a deadly weapon and abduction with intent to defile.[44] On state habeas, the Virginia Supreme Court rejected as procedurally barred petitioner's challenge to this jury instruction on the ground that "abduction with intent to defile" was not a predicate for capital murder for a victim over the age of 12.[45] That issue is not before us. Even assuming, however, that this predicate was erroneous, armed robbery still would have supported the capital murder conviction.

Petitioner argues that the prosecution's evidence on armed robbery "flowed almost entirely from inferences from Stoltzfus' testimony," and especially from her statement that Henderson had a "hard object" under his coat at the mall. Brief for Petitioner 35. That argument, however, ignores the fact that petitioner's mother and Tudor provided direct evidence that petitioner had a knife with him on the day of the crime.

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[44] The trial court instructed the jury that, to convict petitioner of capital murder, it must find beyond a reasonable doubt that (1) "the defendant killed Leanne Whitlock"; (2) "the killing was willful, deliberate and premeditated"; and (3) "the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape." *Strickler* v. *Murray*, 249 Va. 120, 124–125, 452 S. E. 2d 648, 650 (1995).

[45] In its motion to dismiss petitioner's state habeas petition, the Commonwealth conceded that the instruction on intent to defile was erroneously given in this case as a predicate for capital murder. App. 218.

In addition, the prosecution contended in its closing argument that the rock—not the knife—was the murder weapon.[46] The prosecution did advance the theory that petitioner had a knife when he got in the car with Whitlock, but it did not specifically argue that petitioner used the knife during the robbery.[47]

Petitioner also maintains that he suffered prejudice from the failure to disclose the Stoltzfus documents because her testimony impacted on the jury's decision to impose the death penalty. Her testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase.[48] With respect to the jury's discretionary decision to impose the death penalty, it is true that Stoltzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking at Dice's or the powerful message conveyed by the 69-

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[46] In his closing argument, the prosecutor stated that there was "really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to[o] big to be called a rock and to[o] small to be called a boulder." *Id.*, at 167.

[47] The instructions given to the jury defined a deadly weapon as "any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used." *Id.*, at 160.

[48] The jury recommended death after finding the predicates of "future dangerousness" and "vileness." Neither of these predicates depended on Stoltzfus' testimony. The trial court instructed the jury, "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives. One, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing, continuing serious threat to society or two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman and that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Tr. 899–900.

pound rock that was part of the record before the jury. Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Petitioner has satisfied two of the three components of a constitutional violation under *Brady:* exculpatory evidence and nondisclosure of this evidence by the prosecution. Petitioner has also demonstrated cause for failing to raise this claim during trial or on state postconviction review. However, petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins as to Part II, concurring in part and dissenting in part.

I look at this case much as the Court does, starting with its view in Part III (which I join) that Strickler has shown cause to excuse the procedural default of his *Brady* claim. Like the Court, I think it clear that the materials withheld were exculpatory as devastating ammunition for impeaching Stoltzfus.[1] See *ante,* at 282. Even on the question of preju-

[1] The Court notes that the District Court did not resolve whether all eight of the Stoltzfus documents had been withheld, as Strickler claimed, or only five. For purposes of its decision granting summary judgment for Strickler, the District Court assumed that only five had not been disclosed. See *ante,* at 290, 279. The Court of Appeals also left the dispute unresolved, see App. 418, n. 8, though granting summary judgment for respondent based on a lack of prejudice would presumably have required that court to assume that all eight documents had been withheld. Because this Court affirms the grant of summary judgment for respondent based on lack of prejudice and because it relies on at least one of the

dice or materiality,[2] over which I ultimately part company with the majority, I am persuaded that Strickler has failed to establish a reasonable probability that, had the materials withheld been disclosed, he would not have been found guilty of capital murder. See *ante*, at 292–296. As the Court says, however, the prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation. See *ante*, at 294–296. It is with respect to the penultimate step in determining the sentence that I think Strickler has carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure of the Stoltzfus materials would have led the jury to recommend life, not death, and I respectfully dissent.

I

Before I get to the analysis of prejudice I should say something about the standard for identifying it, and about the unfortunate phrasing of the shorthand version in which the standard is customarily couched. The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard in-

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disputed documents in its analysis, see *ante*, at 282, I understand it to have assumed that none of the eight documents was disclosed. I proceed based on that assumption as well. If one thought the difference between five and eight documents withheld would affect the determination of prejudice, a remand to resolve that factual question would be necessary.

[2] In keeping with suggestions in a number of our opinions, see *Schlup* v. *Delo*, 513 U. S. 298, 327, n. 45 (1995); *Sawyer* v. *Whitley*, 505 U. S. 333, 345 (1992), the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady* v. *Maryland*, 373 U. S. 83 (1963). See *ante*, at 282, 288–289, 296. I follow the Court's lead.

tended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. See *ante*, at 289–290; *Kyles* v. *Whitley*, 514 U. S. 419, 434–435 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence'" in the outcome. *Ante*, at 290 (quoting *Kyles*, *supra*, at 435).

Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not." While any short phrases for what the cases are getting at will be "inevitably imprecise," *United States* v. *Agurs*, 427 U. S. 97, 108 (1976), I think "significant possibility" would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.

To see that this is so, we need to recall *Brady*'s evolution since the appearance of the rule as originally stated, that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). *Brady* itself did not explain what it meant by "material" (perhaps assuming the term would be given its usual meaning in the law of evidence, see *United States* v. *Bagley*, 473 U. S. 667, 703, n. 5 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in *United States* v. *Agurs*, *supra*, where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testi-

mony, reversal was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. *Agurs*, *supra*, at 103 (citing *Giglio* v. *United States*, 405 U. S. 150, 154 (1972), in turn quoting *Napue* v. *Illinois*, 360 U. S. 264, 271 (1959)). We have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. *Bagley*, *supra*, at 678–680, and n. 9 (opinion of Blackmun, J.). See also *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no "'reasonable possibility' that trial error contributed to the verdict"); *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (same). In *Agurs*, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's "'conviction [was] sure that the error did not influence the jury, or had but very slight effect.'" 427 U. S., at 112 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 764 (1946)). Finally, in *United States* v. *Bagley*, *supra*, we embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984), where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. *Strickland* in turn cited two cases for its formulation, *Agurs* (which did not contain the expression "reasonable probability") and *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 873–874 (1982) (which held that sanctions against the Government for deportation of a potential defense witness were appropriate only

if there was a "reasonable likelihood" that the lost testimony "could have affected the judgment of the trier of fact").

The circuitous path by which the Court came to adopt "reasonable probability" of a different result as the rule of *Brady* materiality suggests several things. First, while "reasonable possibility" or "reasonable likelihood," the *Kotteakos* standard, and "reasonable probability" express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight. Second, the gap between all three of those formulations and "more likely than not" is greater than any differences among them. Third, because of that larger gap, it is misleading in *Brady* cases to use the term "probability," which is naturally read as the cognate of "probably" and thus confused with "more likely than not," see *Morris* v. *Mathews*, 475 U. S. 237, 247 (1986) (apparently treating "reasonable probability" as synonymous with "probably"); *id.*, at 254, n. 3 (Blackmun, J., concurring in judgment) (cautioning against confusing "reasonable probability" with more likely than not). We would be better off speaking of a "significant possibility" of a different result to characterize the *Brady* materiality standard. Even then, given the soft edges of all these phrases,[3] the touchstone of the enquiry

[3] Each of these phrases or standards has been used in a number of contexts. This Court has used "reasonable possibility," for example, in defining the level of threat of injury to competition needed to make out a claim under the Robinson-Patman Act, see, *e. g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 222 (1993); the standard for judging whether a grand jury subpoena should be quashed under Federal Rule of Criminal Procedure 17(c), see *United States* v. *R. Enterprises, Inc.*, 498 U. S. 292, 301 (1991); and the debtor's burden in establishing that certain collateral is necessary to reorganization and thus exempt from the Bankruptcy Code's automatic stay provision, see *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 375–376 (1988). We have adopted the standard established in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), for determining the harmlessness of nonconstitutional errors on direct review as the criterion for the harmlessness enquiry concerning constitutional errors on collateral review. See *Brecht* v. *Abra-*

must remain whether the evidentiary suppression "undermines our confidence" that the factfinder would have reached the same result.

II

Even keeping in mind these caveats about the appropriate level of materiality, applying the standard to the facts of this case does not give the Court easy answers, as the Court candidly acknowledges. See *ante*, at 289. Indeed, the Court concedes that discrediting Stoltzfus's testimony "might have changed the outcome of the trial," *ibid.*, and that the District Court was "surely correct" to find a "reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases," *ante*, at 291.

In the end, however, the Court finds the undisclosed evidence inadequate to undermine confidence in the jury's sen-

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hamson, 507 U. S. 619, 637–638 (1993). We have used "reasonable probability" to define the plaintiff's burden in making out a claim under § 7 of the Clayton Act, see, *e. g.*, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962); *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 55–61 (1948) (Jackson, J., dissenting in part) (contrasting "reasonable possibility" and "reasonable probability" and arguing for latter as appropriate standard under Robinson-Patman Act); the standard for granting certiorari, vacating, and remanding in light of intervening developments, see, *e. g.*, *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam);* and the standard for exempting organizations from otherwise valid disclosure requirements in light of threats or harassment resulting from the disclosure, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 74 (1976) *(per curiam).* We have recently used "significant possibility" in explaining the circumstances under which nominal compensation is an appropriate award in a suit under the Longshore and Harbor Workers' Compensation Act, see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U. S. 121, 123 (1997), but we most commonly use that term in defining one of the requirements for the granting of a stay pending certiorari. The three-part test requires a "reasonable probability" that the Court will grant certiorari or note probable jurisdiction, a "significant possibility" that the Court will reverse the decision below, and a likelihood of irreparable injury absent a stay. See, *e. g.*, *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983); *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319 (1994) (REHNQUIST, C. J., in chambers).

tencing recommendation, whereas I find it sufficient to do that. Since we apply the same standard to the same record, our differing conclusions largely reflect different assessments of the significance the jurors probably ascribed to the Stoltzfus testimony. My assessment turns on two points. First, I believe that in making the ultimate judgment about what should be done to one of several participants in a crime this appalling the jurors would very likely have given weight to the degree of initiative and leadership exercised by that particular defendant. Second, I believe that no other testimony comes close to the prominence and force of Stoltzfus's account in showing Strickler as the unquestionably dominant member of the trio involved in Whitlock's abduction and the aggressive and moving figure behind her murder.

Although Stoltzfus was not the prosecution's first witness, she was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury. From the start of Stoltzfus's testimony, Strickler was "Mountain Man" and his male companion "Shy Guy," labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus's observation. According to her, when she first saw Strickler she "just sort of instinctively backed up because I was frightened." App. 36. Unlike retiring "Shy Guy," Strickler was "revved up." *Id.*, at 39, 60. Even in describing her first encounter with Strickler inside the mall, Stoltzfus spoke of him as domineering, a "very impatient" character yelling at his female companion, "Blonde Girl," to join him. *Id.*, at 36, 38–39.

After describing in detail how "Mountain Man" and "Blonde Girl" were dressed, Stoltzfus said that "'Mountain Man' came tearing out of the Mall entrance door and went up to the driver of [a] van and . . . was just really mad and ran back and banged on back of the backside of the van"

while "Shy Guy" and "Blonde Girl" hung back. *Id.*, at 43. "Mountain Man" approached a pickup truck, then "pounded on" the front passenger side window of Whitlock's car, "shook and shook the car door," "banging and banging on the window" while Whitlock checked to see if the door was locked. *Ibid.* Finally, "he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he jumped in . . . and faced her." *Id.*, at 43–44. While Whitlock tried to push him away, "Mountain Man" "motioned for 'Blonde Girl' and 'Shy Guy' to come" and the girl did as she was bidden. She "started to jump into the car," but "jumped back" when Whitlock stepped on the gas. *Id.*, at 44. Then "Mountain Man" started "hitting [Whitlock] on the left shoulder, her right shoulder and then . . . the head," finally "open[ing] the door again" so "the 'Blonde Girl' got in the back and 'Shy Guy' followed and got behind him." *Id.*, at 45. "Shy Guy" passed "Mountain Man" his tan coat, which "Mountain Man" "fiddled with" for "what seemed like a long time," then "sat back up and . . . faced" Whitlock while "the other two in the back seat sat back and relaxed." *Ibid.* Stoltzfus then claimed that she got out of her car and went over to Whitlock's, whereupon unassertive "Shy Guy" "instinctively jumped, you know, laid over on the seat to hide from me." *Id.*, at 46. Stoltzfus pulled up next to Whitlock's car and repeatedly asked, "[A]re you O.K.[?]," but Whitlock responded only with eye contact; "she didn't smile, there was no expression," and "[j]ust very serious, looked down to her right," suggesting Strickler was holding a weapon on her. *Id.*, at 46, 47. Finally, Whitlock mouthed something, which Stoltzfus demonstrated for the jury and then explained she realized must have been the word, "help." *Id.*, at 47.

Without rejecting the very notion that jurors with discretion in sentencing would be influenced by the relative dominance of one accomplice among others in a shocking crime, I could not regard Stoltzfus's colorful testimony as anything but significant on the matter of sentence. It was Stoltzfus

alone who described Strickler as the initiator of the abduction, as the one who broke into Whitlock's car, who beckoned his companions to follow him, and who violently subdued the victim while "Shy Guy" sat in the back seat. The bare content of this testimony, important enough, was enhanced by one of the inherent hallmarks of reliability, as Stoltzfus confidently recalled detail after detail. The withheld documents would have shown, however, that many of the details Stoltzfus confidently mentioned on the stand (such as Strickler's appearance, Whitlock's appearance, the hour of day when the episode occurred, and her daughter's alleged notation of the license plate number of Whitlock's car) had apparently escaped her memory in her initial interviews with the police. Her persuasive account did not come, indeed, until after her recollection had been aided by further conversations with the police and with the victim's boyfriend. I therefore have to assess the likely havoc that an informed cross-examiner could have wreaked upon Stoltzfus as adequate to raise a significant possibility of a different recommendation, as sufficient to undermine confidence that the death recommendation would have been the choice. All it would have taken, after all, was one juror to hold out against death to preclude the recommendation actually given.

The Court does not, of course, deny that evidence of dominant role would probably have been considered by the jury; the Court, instead, doubts that this consideration, and the evidence bearing on it, would have figured so prominently in a juror's mind as to be a fulcrum of confidence. I am not convinced by the Court's reasons.

The Court emphasizes the brutal manner of the killing and Strickler's want of remorse as jury considerations diminishing the relative importance of Strickler's position as ringleader. See *ante*, at 295–296. Without doubt the jurors considered these to be important factors, and without doubt they may have been treated as sufficient to warrant death. But as the Court says, sufficiency of other evidence and the

facts it supports is not the *Brady* standard, and the significance of both brutality and sangfroid must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder.

The Court concludes that Stoltzfus's testimony is unlikely to have had significant influence on the jury's sentencing recommendation because the prosecutor made no mention of her testimony in his closing statement at the sentencing proceeding. See *ante*, at 295. But although the Court is entirely right that the prosecution gave no prominence to the Stoltzfus testimony at the sentencing stage, the Commonwealth's closing actually did include two brief references to Strickler's behavior in "just grabbing a complete stranger and abducting her," 19 Record 919; see also *id.*, at 904, as relevant to the jury's determination of future dangerousness. And since Strickler's criminal record had no convictions involving actual violence, a point defense counsel stressed in his closing argument, see *id.*, at 913, the jurors may well have given weight to Stoltzfus's lively portrait of Strickler as the aggressive leader of the group when they came to assess his future dangerousness.

What is more important, common experience, supported by at least one empirical study, see Bowers, Sandys, & Steiner, Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476, 1486–1496 (1998), tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence. True, Stoltzfus's testimony directly discussed only the circumstances of Whitlock's abduction, but its impact on the jury was almost certainly broader, as the prosecutor recognized. After the jury rendered its verdict on guilt, for example, the defense moved for a judgment of acquittal on the capital murder charge based on insufficiency of the evidence. In the prosecutor's argument to the court he replied that

> "the evidence clearly shows that this man was the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him . . . , he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall, so you start with the principle that he is the aggressor." 20 Record 15.

Stoltzfus's testimony helped establish the "principle," as the prosecutor put it, that Strickler was "the aggressor," the dominant figure, in the whole sequence of criminal events, including the murder, not just in the abduction. If the defense could have called Stoltzfus's credibility into question, the jurors' belief that Strickler was the chief aggressor might have been undermined to the point that at least one of them would have hesitated to recommend death.

The Court suggests that the jury might have concluded that Strickler was the leader based on three other pieces of evidence: Kurt Massie's identification of Strickler as the driver of Whitlock's car on its way toward the field where she was killed; Donna Tudor's testimony that Strickler kept the car the following week; and Tudor's testimony that Strickler threatened Henderson with a knife later on the evening of the murder. But if we are going to look at other testimony we cannot stop here. The accuracy of both Massie's and Tudor's testimony was open to question,[4] and all of it was subject to some evidence that Henderson had taken a major role in the murder. The Court has quoted the Dis-

[4] Massie's identification was open to some doubt because it occurred at night as one car passed another on a highway. Moreover, he testified that he first saw four people in the car, then only three, and that none of the occupants was black. App. 66–67, 70–73. Tudor, as defense counsel brought out on cross-examination, testified pursuant to a cooperation agreement with the government and admitted that the story she told on the stand was different from what she had told the defense investigator before trial. *Id.*, at 100–101, 103–104.

trict Court's summation of evidence against him, *ante,* at 291, n. 36: Henderson's wallet was found near the body, his clothes were bloody, he presented a woman friend with the victim's watch at a postmortem celebration (which he left driving the victim's car), and he confessed to a friend that he had just killed an unidentified black person. Had this been the totality of the evidence, the jurors could well have had little certainty about who had been in charge. But they could have had no doubt about the leader if they believed Stoltzfus.

Ultimately, I cannot accept the Court's discount of Stoltzfus in the *Brady* sentencing calculus for the reason I have repeatedly emphasized, the undeniable narrative force of what she said. Against this, it does not matter so much that other witnesses could have placed Strickler at the shopping mall on the afternoon of the murder, *ante,* at 293–294, or that the Stoltzfus testimony did not directly address the aggravating factors found, *ante,* at 295. What is important is that her evidence presented a gripping story, see E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal 5 (3d ed. 1997) ("[R]esearch redoundingly proves that the story format is a powerful key to juror decision making"). Its message was that Strickler was the madly energetic leader of two morally apathetic accomplices, who were passive but for his direction. One cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility of that story. I would accordingly vacate the sentence and remand for reconsideration, and to that extent I respectfully dissent.

Syllabus

GRUPO MEXICANO DE DESARROLLO, S. A., ET AL. *v.* ALLIANCE BOND FUND, INC., ET AL.

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

No. 98–231. Argued March 31, 1999—Decided June 17, 1999

Respondent investment funds purchased unsecured notes (Notes) from petitioner Grupo Mexicano de Desarrollo, S. A. (GMD), a Mexican holding company. Four GMD subsidiaries (also petitioners) guaranteed the Notes. After GMD fell into financial trouble and missed an interest payment on the Notes, respondents accelerated the Notes' principal amount and filed suit for the amount due in Federal District Court. Alleging that GMD was at risk of insolvency, or already insolvent, that it was preferring its Mexican creditors by its planned allocation to them of its most valuable assets, and that these actions would frustrate any judgment respondents could obtain, respondents requested a preliminary injunction restraining petitioners from transferring the assets. The court issued the preliminary injunction and ordered respondents to post a $50,000 bond. The Second Circuit affirmed.

Held:

1. This case has not been rendered moot by the District Court's granting summary judgment to respondents on their contract claim and converting the preliminary injunction into a permanent injunction. Generally, the appeal of a preliminary injunction becomes moot when the trial court enters a permanent injunction because the former merges into the latter. Here, however, petitioners' potential cause of action against the injunction bond for wrongful injunction suffices to preserve the Court's jurisdiction, since petitioners' argument that the District Court lacked the power to restrain their use of assets pending a money judgment is independent of their defense against the money judgment on the merits. For the same reason, petitioners' failure to appeal the conversion of the preliminary injunction into a permanent injunction does not forfeit their claim on the bond. Pp. 313–318.

2. The District Court lacked the authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages because such a remedy was historically unavailable from a court of equity. Pp. 318–333.

Syllabus

(a) The federal courts have the equity jurisdiction that was exercised by the English Court of Chancery at the time the Constitution was adopted and the Judiciary Act of 1789 was enacted. Pp. 318–319.

(b) The well-established general rule was that a judgment fixing the debt was necessary before a court in equity would interfere with the debtor's use of his property. See, *e. g.*, *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497. It is by no means clear that there are any exceptions to the general rule relevant to this case, and the lower courts did not address this point. The merger of law and equity did not change the rule, since the merger did not alter substantive rights. The rule was regarded as serving not merely the procedural end of assuring exhaustion of legal remedies, but also the substantive end of giving the creditor an interest in the property which equity could act upon. Pp. 319–324.

(c) The postmerger cases of *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, *United States* v. *First Nat. City Bank*, 379 U. S. 378, and *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, are entirely consistent with the view that the preliminary injunction in this case was beyond the District Court's equitable power. Pp. 324–327.

(d) The English Court of Chancery did not provide a prejudgment injunctive remedy until 1975, and the decision doing so has been viewed by commentators as a dramatic departure from prior practice. Enjoining the debtor's disposition of his property at the instance of a nonjudgment creditor is incompatible with this Court's traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress. Pp. 327–329.

(e) The various weighty considerations both for and against creating the remedy at issue here should be resolved not in this forum, but in Congress. Pp. 329–333.

143 F. 3d 688, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 333.

Richard A. Mescon argued the cause for petitioners. With him on the briefs were *Scott S. Balber* and *Peter Buscemi*.

Drew S. Days III argued the cause for respondents. With him on the brief were *Kenneth W. Irvin*, *Dale C. Christen-*

sen, Jr., John J. Galban, Jeremy G. Epstein, Stephen J. Marzen, Meredith Kolsky Lewis, Andrew J. Wertheim, and *Lisa T. Simpson.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed.

I

Petitioner Grupo Mexicano de Desarrollo, S. A. (GMD), is a Mexican holding company. In February 1994, GMD issued $250 million of 8.25% unsecured, guaranteed notes due in 2001 (Notes), which ranked *pari passu* in priority of payment with all of GMD's other unsecured and unsubordinated debt. Interest payments were due in February and August of every year. Four subsidiaries of GMD (which are the remaining petitioners) guaranteed the Notes. Respondents are investment funds which purchased approximately $75 million of the Notes.

Between 1990 and 1994, GMD was involved in a toll road construction program sponsored by the Government of Mexico. In order to elicit private financing, the Mexican Government granted concessions to companies that would build and operate the system of toll roads. GMD was both an investor in the concessionaries and among the construction companies hired by the concessionaries to build the toll

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**Daniel W. Krasner* filed a brief for the Dominican Republic urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, Edward C. DuMont, Michael Jay Singer,* and *Peter J. Smith;* and for the Securities Industry Association et al. by *Richard A. Rosen* and *Robert S. Smith.*

roads. Problems in the Mexican economy resulted in severe losses for the concessionaries, who were therefore unable to pay contractors like GMD. In response to these problems, in 1997, the Mexican Government announced the Toll Road Rescue Program, under which it would issue guaranteed notes (Toll Road Notes) to the concessionaries, in exchange for their ceding to the Government ownership of the toll roads. The Toll Road Notes were to be used to pay the bank debt of the concessionaries, and also to pay outstanding receivables held by GMD and other contractors for services rendered to the concessionaries (Toll Road Receivables). In the fall of 1997, GMD announced that it expected to receive approximately $309 million of Toll Road Notes under the program.

Because of the downturn in the Mexican economy and the related difficulties in the toll road program, by mid-1997 GMD was in serious financial trouble. In addition to the Notes, GMD owed other debts of about $450 million. GMD's 1997 Form 20–F, which was filed with the Securities and Exchange Commission on June 30, 1997, stated that GMD's current liabilities exceeded its current assets and that there was "substantial doubt" whether it could continue as a going concern. As a result of these financial problems, neither GMD nor its subsidiaries (who had guaranteed payment) made the August 1997 interest payment on the Notes.

Between August and December 1997, GMD attempted to negotiate a restructuring of its debt with its creditors. On August 26, Reuters reported that GMD was negotiating with the Mexican banks to reduce its $256 million bank debt, and that it planned to deal with this liability before negotiating with the investors owning the Notes. On October 28, GMD publicly announced that it would place in trust its right to receive $17 million of Toll Road Notes, to cover employee compensation payments, and that it had transferred its right to receive $100 million of Toll Road Notes to the Mexican

Government (apparently to pay back taxes). GMD also negotiated with the holders of the Notes (including respondents) to restructure that debt, but by December these negotiations had failed.

On December 11, respondents accelerated the principal amount of their Notes, and, on December 12, filed suit for the amount due in the United States District Court for the Southern District of New York (petitioners had consented to personal jurisdiction in that forum). The complaint alleged that "GMD is at risk of insolvency, if not insolvent already"; that GMD was dissipating its most significant asset, the Toll Road Notes, and was preferring its Mexican creditors by its planned allocation of Toll Road Notes to the payment of their claims, and by its transfer to them of Toll Road Receivables; and that these actions would "frustrate any judgment" respondents could obtain. App. 29–30. Respondents sought breach-of-contract damages of $80.9 million, and requested a preliminary injunction restraining petitioners from transferring the Toll Road Notes or Receivables. On that same day, the District Court entered a temporary restraining order preventing petitioners from transferring their right to receive the Toll Road Notes.

On December 23, the District Court entered an order in which it found that "GMD is at risk of insolvency if not already insolvent"; that the Toll Road Notes were GMD's "only substantial asset"; that GMD planned to use the Toll Road Notes "to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the Notes"; that "[i]n light of [petitioners'] financial condition and dissipation of assets, any judgment [respondents] obtain in this action will be frustrated"; that respondents had demonstrated irreparable injury; and that it was "almost certain" that respondents would succeed on the merits of their claim. App. to Pet. for Cert. 25a–26a. It preliminarily enjoined petitioners "from dissipating, disbursing, transferring, conveying, encumbering

or otherwise distributing or affecting any [petitioner's] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes]." *Id.*, at 26a. The court ordered respondents to post a $50,000 bond.

The Second Circuit affirmed. 143 F. 3d 688 (1998). We granted certiorari, 525 U. S. 1015 (1998).

II

Respondents contend that events subsequent to petitioners' appeal of the preliminary injunction render this case moot. While that appeal was pending in the Second Circuit, the case proceeded in the District Court. Petitioners filed an answer and asserted various counterclaims. On April 17, 1998, the District Court granted summary judgment to respondents on their contract claim and dismissed petitioners' counterclaims. The court ordered petitioners to pay respondents $82,444,259 by assignment or transfer of Toll Road Receivables or Toll Road Notes; the court also converted the preliminary injunction into a permanent injunction pending such assignment or transfer. Although petitioners initially appealed both portions of this order to the Second Circuit, they later abandoned their appeal from the permanent injunction. The appeal from the payment order is still pending in the Second Circuit. The same date the District Court entered judgment, respondents moved to dismiss petitioners' first appeal—the one now before us—arguing that the final judgment rendered the appeal moot. On May 4, the Second Circuit denied the motion to dismiss and two days later affirmed, as mentioned above, the District Court's grant of the preliminary injunction.

Respondents argue that the issue of the propriety of the preliminary injunction is moot because that injunction is now merged into the permanent injunction. Petitioners contend that the case is not moot because, if we hold that the District Court was without power to issue the preliminary injunction,

then under Federal Rules of Civil Procedure 65(c) and 65.1[1] they will have a claim against the injunction bond. They assert that the injunction "interfered with GMD's efforts to restructure its debt and substantially impaired GMD's ability to continue its operations in the ordinary course of business." Brief for Petitioners 7. Respondents concede that a party who has been wrongfully enjoined has a claim on the bond, but they argue that although such a claim might mean that the *case* is not moot, it does not prevent this *interlocutory appeal* from becoming moot. In any event, say respondents, because a claim for wrongful injunction requires that the enjoined party win on the ultimate merits, petitioners have forfeited any claim by failing to appeal the portion of the District Court's judgment converting the preliminary injunction into a permanent injunction.

Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. We have dismissed appeals in such circumstances. See, *e. g.*, *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588–589 (1926). We agree with petitioners, however, that their potential cause of action against the injunction bond preserves our jurisdiction over this appeal. Cf. *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 305–306 (1964).

In the case of the usual preliminary injunction, the plaintiff seeks to enjoin, pending the outcome of the litigation, action that he claims is unlawful. If his lawsuit turns out to be meritorious—if he is found to be entitled to the permanent injunction that he seeks—even if the preliminary injunction was wrongly issued (because at that stage of the

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[1] Rule 65(c) provides that an applicant for a preliminary injunction must obtain security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65.1 states in part that "[t]he surety's liability may be enforced on motion without the necessity of an independent action."

litigation the plaintiff's prospects of winning were not sufficiently clear, or the plaintiff was not suffering irreparable injury) its issuance would in any event be harmless error. The final injunction establishes that the defendant *should not have been engaging in the conduct that was enjoined.* Hence, it is reasonable to regard the preliminary injunction as merging into the final one: If the latter is valid, the former is, if not procedurally correct, at least harmless. A quite different situation obtains in the present case, where (according to petitioners' claim) the substantive validity of the final injunction does *not* establish the substantive validity of the preliminary one. For the latter was issued not to enjoin *unlawful* conduct, but rather to *render* unlawful conduct that would otherwise be permissible, in order to protect the anticipated judgment of the court; and it is the essence of petitioners' claim that such an injunction can be issued only after the judgment is rendered. If petitioners are correct, they *have* been harmed by issuance of the unauthorized preliminary injunction—and hence *should* be able to recover on the bond—*even if* the final injunction is proper. It would make no sense, when this is the claim, to say that the preliminary injunction merges into the final one.[2]

[2] We recognize that respondents alleged in their complaint that the assignments of the rights to receive Toll Road Notes violated the negative pledge clause of the note instrument and the provision that the Notes ranked *pari passu* with other debt, and therefore that petitioners were not entitled to engage in the restrained conduct. We do not, however, understand the District Court to have made a finding—either in the preliminary injunction order or in the final order—that petitioners' enjoined conduct was unlawful. The mootness of petitioners' claim at the present stage of the proceedings must be assessed on the basis of what that claim *is.* As shown by the question on which we granted certiorari, it is that the District Court wrongfully entered an order to protect its judgment before the judgment was rendered. If, in fact, petitioners had no right under the note instrument to take the actions that were enjoined, that would presumably be a defense to the action on the injunction bond. See, *e. g., Blumenthal* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F. 2d 1049, 1054 (CA2 1990); Note, Recovery for Wrongful Interlocutory Injunc-

We reject respondents' argument that the controversy over the bond saves the "case" from mootness, but does not save the "issue" of the validity of the preliminary injunction from mootness. *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), upon which respondents principally rely, is inapposite. In that case a deaf graduate student sued the University of Texas to obtain an injunction requiring the school to pay for a sign-language interpreter for his school work. The District Court granted a preliminary injunction and required the student to post an injunction bond. Pending appeal of that injunction, the university paid for the interpreter, but the student graduated before the Court of Appeals issued its decision. Nevertheless, the Court of Appeals held that the appeal of the preliminary injunction was not moot because the issue of who had to pay for the interpreter remained. We reversed:

> "The Court of Appeals correctly held that the case as a whole is not moot, since, as that court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him. The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors listed in [Fifth Circuit precedent], while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.

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tions Under Rule 65(c), 99 Harv. L. Rev. 828, 836 (1986). But it does not bear upon the mootness of petitioners' present claim.

> "This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot. . . . Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits." *Id.*, at 393–394 (citations omitted).

Camenisch is simply an application of the same principle which underlies the rule that a preliminary injunction ordinarily merges into the final injunction. Since the preliminary injunction no longer had any effect (the student had graduated), and since the substantive issue governing the propriety of what had been paid under the preliminary injunction (as opposed to the procedural issue of whether the injunction should have issued when it did) was the same issue underlying the merits claim, there was no sense in trying the preliminary injunction question separately. In the present case, however, petitioners' basis for arguing that the preliminary injunction was wrongfully issued—which is that the District Court lacked the power to restrain their use of assets pending a money judgment—is independent of respondents' claim on the merits—which is that petitioners breached the note instrument by failing to make the August 1997 interest payment. The resolution of the merits is immaterial to the validity of petitioners' potential claim on the bond. Cf. *American Can Co.* v. *Mansukhani*, 742 F. 2d 314, 320–321 (CA7 1984); *Stacey G.* v. *Pasadena Independent Sch. Dist.*, 695 F. 2d 949, 955 (CA5 1983).

For the same reason, petitioners' failure to appeal the permanent injunction does not forfeit their claim that the preliminary injunction was wrongful. Petitioners do not contest the District Court's power to issue a permanent injunction after rendering a money judgment against them,

but they do contest its power to issue a *preliminary* injunction, and they do so on a ground that has nothing to do with the validity of the permanent injunction. And again for the same reason, we reject respondents' argument that petitioners have no wrongful injunction claim because they lost the case on the merits.

III

We turn, then, to the merits question whether the District Court had authority to issue the preliminary injunction in this case pursuant to Federal Rule of Civil Procedure 65.[3] The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits . . . in equity." § 11, 1 Stat. 78. We have long held that "[t]he 'jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939). See also, *e. g.*, *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 382, n. 26 (1949); *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945); *Gordon* v. *Washington*, 295 U. S. 30, 36 (1935). "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928). "[T]he substantive prerequisites for obtaining an equitable remedy as

[3] Although this is a diversity case, respondents' complaint sought the injunction pursuant to Rule 65, and the Second Circuit's decision was based on that rule and on federal equity principles. Petitioners argue for the first time before this Court that under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the availability of this injunction under Rule 65 should be determined by the law of the forum State (in this case New York). Because this argument was neither raised nor considered below, we decline to consider it.

well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2941, p. 31 (2d ed. 1995). We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.

A

Respondents do not even argue this point. The United States as *amicus curiae*, however, contends that the preliminary injunction issued in this case is analogous to the relief obtained in the equitable action known as a "creditor's bill." This remedy was used (among other purposes) to permit a judgment creditor to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances. See 1 D. Dobbs, Law of Remedies § 2.8(1), pp. 191–192 (2d ed. 1993); 4 S. Symons, Pomeroy's Equity Jurisprudence § 1415, pp. 1065–1066 (5th ed. 1941); 1 G. Glenn, Fraudulent Conveyances and Preferences § 26, p. 51 (rev. ed. 1940). It was well established, however, that, as a general rule, a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt. See, *e. g.*, *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497 (1923); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 378–379 (1893); *Cates* v. *Allen*, 149 U. S. 451, 457 (1893); *National Tube Works Co.* v. *Ballou*, 146 U. S. 517, 523–524 (1892); *Scott* v. *Neely*, 140 U. S. 106, 113 (1891); *Smith* v. *Railroad Co.*, 99 U. S. 398, 401 (1879); *Adler* v. *Fenton*, 24 How. 407, 411–413 (1861); see also 4 Symons, *supra*, at 1067; 1 Glenn, *supra*, § 9, at 11; F. Wait, Fraudulent Conveyances and Creditors' Bills § 73, pp. 110–111 (1884). The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either

at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property. As stated by Chancellor Kent: "The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights." *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144, 145–146 (N. Y. 1816). See also, *e. g.*, *Guaranty Trust Co.*, *supra*, at 106–107, n. 3; *Pusey & Jones Co.*, *supra*, at 497; *Cates*, *supra*, at 457; *Adler*, *supra*, at 411–413; *Shufeldt* v. *Boehm*, 96 Ill. 560, 564 (1880); 1 Glenn, *supra*, § 9, at 11; Wait, *supra*, § 52, at 81, § 73, at 113.

The United States asserts that there were exceptions to the general rule requiring a judgment. The existence and scope of these exceptions is by no means clear.[4] Cf. G. Glenn, The Rights and Remedies of Creditors Respecting Their Debtor's Property §§ 21–24, pp. 18–21 (1915). Although the United States says that some of them "might have been relevant in a case like this one," Brief for United States as *Amicus Curiae* 11, it chooses not to resolve (or argue definitively) whether any particular one would have been, *id.*, at 12.[5] For their part, as noted above, respondents

[4] For example, some courts said that insolvency was an exception, but others disagreed. See, *e. g.*, Annot., Of the Demands Which Will Support a Creditor's Bill, 66 American State Reports 271, 285 (1899) (cases are "in almost hopeless conflict"). This Court has concluded that that particular exception does not exist. See, *e. g.*, *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 495–497 (1923); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 385–386 (1893); *Smith* v. *Railroad Co.*, 99 U. S. 398, 400–401 (1879).

[5] Some cases suggested that there was an exception where the debt was admitted or confessed, at least if the creditor possessed an interest in the debtor's property. See, *e. g.*, *Scott* v. *Neely*, 140 U. S. 106, 113 (1891); *D. A. Tompkins Co.* v. *Catawba Mills*, 82 F. 780, 783 (CCSC 1897). Even if the latter condition is overlooked, it is by no means clear that the action here would qualify. Petitioners' answer (filed after the preliminary injunction had issued) denied knowledge or information sufficient to form a belief (which is the equivalent of a denial, see Federal Rule of Civil Procedure 8(b)) as to respondents' allegations that petitioners were currently in-

do not discuss creditor's bills at all. Particularly in the absence of any discussion of this point by the lower courts, we are not inclined to speculate upon the existence or applicability to this case of any exceptions, and follow the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property.

JUSTICE GINSBURG concedes that federal equity courts have traditionally rejected the type of provisional relief granted in this case. See *post*, at 338 (opinion concurring in part and dissenting in part). She invokes, however, "the grand aims of equity," and asserts a general power to grant relief whenever legal remedies are not "practical and efficient," unless there is a statute to the contrary. *Post*, at 342 (internal quotation marks omitted). This expansive view of equity must be rejected. Joseph Story's famous treatise reflects what we consider the proper rule, both with regard to the general role of equity in our "government of laws, not of men," and with regard to its application in the very case before us:

> "Mr. Justice Blackstone has taken considerable pains to refute this doctrine. 'It is said,' he remarks, 'that it is the business of a Court of Equity, in England, to abate the rigor of the common law. But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate . . . . But a Court of Equity can give no relief . . . .' And illustrations of the same character may be found in every state of the Union. . . . In many [States], if not in all, a debtor may prefer one creditor to another, in discharging his debts, whose assets are wholly insufficient to pay all the

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debted to respondents in the amount of $80.9 million, and that petitioners breached their agreements under the Notes and the related guarantee; and denied respondents' allegations that all conditions precedent to suit had occurred, been waived, or otherwise been satisfied, and that respondents had suffered damages of $80.9 million.

> debts." 1 Commentaries on Equity Jurisprudence § 12, pp. 14–15 (1836).

See also *infra*, at 332–333. We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a "default rule," *post*, at 342, not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy. Despite JUSTICE GINSBURG's allusion to the "increasing complexities of modern business relations," *post*, at 337 (internal quotation marks omitted), and to the bygone "age of slow-moving capital and comparatively immobile wealth," *post*, at 338, we suspect there is absolutely nothing new about debtors' trying to avoid paying their debts, or seeking to favor some creditors over others—or even about their seeking to achieve these ends through "sophisticated . . . strategies," *ibid.* The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not.

Respondents argue (supported by the United States) that the merger of law and equity changed the rule that a general creditor could not interfere with the debtor's use of his property. But the merger did not alter substantive rights. "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected." *Stainback*, 336 U. S., at 382, n. 26. Even in the absence of historical support, we would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be

frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners. In any event it appears, as we have observed, that the rule requiring a judgment was historically regarded as serving, not merely the procedural end of assuring exhaustion of legal remedies (which the merger of law and equity could render irrelevant), but also the substantive end of giving the creditor an interest in the property which equity could then act upon. See *supra*, at 319–320.[6]

We note that none of the parties or *amici* specifically raised the applicability to this case of Federal Rule of Civil Procedure 18(b), which states:

> "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money."

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[6] As we stated in *Adler* v. *Fenton*, 24 How. 407, 411–412 (1861): "'Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity'" (quoting *Moran* v. *Dawes*, 1 Hopk. Ch. 365, 367 (N. Y. 1825)).

Because the Rule was neither mentioned by the lower courts nor briefed by the parties, we decline to consider its application to the present case. We note, however, that it says nothing about preliminary relief, and specifically reserves substantive rights (as did the Rules Enabling Act, see 28 U. S. C. § 2072(b)).[7]

B

Respondents contend that two of our postmerger cases support the District Court's order "in principle." Brief for Respondents 22. We find both of these cases entirely consistent with the view that the preliminary injunction in this case was beyond the equitable authority of the District Court.

In *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940), purchasers of certificates that entitled the holders to invest in a trust of common stocks sued the company that sold the certificates and the company administering the trust, and related officers and affiliates, under the Securities Act of 1933, alleging that the sale was fraudulent. They further alleged that the company that sold the certificates was insolvent, that it was likely to make preferential payments to certain creditors, and that its assets were in danger of dissipation. They sought the appointment of a receiver and an injunction restraining the company administering the trust from transferring any assets of the corporations or of the trust. The District Court preliminarily enjoined the company from transferring a fixed sum. *Id.*, at 285–286.

[7] Several States have adopted the Uniform Fraudulent Conveyance Act (or its successor the Uniform Fraudulent Transfers Act), which has been interpreted as conferring on a nonjudgment creditor the right to bring a fraudulent conveyance claim. See generally P. Alces, Law of Fraudulent Transactions ¶ 5.04[3], p. 5–116 (1989). Insofar as Rule 18(b) applies to such an action, the state statute eliminating the need for a judgment may have altered the common-law rule that a general contract creditor has no interest in his debtor's property. Because this case does not involve a claim of fraudulent conveyance, we express no opinion on the point.

After deciding that the Securities Act permitted equitable relief, we concluded that the bill stated a cause of action for the equitable remedies of rescission of the contracts and restitution of the consideration paid, *id.*, at 287–288, and that the preliminary injunction "was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill," *id.*, at 290. *Deckert* is not on point here because, as the Court took pains to explain, "the bill state[d] a cause [of action] for equitable relief." *Id.*, at 288.

> "The principal objects of the suit are rescission of the Savings Plan contracts and restitution of the consideration paid . . . . That a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate, is well established." *Id.*, at 289.

The preliminary relief available in a suit seeking equitable relief has nothing to do with the preliminary relief available in a creditor's bill seeking equitable assistance in the collection of a legal debt.

In the second case relied on by respondents, *United States* v. *First Nat. City Bank*, 379 U. S. 378 (1965), the United States, in its suit to enforce a tax assessment and tax lien, requested a preliminary injunction preventing a third-party bank from transferring any of the taxpayer's assets which were held in a foreign branch office of the bank. *Id.*, at 379–380. Relying on a statute giving district courts the power to grant injunctions "'necessary or appropriate for the enforcement of the internal revenue laws,'" *id.*, at 380 (quoting former 26 U. S. C. § 7402(a) (1964 ed.)), we concluded that the temporary injunction was "appropriate to prevent further dissipation of assets," 379 U. S., at 385. We stated that if a district court could not issue such an injunction, foreign taxpayers could avoid their tax obligations.

First National is distinguishable from the present case on a number of grounds. First, of course, it involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing issuance of tax injunctions.[8] Second, *First National* relied in part on the doctrine that courts of equity will "'go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,'" *id.*, at 383 (quoting *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 552 (1937)). And finally, although the Court did not rely on this fact, the creditor (the Government) asserted an equitable lien on the property, see 379 U. S., at 379–380, which presents a different case from that of the unsecured general creditor.

That *Deckert* and *First National* should not be read as establishing the principle relied on by respondents is strongly suggested by *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212 (1945). In that case the United States brought suit against several corporations seeking equitable relief against alleged antitrust violations. The United States also sought a preliminary injunction restraining the defendants from removing their assets from this country pending adjudication of the merits. We concluded that the injunction was beyond the power of the District Court. We stated that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally," but that the injunction in that case dealt "with a matter lying wholly out-

[8] Although the United States suggests that there is statutory support for the present injunction in the All Writs Act, 28 U. S. C. § 1651, Brief for United States as *Amicus Curiae* 18, we have said that the power conferred by the predecessor of that provision is defined by "what is the usage, and what are the principles of equity applicable in such a case." *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, 219 (1945). That is the very inquiry in which we have engaged.

side the issues in the suit." *Id.*, at 220. We pointed out that "Federal and State courts appear consistently to have refused relief of the nature here sought," *id.*, at 221, and we concluded:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence." *Id.*, at 222–223.

The statements in the last two sentences, though dictum, confirms that the relief sought by respondents does not have a basis in the traditional powers of equity courts.

C

As further support for the proposition that the relief accorded here was unknown to traditional equity practice, it is instructive that the English Court of Chancery, from which the First Congress borrowed in conferring equitable powers on the federal courts, did not provide an injunctive remedy such as this until 1975. In that year, the Court of Appeal decided *Mareva Compania Naviera S. A.* v. *International*

Bulkcarriers S. A., 2 Lloyd's Rep. 509.[9] *Mareva*, although acknowledging that the prior case of *Lister & Co.* v. *Stubbs*, [1890] 45 Ch. D. 1 (C. A.), said that a court has no power to protect a creditor before he gets judgment,[10] relied on a statute giving courts the authority to grant an interlocutory injunction "'in all cases in which it shall appear to the court to be just or convenient,'" 2 Lloyd's Rep., at 510 (quoting Judicature Act of 1925, Law Reports 1925 (2), 15 & 16 Geo. V, ch. 49, § 45). It held (in the words of Lord Denning) that "[i]f it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him *[sic]* disposing of those assets." 2 Lloyd's Rep., at 510. The *Mareva* injunction has now been confirmed by statute. See Supreme Court Act of 1981, § 37, 11 Halsbury's Statutes 966, 1001 (1991 reissue).

Commentators have emphasized that the adoption of *Mareva* injunctions was a dramatic departure from prior practice.

> "Before 1975 the courts would not grant an injunction to restrain a defendant from disposing of his assets pen-

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[9] Apparently the first "*Mareva*" injunction was actually issued in *Nippon Yusen Kaisha* v. *Karageorgis*, [1975] 2 Lloyd's Rep. 137 (C. A.), in which Lord Denning recognized the prior practice of not granting such injunctions, but stated that "the time has come when we should revise our practice." *Id.*, at 138; see also Hetherington, Introduction to the Mareva Injunction, in Mareva Injunctions 1, n. 1 (M. Hetherington ed. 1983). For whatever reason, *Mareva* has gotten the credit (or blame), and we follow the tradition of leaving *Nippon Yusen* in the shadows.

[10] In *Lister & Co.* v. *Stubbs*, 45 Ch. D., at 1, 13, the Court of Appeal held that an injunction restraining the defendant's use of assets could not be issued. Lord Justice Cotton stated: "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

> dente lite merely because the plaintiff feared that by the time he obtained judgment the defendant would have no assets against which execution could be levied. Applications for such injunctions were consistently refused in the English Commercial Court as elsewhere. They were thought to be so clearly beyond the powers of the court as to be 'wholly unarguable.'" Hetherington, *supra* n. 9, at 3.

See also Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 Wash. L. Rev. 257, 337 (1992) (stating that *Mareva* "revolutionized English practice"). The *Mareva* injunction has been recognized as a powerful tool for general creditors; indeed, it has been called the "nuclear weapo[n] of the law." R. Ough & W. Flenley, The Mareva Injunction and Anton Piller Order: Practice and Precedents xi (2d ed. 1993).

The parties debate whether *Mareva* was based on statutory authority or on inherent equitable power. See Brief for Petitioners 17, n. 8; Brief for Respondents 35–36. Regardless of the answer to this question, it is indisputable that the English courts of equity did not actually *exercise* this power until 1975, and that federal courts in this country have traditionally applied the principle that courts of equity will not, as a general matter, interfere with the debtor's disposition of his property at the instance of a nonjudgment creditor. We think it incompatible with our traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress, to decree the elimination of this significant protection for debtors.

IV

The parties and *amici* discuss various arguments for and against creating the preliminary injunctive remedy at issue in this case. The United States suggests that the factors supporting such a remedy include

> "simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment 'at law') and those that do not; avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions." Brief for United States as *Amicus Curiae* 16.

But there are weighty considerations on the other side as well, the most significant of which is the historical principle that before judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor. As one treatise writer explained:

> "A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants." Wait, Fraudulent Conveyances § 73, at 110–111.

The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim. There are other factors which likewise give us pause: The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance. Why go through the trouble of complying with local

attachment and garnishment statutes when this all-purpose prejudgment injunction is available? More importantly, by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences. Because any rational creditor would want to protect his investment, such a remedy might induce creditors to engage in a "race to the courthouse" in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor. (In this case, we might observe, the respondents did not represent all of the holders of the Notes; they were an active few who sought to benefit at the expense of the other noteholders as well as GMD's other creditors.[11]) It is significant that, in England, use of the *Mareva* injunction has expanded rapidly. "Since 1975, the English courts have awarded *Mareva* injunctions to freeze assets in an ever-increasing set of circumstances both within and beyond the commercial setting to an ever-expanding number of plaintiffs." Wasserman, *supra*, at 339. As early as 1984, one observer stated that "[t]here are now a steady flow of such applications to our Courts which have been estimated to exceed one thou-

[11] JUSTICE GINSBURG suggests that respondents acted to benefit all of GMD's creditors. See *post*, at 341, n. 6. But respondents' complaint sought the full amount they were allegedly owed, despite their contention that petitioners could not pay all their creditors. It is not clear that the "trust in compliance with Mexican law" that respondents proposed as a possible preliminary remedy, *ibid.*, was to be for the benefit of all creditors, rather than respondents alone—but that remedy was in any event denied, which did not deter respondents from seeking a simple freeze on assets to satisfy their anticipated judgment. There is nothing whatever wrong with respondents' pursuing their own interests. Indeed, the fact that it is entirely proper and entirely predictable is the very premise of the point we are making: that this new remedy will promote unregulated competition among the creditors of a struggling debtor.

sand per month." Shenton, Attachments and Other Interim Court Remedies in Support of Arbitration, 1984 Int'l Bus. Law. 101, 104.

We do not decide which side has the better of these arguments. We set them forth only to demonstrate that resolving them in this forum is incompatible with the democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a "nuclear weapon" of the law like the one advocated here. Joseph Story made the point many years ago:

> "If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superceding the law, and of enforcing all the rights, as well as charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, and it may be, *ex aequo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Seldon; 'For law we have a measure, and know what to trust to—Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. 'T is all one, as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. It

> is the same thing with the Chancellor's conscience.'" 1 Commentaries on Equity Jurisprudence § 19, at 21.

The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress.

* * *

Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages. We reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, concurring in part and dissenting in part.

I

Uncontested evidence presented to the District Court at the preliminary injunction hearing showed that petitioner Grupo Mexicano de Desarrollo, S. A. (GMD), had defaulted on its contractual obligations to respondents, a group of GMD noteholders (Alliance), see App. to Pet. for Cert. 24a, 31a, that Alliance had satisfied all conditions precedent to its breach of contract claim, see *id.*, at 25a, and that GMD had no plausible defense on the merits, see *id.*, at 25a, 36a. Alliance also demonstrated that GMD had undertaken to treat Alliance's claims on the same footing as all other unsecured, unsubordinated debt, see *id.*, at 24a, but that GMD was in fact satisfying Mexican creditors to the exclusion of Alliance, *id.*, at 26a. Furthermore, unchallenged evidence indicated that GMD was so rapidly disbursing its sole remaining asset that, absent provisional action by the District Court, Alli-

ance would have been unable to collect on the money judgment for which it qualified. See *id.*, at 26a, 32a.[1]

Had it been possible for the District Judge to set up "a pie-powder court . . . on the instant and on the spot," *Parks* v. *Boston*, 32 Mass. 198, 208 (1834) (Shaw, C. J.), the judge could have moved without pause from evidence taking to entry of final judgment for Alliance, including an order prohibiting GMD from transferring assets necessary to satisfy the judgment. Lacking any such device for instant adjudication, the judge employed a preliminary injunction "to preserve the relative positions of the parties until a trial on the merits [could] be held." *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981). The order enjoined GMD from distributing assets likely to be necessary to satisfy the judgment in the instant case, but gave Alliance no security interest in GMD's assets, nor any preference relative to GMD's other creditors. Moreover, the injunction expressly reserved to GMD the option of commencing proceedings under the bankruptcy laws of Mexico or the United States. App. to Pet. for Cert. 27a. In addition, the District Judge recorded his readiness to modify the interim order if necessary to keep GMD in business. See *id.*, at 53a. The preliminary injunction thus constrained GMD only to the extent essential to the subsequent entry of an effective judgment.

The Court nevertheless disapproves the provisional relief ordered by the District Court, holding that a preliminary injunction freezing assets is beyond the equitable authority of the federal courts. I would not so disarm the district

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[1] GMD did not seek Second Circuit review of the District Court's fact findings on irreparable harm or of that court's determination that Alliance almost certainly would prevail on the merits. See Brief for Petitioners 7. Nor does GMD cast any doubt on those matters here. Instead, GMD forthrightly concedes that had the District Court declined to issue the preliminary injunction, GMD would have had no assets available to satisfy the money judgment that Alliance ultimately obtained. See Tr. of Oral Arg. 8–9.

courts. As I comprehend the courts' authority, injunctions of this kind, entered in the circumstances presented here, are within federal equity jurisdiction. Satisfied that the injunction issued in this case meets the exacting standards for preliminary equitable relief, I would affirm the judgment of the Second Circuit.[2]

II

The Judiciary Act of 1789 gave the lower federal courts jurisdiction over "all suits . . . in equity." § 11, 1 Stat. 78. We have consistently interpreted this jurisdictional grant to confer on the district courts "authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered" by the English High Court of Chancery at the time of the founding. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939).

As I see it, the preliminary injunction ordered by the District Court was consistent with these principles. We long ago recognized that district courts properly exercise their equitable jurisdiction where "the remedy in equity could alone furnish relief, and . . . the ends of justice requir[e] the injunction to be issued." *Watson* v. *Sutherland*, 5 Wall. 74, 79 (1867). Particularly, district courts enjoy the "historic federal judicial discretion to preserve the situation [through provisional relief] pending the outcome of a case lodged in court." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2943, p. 79 (2d ed. 1995). The District Court acted in this case in careful accord with these prescriptions, issuing the preliminary injunction only upon well-supported findings that Alliance had "[no] adequate remedy at law," would be "frustrated" in its ability to recover a judgment absent interim injunctive relief, and was

[2] I agree, for the reasons JUSTICE SCALIA states, see *ante*, at 313–318, that the case is not moot; accordingly, I join Part II of the Court's opinion.

"almost certain" to prevail on the merits. App. to Pet. for Cert. 26a.[3]

The Court holds the District Court's preliminary freeze order impermissible principally because injunctions of this kind were not "traditionally accorded by courts of equity" at the time the Constitution was adopted. *Ante,* at 319; see *ante,* at 333. In my view, the Court relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England, see, *e. g.*, *Payne* v. *Hook*, 7 Wall. 425, 430 (1869); *Gordon* v. *Washington*, 295 U. S. 30, 36 (1935); we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.

Since our earliest cases, we have valued the adaptable character of federal equitable power. See *Seymour* v. *Freer*, 8 Wall. 202, 218 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [federal equity jurisdiction]."). We have also recognized that equity must evolve over time, "in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed." *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564,

[3] We have on three occasions considered the availability of a preliminary injunction to freeze assets pending litigation, see *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940); *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212 (1945); *United States* v. *First Nat. City Bank*, 379 U. S. 378 (1965). As the Court recognizes, see *ante*, at 324–327, these cases involved factual and legal circumstances markedly different from those presented in this case and thus do not rule out or in the provisional remedy at issue here.

601 (1896) (internal quotation marks omitted); see also 1 S. Symons, Pomeroy's Equity Jurisprudence § 67, p. 89 (5th ed. 1941) (the "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs . . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age."). A dynamic equity jurisprudence is of special importance in the commercial law context. As we observed more than a century ago: "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." *Union Pacific R. Co.*, 163 U. S., at 600–601. On this understanding of equity's character, we have upheld diverse injunctions that would have been beyond the contemplation of the 18th-century Chancellor.[4]

Compared to many contemporary adaptations of equitable remedies, the preliminary injunction Alliance sought in this case was a modest measure. In operation, moreover, the preliminary injunction to freeze assets *pendente lite* may be a less heavy-handed remedy than prejudgment attachment,

[4] In a series of cases implementing the desegregation mandate of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), for example, we recognized the need for district courts to draw on their equitable jurisdiction to supervise various aspects of local school administration. See *Freeman* v. *Pitts*, 503 U. S. 467, 491–492 (1992) (describing responsibility shouldered by district courts, "in a manner consistent with the purposes and objectives of [their] equitable power," first, to structure and supervise desegregation decrees, then, as school districts achieved compliance, to relinquish control at a measured pace). Similarly, courts enforcing the antitrust laws have superintended intricate programs of corporate dissolution or divestiture. See *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 328–331, and nn. 9–13 (1961) (cataloging cases); cf. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (DC 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U. S. 1001 (1983) (approving consent decree that set in train lengthy judicial oversight of divestiture of telephone monopoly).

which deprives the defendant of possession and use of the seized property. See Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 Wash. L. Rev. 257, 281–282, 323–324 (1992). Taking account of the office of equity, the facts of this case, and the moderate, status quo preserving provisional remedy, I am persuaded that the District Court acted appropriately.[5]

I do not question that equity courts traditionally have not issued preliminary injunctions stopping a party sued for an unsecured debt from disposing of assets pending adjudication. (As the Court recognizes, however, see *ante*, at 319–321, the historical availability of prejudgment freeze injunctions in the context of creditors' bills remains cloudy.) But it is one thing to recognize that equity courts typically did not provide this relief, quite another to conclude that, therefore, the remedy was beyond equity's capacity. I would not draw such a conclusion.

Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth. By turning away cases that the law courts could deal with adequately, the Chancellor acted to reduce the tension inevitable when justice was divided between two discrete systems. See Wasserman, *supra*, at 319. But as the facts of this case so plainly show, for creditors situated as Alliance is, the remedy at law is worthless absent the provisional relief in equity's arsenal. Moreover, increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instan-

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[5] The Court suggests that a "debtor's right to a jury trial on [a] legal claim" counsels against the exercise of equity power here. *Ante*, at 330. But the decision to award provisional relief—whether equitable or legal—*always* rests with the judge. Moreover, the merits of any legal claim will be resolved by a jury, if there is any material issue of fact for trial, and findings made at the preliminary stage do not bind the jury. See Wasserman, 67 Wash. L. Rev., at 322–323.

taneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity. See LoPucki, The Death of Liability, 106 Yale L. J. 1, 32–38 (1996). I am not ready to say a responsible Chancellor today would deny Alliance relief on the ground that prior case law is unsupportive.

The development of *Mareva* injunctions in England after 1975 supports the view of the lower courts in this case, a view to which I adhere. As the Court observes, see *ante*, at 327–329, preliminary asset-freeze injunctions have been available in English courts since the 1975 Court of Appeal decision in *Mareva Compania Naviera S. A.* v. *International Bulkcarriers S. A.*, 2 Lloyd's Rep. 509. Although the cases reveal some uncertainty regarding *Mareva*'s jurisdictional basis, the better-reasoned and more recent decisions ground *Mareva* in equity's traditional power to remedy the "abuse" of legal process by defendants and the "injustice" that would result from defendants "making themselves judgment-proof" by disposing of their assets during the pendency of litigation. *Iraqi Ministry of Defence* v. *Arcepey Shipping Co.*, 1 All E. R. 480, 484–487 (1979) (citations omitted); see Hetherington, Introduction to the Mareva Injunction, in Mareva Injunctions 1, 10–13, and n. 95, 20 (M. Hetherington ed. 1983) (explaining the doctrinal basis of this jurisdictional theory and citing cases adopting it). That grounding, in my judgment, is secure.

III

A

The Court worries that permitting preliminary injunctions to freeze assets would allow creditors, " 'on a mere statement of belief that the defendant can easily make away with or transport his money or goods, [to] impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for secu-

rity or compliance with its possible decree.'" *Ante*, at 327 (quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, 222 (1945)). Given the strong showings a creditor would be required to make to gain the provisional remedy, and the safeguards on which the debtor could insist, I agree with the Second Circuit "that this 'parade of horribles' [would] not come to pass." 143 F. 3d 688, 696 (1998).

Under standards governing preliminary injunctive relief generally, a plaintiff must show a likelihood of success on the merits and irreparable injury in the absence of an injunction. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). Plaintiffs with questionable claims would not meet the likelihood of success criterion. See 11A Wright, Miller, & Kane, Federal Practice and Procedure § 2948.3, at 184–188 (as a general rule, plaintiff seeking preliminary injunction must demonstrate a reasonable probability of success). The irreparable injury requirement would not be met by unsubstantiated allegations that a defendant may dissipate assets. See *id.*, § 2948.1, at 153 ("Speculative injury is not sufficient."); see also Wasserman, 67 Wash. L. Rev., at 286–305 (discussing application of traditional preliminary injunction requirements to provisional asset-freeze requests). As the Court of Appeals recognized, provisional freeze orders would be appropriate in damages actions only upon a finding that, without the freeze, "the movant would be unable to collect [a money] judgment." 143 F. 3d, at 697. The preliminary asset-freeze order, in short, would rank and operate as an extraordinary remedy.

Federal Rule of Civil Procedure 65(c), moreover, requires a preliminary injunction applicant to post a bond "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." As an essential condition for a preliminary freeze order, a district court could demand sufficient security to ensure a remedy for wrongly enjoined defendants. Furthermore, it would be

incumbent on a district court to "match the scope of its injunction to the most probable size of the likely judgment," thereby sparing the defendant from undue hardship. See *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F. 2d 186, 199 (CA3 1990); cf. App. to Pet. for Cert. 53a (District Court expressed readiness to modify the preliminary injunction if necessary to GMD's continuance in business).

The protections in place guard against any routine or arbitrary imposition of a preliminary freeze order designed to stop the dissipation of assets that would render a court's judgment worthless. Cf. *ante*, at 327, 332–333. The case we face should be paradigmatic. There was no question that GMD's debt to Alliance was due and owing. And the short span—less than four months—between preliminary injunction and summary judgment shows that the temporary restraint on GMD did not linger beyond the time necessary for a fair and final adjudication in a busy but efficiently operated court. Absent immediate judicial action, Alliance would have been left with a multimillion dollar judgment on which it could collect not a penny.[6] In my view, the District Court properly invoked its equitable power to avoid that manifestly unjust result and to protect its ability to render an enforceable final judgment.

At the hearing on the preliminary injunction, the District Judge asked: "We have got a case where there is no defense

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[6] Before the District Court, Alliance frankly acknowledged the existence of other, unrepresented creditors. While acting to protect its own interest, Alliance asked the District Court to fashion relief that "does not just directly benefit us, but benefits . . . the whole class of creditors" by creating "an even playing field" among creditors. App. to Pet. for Cert. 46a; see also *id.*, at 45a (Alliance suggests that District Court direct GMD to set up a trust in compliance with Mexican law in order to oversee distributions to creditors). The Court supplies no reason to think that Alliance should have abandoned its rock-solid claim just because other creditors, for whatever reason, failed to bring suit. But cf. *ante*, at 331 ("respondents did not represent all of the holders of the Notes; they were an active few who sought to benefit at the expense of the other [creditors]").

presented, why shouldn't I be able to provide [Alliance] with [injunctive] relief?" App. to Pet. for Cert. 34a. Why, the District Judge asked, should GMD be allowed "to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?" *Id.*, at 36a. The Court gives no satisfactory answer.

B

Contrary to the Court's suggestion, see *ante*, at 332, this case involves no judicial usurpation of Congress' authority. Congress, of course, can instruct the federal courts to issue preliminary injunctions freezing assets pending final judgment, or instruct them not to, and the courts must heed Congress' command. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945) ("Congressional curtailment of equity powers must be respected."). Indeed, Congress has restricted the equity jurisdiction of federal courts in a variety of contexts. See *Yakus* v. *United States*, 321 U. S. 414, 442, n. 8 (1944) (cataloging statutes regulating federal equity power).

The Legislature, however, has said nothing about preliminary freeze orders. The relevant question, therefore, is whether, absent congressional direction, the general equitable powers of the federal courts permit relief of the kind fashioned by the District Court. I would find the default rule in the grand aims of equity. Where, as here, legal remedies are not "practical and efficient," *Payne*, 7 Wall., at 431, the federal courts must rely on their "flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned," *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 807 (1870). No countervailing precedent or principle holds the federal courts powerless to prevent a defendant from dissipating assets, to the destruction of a plaintiff's claim, during the course of judicial proceedings. Accordingly, I would affirm the judgment of the Court of Appeals and uphold the District Court's preliminary injunction.

Syllabus

MARTIN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* HADIX ET AL.

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

No. 98–262. Argued March 30, 1999—Decided June 21, 1999

Respondent prisoners filed two federal class actions in 1977 and 1980 against petitioner prison officials challenging the conditions of confinement in the Michigan prison system under 42 U. S. C. § 1983. By 1987, the plaintiffs had prevailed in both suits, the District Court for the Eastern District of Michigan had ruled them entitled to attorney's fees under § 1988 for postjudgment monitoring of the defendants' compliance with remedial decrees, systems were established for awarding those fees on a semiannual basis, and the District Court had established specific market rates for awarding fees. By April 26, 1996, the effective date of the Prison Litigation Reform Act of 1995 (PLRA), the prevailing market rate in both cases was $150 per hour. However, § 803(d)(3) of the PLRA, 42 U. S. C. § 1997e(d)(3), limits the size of fees that may be awarded to attorneys who litigate prisoner lawsuits. In the Eastern District, those fees are capped at a maximum hourly rate of $112.50. When first presented with the issue, the District Court concluded that the PLRA cap did not limit attorney's fees for services performed in these cases prior to, but that were still unpaid by, the PLRA's effective date, and the Sixth Circuit affirmed. Fee requests next were filed in both cases for services performed between January 1, 1996, and June 30, 1996, a period encompassing work performed both before and after the PLRA's effective date. In nearly identical orders, the District Court reiterated its earlier conclusion that the PLRA does *not* limit fees for work performed *before* April 26, 1996, but concluded that the PLRA cap *does* limit fees for services performed *after* that date. The Sixth Circuit consolidated the appeals from these orders, and, as relevant here, affirmed in part and reversed in part. It held that the PLRA's fee limitation does not apply to cases pending on the enactment date. If it did, the court held, it would have an impermissible retroactive effect, regardless of when the work was performed.

Held: Section 803(d)(3) limits attorney's fees for postjudgment monitoring services performed after the PLRA's effective date, but does not limit fees for monitoring performed before that date. Pp. 352–362.

(a) Whether the PLRA applies to cases pending when it was enacted depends on whether Congress has expressly prescribed the statute's

temporal reach. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280. If not, the Court determines whether the statute's application to the conduct at issue would result in a retroactive effect. If so, the Court presumes that the statute does not apply to that conduct. *E. g., ibid.* P. 352.

(b) Congress has not expressly mandated § 803(d)(3)'s temporal reach. The fundamental problem with petitioners' arguments that the language of § 803(d)(1)—which provides for attorney's fees "[i]n *any* action *brought* by a prisoner who *is* confined" (emphasis added)—and of § 803(d)(3)—which relates to fee "award[s]"—clearly expresses a congressional intent that § 803(d) apply to pending cases is that § 803(d) is better read as setting substantive limits on the award of attorney's fees, and as making no attempt to define the temporal reach of these substantive limitations. Had Congress intended § 803(d)(3) to apply to all fee orders entered after the effective date, it could have used language that unambiguously addresses the section's temporal reach, such as the language suggested in *Landgraf:* "[T]he [PLRA] shall apply to all proceedings pending on or commenced after the date of enactment." 511 U. S., at 260 (internal quotation marks omitted). Pp. 353–355.

(c) The Court also rejects respondents' contention that the PLRA's fee provisions reveal a congressional intent that they apply *prospectively* only to cases filed after the effective date. According to respondents, a comparison of § 802—which, in addressing "appropriate remedies" in prison litigation, explicitly provides that it applies to pending cases, § 802(b)(1)—with § 803—which is silent on the subject—supports the negative inference that § 803 does *not* apply to pending cases. This argument is based on an analogy to *Lindh* v. *Murphy*, 521 U. S. 320, 329, in which the Court, in concluding that chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996 was inapplicable to pending cases, relied heavily on the observation that chapter 154 of that Act included explicit language making it applicable to such cases. The "negative inference" argument is inapposite here. In *Lindh*, the negative inference arose from the fact that the two chapters addressed similar issues, see *ibid.;* here, §§ 802 and 803 address wholly distinct subject matters. Finally, respondents' attempt to bolster their "negative inference" argument with the legislative history—which indicates that § 803's attorney's fees limitations were originally part of § 802, along with language making them applicable to pending cases—overstates the inferences that can be drawn from an ambiguous act of legislative drafting. Pp. 355–357.

(d) Application of § 803(d)(3) in parts of this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. Pp. 357–362.

Syllabus

(1) This inquiry demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf*, 511 U. S., at 270. This judgment should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations. *Ibid.* Pp. 357–358.

(2) For postjudgment monitoring performed before the PLRA's effective date, the attorney's fees provisions have a retroactive effect contrary to the usual assumption that statutes are prospective in operation. The attorneys in both cases below had a reasonable expectation that work they performed before the PLRA's enactment would be compensated at the pre-PLRA rates set by the District Court. The PLRA, as applied to work performed before its effective date, would alter the fee arrangement *post hoc* by reducing the compensation rate. To give effect to the PLRA's fees limitations, after the fact, would attach new legal consequences to completed conduct. *Landgraf*, *supra*, at 270. The Court rejects petitioners' contention that the application of a new attorney's fees provision is proper in that fees questions do not change the parties' substantive obligations because they are collateral to the main cause of action. When determining whether a new statute operates retroactively, it is not enough to attach a label (*e. g.*, "procedural," "collateral") to the statute; it must be asked whether the statute operates retroactively, as does the PLRA. Petitioners also misplace their reliance on *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 720–721. Unlike the situation here, the award of statutory attorney's fees in that case did not upset any reasonable expectations of the parties. See *Landgraf*, 511 U. S., at 276–279. Thus, in the absence of an express command by Congress to apply the PLRA retroactively, the Court declines to do so. *Id.*, at 280. Pp. 358–360.

(3) With respect to postjudgment monitoring performed after the PLRA's effective date, by contrast, there is no retroactive effect, and the PLRA fees cap applies to such work. On April 26, 1996, through the PLRA, the plaintiffs' attorneys were on notice that their hourly rate had been adjusted. From that point forward, they would be paid at a rate consistent with the law's dictates, and any expectation of compensation at the pre-PLRA rates was unreasonable. The Court rejects respondents' contention that the PLRA has retroactive effect in this context because it attaches new legal consequences (a lower pay rate) to conduct completed before enactment, the attorney's initial decision to file suit on behalf of prisoners. That argument is based on the erroneous assumption that the attorney's initial decision to file a case is irrevocable. Respondents do not seriously contend that the attorneys here were prohibited from withdrawing from the case during the postjudgment monitoring stage. Pp. 360–361.

143 F. 3d 246, affirmed in part and reversed in part.

Syllabus

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined, in which SCALIA, J., joined as to all but Part II–B, and in which STEVENS and GINSBURG, JJ., joined as to Parts I, II–A–1, and II–B–1. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 362. GINSBURG, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 364.

Thomas L. Casey, Solicitor General of Michigan, argued the cause for petitioners. With him on the briefs were *Jennifer M. Granholm*, Attorney General, *Frank J. Kelley*, former Attorney General, and *Leo H. Friedman* and *Mark W. Matus*, Assistant Attorneys General.

Deborah LaBelle argued the cause for respondents. With her on the brief was *Jeffrey D. Dillman*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, and *Stuart W. Harris* and *Todd R. Marti*, Assistant Attorneys General, by *L. A. Prager*, Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Robert H. Kono* of Guam, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, and *Darrell V. McGraw* of West Virginia.

Elizabeth Alexander, *Donna H. Lee*, *Eric Balaban*, *Steven R. Shapiro*, and *Kary L. Moss* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE O'CONNOR delivered the opinion of the Court.*

Section 803(d)(3) of the Prison Litigation Reform Act of 1995 (PLRA or Act), 110 Stat. 1321–72, 42 U. S. C. § 1997e(d)(3) (1994 ed., Supp. III),† places limits on the fees that may be awarded to attorneys who litigate prisoner lawsuits. We are asked to decide how this section applies to cases that were pending when the PLRA became effective on April 26, 1996. We conclude that § 803(d)(3) limits attorney's fees with respect to postjudgment monitoring services performed after the PLRA's effective date but it does not so limit fees for postjudgment monitoring performed before the effective date.

I

The fee disputes before us arose out of two class action lawsuits challenging the conditions of confinement in the Michigan prison system. The first case, which we will call *Glover*, began in 1977 when a now-certified class of female prisoners filed suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, in the United States District Court for the Eastern District of Michigan. The *Glover* plaintiffs alleged that the defendant prison officials had violated their rights under the Equal Protection Clause of the Fourteenth Amendment by denying them access to vocational and educational opportunities that were available to male prisoners. They also claimed that the defendants had denied them their right of access to the courts. After a bench trial, the District Court found "[s]ignificant discrimination against the female prison population" in violation of the Equal Protection Clause, *Glover* v. *John-*

*For the reasons stated in his separate opinion, JUSTICE SCALIA joins Parts I, II–A, and II–C of this opinion. For the reasons stated in JUSTICE GINSBURG's separate opinion, she and JUSTICE STEVENS join Parts I, II–A–1, and II–B–1 of this opinion.

†Subsection (d) of § 803(d) is the fee provision we consider today, and is codified at 42 U. S. C. § 1997e(d). Although that provision is technically § 803(d)(d) of the PLRA, like the parties, we refer to it simply as § 803(d) of the PLRA.

son, 478 F. Supp. 1075, 1083 (1979), and concluded that the defendants' policies had denied the *Glover* plaintiffs their right of meaningful access to the courts, *id.*, at 1096–1097. In 1981, the District Court entered a "Final Order" detailing the specific actions to be undertaken by the defendants to remedy the constitutional violations. *Glover* v. *Johnson*, 510 F. Supp. 1019 (ED Mich.). One year later, the court found that the plaintiffs were "prevailing parties" and thus entitled to attorney's fees under 42 U. S. C. § 1988 (1994 ed. and Supp. III). *Glover* v. *Johnson*, Civ. Action No. 77–71229 (ED Mich., Feb. 2, 1982), App. 103a.

In 1985, the parties agreed to, and the District Court entered, an order providing that the plaintiffs were entitled to attorney's fees for postjudgment monitoring of the defendants' compliance with the court's remedial decrees. *Glover* v. *Johnson*, No. 77–71229 (ED Mich., Nov. 12, 1985), App. 125a (Order Granting Plaintiffs' Motion for System for Submission of Attorney Fee). This order also established the system for awarding monitoring fees that was in place when the present dispute arose. Under this system, the plaintiffs submit their fee requests on a semiannual basis, and the defendants then have 28 days to submit any objections to the requested award. The District Court resolves any disputes. *Ibid.* In an appeal from a subsequent dispute over the meaning of this order, the Court of Appeals for the Sixth Circuit affirmed that the plaintiffs were entitled to attorney's fees, at the prevailing market rate, for postjudgment monitoring. *Glover* v. *Johnson*, 934 F. 2d 703, 715–716 (1991). The prevailing market rate has been adjusted over the years, but it is currently set at $150 per hour. See *Hadix* v. *Johnson*, 143 F. 3d 246, 248 (CA6 1998) (describing facts of *Glover*).

The second case at issue here, *Hadix*, began in 1980. At that time, male prisoners at the State Prison of Southern Michigan, Central Complex (SPSM–CC), filed suit under 42 U. S. C. § 1983 in the United States District Court for

the Eastern District of Michigan claiming that the conditions of their confinement at SPSM–CC violated the First, Eighth, and Fourteenth Amendments to the Constitution. Five years later, the *Hadix* plaintiffs and the defendant prison officials entered into a consent decree to "'assure the constitutionality'" of the conditions of confinement at SPSM–CC. *Hadix* v. *Johnson*, 144 F. 3d 925, 930 (CA6 1998) (quoting consent decree). The consent decree, which was approved by the District Court, addressed a variety of issues at SPSM–CC, ranging from sanitation and safety to food service, mail, and access to the courts.

In November 1987, the District Court entered an order awarding attorney's fees to the *Hadix* plaintiffs for postjudgment monitoring of the defendants' compliance with the consent decree. *Hadix* v. *Johnson*, No. 80–CV–73581 (ED Mich., Nov. 19, 1987), App. 79a. Subsequently, the *Hadix* plaintiffs were awarded attorney's fees through a procedure similar to the procedure that had been established for the *Glover* plaintiffs: The plaintiffs submitted semiannual fee requests, the defendants filed timely objections to these requests, and the District Court resolved any disputes. The District Court set, and periodically adjusted, a specific market rate for the fee awards; by 1995, that rate was set at $150 per hour for lead counsel. See *Hadix* v. *Johnson*, 65 F. 3d 532, 536 (CA6 1995).

Thus, by 1987, *Glover* and *Hadix* were on parallel paths. In both cases, the District Court had concluded that the plaintiffs were entitled to postjudgment monitoring fees under 42 U. S. C. § 1988, and the parties had established a system for awarding those fees on a semiannual basis. Moreover, in both cases, the District Court had established specific market rates for awarding fees. By the time the PLRA was enacted, the prevailing market rate in both cases had been set at $150 per hour.

The fee landscape changed with the passage of the PLRA on April 26, 1996. The PLRA, as its name suggests, con-

tains numerous provisions governing the course of prison litigation in the federal courts. It provides, for example, limits on the availability of certain types of relief in such suits, see 18 U. S. C. § 3626(a)(2) (1994 ed., Supp. III), and for the termination of prospective relief orders after a limited time, § 3626(b). The section of the PLRA at issue here, § 803(d)(3), places a cap on the size of attorney's fees that may be awarded in prison litigation suits:

> "(d) Attorney's fees
>
> "(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U. S. C. § 1988], such fees shall not be awarded, except to the extent [authorized here].
>
> . . . . .
>
> "(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. § 3006A (1994 ed. and Supp. III)], for payment of court-appointed counsel." § 803(d), 42 U. S. C. § 1997e(d) (1994 ed., Supp. III).

Court-appointed attorneys in the Eastern District of Michigan are compensated at a maximum rate of $75 per hour, and thus, under § 803(d)(3), the PLRA fee cap for attorneys working on prison litigation suits translates into a maximum hourly rate of $112.50.

Questions involving the PLRA first arose in both *Glover* and *Hadix* with respect to fee requests for postjudgment monitoring performed *before* the PLRA was enacted. In both cases, in early 1996, the plaintiffs submitted fee requests for work performed during the last half of 1995. These requests were still pending when the PLRA became effective on April 26, 1996. In both cases, the District Court concluded that the PLRA fee cap did not limit attorney's fees for services performed in these cases prior to the effective

date of the Act. *Glover* v. *Johnson*, Civ. Action No. 77–71229 (ED Mich., June 3, 1996), App. 148a; *Hadix* v. *Johnson*, Civ. Action No. 80–73581 (ED Mich., May 30, 1996), App. 91a. The Sixth Circuit affirmed this interpretation of the PLRA on appeal. *Glover* v. *Johnson*, 138 F. 3d 229, 249–251 (1998); *Hadix* v. *Johnson*, 144 F. 3d, at 946–948.

Fee requests next were filed in both *Glover* and *Hadix* for services performed between January 1, 1996, and June 30, 1996, a time period encompassing work performed both before and after the effective date of the PLRA. As relevant to this case, the defendant state prison officials argued that these fee requests were subject to the fee cap found in § 803(d)(3) of the PLRA, and the District Court accepted this argument in part. In nearly identical orders issued in the two cases, the court reiterated its earlier conclusion that the PLRA does *not* limit fees for work performed *before* April 26, 1996, but concluded that the PLRA fee cap *does* limit fees for services performed *after* the effective date. *Hadix* v. *Johnson*, Case No. 80–73581 (ED Mich., Dec. 4, 1996), App. to Pet. for Cert. 27a; *Glover* v. *Johnson*, Case No. 77–71229 (ED Mich., Dec. 4, 1996), App. to Pet. for Cert. 33a.

The Court of Appeals for the Sixth Circuit consolidated the appeals from these orders, and, as relevant here, affirmed in part and reversed in part. *Hadix* v. *Johnson*, 143 F. 3d 246 (1998). According to the Court of Appeals, the PLRA's fee limitation does not apply to fee requests such as those in *Hadix* and *Glover* that relate to cases that were pending on the date of enactment. If it were applied to pending cases, the court held, it would have an impermissible retroactive effect, regardless of when the work was performed. 143 F. 3d, at 250–256.

The Court of Appeals' holding—that the PLRA's attorney's fees provisions do not apply to pending cases—is inconsistent with the holdings of other Circuits on these issues. For example, the Courts of Appeals for the Fourth and Ninth

Circuits have held that § 803(d) caps all fees that are ordered to be paid after the enactment of the PLRA, even when those fees compensate attorneys for work performed prior to the enactment of the PLRA. *Alexander S.* v. *Boyd*, 113 F. 3d 1373, 1385–1388 (CA4 1997), cert. denied, 522 U. S. 1090 (1998); *Madrid* v. *Gomez*, 150 F. 3d 1030 (CA9 1998). See also *Blissett* v. *Casey*, 147 F. 3d 218 (CA2 1998) (PLRA does not necessarily limit fees when work performed before effective date but award rendered after effective date), cert. pending, No. 98–527; *Inmates of D. C. Jail* v. *Jackson*, 158 F. 3d 1357, 1360 (CADC 1998) (holding that PLRA limits fees for work performed after effective date of Act, and suggesting in dicta that it does not apply to work performed prior to effective date), cert. pending, No. 98–917. We granted certiorari to resolve these conflicts. 525 U. S. 1000 (1998). In this Court, the *Hadix* and *Glover* plaintiffs are respondents, and the defendant prison officials from both cases are petitioners.

II

Petitioners contend that the PLRA applies to *Glover* and *Hadix*, cases that were pending when the PLRA was enacted. This fact pattern presents a recurring question in the law: When should a new federal statute be applied to pending cases? See, *e. g.*, *Lindh* v. *Murphy*, 521 U. S. 320 (1997); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939 (1997). To answer this question, we ask first "whether Congress has expressly prescribed the statute's proper reach." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280 (1994). If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. *Ibid.* If so, then in keeping with our "traditional presumption" against retroactivity, we presume that the statute does not apply to that conduct. *Ibid.* See also *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, *supra*, at 946.

A

1

Congress has not expressly mandated the temporal reach of § 803(d)(3). Section 803(d)(1) provides that "[i]n any action brought by a prisoner who is confined [to a correctional facility] . . . attorney's fees . . . shall not be awarded, except" as authorized by the statute. Section 803(d)(3) further provides that "[n]o award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. § 3006A], for payment of court-appointed counsel." Petitioners contend that this language—particularly the phrase "[i]n *any* action *brought* by a prisoner who *is* confined," § 803(d)(1) (emphasis added)—clearly expresses a congressional intent that § 803(d) apply to pending cases. They argue that "any" is a broad, encompassing word, and that its use with "brought," a past-tense verb, demonstrates congressional intent to apply the fees limitations to *all* fee awards entered after the PLRA became effective, even when those awards were for services performed before the PLRA was enacted. They also contend that § 803(d)(3), by its own terms, applies to all "award[s]"—understood as the actual court order directing the payment of fees—entered after the effective date of the PLRA, regardless of when the work was performed.

The fundamental problem with all of petitioners' statutory arguments is that they stretch the language of § 803(d) to find congressional intent on the temporal scope of that section when we believe that § 803(d) is better read as setting *substantive* limits on the award of attorney's fees. Section 803(d)(1), for example, prohibits fee awards unless those fees were "directly and reasonably incurred" in the suit, and unless those fees are "proportionately related" to, or "directly and reasonably incurred in enforcing," the relief ordered. 42 U. S. C. § 1997e(d)(1) (1994 ed., Supp. III). Similarly, § 803(d)(3) sets substantive limits by prohibiting the award

of fees based on hourly rates greater than a specified rate. In other words, these sections define the substantive availability of attorney's fees; they do not purport to define the temporal reach of these substantive limitations. This language falls short of demonstrating a "clear congressional intent" favoring retroactive application of these fees limitations. *Landgraf*, 511 U. S., at 280. It falls short, in other words, of the "unambiguous directive" or "express command" that the statute is to be applied retroactively. *Id.*, at 263, 280.

In any event, we note that "brought," as used in this section, is not a past-tense verb; rather, it is the participle in a participial phrase modifying the noun "action." And although the word "any" is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards. Finally, we do not believe that the phrase "[n]o award" in § 803(d)(3) demonstrates congressional intent to apply that section to all fee awards (*i. e.*, fee payment orders) entered after the PLRA's effective date. Had Congress intended § 803(d)(3) to apply to all fee orders entered after the effective date, even when those awards compensate for work performed before the effective date, it could have used language more obviously targeted to addressing the temporal reach of that section. It could have stated, for example, that "No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate."

The conclusion that § 803(d) does not clearly express congressional intent that it apply retroactively is strengthened by comparing § 803(d) to the language that we suggested in *Landgraf* might qualify as a clear statement that a statute was to apply retroactively: "[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *Id.*, at 260 (internal quotation marks omitted). This provision, unlike the language of the PLRA, unambiguously addresses the temporal reach of the statute.

With no such analogous language making explicit reference to the statute's temporal reach, it cannot be said that Congress has "expressly prescribed" § 803(d)'s temporal reach. *Id.*, at 280.

2

Respondents agree that § 803(d) of the PLRA lacks an express directive that the statute apply retroactively, but they contend that the PLRA reveals congressional intent that the fees provisions apply *prospectively* only. That is, respondents insist that the PLRA's fees provisions demonstrate that they only apply to cases filed after the effective date of the Act. For respondents, this congressional intent is evident from a study of the Act's structure and legislative history.

According to respondents, a comparison of §§ 802 and 803 of the PLRA leads to the conclusion that § 803(d) should only apply to cases filed after its enactment. The attorney's fees provisions are found in § 803 of the PLRA, and, as described above, this section contains no explicit directive that it should apply to pending cases. By contrast, § 802—addressing "appropriate remedies" in prison litigation—explicitly provides that it applies to pending cases: "[This section] shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." § 802(b)(1), note following 18 U. S. C. § 3626 (1994 ed., Supp. III). According to respondents, the presence of this express command in § 802, when coupled with § 803's silence, supports the negative inference that § 803 is *not* to apply to pending cases. Respondents buttress this "negative inference" argument by reference to the legislative history of the fees provisions. Respondents contend that when the attorney's fees limitations were originally drafted, they were in the section that became § 802 of the PLRA, which at the time contained language making them applicable to pending cases. Later, the fees provisions were moved to what be-

came § 803 of the PLRA, a section without language making it applicable to pending cases. Thus, according to respondents, when Congress moved the fees provisions out of § 802, with its explicitly retroactive language, it demonstrated its intent to apply the fees provisions *prospectively* only. Brief for Respondents 15–18.

Respondents' "negative inference" argument is based on an analogy to our decision in *Lindh* v. *Murphy,* 521 U. S. 320 (1997). In *Lindh,* we considered whether chapter 153 of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, was applicable to pending cases. In concluding that chapter 153 does not apply to such cases, we relied heavily on the observation that chapter 154 of AEDPA includes explicit language making that chapter applicable to pending cases. We concluded that "[n]othing . . . but a different intent explains the different treatment." 521 U. S., at 329. This argument carried special weight because both chapters addressed similar issues: Chapter 153 established new standards for review of habeas corpus applications by state prisoners, and chapter 154 created new standards for review of habeas corpus applications by state prisoners under capital sentences. Because both chapters "govern[ed] standards affecting entitlement to relief" in habeas cases, "[i]f . . . Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153." *Ibid.*

Because §§ 802 and 803 address wholly distinct subject matters, the same negative inference does not arise from the silence of § 803. Section 802 addresses "[a]ppropriate remedies" in prison litigation, prohibiting, for example, prospective relief unless it is "narrowly drawn" and is "the least intrusive means necessary to correct the violation." § 802(a), 18 U. S. C. § 3626(a)(1)(A) (1994 ed., Supp. III). That section also creates new standards designed to encourage the prompt termination of prospective relief or-

ders, providing, for example, for the "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." § 802(a), 18 U. S. C. § 3626(b)(2). Section 803(d), by contrast, does not address the propriety of various forms of relief and does not provide for the immediate termination of ongoing relief orders. Rather, it governs the award of attorney's fees. Thus, there is no reason to conclude that if Congress was concerned that § 802 apply to pending cases, it would "have been just as concerned" that § 803 apply to pending cases.

Finally, we note that respondents' reliance on the legislative history overstates the inferences that can be drawn from an ambiguous act of legislative drafting. Even if respondents are correct about the legislative history, the inference that respondents draw from this history is speculative. It rests on the assumption that the *reason* the fees provisions were moved was to move them away from the language applying § 802 to pending cases, when they may have been moved for a variety of other reasons. This weak inference provides a thin reed on which to rest the argument that the fees provisions, by negative implication, were intended to apply prospectively.

B

Because we conclude that Congress has not "expressly prescribed" the proper reach of § 803(d)(3), *Landgraf,* 511 U. S., at 280, we must determine whether application of this section in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about "whether the new provision attaches new legal

consequences to events completed before its enactment." *Id.*, at 270. This judgment should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Ibid.*

1

For postjudgment monitoring performed before the effective date of the PLRA, the PLRA's attorney's fees provisions, as construed by respondents, would have a retroactive effect contrary to the usual assumption that congressional statutes are prospective in operation. The attorneys in both *Hadix* and *Glover* had a reasonable expectation that work they performed prior to enactment of the PLRA in monitoring petitioners' compliance with the court orders would be compensated at the pre-PLRA rates as provided in the stipulated order. Long before the PLRA was enacted, the plaintiffs were declared prevailing parties, and the parties agreed to a system for periodically awarding attorney's fees for postjudgment monitoring. The District Court entered orders establishing that the fees were to be awarded at prevailing market rates, and specifically set those rates, as relevant here, at $150 per hour. Respondents' counsel performed a specific task—monitoring petitioners' compliance with the court orders—and they were told that they would be compensated at a rate of $150 per hour. Thus, when the lawyers provided these postjudgment monitoring services before the enactment of the PLRA, they worked in reasonable reliance on this fee schedule. The PLRA, as applied to work performed before its effective date, would alter the fee arrangement *post hoc* by reducing the rate of compensation. To give effect to the PLRA's fees limitations, after the fact, would "attac[h] new legal consequences" to completed conduct. *Landgraf, supra*, at 270.

Petitioners contest this conclusion. They contend that the application of a new attorney's fees provision is "'unquestionably proper,'" Brief for Petitioners 24 (quoting

Landgraf, supra, at 273), because fees questions "are incidental to, and independent from, the underlying substantive cause of action." They do not, in other words, change the substantive obligations of the parties because they are "collateral to the main cause of action." Brief for Petitioners 24–25 (quoting *Landgraf,* 511 U. S., at 277) (internal quotation marks omitted). Attaching the label "collateral" to attorney's fees questions does not advance the retroactivity inquiry, however. While it may be possible to generalize about types of rules that ordinarily will not raise retroactivity concerns, see, *e. g., id.,* at 273–275, these generalizations do not end the inquiry. For example, in *Landgraf,* we acknowledged that procedural rules may often be applied to pending suits with no retroactivity problems, *id.,* at 275, but we also cautioned that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," *id.,* at 275, n. 29. We took pains to dispel the "sugges[tion] that concerns about retroactivity have no application to procedural rules." *Ibid.* See also *Lindh* v. *Murphy,* 521 U. S., at 327–328. When determining whether a new statute operates retroactively, it is not enough to attach a label (*e. g.,* "procedural," "collateral") to the statute; we must ask whether the statute operates retroactively.

Moreover, petitioners' reliance on our decision in *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696 (1974), to support their argument that attorney's fees provisions can be applied retroactively is misplaced. In *Bradley,* the District Court had awarded attorney's fees, based on general equitable principles, to a group of parents who had prevailed in their suit seeking the desegregation of the Richmond schools. While the case was pending on appeal, Congress passed a statute specifically authorizing the award of attorney's fees for prevailing parties in school desegregation cases. The Court of Appeals held that the new statute could not authorize fee awards for work performed before the effective date of the new law, but we reversed, holding that the

fee award in that case was proper. Because attorney's fees were available, albeit under different principles, before passage of the statute, and because the District Court had in fact already awarded fees invoking these different principles, there was no manifest injustice in allowing the fee statute to apply in that case. *Id.*, at 720–721. We held that the award of statutory attorney's fees did not upset any reasonable expectations of the parties. See also *Landgraf, supra*, at 276–279 (distinguishing *Bradley* on these same grounds). In this case, by contrast, from the beginning of these suits, the parties have proceeded on the assumption that 42 U. S. C. § 1988 would govern. The PLRA was not passed until well after respondents had been declared prevailing parties and thus entitled to attorney's fees. To impose the new standards now, for work performed before the PLRA became effective, would upset the reasonable expectations of the parties.

2

With respect to postjudgment monitoring performed after the effective date of the PLRA, by contrast, there is no retroactivity problem. On April 26, 1996, through the PLRA, the plaintiffs' attorneys were on notice that their hourly rate had been adjusted. From that point forward, they would be paid at a rate consistent with the dictates of the law. After April 26, 1996, any expectation of compensation at the pre-PLRA rates was unreasonable. There is no manifest injustice in telling an attorney performing postjudgment monitoring services that, going forward, she will earn a lower hourly rate than she had earned in the past. If the attorney does not wish to perform services at this new, lower pay rate, she can choose not to work. In other words, as applied to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns.

Respondents contend that the PLRA has retroactive effect in this context because it attaches new legal consequences

(a lower pay rate) to conduct completed before enactment. The preenactment conduct that respondents contend is affected is the attorney's initial decision to file suit on behalf of the prisoner clients. Brief for Respondents 29–31. Even assuming, *arguendo*, that when the attorneys filed these cases in 1977 and 1980, they had a reasonable expectation that they would be compensated for postjudgment monitoring based on a particular fee schedule (*i. e.*, the pre-PLRA, "prevailing market rate" schedule), respondents' argument that the PLRA affects pre-PLRA conduct fails because it is based on the assumption that the attorney's initial decision to file a case on behalf of a client is an irrevocable one. In other words, respondents' argument assumes that once an attorney files suit, she must continue working on that case until the decree is terminated. Respondents provide no support for this assumption, however. They allude to ethical constraints on an attorney's ability to withdraw from a case midstream, see Brief for Respondents 29 ("And finally, it is at that time that plaintiffs' counsel commit themselves ethically to continued representation of their clients to ensure that the Constitution is honored, a course of conduct that cannot lightly be altered"), but they do not seriously contend that the attorneys here were prohibited from withdrawing from the case during the postjudgment monitoring stage, see, *e. g.*, Tr. of Oral Arg. 42–43. It cannot be said that the PLRA changes the legal consequences of the attorneys' pre-PLRA decision to file the case.

C

In sum, we conclude that the PLRA contains no express command about its temporal scope. Because we find that the PLRA, if applied to postjudgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent with our assumption that statutes are prospective, in the absence of an express command by Congress to apply the Act retroactively, we de-

cline to do so. *Landgraf,* 511 U. S., at 280. With respect to postjudgment monitoring performed after the effective date, by contrast, there is no retroactive effect, and the PLRA fees cap applies to such work. Accordingly, the judgment of the Court of Appeals for the Sixth Circuit is affirmed in part and reversed in part.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

Our task in this case is to determine the temporal application of that provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U. S. C. § 1997e(d)(3) (1994 ed., Supp. III), which prescribes that "[n]o award of attorney's fees in an action [brought by a prisoner in which attorney's fees are authorized under 42 U. S. C. § 1988 (1994 ed., and Supp. III)] shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. § 3006A (1994 ed., and Supp. III)] for payment of court-appointed counsel."

I agree with the Court that the intended temporal application is not set forth in the text of the statute, and that the outcome must therefore be governed by our interpretive principle that, in absence of contrary indication, a statute will not be construed to have retroactive application, see *Landgraf* v. *USI Film Products,* 511 U. S. 244, 280 (1994). But that leaves open the key question: retroactive in reference to what? The various options in the present case include (1) the alleged violation upon which the fee-imposing suit is based (applying the new fee rule to any case involving an alleged violation that occurred before the PLRA became effective would be giving it "retroactive application"); (2) the lawyer's undertaking to prosecute the suit for which attorney's fees were provided (applying the new fee rule to any case in which the lawyer was retained before the PLRA became effective would be giving it "retroactive application");

(3) the filing of the suit in which the fees are imposed (applying the new fee rule to any suit brought before the PLRA became effective would be giving it "retroactive application"); (4) the doing of the legal work for which the fees are payable (applying the new fee rule to any work done before the PLRA became effective would be giving it "retroactive application"); and (5) the actual award of fees in a prisoner case (applying the new fee rule to an award rendered before the PLRA became effective would be giving it "retroactive application").

My disagreement with the Court's approach is that, in deciding which of the above five reference points for the retroactivity determination ought to be selected, it seems to me not much help to ask which of them would frustrate expectations. In varying degrees, they *all* would. As I explained in my concurrence in *Landgraf, supra*, at 286 (opinion concurring in judgments), I think the decision of which reference point (which "retroactivity event") to select should turn upon which activity the statute was intended to regulate. If it was intended to affect primary conduct, No. 1 should govern; if it was intended to induce lawyers to undertake representation, No. 2—and so forth.

In my view, the most precisely defined purpose of the provision at issue here was to reduce the previously established incentive for lawyers to work on prisoners' civil rights cases. If the PLRA is viewed in isolation, of course, its purpose could be regarded as being simply to prevent a judicial award of fees in excess of the referenced amount—in which case the relevant retroactivity event would be the award. In reality, however, the PLRA simply revises the fees provided for by § 1988, and it seems to me that the underlying purpose of *that* provision must govern its amendment as well—which purpose was to provide an appropriate incentive for lawyers to work on (among other civil rights cases) pris-

oner suits.[1] That being so, the relevant retroactivity event is the doing of the work for which the incentive was offered.[2] All work rendered in reliance upon the fee assurance contained in the former § 1988 will be reimbursed at those rates; all work rendered after the revised fee assurance of the PLRA became effective will be limited to the new rates. The District Court's announcement that it would permit future work to be billed at a higher rate operated *in futuro;* it sought to regulate future conduct rather than adjudicate past. It was therefore no less subject to revision by statute than is an injunction. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421, 436 (1856).

For these reasons, I concur in the judgment of the Court and join all but Part II–B of its opinion.

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

I agree with the Court's determination that § 803(d) of the Prison Litigation Reform Act of 1995, (PLRA or Act), 42 U. S. C. § 1997e(d) (1994 ed., Supp. III), does not "limit fees for postjudgment monitoring performed before the [Act's] effective date," *ante,* at 347, and with much of the reasoning set out in Parts I, II–A–1, and II–B–1 of the Court's opinion. I disagree, however, with the holding that § 803(d) "limits attorney's fees with respect to postjudgment monitoring services performed after . . . the effective date." *Ibid.*

[1] Although the fees awarded under § 1988 are payable to the party rather than to the lawyer, I think it clear that the purpose of the provision was to enable the civil rights plaintiffs to offer a rate of compensation that would attract attorneys.

[2] I reject JUSTICE GINSBURG's contention that the retroactivity event should be the attorney's undertaking to represent the civil rights plaintiff. The fees are intended to induce not merely signing on (no time can be billed for that) but actually doing the legal work. Like the Court, I do not think it true that an attorney who has signed on cannot terminate his representation; he assuredly can if the client says that he will no longer pay the hourly fee agreed upon.

I do not find in the PLRA's text or history a satisfactory basis for concluding that Congress meant to order a midstream change, placing cases commenced before the PLRA became law under the new regime. I would therefore affirm in full the judgment of the Court of Appeals for the Sixth Circuit, which held § 803(d) inapplicable to cases brought to court prior to the enactment of the PLRA. To explain my view of the case, I retread some of the factual and analytical ground treated in more detail in the Court's opinion.

I

On April 26, 1996, President Clinton signed the PLRA into law. Section 803(d) of the Act, governing attorney's fees, provides:

> "(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—
>
> "(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> "(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> "(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> "(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> "(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater

> than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel." 42 U. S. C. § 1997e(d) (1994 ed., Supp. III).

At issue here is whether § 803(d) governs post-April 26, 1996, fee awards in two lawsuits commenced before that date. In *Glover* v. *Johnson*, 478 F. Supp. 1075 (ED Mich. 1979), a class of female Michigan inmates filed an action under 42 U. S. C. § 1983 (1994 ed., Supp. III) against various Michigan prison officials (State) in 1977; the *Glover* plaintiffs alleged principally that they were denied vocational and educational opportunities afforded their male counterparts, in violation of the Equal Protection Clause. Ruling in plaintiffs' favor, the District Court entered a remedial order and retained jurisdiction over the case pending defendants' substantial compliance with that order. See *Glover* v. *Johnson*, 510 F. Supp. 1019, 1020 (ED Mich. 1981). Under a 1985 ruling governing fee awards, plaintiffs' counsel applied for fees and costs twice yearly. See *Hadix* v. *Johnson*, 143 F. 3d 246, 248 (CA6 1998).

In *Hadix* v. *Johnson*, a class of male Michigan inmates filed a § 1983 action against the State in 1980, alleging that the conditions of their confinement violated the First, Eighth, Ninth, and Fourteenth Amendments. In 1985, the parties entered into a consent decree governing sanitation, health care, fire safety, overcrowding, court access, and other aspects of prison life. The District Court retained jurisdiction over the case pending substantial compliance with the decree. Plaintiffs' attorneys remain responsible for monitoring compliance with the decree. In 1987, the District Court entered an order governing the award of fees and costs to plaintiffs' counsel for compliance monitoring. See *id.*, at 249.

Counsel for plaintiffs in both cases filed fee applications for compensation at the court-approved market-based level of $150 per hour for work performed between January 1, 1996, and June 30, 1996. See App. to Pet. for Cert. 27a, 33a. The

State objected, arguing that § 803(d) limits all fees awarded after April 26, 1996, in these litigations to $112.50 per hour. *Id.*, at 34a. In separate but nearly identical opinions, the District Court refused to apply § 803(d)'s fee limitation to work performed before the PLRA's effective date, see *id.*, at 28a, n. 1; *id.*, at 34a, n. 1, but applied the limitation to all work performed thereafter, see *id.*, at 31a, 41a.

Relying on its recent decision in *Glover* v. *Johnson*, 138 F. 3d 229 (1998), the Sixth Circuit affirmed the District Court's refusal to apply § 803(d) to work completed pre-enactment. See 143 F. 3d, at 248. The appeals court reversed the District Court's judgment, however, to the extent that it applied § 803(d) to work performed postenactment. See *id.*, at 255–256. Unpersuaded that Congress intended the PLRA attorney's fees provisions to apply retroactively, the panel held that § 803(d) "is inapplicable to cases brought before the statute was enacted whether the underlying work was performed before or after the enactment date of the statute." *Ibid.*

II

In *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), we reaffirmed the Court's longstanding presumption against retroactive application of the law. "If [a] statute would operate retroactively," we held, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*, at 280.

Emphasizing that § 803(d) applies to "any action brought by a prisoner who is confined," the State insists that the statute's plain terms reveal Congress' intent to limit fees in pending as well as future cases. See Brief for Petitioners 14–15 (emphases deleted; internal quotation marks omitted). As the Court recognizes, however, § 803(d)'s "any action brought" language refers to the provision's substantive scope, not its temporal reach, see *ante*, at 353–354; "any" appears in the text only in proximity to provisions identifying the

law's substantive dimensions.[1] Had Congress intended that § 803(d) apply retroactively, it might easily have specified, as the Court suggests, that all postenactment awards shall be subject to the limitation, see *ante*, at 354, or prescribed that the provision "shall apply in all proceedings pending on or commenced after the date of enactment of this Act." Congress instead left unaddressed § 803(d)'s temporal reach.

Comparison of § 803(d)'s text with that of a neighboring provision, § 802(b)(1) of the PLRA, is instructive for the retroactivity question we face. Section 802(b)(1), which governs "appropriate remedies" in prison litigation, applies expressly to "all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." 110 Stat. 1321–70, note following 18 U. S. C. § 3626. "Congress [thus] saw fit to tell us which part of the Act was to be retroactively applied," *i. e.*, § 802. *Jensen* v. *Clarke*, 94 F. 3d 1191, 1203 (CA8 1996). While I agree with the Court that the negative implication created by these two provisions is not dispositive, see *ante*, at 357, Congress' silence nevertheless suggests that § 803(d) has no carryback thrust.

Absent an express statutory command respecting retroactivity, *Landgraf* teaches, the attorney's fees provision should not be applied to pending cases if doing so would "have retroactive effect." 511 U. S., at 280. As the Court recognizes, see *ante*, at 360, application of § 803(d) to work performed before the PLRA's effective date would be impermissibly retroactive. Instead of the court-approved

[1] Section 803(d) is thus unlike the unenacted provision discussed in *Landgraf* v. *USI Film Products*, 511 U. S. 244, 260 (1994), which would have made the statute at issue in that case applicable "'to all proceedings pending on or commenced after'" the effective date. Because this language would have linked the word "all" directly to the statute's temporal scope, we recognized that it might have qualified as a clear statement of retroactive effect. The word "any" is not similarly tied to the temporal scope of the PLRA, however, and so the inference suggested in the *Landgraf* discussion is not permissible here.

market-based fee that attorneys anticipated for work performed under the old regime, counsel would be limited to the new statutory rate. We long ago recognized the injustice of interpreting a statute to reduce the level of compensation for work already performed. See *United States* v. *Heth*, 3 Cranch 399, 408–409 (1806) (precluding, as impermissibly retroactive, application of a statute reducing customs collectors' commissions to customs collected before enactment, even when the commission was due after the statute's effective date).

III

In my view, § 803(d) is most soundly read to cover all, and only, representations undertaken after the PLRA's effective date. Application of § 803(d) to representations commenced before the PLRA became law would "attac[h] new legal consequences to [an] even[t] completed before [the statute's] enactment"; hence the application would be retroactive under *Landgraf.* 511 U. S., at 270. The critical event effected before the PLRA's effective date is the lawyer's undertaking to prosecute the client's civil rights claim. Applying § 803(d) to pending matters significantly alters the consequences of the representation on which the lawyer has embarked.[2] Notably, attorneys engaged before passage of the PLRA have little leeway to alter their conduct in response to the new legal regime; an attorney who initiated a prisoner's rights suit before April 26, 1996, remains subject to a professional obligation to see the litigation through to final disposition. See ABA Model Rule of Professional Conduct 1.3, and Comment [3] (1999) ("[A] lawyer should carry

[2] An attorney's decision to invest time and energy in a civil rights suit necessarily involves a complex balance of factors, including the likelihood of success, the amount of labor necessary to prosecute the case to completion, and the potential recovery. Applying § 803(d) to PLRA representations ongoing before April 26, 1996, effectively reduces the value of the lawyer's prior investment in the litigation, and disappoints reasonable reliance on the law in place at the time of the lawyer's undertaking.

through to conclusion all matters undertaken for a client."). Counsel's actions before and after that date are thus "inextricab[ly] part of a course of conduct initiated prior to the law." *Inmates of D. C. Jail* v. *Jackson*, 158 F. 3d 1357, 1362 (CADC 1998) (Wald, J., dissenting).

While the injustice in applying the fee limitations to pending actions may be more readily apparent regarding work performed before the PLRA's effective date, application of the statute to work performed thereafter in pending cases also frustrates reasonable reliance on prior law and court-approved market rates. Consider, for example, two attorneys who filed similar prison reform lawsuits at the same time, pre-PLRA. Both attorneys initiated their lawsuits in the expectation that, if they prevailed, they would earn the market rate anticipated by pre-PLRA law. In one case, the lawsuit progressed swiftly, and labor-intensive pretrial discovery was completed before April 26, 1996. In the other, the suit lagged through no fault of plaintiff's counsel, pending the court's disposition of threshold motions, and the attorney was unable to pursue discovery until after April 26, 1996.[3] Both attorneys have prosecuted their claims with due diligence; both were obliged, having accepted the representations, to perform the work for which they seek compensation. There is scarcely greater injustice in denying pre-PLRA compensation for pretrial discovery in the one case than the other. Nor is there any reason to think that Congress intended these similarly situated attorneys to be treated differently.

The Court avoids a conclusion of retroactivity by dismissing as an unsupported assumption the attorneys' assertion of an obligation to continue their representations through to

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[3] If counsel's conduct caused delay or protraction, the court could properly exercise discretion to deny or reduce the attorney's fee. See 42 U. S. C. § 1988(b) (1994 ed., Supp. III) ("[T]he court, in its discretion, may allow . . . a reasonable attorney's fee.").

final disposition. See *ante*, at 361. It seems to me, however, that the assertion has secure support.

Like the ABA's Model Rules, the Michigan Rules of Professional Conduct (1999), which apply to counsel in both *Hadix* and *Glover*, see Rule 83.20(j), provide that absent good cause for terminating a representation, "a lawyer should carry through to conclusion all matters undertaken for a client." Rule 1.3, Comment. It is true that withdrawal may be permitted where "the representation will result in an unreasonable financial burden on the lawyer," Rule 1.16(b)(5), but explanatory comments suggest that this exception is designed for situations in which "the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees," Rule 1.16, Comment. Consistent with the Michigan Rules, counsel for petitioners affirmed at oral argument their ethical obligation to continue these representations to a natural conclusion. See Tr. of Oral Arg. 43 ("[Continuing the representation] does involve ethical concerns certainly, especially in the[se] circumstance[s]."). There is no reason to think counsel ethically could have abandoned these representations in response to the PLRA fee limitation, nor any basis to believe the trial court would have permitted counsel to withdraw. See Rule 1.16(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation."). As I see it, the attorneys' pre-PLRA pursuit of the civil rights claims thus created an obligation, enduring post-PLRA, to continue to provide effective representation.

Accordingly, I conclude that the Sixth Circuit soundly resisted the "sophisticated construction," 143 F. 3d, at 252, that would split apart, for fee award purposes, a constant course of representation. "[T]he triggering event for retroactivity purposes," I am persuaded, "is when the lawyer undertakes to litigate the civil rights action on behalf of the client." *Inmates of D. C. Jail*, 158 F. 3d, at 1362 (Wald, J., dissenting).

* * *

Landgraf's lesson is that Congress must speak clearly when it wants new rules to govern pending cases. Because § 803(d) contains no clear statement on its temporal reach, and because the provision would operate retroactively as applied to lawsuits pending on the Act's effective date, I would hold that the fee limitation applies only to cases commenced after April 26, 1996.

Syllabus

JONES *v.* UNITED STATES

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

No. 97–9361. Argued February 22, 1999—Decided June 21, 1999

Petitioner was sentenced to death for the crime of kidnaping resulting in the victim's death. Petitioner's sentence was imposed pursuant to the Federal Death Penalty Act of 1994, 18 U. S. C. § 3591 *et seq.* At the sentencing hearing, the District Court instructed the jury and provided it with four decision forms on which to record its sentencing recommendation. The court refused petitioner's request to instruct the jury as to the consequences of jury deadlock. The jury unanimously recommended that petitioner be sentenced to death. The District Court imposed sentence in accordance with the jury's recommendation, and the Fifth Circuit affirmed.

Held: The judgment is affirmed.

132 F. 3d 232, affirmed.

JUSTICE THOMAS delivered the opinion of the Court with respect to Parts I, II, and III–B, concluding:

1. The Eighth Amendment does not require that a jury be instructed as to the consequences of their failure to agree. Pp. 379–384.

(a) As petitioner argues, the Federal Death Penalty Act requires judge sentencing when the jury, after retiring for deliberations, reports itself as unable to reach a unanimous verdict. In such a case, the sentencing duty falls upon the District Court pursuant to 18 U. S. C. § 3594. Pp. 379–381.

(b) The Eighth Amendment, however, does not require that a jury be instructed as to the consequences of a breakdown in the deliberative process. Such an instruction has no bearing on the jury's role in the sentencing process. Moreover, the jury system's very object is to secure unanimity, and the Government has a strong interest in having the jury express the conscience of the community on the ultimate life or death question. A charge of the sort petitioner suggests might well undermine this strong governmental interest. In addition, Congress chose not to require such an instruction be given. The Court declines to invoke its supervisory powers over the federal courts and require that such an instruction be given in every capital case in these circumstances. Pp. 381–384.

2. There is no reasonable likelihood that the jury was led to believe that petitioner would receive a court-imposed sentence less than life

imprisonment in the event they could not recommend unanimously a sentence of death or life imprisonment without the possibility of release. Pp. 384–395.

(a) Petitioner claims that the instruction pertaining to the jury's sentencing recommendation, in combination with the Decision Forms, led to confusion warranting reversal of his sentence under the Due Process Clause, the Eighth Amendment, and the Act. Because petitioner did not voice the objections that he now raises before the jury retired, see Fed. Rule Crim. Proc. 30, his claim of error is subject to a limited appellate review for plain error, *e. g.*, *Johnson* v. *United States*, 520 U. S. 461, 465–466. Pp. 384–389.

(b) Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. Petitioner's argument falls short of satisfying even the first requirement, for no error occurred. The proper standard for reviewing claims that allegedly ambiguous instructions caused jury confusion is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. There is no such likelihood here. The District Court gave no explicit instructions on the consequences of nonunanimity; and the passages that petitioner argues led to jury confusion, when viewed in the context of the entire instructions, lack any ambiguity. Nor did the Decision Forms or their accompanying instructions create a reasonable likelihood of confusion over the effect of nonunanimity. The District Court's explicit instruction that the jury had to be unanimous and its exhortation to the jury to discuss the punishment and to attempt to reach agreement make it doubtful that the jury thought it was compelled to recommend a lesser sentence in the event of a disagreement. Even assuming, *arguendo*, that a plain error occurred, petitioner cannot show that it affected his substantial rights. The District Court admonished the jury not to concern itself with the effect of a lesser sentence recommendation. Moreover, assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loathe to recommend a lesser sentence, would have compromised on a life imprisonment sentence as on a death sentence. Cf. *Romano* v. *Oklahoma*, 512 U. S. 1, 14. Pp. 389–395.

3. Assuming, *arguendo*, that the District Court erred in allowing the jury to consider nonstatutory aggravating factors that were vague, overbroad, or duplicative in violation of the Eighth Amendment, such error was harmless beyond a reasonable doubt. An appellate court may conduct harmless-error review by considering either whether absent an invalid factor, the jury would have reached the same verdict or whether the result would have been the same had the invalid aggravat-

ing factor been precisely defined. See *Clemons* v. *Mississippi*, 494 U. S. 738, 753–754. The Fifth Circuit performed the first sort of analysis, and its explanation appears sufficient. Even if its analysis was too perfunctory, it is plain, under the alternative mode of harmless-error analysis, that the error indeed was harmless. Had the nonstatutory aggravating factors been precisely defined in writing, the jury would have reached the same recommendation as it did. The Government's argument to the jury cured the factors of any infirmity as written. Pp. 402–405.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–B, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part III–A, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which BREYER, J., joined as to Parts I, II, III, and V, *post*, p. 405.

Timothy Crooks argued the cause for petitioner. With him on the briefs was *Timothy W. Floyd.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Matthew D. Roberts*, and *Sean Connelly.**

JUSTICE THOMAS delivered the opinion of the Court, except as to Part III–A.†

Petitioner was sentenced to death for committing a kidnaping resulting in death to the victim. His sentence was imposed under the Federal Death Penalty Act of 1994, 18 U. S. C. § 3591 *et seq.* (1994 ed. and Supp. III). We are presented with three questions: whether petitioner was entitled to an instruction as to the effect of jury deadlock; whether there is a reasonable likelihood that the jury was led to believe that petitioner would receive a court-imposed sentence

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**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

†JUSTICE SCALIA joins all but Part III–A of the opinion.

less than life imprisonment in the event that they could not reach a unanimous sentence recommendation; and whether the submission to the jury of two allegedly duplicative, vague, and overbroad nonstatutory aggravating factors was harmless error. We answer "no" to the first two questions. As for the third, we are of the view that there was no error in allowing the jury to consider the challenged factors. Assuming error, *arguendo,* we think it clear that such error was harmless.

I

Petitioner Louis Jones, Jr., kidnaped Private Tracie Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. He brought her to his house and sexually assaulted her. Soon thereafter, petitioner drove Private McBride to a bridge just outside of San Angelo, where he repeatedly struck her in the head with a tire iron until she died. Petitioner administered blows of such severe force that, when the victim's body was found, the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing.

The Government charged petitioner with, *inter alia,* kidnaping with death resulting to the victim, in violation of 18 U. S. C. § 1201(a)(2), an offense punishable by life imprisonment or death. Exercising its discretion under the Federal Death Penalty Act of 1994, 18 U. S. C. § 3591 *et seq.*, the Government decided to seek the latter sentencing option. Petitioner was tried in the District Court for the Northern District of Texas and found guilty by the jury.

The District Court then conducted a separate sentencing hearing pursuant to § 3593. As an initial matter, the sentencing jury was required to find that petitioner had the requisite intent, see § 3591(a)(2); it concluded that petitioner intentionally killed his victim and intentionally inflicted serious bodily injury resulting in her death. Even on a finding of intent, however, a defendant is not death eligible unless the sentencing jury also finds that the Government

has proved beyond a reasonable doubt at least one of the statutory aggravating factors set forth at § 3592. See § 3593(e). Because petitioner was charged with committing a homicide, the Government had to prove 1 of the 16 statutory aggravating factors set forth at 18 U. S. C. § 3592(c) (1994 ed. and Supp. III) (different statutory aggravating factors for other crimes punishable by death are set forth at §§ 3592(b), (d)). The jury unanimously found that two such factors had been proved beyond a reasonable doubt—it agreed that petitioner caused the death of his victim during the commission of another crime, see § 3592(c)(1), and that he committed the offense in an especially heinous, cruel, and depraved manner, see § 3592(c)(6).[1]

Once petitioner became death eligible, the jury had to decide whether he should receive a death sentence. In making the selection decision, the Act requires that the sentencing jury consider all of the aggravating and mitigating factors and determine whether the former outweigh the latter (or, if there are no mitigating factors, whether the aggravating factors alone are sufficient to warrant a death sentence). §§ 3591(a), 3592, 3593(e). The Act, however, requires more exacting proof of aggravating factors than mitigating ones—although a jury must unanimously agree that the Government established the existence of an aggravating factor beyond a reasonable doubt, § 3593(c), the jury may consider a mitigating factor in its weighing process so long as one juror finds that the defendant established its existence by preponderance of the evidence, §§ 3593(c), (d). In addition to the

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[1] As phrased on the Special Findings Form returned by the jury, the statutory aggravating factors read:

"2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping."

"2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." App. 51–52.

two statutory aggravators that established petitioner's death eligibility, the jury also unanimously found two aggravators of the nonstatutory variety[2] had been proved: One set forth victim impact evidence and the other victim vulnerability evidence.[3] As for mitigating factors, at least one juror found 10 of the 11 that petitioner proposed and seven jurors wrote in a factor petitioner had not raised on the Special Findings Form.[4]

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[2] The term "nonstatutory aggravating factor" is used to refer to any aggravating factor that is not specifically described in 18 U. S. C. § 3592. Section 3592(c) provides that the jury may consider "whether any other aggravating factor for which notice has been given exists." Pursuant to § 3593(a), when the Government decides to seek the death penalty, it must provide notice of the aggravating factors that it proposes to prove as justifying a sentence of death.

[3] As phrased on the Special Findings Form, the nonstatutory aggravating factors read:

"3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

"3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense." App. 53.

[4] The mitigating factors that the jury found as set forth on the Special Findings Form (along with the number of jurors that found for each factor in brackets) are as follows:

"1. That the defendant Louis Jones did not have a significant prior criminal record." [6]

"2. That the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge." [2]

"3. That the defendant Louis Jones committed the offense under severe mental or emotional disturbance." [1]

"4. That the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed)." [4]

"5. That the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army." [8]

"6. That the defendant Louis Jones is likely to be a well-behaved inmate." [3]

After weighing the aggravating and mitigating factors, the jury unanimously recommended that petitioner be sentenced to death. App. 57–58. The District Court imposed sentence in accordance with the jury's recommendation pursuant to § 3594. The United States Court of Appeals for the Fifth Circuit affirmed the sentence. 132 F. 3d 232 (1998). We granted certiorari, 525 U. S. 809 (1998), and now affirm.

II

A

We first decide the question whether petitioner was entitled to an instruction as to the consequences of jury deadlock. Petitioner requested, in relevant part, the following instruction:

> "In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. . . .
>
> "In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release." App. 14–15.

"7. That the defendant Louis Jones is remorseful for the crime he committed." [4]

"8. That the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution." [9]

"9. That the defendant Louis Jones was under unusual and substantial internally generated duress and stress at the time of the offense." [3]

"10. That the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense." [1] *Id.*, at 54–56.

Seven jurors added petitioner's ex-wife as a mitigating factor without further elaboration. *Id.*, at 56.

In petitioner's view, the Eighth Amendment requires that the jurors be instructed as to the effect of their inability to agree. He alternatively argues that we should invoke our supervisory power over the federal courts and require that such an instruction be given.

Before we turn to petitioner's Eighth Amendment argument, a question of statutory interpretation calls for our attention. The Fifth Circuit held that the District Court did not err in refusing petitioner's requested instruction because it was not substantively correct. See 132 F. 3d, at 242–243. According to the Court of Appeals, § 3593(b)(2)(C), which provides that a new jury shall be impaneled for a new sentencing hearing if the guilt phase jury is discharged for "good cause," requires the District Court to impanel a second jury and hold a second sentencing hearing in the event of jury deadlock. *Id.*, at 243. The Government interprets the statute the same way (although its reading is more nuanced) and urges that the judgment below be affirmed on this ground.

Petitioner, however, reads the Act differently. In his view, whenever the jury reaches a result other than a unanimous verdict recommending a death sentence or life imprisonment without the possibility of release, the duty of sentencing falls upon the district court pursuant to § 3594, which reads:

> "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

Petitioner's argument is based on his construction of the term "[o]therwise." He argues that this term means that when the jury, after retiring for deliberations, reports itself as unable to reach a unanimous verdict, the sentencing determination passes to the court.

As the dissent also concludes, *post*, at 417–418, petitioner's view of the statute is the better one. The phrase "good cause" in § 3593(b)(2)(C) plainly encompasses events such as juror disqualification, but cannot be read so expansively as to include the jury's failure to reach a unanimous decision. Nevertheless, the Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree.

To be sure, we have said that the Eighth Amendment requires that a sentence of death not be imposed arbitrarily. See, *e. g.*, *Buchanan* v. *Angelone*, 522 U. S. 269, 275 (1998). In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry. *Ibid.* The instruction that petitioner requested has no bearing on what we have called the "eligibility phase" of the capital sentencing process. As for what we have called the "selection phase," our cases have held that in order to satisfy the requirement that capital sentencing decisions rest upon an individualized inquiry, a scheme must allow a "broad inquiry" into all "constitutionally relevant mitigating evidence." *Id.*, at 276. Petitioner does not argue, nor could he, that the District Court's failure to give the requested instruction prevented the jury from considering such evidence.

In theory, the District Court's failure to instruct the jury as to the consequences of deadlock could give rise to an Eighth Amendment problem of a different sort: We also have held that a jury cannot be "affirmatively misled regarding its

role in the sentencing process." *Romano* v. *Oklahoma*, 512 U. S. 1, 9 (1994). In no way, however, was the jury affirmatively misled by the District Court's refusal to give petitioner's proposed instruction. The truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation. Petitioner's argument, although less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen* v. *United States*, 164 U. S. 492, 501 (1896).[5] We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." *Lowenfield* v. *Phelps*, 484 U. S. 231, 238 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.[6]

[5] We have thus approved of the use of a supplemental charge to encourage a jury reporting itself as deadlocked to engage in further deliberations, see *Allen* v. *United States*, 164 U. S., at 501, even capital sentencing juries, see *Lowenfield* v. *Phelps*, 484 U. S. 231, 237–241 (1988).

[6] It is not insignificant that the Courts of Appeals to have addressed this question, as far as we are aware, are uniform in rejecting the argument that the Constitution requires an instruction as to the consequences of a jury's inability to agree. See, *e. g.*, *Coe* v. *Bell*, 161 F. 3d 320, 339–340

We similarly decline to exercise our supervisory powers to require that an instruction on the consequences of deadlock be given in every capital case. In drafting the Act, Congress chose not to require such an instruction. Cf. § 3593(f) (district court "shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be"). Petitioner does point us to a decision from the New Jersey Supreme Court requiring, in an exercise of that court's supervisory authority, that the jury be informed of the sentencing consequences of nonunanimity. See *New Jersey* v. *Ramseur*, 106 N. J. 123, 304–315, 524 A. 2d 188, 280–286 (1987). Of course, New Jersey's practice has no more relevance to our decision than the power to persuade. Several other States have declined to require a similar instruction. See, *e. g.*, *North Carolina* v. *McCarver*, 341 N. C. 364, 394, 462 S. E. 2d 25, 42 (1995); *Brogie* v. *Oklahoma*, 695 P. 2d 538, 547 (Okla. Crim. App. 1985); *Calhoun* v. *Maryland*, 297 Md. 563, 593–595, 468 A. 2d 45, 58–60 (1983); *Coulter* v. *Alabama*, 438 So. 2d 336, 346 (Ala. Crim. App. 1982); *Justus* v. *Virginia*, 220 Va. 971, 979, 266 S. E. 2d 87, 92–93 (1980). We find the reasoning of the Virginia Supreme Court in *Justus* far more persuasive than that of the New Jersey Supreme Court, especially in light of the strong governmental interest that we have recognized in having the jury render a unanimous sentence recommendation:

(CA6 1998); *Green* v. *French*, 143 F. 3d 865, 890 (CA4 1998); *United States* v. *Chandler*, 996 F. 2d 1073, 1088–1089 (CA11 1993); *Evans* v. *Thompson*, 881 F. 2d 117, 123–124 (CA4 1989). Indeed, the Fifth Circuit, in the alternative, reached the same conclusion in this very case. See 132 F. 3d 232, 245 (1998).

> "The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. While this was a correct statement of law it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree." *Id.*, at 979, 266 S. E. 2d, at 92.

In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case. Cf. *Shannon* v. *United States*, 512 U. S. 573, 587 (1994).

B

Petitioner further argues that the jury was led to believe that if it could not reach a unanimous sentence recommendation he would receive a judge-imposed sentence less severe than life imprisonment, and his proposed instruction as to the consequences of deadlock was necessary to correct the jury's erroneous impression. Moreover, he contends that the alleged confusion independently warrants reversal of his sentence under the Due Process Clause, the Eighth Amendment, and the Act itself. He grounds his due process claim in the assertion that sentences may not be based on materially untrue assumptions, his Eighth Amendment claim in his contention that the jury is entitled to accurate sentencing information, and his statutory claim in an argument that jury confusion over the available sentencing options constitutes an "arbitrary factor" under § 3595(c)(2)(A).

To put petitioner's claim in the proper context, we must briefly review the jury instructions and sentencing proce-

dures used at trial. After instructing the jury on the aggravating and mitigating factors and explaining the process of weighing those factors, the District Court gave the following instructions pertaining to the jury's sentencing recommendation:

> "Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.
>
> "If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.
>
> "If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended." App. 43–44.

The District Court also provided the jury with four decision forms on which to record its recommendation.[7] In its instructions explaining those forms, the District Court told the jury that its choice of form depended on its recommendation:

> "The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; (2) you do not unanimously find that the aggravating factor or factors found to exist are

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[7] The decision forms read as follows:

"DECISION FORM A

"We the jury have determined that a sentence of death should not be imposed because the government has failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor."

"DECISION FORM B

"Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor or factors are themselves sufficient to justify a sentence of death, we recommend, by unanimous vote, that a sentence of death be imposed."

"DECISION FORM C

"We the jury recommend, by unanimous verdict, a sentence of life imprisonment without the possibility of release."

"DECISION FORM D

"We the jury recommend some other lesser sentence." App. 57–59.

> themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.
>
> "Decision Form D should be used if you recommend that some other lesser sentence should be imposed." *Id.*, at 47–48.

Petitioner maintains that the instructions in combination with the decision forms led the jury to believe that if it failed to recommend unanimously a sentence of death or life imprisonment without the possibility of release, then it would be required to use Decision Form D and the court would impose a sentence less than life imprisonment.[8] The scope of our review is shaped by whether petitioner properly raised and preserved an objection to the instructions at trial. A party generally may not assign error to a jury instruction if he fails to object before the jury retires or to "stat[e] distinctly the matter to which that party objects and the grounds of the objection." Fed. Rule Crim. Proc. 30. These timeliness and specificity requirements apply during the sentencing phase as well as the trial. See 18 U. S. C. § 3595(c)(2)(C); see also Fed. Rules Crim. Proc. 1, 54(a). They enable a trial court to correct any instructional mis-

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[8] Petitioner does not argue that the District Court's instructions on the lesser sentence option, standing alone, constituted reversible error although the parties agree that, after the jury found petitioner guilty of kidnaping resulting in death, the only possible sentences were death and a life sentence. See Brief for Petitioner 18–19; Brief for United States 13, n. 2; see also 18 U. S. C. § 1201. Petitioner made such an argument below; the Fifth Circuit, however, concluded that the instructions as to the lesser sentence option did not rise to the level of plain error. 132 F. 3d, at 246–248.

takes before the jury retires and in that way help to avoid the burdens of an unnecessary retrial. While an objection in a directed verdict motion before the jury retires can preserve a claim of error, *Leary* v. *United States*, 395 U. S. 6, 32 (1969), objections raised after the jury has completed its deliberations do not. See *Singer* v. *United States*, 380 U. S. 24, 38 (1965); *Lopez* v. *United States*, 373 U. S. 427, 436 (1963); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239 (1940). Nor does a request for an instruction before the jury retires preserve an objection to the instruction actually given by the court. Otherwise, district judges would have to speculate on what sorts of objections might be implied through a request for an instruction and issue rulings on "implied" objections that a defendant never intends to raise. Such a rule would contradict Rule 30's mandate that a party state distinctly his grounds for objection.

Petitioner did not voice the objections to the instructions and decision forms that he now raises before the jury retired. See App. 16–33. While Rule 30 could be read literally to bar any review of petitioner's claim of error, our decisions instead have held that an appellate court may conduct a limited review for plain error. Fed. Rule Crim. Proc. 52(b); *Johnson* v. *United States*, 520 U. S. 461, 465–466 (1997); *United States* v. *Olano*, 507 U. S. 725, 731–732 (1993); *Lopez*, *supra*, at 436–437; *Namet* v. *United States*, 373 U. S. 179, 190–191 (1963). Petitioner, however, contends that the Federal Death Penalty Act creates an exception. He relies on language in the Act providing that an appellate court shall remand a case where it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 3595(c)(2)(A). According to petitioner, the alleged jury confusion over the available sentencing options is an arbitrary factor and thus warrants resentencing even if he did not properly preserve the objection.

This argument rests on an untenable reading of the Act. The statute does not explicitly announce an exception to

plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme. Statutory language must be read in context and a phrase "gathers meaning from the words around it." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961); see also *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995). Here, the same subsection that petitioner relies upon further provides that reversal is warranted where "the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." § 3595(c)(2)(C). This language makes clear that Congress sought to impose a timely objection requirement at sentencing and did not intend to equate the phrase "arbitrary factor" with legal error. Petitioner's broad interpretation of § 3595(c)(2)(A) would drain § 3595(c)(2)(C) of any independent meaning.

We review the instructions, then, for plain error. Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. *Johnson*, *supra*, at 467; *Olano*, *supra*, at 732. Appellate review under the plain-error doctrine, of course, is circumscribed and we exercise our power under Rule 52(b) sparingly. See *United States* v. *Young*, 470 U. S. 1, 15 (1985); *United States* v. *Frady*, 456 U. S. 152, 163, and n. 14 (1982); cf. *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court"). An appellate court should exercise its discretion to correct plain error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, *supra*, at 732 (internal quotation marks omitted); *Young*, *supra*, at 15; *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936).

Petitioner's argument—which depends on the premise that the instructions and decision forms led the jury to believe that it did not have to recommend unanimously a lesser

sentence—falls short of satisfying even the first requirement of the plain-error doctrine, for we cannot see that any error occurred. We have considered similar claims that allegedly ambiguous instructions caused jury confusion. See, *e. g.*, *Victor* v. *Nebraska*, 511 U. S. 1 (1994); *Estelle* v. *McGuire*, 502 U. S. 62 (1991); *Boyde* v. *California*, 494 U. S. 370 (1990). The proper standard for reviewing such claims is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, *supra*, at 72 (quoting *Boyde*, *supra*, at 380); see also *Victor*, *supra*, at 6 (applying reasonable likelihood standard to direct review of state criminal conviction).[9]

There is no reasonable likelihood that the jury applied the instructions incorrectly. The District Court did not expressly inform the jury that it would impose a lesser sentence in case of deadlock. It simply told the jury that, if it recommended a lesser sentence, the court would impose a sentence "authorized by the law." App. 44. Nor did the District Court expressly require the jury to select Decision Form D if it could not reach agreement. Instead, it exhorted the jury "to discuss the issue of punishment with one

[9] Petitioner concedes that the *Boyde* standard applies to the extent that he is advancing a constitutional claim, but relying on our prior decision in *Andres* v. *United States*, 333 U. S. 740, 752 (1948), he contends that a more lenient standard applies to the extent that he seeks relief under the statute directly. Our decisions in *Boyde* and *Estelle*, however, foreclose that reading of *Andres*. In *Boyde* we noted that our prior decisions, including *Andres*, had been "less than clear" in articulating a single workable standard for evaluating claims that an instruction prevented the jury's consideration of constitutionally relevant evidence. 494 U. S., at 378. In order to supply "a single formulation for this Court and other courts to employ in deciding this kind of federal question," we announced the "reasonable likelihood" standard. *Id.*, at 379. We made this same point later in *Estelle*, noting that "[i]n *Boyde* . . . we made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that had previously been used by this Court." 502 U. S., at 72–73, n. 4.

another in an effort to reach agreement, if you can do so." *Id.*, at 46.

Notwithstanding the absence of an explicit instruction on the consequences of nonunanimity, petitioner identifies several passages which, he believes, support the inference that the jury was confused on this point. He trains on that portion of the instructions telling the jurors that the court would decide the sentence if they did not recommend a sentence of death or life without the possibility of release. Petitioner argues that this statement, coupled with two earlier references to a "lesser sentence" option, caused the jurors to infer that the District Court would impose a lesser sentence if they could not unanimously agree on a sentence of death or life without the possibility of release. He maintains that this inference is strengthened by a later instruction: "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." *Id.*, at 45. According to petitioner, the failure to mention the "lesser sentence" option in this statement strongly implied that, in contradistinction to the first two options, the "lesser sentence" option did not require jury unanimity.

Petitioner parses these passages too finely. Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation but in the context of the entire charge. See, *e. g.*, *Bryan* v. *United States*, 524 U. S. 184, 199 (1998); *United States* v. *Park*, 421 U. S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973); *Boyd* v. *United States*, 271 U. S. 104, 107 (1926). We agree with the Fifth Circuit that when these passages are viewed in the context of the entire instructions, they lack ambiguity and cannot be given the reading that petitioner advances. See 132 F. 3d, at 244. We previously have held that instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions. *Bryan*, *supra*, at 199; *Victor*,

supra, at 14–15; *Estelle*, *supra*, at 74–75. Petitioner's claim is far weaker than those we evaluated in *Bryan*, *Victor*, and *Estelle* because the jury in this case received an explicit instruction that it had to be unanimous. Just prior to its admonition that the jury should not concern itself with the ultimate sentence if it does not recommend death or life without the possibility of release, the trial court expressly instructed the jury in unambiguous language that any sentencing recommendation had to be by a unanimous vote. Specifically, it stated that "you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence." App. 43. Other instructions, by contrast, specified when the jury did not have to act unanimously. For example, the District Court explicitly told the jury that its findings on the mitigating circumstances, unlike those on the aggravating circumstances, did not have to be unanimous.[10] To be sure, the District Court could have used the phrase "unanimously" more frequently. But when read alongside an unambiguous charge that any sentencing recommendation be unanimous and other instructions explicitly identifying when the jury need not be unanimous, the passages identified by petitioner do not create a reasonable likelihood that the jury believed that deadlock would cause the District Court to impose a lesser sentence.

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[10] The relevant portion of the instruction read: "You will also recall that I previously told you that all twelve of you had to unanimously agree that a particular aggravating circumstance was proved beyond a reasonable doubt before you consider it. Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member who finds by a preponderance of the evidence the existence of a mitigating factor may consider such factor established for his or her weighing of aggravating and mitigating factors regardless of the number of other jurors who agree that such mitigating factor has been established." App. 43.

Petitioner also relies on alleged ambiguities in the decision forms and the explanatory instructions. He stresses the fact that Decision Form D (lesser sentence recommendation), unlike Decision Forms B (death sentence) and C (life without the possibility of release), did not contain the phrase "by unanimous vote" and required only the foreperson's signature. These features of Decision Form D, according to petitioner, led the jury to conclude that nonunanimity would result in a lesser sentence. According to petitioner, the instructions accompanying Decision Form D, unlike those respecting Decision Forms B and C, did not mention unanimity, thereby increasing the likelihood of confusion.

With respect to this aspect of petitioner's argument, we agree with the Fifth Circuit that "[a]lthough the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." 132 F. 3d, at 245. The District Court's explicit instruction that the jury had to be unanimous and its exhortation to the jury to discuss the punishment and attempt to reach agreement, App. 46, make it doubtful that the jury thought it was compelled to employ Decision Form D in the event of disagreement.

Petitioner also places too much weight on the fact that Decision Form D required only the foreperson's signature. Although it only contained a space for the foreperson's signature, Form D, like the others, used the phrase "We the jury recommend . . . ," thereby signaling that Form D represented the jury's recommendation. *Id.*, at 59. Moreover, elsewhere, the jury foreperson alone signed the jury forms to indicate the jury's unanimous agreement. Specifically, only the jury foreperson signed the special findings form on which the jury was required to indicate its unanimous agreement that an aggravating factor had been proved beyond a reasonable doubt. *Id.*, at 51–53. In these circumstances, we do

not think that the decision forms or accompanying instructions created a reasonable likelihood of confusion over the effect of nonunanimity.[11]

Even assuming, *arguendo*, that an error occurred (and that it was plain), petitioner cannot show that it affected his substantial rights. Any confusion among the jurors over the effect of a lesser sentence recommendation was allayed by the District Court's admonition that the jury should not concern itself with the effect of such a recommendation. See *supra*, at 390 (quoting App. 44). The jurors are presumed to have followed these instructions. See *Shannon*, 512 U. S., at 585; *Richardson* v. *Marsh*, 481 U. S. 200, 206 (1987). Even if the jurors had some lingering doubts about the effect of deadlock, therefore, the instructions made clear that they should set aside their concerns and either report that they were unable to reach agreement or recommend a lesser sentence if they believed that this was the only option.

Moreover, even assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence. Where the effect of an al-

[11] Petitioner also urges us to take cognizance of two affidavits prepared after the jury had returned its sentencing recommendation. One affidavit, attached to petitioner's new trial motion, was executed by an investigator for the federal public defender after a juror had contacted the public defender's office. *Id.*, at 66–68. The other affidavit, attached to petitioner's motion to reconsider the District Court's order denying his motion for a new trial, was executed by one of the jurors. *Id.*, at 78–80. The Fifth Circuit ruled that petitioner could not rely on these affidavits to undermine the jury's sentencing recommendation. 132 F. 3d, at 245–246. Petitioner did not raise this independent determination in any of his questions presented, and we do not believe that the issue is fairly included within them. We therefore decline review of this ruling by the Fifth Circuit. See this Court's Rule 14.1(a); *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984).

leged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights. Cf. *Romano,* 512 U. S., at 14. In *Romano,* we considered a similar argument, namely, that jurors had disregarded a trial judge's instructions and given undue weight to certain evidence. In rejecting that argument, we noted that, even assuming that the jury disregarded the trial judge's instructions, "[i]t 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." *Ibid.* Any speculation on the effect of a lesser sentence recommendation, like the evidence in *Romano,* would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected petitioner's substantial rights. See *Park,* 421 U. S., at 676; *Lopez,* 373 U. S., at 436–437.

III

A

Apart from the claimed instructional error, petitioner argues that the nonstatutory aggravating factors found and considered by the jury, see n. 2, *supra,* were vague, overbroad, and duplicative in violation of the Eighth Amendment, and that the District Court's error in allowing the jury to consider them was not harmless beyond a reasonable doubt.

The Eighth Amendment, as the Court of Appeals correctly recognized, see 132 F. 3d, at 250, permits capital sentencing juries to consider evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family in deciding whether an eligible defendant should receive a death sentence. See *Payne* v. *Tennessee,* 501 U. S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be im-

posed. There is no reason to treat such evidence differently than other relevant evidence is treated"). Petitioner does not dispute that, as a general matter, such evidence is appropriate for the sentencing jury's consideration. See Reply Brief for Petitioner 15. His objection is that the two nonstatutory aggravating factors were duplicative, vague, and overbroad so as to render their use in this case unconstitutional, a point with which the Fifth Circuit agreed, 132 F. 3d, at 250–251, although it ultimately ruled in the Government's favor on the ground that the alleged error was harmless beyond a reasonable doubt, *id.*, at 251–252.

The Government here renews its argument that the nonstatutory aggravators in this case were constitutionally valid. At oral argument, however, it was suggested that this case comes to us on the assumption that the nonstatutory aggravating factors were invalid because the Government did not cross-appeal on the question. Tr. of Oral Arg. 25. As the prevailing party, the Government is entitled to defend the judgment on any ground that it properly raised below. See, *e. g.*, *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 479 (1999); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment"). It further was suggested that because we granted certiorari on the Government's rephrasing of petitioner's questions and because the third question—"whether the court of appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt"—presumes error, we must assume the nonstatutory aggravating factors were erroneous. Tr. of Oral Arg. 25–27. We are not convinced that the reformulated question presumes error. The question whether the nonstatutory aggravating factors were constitutional is fairly included within the third question pre-

sented—we might answer "no" to the question "[w]hether the Court of Appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt," 525 U. S. 809 (1998), by explaining that the Fifth Circuit was incorrect in holding that there was error. Without a doubt, the Government would have done better to call our attention to the fact that it planned to argue that the nonstatutory aggravating factors were valid at the petitioning stage. But it did not affirmatively concede that the nonstatutory aggravators were invalid, see Brief in Opposition 18–22, and absent such a concession, we think that the Government's argument is properly presented.[12]

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[12] The dissent would treat this aspect of the Government's argument as waived. *Post*, at 420–421, n. 24. As JUSTICE GINSBURG explained, for a unanimous Court, in *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61 (1996): "Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari '*may* be deemed waived.'" *Id.*, at 75, n. 13 (emphasis added). But we have not done so when the issue not raised in the brief in opposition was "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted); see also *Caterpillar*, 519 U. S., at 75, n. 13. In those instances, we have treated the issue not raised in opposition as fairly included within the question presented. This is certainly such a case. Assessing the error (including whether there was error at all) is essential to an intelligent resolution of whether any such error was harmless. Moreover, here, as in *Caterpillar*, "[t]he parties addressed the issue in their briefs and at oral argument." *Ibid.* By contrast, in the cases that the dissent looks to for support for its position, there were good reasons to decline to exercise our discretion. In *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253–254 (1999) *(per curiam)*, the "claims [we declined to consider did] not appear to have been sufficiently developed below for us to assess them," and in *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999), the argument respondent raised for the first time in its merits brief was "so far-reaching an argument" that "[w]e would normally expect notice [of it]," especially when, unlike this case, the respondent's argument did not appear to have been raised or considered below.

1

We first address petitioner's contention that the two nonstatutory aggravating factors were impermissibly duplicative. The Fifth Circuit reasoned that "[t]he plain meaning of the term 'personal characteristics,' used in [nonstatutory aggravator] 3(C), necessarily includes 'young age, slight stature, background, and unfamiliarity,' which the jury was asked to consider in 3(B)." 132 F. 3d, at 250. The problem, the court thought, was that this duplication led to "double counting" of aggravating factors. Following a Tenth Circuit decision, *United States* v. *McCullah*, 76 F. 3d 1087, 1111 (1996), the Fifth Circuit was of the view that in a weighing scheme, "double counting" has a tendency to skew the process so as to give rise to the risk of an arbitrary, and thus unconstitutional, death sentence. 132 F. 3d, at 251. In the Fifth Circuit's words, there may be a thumb on the scale in favor of death "[i]f the jury has been asked to weigh the same aggravating factor twice." *Ibid.*

We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in *McCullah*[13] and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. See *Stringer* v. *Black*, 503 U. S. 222, 232 (1992). Petitioner's argument (and the reasoning of the Fifth and Tenth Circuits) would have us reach a quite different proposition—that if two aggravating factors are "duplicative," then the weighing process necessarily is skewed, and the factors are therefore invalid.

Even accepting, for the sake of argument, petitioner's "double counting" theory, there are nevertheless several

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[13] The Tenth Circuit, in a decision subsequent to *McCullah*, has emphasized that factors do not impermissibly overlap unless one "necessarily subsumes" the other. *Cooks* v. *Ward*, 165 F. 3d 1283, 1289 (1998).

problems with the Fifth Circuit's application of the theory in this case. The phrase "personal characteristics" as used in factor 3(C) does not obviously include the specific personal characteristics listed in 3(B)—"young age, her slight stature, her background, and her unfamiliarity with San Angelo"—especially in light of the fact that 3(C) went on to refer to the impact of the crime on the victim's family. In the context of considering the effect of the crime on the victim's family, it would be more natural to understand "personal characteristics" to refer to those aspects of the victim's character and personality that her family would miss the most. More important, to the extent that there was any ambiguity arising from how the factors were drafted, the Government's argument to the jury made clear that 3(B) and 3(C) went to entirely different areas of aggravation—the former clearly went to victim vulnerability while the latter captured the victim's individual uniqueness and the effect of the crime on her family. See, *e. g.*, 25 Record 2733–2734 ("[Y]ou can consider [the victim's] young age, her slight stature, her background, her unfamiliarity with the San Angelo area. . . . She is barely five feet tall [and] weighs approximately 100 pounds. [She is] the ideal victim"); *id.*, at 2734 ("[Y]ou can consider [the victim's] personal characteristics and the effects of the instant offense on her family. . . . You heard about this young woman, you heard about her from her mother, you heard about her from her friends that knew her. She was special, she was unique, she was loving, she was caring, she had a lot to offer this world"). As such, even if the phrase "personal characteristics" as used in factor 3(C) *was* understood to include the specific personal characteristics listed in 3(B), the factors as a whole were not duplicative—at best, certain evidence was relevant to two different aggravating factors. Moreover, any risk that the weighing process would be skewed was eliminated by the District Court's instruction that the jury "should not simply count the number of aggravating and mitigating factors and reach a deci-

sion based on which number is greater [but rather] should consider the weight and value of each factor." App. 45.

2

We also are of the view that the Fifth Circuit incorrectly concluded that factors 3(B) and 3(C) were unconstitutionally vague. In that court's view, the nonstatutory aggravating factors challenged here "fail[ed] to guide the jury's discretion, or [to] distinguish this murder from any other murder." 132 F. 3d, at 251. The Court of Appeals, relying on our decision in *Maynard* v. *Cartwright*, 486 U. S. 356, 361–362 (1988), also was of the opinion that "[t]he use of the terms 'background,' 'personal characteristics,' and 'unfamiliarity' without further definition or instruction left the jury with . . . open-ended discretion." 132 F. 3d, at 251 (internal quotation marks omitted).

Ensuring that a sentence of death is not so infected with bias or caprice is our "controlling objective when we examine eligibility and selection factors for vagueness." *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994). Our vagueness review, however, is "quite deferential." *Ibid.* As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster. *Ibid.* Assessed under this deferential standard, the factors challenged here surely are not vague. The jury should have had no difficulty understanding that factor 3(B) was designed to ask it to consider whether the victim was especially vulnerable to petitioner's attack. Nor should it have had difficulty comprehending that factor 3(C) asked it to consider the victim's personal traits and the effect of the crime on her family.[14] Even if the factors as written

[14] Petitioner argues that the term "personal characteristics" was so vague that the jury may have thought it could consider the victim's race and the petitioner's race under factor 3(C). In light of the remainder of the factor and the Government's argument with respect to the factor, we fail to see that possibility. In any event, in accordance with the Death

were somewhat vague, the Fifth Circuit was wrong to conclude that the factors were not given further definition, see 132 F. 3d, at 251; as we have explained, the Government's argument made absolutely clear what each nonstatutory factor meant.[15]

3

Finally, we turn to petitioner's contention that the challenged nonstatutory factors were overbroad. An aggravating factor can be overbroad if the sentencing jury "fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty." *Arave* v. *Creech*, 507 U. S. 463, 474 (1993). We have not, however, specifically considered what it means for a factor to be overbroad when it is important only for selection purposes and especially when it sets forth victim vulnerability or victim impact evidence. Of course, every murder will have an impact on the victim's family and friends and victims are often chosen because of their vulnerability. It might seem, then, that the factors 3(B) and 3(C) apply to every eligible defendant and thus fall within the Eighth Amendment's proscription against overbroad factors. But that cannot be correct; if it were, we would not have decided *Payne* as we did. Even though the *concepts* of victim impact and victim vulnerability may well be relevant in every case, *evidence* of victim vulnerability and victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer

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Penalty Act's explicit command in § 3593(f), the District Court instructed the jury not to consider race at all in reaching its decision. App. 47. Jurors are presumed to have followed their instructions. See *Richardson* v. *Marsh*, 481 U. S. 200, 206 (1987).

[15] We reiterate the point we made in *Tuilaepa* v. *California*, 512 U. S. 967 (1994)—we have held only a few, quite similar factors vague, see, *e. g.*, *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) (whether murder was "especially heinous, atrocious, or cruel"), while upholding numerous other factors against vagueness challenges, see 512 U. S., at 974 (collecting cases).

should consider all of the circumstances of the crime in deciding whether to impose the death penalty. See *Tuilaepa*, 512 U. S., at 976.

What is of common importance at the eligibility and selection stages is that "the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Id.*, at 973. So long as victim vulnerability and victim impact factors are used to direct the jury to the individual circumstances of the case, we do not think that principle will be disturbed. Because factors 3(B) and 3(C) directed the jury to the evidence specific to this case, we do not think that they were overbroad in a way that offended the Constitution.

B

The error in this case, if any, rests in loose drafting of the nonstatutory aggravating factors; as we have made clear, victim vulnerability and victim impact evidence are appropriate subjects for the capital sentencer's consideration. Assuming that use of these loosely drafted factors was indeed error, we conclude that the error was harmless.

Harmless-error review of a death sentence may be performed in at least two different ways. An appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined. See *Clemons* v. *Mississippi*, 494 U. S. 738, 753–754 (1990). The Fifth Circuit chose to perform the first sort of analysis, and ultimately concluded that the jury would have returned a recommendation of death even had it not considered the two supposedly invalid nonstatutory aggravating factors:

> "After removing the offensive non-statutory aggravating factors from the balance, we are left with two

> statutory aggravating factors and eleven mitigating factors to consider when deciding whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factors never been submitted to the jury. At the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury—Jones caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim. Under part two of the Special Findings Form, if the jury had failed to find that the government proved at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore, the ability of the jury to recommend the death penalty hinged on a finding of a least one statutory aggravating factor. Conversely, jury findings regarding the non-statutory aggravating factors were not required before the jury could recommend the death penalty. After removing the two non-statutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors. Consequently, the error was harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." 132 F. 3d, at 252.

Petitioner claims that the court's analysis was so perfunctory as to be infirm. His argument is largely based on the following passage from *Clemons:* "*Under these circumstances*, it would require a detailed explanation based on the record for

us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." 494 U. S., at 753–754 (emphasis added). *Clemons,* however, involved quite different facts. There, an "especially heinous" aggravating factor was determined to be unconstitutionally vague. The only remaining aggravating factor was that the murder was committed during a robbery for pecuniary gain. The State had repeatedly emphasized the invalid factor and said little about the valid aggravator. See *id.*, at 753. Despite this, all that the Mississippi Supreme Court said was: "'We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the "especially heinous, atrocious or cruel" aggravating circumstance.'" *Ibid.* (quoting *Clemons* v. *State,* 535 So. 2d 1354, 1364 (Miss. 1988)). We quite understandably required a "detailed explanation based on the record" in those circumstances.

The same "detailed explanation . . . on the record" that we required in *Clemons* may not have been necessary in this case. Cf. *Sochor* v. *Florida,* 504 U. S. 527, 540 (1992) (there is no federal requirement that state courts adopt "a particular formulaic indication" before their review for harmless error will pass scrutiny). But even if the Fifth Circuit's harmless-error analysis was too perfunctory, we think it plain, under the alternative mode of harmless-error analysis, that the error indeed was harmless beyond a reasonable doubt. See § 3595(c)(2) (federal death sentences are not to be set aside on the basis of errors that are harmless beyond a reasonable doubt). Had factors 3(B) and 3(C) been precisely defined in writing, the jury surely would have reached the same recommendation as it did. The Government's argument to the jury, see, *e. g.,* 25 Record 2733–2734, cured the nonstatutory factors of any infirmity as written. We are satisfied that the jury in this case actually understood what each factor was designed to put before it, and therefore have

no doubt that the jury would have reached the same conclusion had the aggravators been precisely defined in writing.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE SOUTER join, and with whom JUSTICE BREYER joins as to Parts I, II, III, and V, dissenting.

The Federal Death Penalty Act of 1994 (FDPA), 18 U. S. C. §§ 3591–3598 (1994 ed. and Supp. III), establishes a complex regime applicable when the Government seeks the ultimate penalty for a defendant found guilty of an offense potentially punishable by death. This case is pathmarking, for it is the first application of the FDPA. Two questions, as I comprehend petitioner's core objections, warrant prime attention.

First, when Congress specifies only two sentencing options for an offense, death or life without possibility of release, must the jury be told exactly that? Or, can a death decision stand despite misleading trial court "lesser sentence" instructions, specifically, instructions open to the construction that lack of a unanimous jury vote for either life or death would allow the judge to impose a sentence less severe than life in prison? Second, when the jury is unable to agree on a unanimous recommendation in a case in which death or life without possibility of release are the only sentencing options, must the judge then impose the life sentence? Or, is the judge required or permitted to impanel a second jury to make the life or death decision?

The Court of Appeals for the Fifth Circuit confronted these two questions and resolved both for the prosecution. The Fifth Circuit also tolerated the trial court's submission of two nonstatutory aggravating factors to the jury, although

the appeals court found those factors duplicative and vague.[1] The lower courts' disposition for death, despite the flawed trial proceedings, and this Court's tolerance of the flaws, disregard a most basic guide: "[A]ccurate sentencing information is an indispensable prerequisite to a [jury's] 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.). That "indispensable prerequisite" was not satisfied in this case. I would reverse and remand so that the life or death decision may be made by an accurately informed trier.

I

After authorizing the federal death penalty for a small category of cases in 1988,[2] Congress enacted comprehensive death penalty legislation in 1994. See FDPA, 108 Stat.

[1] The Court granted certiorari on three questions as phrased by the United States:

"'1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release. 2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment. 3. Whether the Court of Appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt.'" 525 U. S. 809 (1998); see also Brief for United States I.

I think it fair and "'principled,'" *ante*, at 402, to read the indigent petitioner's arguments on the questions presented with the willingness to overlook "loose drafting" that the Court consistently shows in evaluating the Government's case. See, *e. g.*, *ante*, at 402; see also *ante*, at 395–402 (adopting Government's merits brief arguments although those arguments were not mentioned in the Brief in Opposition).

[2] The predecessor Anti-Drug Abuse Act of 1988 authorized the death penalty for murder resulting from certain drug-related offenses. See 21 U. S. C. § 848(e). The FDPA states that its procedures apply to "any [federal] offense for which a sentence of death is provided," 18 U. S. C. § 3591(a)(2), but does not repeal the 1988 Act, which differs in some respects. See, *e. g.*, 21 U. S. C. §§ 848(q)(4)–(9) (mandatory appointment of habeas counsel and provision of investigative and expert services).

1959.[3] Applicable to over 40 existing and newly declared death-eligible offenses, see 18 U. S. C. § 3591; §§ 60005–60024, 108 Stat. 1970–1982,[4] the FDPA prescribes penalty-phase procedures; principally, it provides for a separate sentencing hearing whenever the Government seeks the death penalty for defendants found guilty of a covered offense. See 18 U. S. C. § 3593.[5]

In death-eligible homicide cases, the Act instructs, the jury must respond sequentially to three inquiries; imposition of the death penalty requires unanimity on each of the three. First, the jury determines whether there was a killing or death resulting from the defendant's intentional engagement in life-threatening activity. See 18 U. S. C. § 3591(a)(2).[6]

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[3] Congress enacted three statutes authorizing the death penalty between 1972 and 1988: Antihijacking Act of 1974, § 105, 88 Stat. 411–413, repealed by FDPA, § 6002, 108 Stat. 1970 (air piracy); Criminal Law and Procedure Technical Amendments Act of 1986, § 61, 100 Stat. 3614 (witness killing); Department of Defense Authorization Act, 1986, § 534, 99 Stat. 634–635 (amending the Uniform Military Justice Act to establish weighing procedures for courts-martial considering the death penalty for espionage). Earlier federal statutes authorizing the death penalty remained on the books, but were not invoked following this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, which led to a hiatus in death penalty adjudications. See Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Ford. Urb. L. J. 347, 349, n. 5, 372–380 (1999).

[4] See *id.*, at 391, and n. 242 (estimating that the FDPA applies to at least 44 offenses).

[5] The sentencing hearing is before a jury unless the defendant, with the approval of the Government, moves for a hearing before the court. See 18 U. S. C. § 3593(b).

[6] Section 3591(a)(2) allows the death penalty for a defendant found guilty of a death-eligible homicide "if the defendant, as determined beyond a reasonable doubt at the [sentencing] hearing":

"(A) intentionally killed the victim;

"(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

"(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in

Second, the jury decides which, if any, of the Government-proposed aggravating factors, statutory and nonstatutory, were proved beyond a reasonable doubt. See § 3593(d).[7] Third, if the jury finds at least one of the statutory aggravators proposed by the Government, the jury then determines whether the aggravating factors "sufficiently outweigh" the mitigating factors to warrant a death sentence, or, absent mitigating factors, whether the aggravators alone warrant that sentence. § 3593(e). The mitigating factors, seven statutory and any others tending against the death sentence, are individually determined by each juror; unlike aggravating factors, on which the jury must unanimously agree under a "beyond a reasonable doubt" standard, a mitigating factor may be considered in the jury's weighing process if any one juror finds the factor proved by a "preponderance of the evidence." See §§ 3592(a), (c), 3593(d). The weighing is not numeric; the perceived significance, not the number, of aggravating and mitigating factors determines the decision.[8]

II

Louis Jones, Jr.'s crime was atrocious; its commission followed Jones's precipitous decline in fortune and self-governance on termination of his 22-year Army career. On February 18, 1995, Jones forcibly abducted Private Tracie

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connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

"(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act."

[7] The FDPA lists 16 aggravating factors for homicide and allows the jury to "consider whether any other aggravating factor for which notice has been given [by the Government] exists." 18 U. S. C. § 3592(c). Nonstatutory aggravators "may include factors concerning the effect of the offense on the victim and the victim's family." § 3593(a).

[8] See Little, *supra*, at 397 ("[Weighing] requires qualitative, not quantitative, evaluation." (internal quotation marks omitted)).

Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. In the course of the abduction, Jones struck Private Michael Alan Peacock with a handgun, leaving him unconscious. Thereafter, Jones sexually assaulted and killed McBride, leaving her body under a bridge located 20 miles outside of San Angelo. See 132 F. 3d 232, 237 (CA5 1998).

In the fall of 1995, Jones was tried before a jury and convicted of kidnaping with death resulting, in violation of 18 U. S. C. § 1201(a)(2). See 132 F. 3d, at 237–238. A separate sentencing hearing followed to determine whether Jones would be punished by death. See *id.*, at 238.

At the close of the sentencing hearing, Jones submitted proposed jury instructions. Jones's instruction no. 4 would have advised the jury that it must sentence Jones to life without possibility of release rather than death "[i]f . . . any one of you is not persuaded that justice demands Mr. Jones's execution." App. 13.[9] Jones's instruction no. 5 would have advised that, if "the jury is unable to agree on a unanimous decision as to the sentence to be imposed," the jury should so inform the judge, who would then "impose a sentence of life imprisonment without possibility of release." *Id.*, at 14.[10] Proposed instructions nos. 4 and 5, although inartfully

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[9] Jones's instruction no. 4 read in relevant part:

"If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones'[s] punishment at life in prison without any possibility of release." App. 13.

[10] Jones's instruction no. 5 read in relevant part:

"[I]f any of you—even a single juror—is not persuaded beyond a reasonable doubt that Mr. Jones'[s] execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

"Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprison-

drawn, unquestionably sought to convey this core information: If the jurors did not agree on death, then the only sentencing option, for jury or judge, would be life without possibility of release. Jones also objected, on vagueness grounds, to two of the three nonstatutory aggravators proposed by the Government. See *id.*, at 21–22, 28.

The District Court rejected Jones's proposed instructions nos. 4 and 5 and refused to strike or modify the nonstatutory aggravators to which Jones had objected. See *id.*, at 33. The trial court instructed the jury that it could recommend death, life without possibility of release, or a lesser sentence, in which event the court would decide what the lesser sentence would be. See *id.*, at 44.

The jury apparently found the case close. It rejected three of the seven aggravators the Government urged. See 132 F. 3d, at 238.[11] And one or more jurors found each of the specific mitigating factors submitted by Jones. See

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ment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. . . .

"In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release." App. 14–15.

In "Defendant's Objections to the Court's Charge," Jones "particularly direct[ed] the court's attention" to his proposed instruction no. 5. *Id.*, at 25, 30.

[11] The jury rejected the following aggravators: (1) the crime involved substantial planning and premeditation, see 18 U. S. C. § 3592(c)(9); (2) the crime created a grave risk to a person other than the victim, see § 3592(c)(5); and (3) Jones posed a future danger to the lives and safety of other persons. It found as aggravators: (1) Jones killed the victim during the commission of kidnaping, see § 3592(c)(1); (2) the crime was especially heinous, cruel, and depraved, see § 3592(c)6); (3) the victim's young age, slight stature, background, and unfamiliarity with San Angelo, Texas; and (4) the victim's personal characteristics and the effect of the offense on her family. See 132 F. 3d, at 238, and nn. 1, 2.

ibid.[12] The jury deliberated for a day and a half before returning a verdict recommending death.

Jones moved for a new trial on the ground, supported by postsentence juror statements, that the court's instructions had misled the jurors. Specifically, Jones urged that the charge led jurors to believe that a deadlock would result in a court-imposed lesser sentence; to avoid such an outcome, Jones asserted, jurors who favored life without possibility of release changed their votes to approve the death verdict. See App. 60–68, 75–80. The vote change, Jones maintained, was not hypothetical; it was backed up by juror statements. See *id.*, at 68, 79. The District Court denied the new trial motion. *Id.*, at 74, 81.

The Court of Appeals for the Fifth Circuit affirmed the death sentence. The appeals court ruled first that the District Court correctly refused to instruct that a jury deadlock would yield a court-imposed sentence of life imprisonment without possibility of release. 132 F. 3d, at 242–243. Jury deadlock under the FDPA, the Fifth Circuit stated, would not occasion an automatic life sentence; instead, that court declared, deadlock would necessitate a second sentencing hearing before a newly impaneled jury. *Id.*, at 243. The Court of Appeals further observed that, "[a]lthough the use of instructions to inform the jury of the consequences of a hung jury ha[s] been affirmed, federal courts have never been affirmatively required to give such instructions." *Id.*, at 245.

Next, the appeals court determined that the instructions, read in their entirety, "could not have led a reasonable jury to conclude that non-unanimity would result in the imposi-

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[12] One or more jurors found each of Jones's ten specific mitigating factors. None found the eleventh, a catchall stating that "other factors in the defendant's background or character militate against the death penalty," see 18 U. S. C. § 3592(a)(8), but seven found the existence of an additional mitigating factor not submitted by Jones. See 132 F. 3d, at 238–239, n. 3.

tion of a lesser sentence." *Id.*, at 244. Jones could not rely on juror statements, the Fifth Circuit held, to show that the jury, in fact, was so misled when it sentenced him to death. See *id.*, at 245–246 (although Federal Rule of Evidence 606(b) is not applicable to FDPA penalty-phase proceedings, see 18 U. S. C. § 3593(c), "[t]he reasons for not allowing jurors to undermine verdicts in [trial proceedings] . . . apply with equal force to sentencing hearings").

Nor, in the Court of Appeals' view, did the District Court err *plainly* by conveying to the jury the misinformation that three sentencing options were available—death, life imprisonment without release, or some other lesser sentence. See 132 F. 3d, at 246–248. Noting that the FDPA takes account of all three possibilities, see 18 U. S. C. § 3593(e), while the kidnaping statute authorizes only two sentences, death or life imprisonment, see § 1201(a), the Fifth Circuit acknowledged that the District Court had erred in giving the jury a lesser sentence option: "[T]he substantive [kidnaping] statute takes precedence over the death penalty sentencing provisions" and limits the options to death or life imprisonment without release. 132 F. 3d, at 248. The appeals court nevertheless concluded that the District Court's error was not "plain" because the FDPA was new and no prior opinion had addressed the question; hence, no "clearly established law" was in place at the time of Jones's sentencing hearing. *Ibid.*

The Fifth Circuit also considered Jones's challenge to the nonstatutory aggravators presented to the jury at the Government's request. The court held that the two found by the jury—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the . . . offense on [her] family"—were "duplicative" of each other, and also impermissibly "vague and overbroad." *Id.*, at 250–251. The court declined to upset the death verdict, however, because it believed "the death sentence would have been imposed beyond a reasonable doubt had the invalid ag-

gravating factors never been submitted to the jury." *Id.*, at 252.

III

The governing law gave Jones's jury at the sentencing phase a life (without release) or death choice. The District Court, however, introduced, erroneously, a third prospect, "some other lesser sentence." App. 44.[13] Moreover, the court told the jury "not to be concerned" with what that lesser sentence might be, for "[t]hat [was] a matter for the court to decide." *Ibid.* The jury's choice was clouded by that misinformation. I set out below my reasons for concluding that the misinformation rendered the jury's death verdict unreliable.

A

The District Court instructed the jury:

> "[Y]ou the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.
>
> . . . . . .
>
> ". . . If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death

[13] The problem was not, as the Court describes it, a failure to give the jury "[a] bit of information that might possibly influence an individual juror's voting behavior," *ante,* at 382; rather, the jury was "'affirmatively misled,'" cf. *ante,* at 381, by the repeated misinformation the charge and decision forms conveyed.

> or life without the possibility of release should not be recommended.
>
> . . . . .
>
> "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." App. 43–45.

Those instructions misinformed the jury in two intertwined respects: First, they wrongly identified a "lesser sentence" option;[14] second, the instructions were open to the reading that, absent juror unanimity on death or life without release, the District Court could impose a lesser sentence.

The Fifth Circuit, and the United States in its submission to this Court, acknowledged the charge error. See 132 F. 3d, at 248; *ante,* at 387, n. 8. Section 1201, which defines the crime, governs. It calls for death or life imprisonment, nothing less, and neither parole nor good-time credits could reduce the life sentence. See Brief for United States 13–14, n. 2 ("[W]e agree with petitioner that the only sentences that could have been imposed are death and life without release (because the kidnapping statute, 18 U. S. C. [§]1201, authorizes only death and life imprisonment, and neither parole nor good-time credits could reduce the life sentence)."). The third option listed in the FDPA provision, "some other lesser sentence," § 3593(e), is available only when the substantive statute does not confine the sentence to life or death. The Fifth Circuit found the error "not so obvious, clear, readily apparent, or conspicuous." 132 F. 3d, at 248. I disagree

[14] The verdict forms compounded the error by allowing the jurors to return as their decision the statement: "We the jury recommend some other lesser sentence." App. 59.

Jones does not press the District Court's identification of a lesser sentence option as an independent ground for reversal. That error, however, is an essential component of his argument that the misinformation conveyed by the District Court led the jury to believe that deadlock could result in a less-than-life sentence.

and would rank the District Court's misconstruction "plain error," [15] because the FDPA unquestionably is a procedural statute that does not alter substantive prescriptions.[16] No serious doubt should have existed on that score.[17]

The flawed charge did not simply include a nonexistent option. It could have been understood to convey that, absent juror unanimity, some "lesser sentence" might be imposed by the court. That message came from instructions that the jury must be unanimous to "bring back a verdict recommending the punishment of death or life without the possibility of release," App. 45, that "some other lesser sentence" was possible, *id.*, at 44, and that the jury should not "be concerned with the . . . sentence the defendant might receive in the event [it] determine[d] not to recommend a death sentence or a sentence of life without the possibility of release," *ibid.* Jones's proposed instructions—that he

[15] JUSTICE BREYER does not believe that the District Court's submission of the (unobjected-to) jury instructions amounted to "plain error." In his view, the judge's (objected-to) failure to submit the defense's proposed instruction no. 5 amounted to an "abuse of discretion," for that proposed instruction was legally correct, the judge's failure to give it likely rested upon an erroneous view of the law, and it would have corrected the false impression created by the remaining instructions. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405 (1990); App. 74 (order denying defendant's motion for new trial); cf. 132 F. 3d, at 242.

[16] The Fifth Circuit noted that Jones's counsel proposed language referring to a "lesser sentence," but reviewed for "plain error," rather than discounting the error as "invited," because the District Court did not use defense counsel's requested language. 132 F. 3d, at 246, n. 10. Although Jones's counsel did propose "lesser sentence" language, see, *e. g.*, App. 26, Jones's proposed instructions nos. 4 and 5 made one thing clear—his view that the jury and judge were required to impose life without possibility of release if the jury did not agree to death. See *supra*, at 409–410, nn. 9, 10.

[17] The Court, in a footnote, appears to recognize what should be beyond genuine debate: For Jones, "the only possible sentences were death and a life sentence." *Ante*, at 387, n. 8. In face of the District Court's lesser sentence instructions, four times given to the jury, it is difficult to comprehend why this Court "cannot see that any error occurred." See *ante*, at 390.

would be sentenced to life without possibility of release if the jury did not agree on death, see *supra*, at 409, and nn. 9, 10—should have made it apparent that he sought to close the door the flawed charge left open.[18]

There is, at least, a reasonable likelihood that the flawed charge tainted the jury deliberations. See *Boyde* v. *California*, 494 U. S. 370, 380 (1990) (where "[t]he claim is that the instruction is . . . subject to an erroneous interpretation," the "proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction" erroneously). As recently noted, a jury may be swayed toward death if it believes the defendant otherwise may serve less than life in prison. See *Simmons* v. *South Carolina*, 512 U. S. 154, 163 (1994) (plurality opinion) ("[I]t 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."). Jurors may have been persuaded to switch from life to death to ward off what no juror wanted, *i. e.*, any chance of a lesser sentence by the judge.[19]

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[18] It is the general rule, as the Government observes, and the Court repeats, that "'[a] party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given.'" Brief for United States 24 (quoting 2 C. Wright, Federal Practice and Procedure § 484, p. 702 (2d ed. 1982)); see also *ante*, at 388. It is also true, however, that "the requirement of objections should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed, rather than being made into a trap for the unwary." 2 Wright, *supra*, § 484, at 699–701. Here, Jones's proposed instruction that his default sentence was life without possibility of release apprised the District Court and the Government of his essential position.

[19] While precedent supports the Fifth Circuit's affirmation that statements attesting to the juror's understanding of the instructions are inadmissible, see 132 F. 3d, at 245–246, the statements Jones submitted do assert that apprehension of a lesser sentence the judge might impose in fact caused jurors to vote for a death sentence, see App. 68, 79. On a matter so grave, I would not discount those statements altogether. Cf. *Jorgensen* v. *York Ice Machinery Corp.*, 160 F. 2d 432, 435 (CA2 1947)

The Court, in common with the Fifth Circuit and the Solicitor General, insists it was just as likely that jurors not supporting death could have persuaded death-prone jurors to give way and vote for a life sentence. See *ante*, at 394; 132 F. 3d, at 246; Brief for United States 22. I would demur (say so what) to that position. It should suffice that the potential to confuse existed, *i. e.*, that the instructions could have tilted the jury toward death. The instructions "introduce[d] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980). "Capital sentencing should not be . . . a game of 'chicken,' in which life or death turns on the . . . happenstance of whether the particular 'life' jurors or 'death' jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors." Reply Brief 7–8, n. 11.

B

The Fifth Circuit held that the District Court was not obliged to tell the jury that Jones's default penalty was life without possibility of release in part because the appeals court viewed that instruction as "substantively [in]correct." 132 F. 3d, at 242.[20] As the Fifth Circuit comprehended the law, if the jury deadlocked, "a second sentencing hearing

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(L. Hand, J.) (while many defects in jury deliberation do not require reversal, "this has . . . nothing to do with what evidence shall be competent to prove the facts when the facts do require the verdict to be set aside, as concededly some facts do").

[20] Misinformation, not the District Court's failure to repeat the unanimity requirement each time it mentioned the jury's sentencing options, or to advise on the consequences of a deadlocked jury, is the harmful error at the heart of Jones's case. I therefore see no cause to dispute that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." *Ante*, at 381. In my judgment, however, the court was obliged, in this life or death case, to make clear to the jury that Jones's minimum sentence was life without possibility of release.

would have to be held in front of a second jury impaneled for that purpose." *Id.*, at 243.[21] But the FDPA, it seems to me clear, does not provide for a second shot at death. The dispositive provision, as I read the Act, is § 3594, which first states that the court shall sentence the defendant to death or life imprisonment without possibility of release if the jury so recommends, and then continues:

> "Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release." 18 U. S. C. § 3594.

The "[o]therwise" clause, requiring judge sentencing, becomes operative when a jury fails to make a unanimous recommendation at the close of deliberations. The Fifth Circuit's attention was deflected from the § 3594 path by § 3593(b)(2)(C), which provides for a sentencing hearing "before a jury impaneled for the purpose of the hearing if . . . the jury that determined the defendant's guilt was discharged for good cause." Discharge for "good cause" under § 3593(b)(2)(C), however, is most reasonably read to cover guilt-phase (and, by extension, penalty-phase) juror disqualification due to, *e. g.*, exposure to prejudicial extrinsic information or illness. The provision should not be read expansively to encompass failure to reach a unanimous life or death decision.

The Government refers to a "background rule" allowing retrial if the jury is unable to reach a verdict, and urges that

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[21] At oral argument, counsel for the United States maintained that it would be up to the prosecutor, when a jury is deadlocked, to request a new panel or to allow the judge to decide on the sentence. See Tr. of Oral Arg. 41. But this could be done only once, the Government maintained: In the event of a second deadlock, it would be the court's obligation to impose the sentence. See *id.*, at 46.

the FDPA should be read in light of that rule. Brief for United States 29. But retrial is not the prevailing rule for capital penalty-phase proceedings. As the Government's own survey of state laws shows, in life or death cases, most States require judge sentencing once a jury has deadlocked. See *id.*, at 32; App. to Brief for United States 1a–6a (identifying 25 States in which the court imposes sentence upon deadlock and three States in which a new sentencing hearing is possible); see also Acker & Lanier, Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform, 32 Crim. L. Bull. 134, 169 (1996) ("In twenty-five of the twenty-nine states in which capital juries have final sentencing authority, . . . a deadlocked sentencing jury is transformed into a 'lifelocked' jury. That is, the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment or life imprisonment without parole." (footnotes omitted)).

Furthermore, at the time Congress adopted the FDPA, identical language in the predecessor Anti-Drug Abuse and Death Penalty Act of 1988 had been construed to mandate court sentencing upon jury deadlock. See *United States* v. *Chandler*, 996 F. 2d 1073, 1086 (CA11 1993) ("If the jury does not [recommend death], the district court sentences the defendant."); *United States* v. *Pitera*, 795 F. Supp. 546, 552 (EDNY 1992) ("Absent a recommendation of death, the court must sentence a defendant.").[22] The House Report suggests that Congress understood and approved that construction. See H. R. Rep. No. 103–467, p. 9 (1994) ("If the jury is not

[22] Like the FDPA, the Anti-Drug Abuse Act provides for a new sentencing jury if the guilt-phase jury "has been discharged for good cause," 21 U. S. C. § 848(i)(1)(B)(iii), and states, immediately after providing for the death sentence upon jury recommendation, that "[o]therwise the court shall impose a sentence, other than death, authorized by law," § 848(*l*). Under the Anti-Drug Abuse Act, unlike the FDPA, the only binding recommendation the jury can make is for death.

unanimous, the judge shall impose the sentence pursuant to Section 3594.").

IV

Piled on the key instructional error, the trial court presented the jury with duplicative, vague nonstatutory aggravating factors. The court told the jury to consider as aggravators, if established beyond a reasonable doubt, factors 3(B)—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"—and 3(C)—the victim's "personal characteristics and the effect of the instant offense on [her] family." 132 F. 3d, at 250.[23] The jury found both. See *ibid.*

The District Court did not clarify the meaning of the terms "background" and "personal characteristics." See *id.*, at 251. Notably, the term "personal characteristics" in aggravator 3(C) necessarily included "young age," "slight stature," "background," and "unfamiliarity," factors the jury was told to consider in aggravator 3(B). I would not attribute to the Court genuine disagreement with that proposition. But see *ante,* at 399. Double counting of aggravators "creates the risk of an arbitrary death sentence." 132 F. 3d, at 251; see also *United States* v. *McCullah,* 76 F. 3d 1087, 1111 (CA10 1996) ("Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily."). The Fifth Circuit considered the District Court's lapse inconsequential, concluding that "the two remaining statutory aggravating factors . . . support the sentence of death, even after considering the eleven mitigating factors." 132 F. 3d, at 252.[24]

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[23] Counsel specifically objected to these factors. See App. 21–22, 28.

[24] The Government now argues, contrary to the Fifth Circuit's conclusion, that aggravating factors 3(B) and 3(C) are not duplicative, vague, or overbroad. See Brief for United States 40–45. The Court granted certiorari on the Government's reformulated questions, which presumed the incorrectness of the aggravators. See *supra,* at 406, n. 1. In its brief

Appellate courts should hesitate to assert confidence that "elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Barclay* v. *Florida*, 463 U. S. 939, 958 (1983). Adding the overlapping aggravators to the more disturbing misinformation conveyed in the charge, I see no basis for concluding "'it would have made no difference if the thumb had been removed from death's side of the scale.'" 132 F. 3d, at 251 (quoting *Stringer* v. *Black*, 503 U. S. 222, 232 (1992)).

V

The Fifth Circuit's tolerance of error in this case, and this Court's refusal to face up to it, cannot be reconciled with the recognition in *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), that "death is qualitatively different." If the jury's weighing process is infected by the trial court's misperceptions of the law, the legitimacy of an ensu-

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in opposition, the Government did not challenge the Fifth Circuit's determination of error, but focused solely on whether the error was harmless. JUSTICE THOMAS, writing for a plurality, nevertheless addresses the Government's newly raised argument. See *ante*, at 395–402. I would hold the Government to a tighter rein and dismiss the tardy argument as waived. See *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253 (1999) *(per curiam); South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160 (1999); cf. this Court's Rule 15.2.

It is evident that the issue held back by the Government was not "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). But see *ante*, at 397, n. 12. JUSTICE THOMAS treats the two issues as separate and independent. He maintains first that there was no error. Writing for the Court, he then proceeds to assume there was error and concludes that any error was harmless. Either holding would do to support the Court's disposition. See, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499, 506, n. 4, 510–512 (1983) (holding presumed error harmless rather than deciding whether there was, in fact, error; Court explains "[t]he question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied"); *id.*, at 512–513 (STEVENS, J., concurring) (Court should decide case on the ground that there was no error, without reaching harmless-error question).

ing death sentence should not hinge on defense counsel's shortfalls or the reviewing court's speculation about the decision the jury would have made absent the infection. I would vacate the jury's sentencing decision and remand the case for a new sentencing hearing, one that would proceed with the accuracy that superintendents of the FDPA should demand.

Syllabus

JEFFERSON COUNTY, ALABAMA *v.* ACKER, SENIOR JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA, ET AL.

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

No. 98–10. Argued March 29, 1999—Decided June 21, 1999

Alabama has not authorized its counties to levy an income tax, but it has authorized them to impose a "license or privilege tax" upon persons who are not otherwise required to pay a license fee under state law. Pursuant to this authorization, Jefferson County enacted Ordinance No. 1120 (Ordinance), which imposes such an occupational tax. The Ordinance declares it "unlawful . . . to engage in" a covered occupation without paying the tax; includes among those subject to the tax, federal, state, and county officeholders; measures the fee as a percentage of the taxpayer's "gross receipts"; and defines "gross receipts" as, *inter alia*, "compensation." Respondents, two United States District Judges who maintain their principal offices in Jefferson County, resist payment of the tax on the ground that it violates the intergovernmental tax immunity doctrine. The county instituted collection suits in Alabama small claims court against the judges, who removed the suits to the Federal District Court under the federal officer removal statute, 28 U. S. C. § 1442. The federal court denied the county's motions to remand and granted summary judgment for respondents, holding the county tax unconstitutional under the intergovernmental tax immunity doctrine to the extent that it reached federal judges' compensation. The en banc Eleventh Circuit affirmed. This Court granted certiorari and remanded for further consideration of whether the Tax Injunction Act, § 1341, deprived the District Court of jurisdiction to adjudicate the matter. On remand, the Eleventh Circuit adhered to its prior en banc decision.

Held:

1. The case was properly removed under the federal officer removal statute. That provision permits a federal-court officer to remove to federal district court any state-court civil action commenced against the officer "for any act under color of office." 28 U. S. C. § 1442(a)(3). To qualify for removal, the officer must both raise a colorable federal defense, see *Mesa* v. *California*, 489 U. S. 121, 139, and establish that the

suit is "*for* a[n] act under color of office," 28 U. S. C. § 1442(a)(3) (emphasis added). Here, the judges argued, and the Eleventh Circuit held, that the county tax falls on the performance of federal judicial duties in the county and risks interfering with the Federal Judiciary's operation in violation of the intergovernmental tax immunity doctrine. That argument, although the Court ultimately rejects it, presents a colorable federal defense. To establish that the suit is "for" an act under color of office, the court officer must show a nexus, a "causal connection" between the charged conduct and asserted official authority. *Willingham* v. *Morgan*, 395 U. S. 402, 409. The judges' colorable federal defense rests on a statement in the Ordinance declaring it "unlawful" for them to "engage in [their] occupation" without paying the tax. Correspondingly, the judges see the county's enforcement actions as suits "for" their having "engage[d] in [their] occupation." The Court credits the judges' theory of the case for purposes of the jurisdictional inquiry and concludes that they have made an adequate threshold showing that the suit is "for a[n] act under color of office." Pp. 430–433.

2. The Tax Injunction Act does not bar federal-court adjudication of this case. That Act prohibits federal district courts from "enjoin[ing], suspend[ing] or restrain[ing]" the imposition or collection of any state tax where a plain, speedy, and efficient remedy may be had in the State's courts. 28 U. S. C. § 1341. By its terms, the Act bars anticipatory relief. Recognizing that there is little practical difference between an injunction and anticipatory relief in the form of a declaratory judgment, the Court has held that declaratory relief falls within the Act's compass. *California* v. *Grace Brethren Church*, 457 U. S. 393, 408. But a suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication. The Act was modeled on state and federal provisions prohibiting anticipatory actions by taxpayers to stop the initiation of collection proceedings. See, *e. g.*, 26 U. S. C. § 7421(a). These provisions were not designed to prevent taxpayers from defending government collection suits. Pp. 433–435.

3. Jefferson County's tax operates as a nondiscriminatory tax on the judges' compensation, to which the Public Salary Tax Act of 1939, 4 U. S. C. § 111, consents when it allows States to tax the pay federal employees receive "if the taxation does not discriminate against [that] employee because of the source of the pay or compensation." Pp. 435–443.

(a) The Eleventh Circuit's holding that the tax violates the intergovernmental tax immunity doctrine as applied to federal judges extends that doctrine beyond the tight limits this Court has set. Until 1938, the doctrine was expansively applied to prohibit Federal and State

Governments from taxing the salaries of another sovereign's employees. See, *e. g.*, *Dobbins* v. *Commissioners of Erie Cty.*, 16 Pet. 435, 450. In *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 486–487, the Court expressly overruled prior decisions and held that a State's taxation of federal employees' salaries lays no unconstitutional burden upon the Federal Government. Since *Graves*, the Court has reaffirmed a narrow approach to governmental tax immunity, *United States* v. *New Mexico*, 455 U. S. 720, 735, closely confining the doctrine to bar only those taxes that are imposed directly on one sovereign by the other or that discriminate against a sovereign or those with whom it deals, *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 811. In contracting the doctrine, the Court has recognized that the area is one over which Congress is the principal superintendent. See *New Mexico*, 455 U. S., at 737–738. Indeed, congressional action coincided with the *Graves* turnaround: The Public Salary Tax Act was enacted shortly after release of the Court's decision in *Graves*. In *Howard* v. *Commissioners of Sinking Fund of Louisville*, 344 U. S. 624, 625, n. 2, 629, the Court concluded that a "license fee" similar in relevant respects to Jefferson County's was an "income tax" for purposes of a federal statute authorizing state taxation of federal employees' incomes, even though the fee was styled as a tax upon the privilege of working in a municipality, was not an "income tax" under state law, and deviated from textbook income tax characteristics. *Id.*, at 628–629. As *Howard* indicates, whether Jefferson County's license tax fits within the Public Salary Tax Act's allowance of nondiscriminatory state taxation of federal employees' pay is a question of federal law. The practical impact, not the State's name tag, determines the answer to that question. Pp. 436–439.

(b) The Court rejects the judges' contention that two features of the Ordinance remove the tax from the Public Salary Tax Act shelter and render it an unconstitutional licensing scheme. The Court finds unpersuasive the judges' first argument that the Ordinance, by declaring it "unlawful . . . to engage in" a covered occupation, falls under *Johnson* v. *Maryland*, 254 U. S. 51, 57, which held that a State could not require a federal postal employee to obtain a state driver's license before performing his federal duties. The incautious "unlawful . . . to engage in" words likely were written with nonfederal employees, the vast majority of the occupational taxpayers, in front view. The Ordinance's actual operation is the decisive factor. See *Detroit* v. *Murray Corp. of America*, 355 U. S. 489, 492. In practice, the county's license tax serves a revenue-raising, not a regulatory, purpose. The county neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as license taxpayers. Cf., *e. g.*, *Johnson*, 254 U. S., at 57. In response to the judges'

refusal to pay the tax, the county simply instituted collection suits. Alabama has not endeavored to make it unlawful to carry out the duties of a federal office without local permission. Also unavailing is the judges' argument that the Ordinance's exemption for those holding another state or county license reveals its true character as a licensing scheme, not an income tax. The dispositive measure is the Public Salary Tax Act, which does not require the state tax to be a typical "income tax," but consents to any tax on "pay or compensation," which Jefferson County's surely is. Cf. *Howard*, 344 U. S., at 629. Pp. 439–442.

(c) The Public Salary Tax Act's sole caveat is that the tax must "not discriminate . . . because of the [federal] source of the pay or compensation." 4 U. S. C. § 111. In *Davis*, the Court held the nondiscrimination requirement violated by a state tax exempting retirement benefits paid by the State but not those paid by the Federal Government. See 489 U. S., at 817–818. Jefferson County's tax, by contrast, does not discriminate against federal judges in particular, or federal officeholders in general, based on the federal *source* of their pay or compensation. The tax is paid by all state judges in Jefferson County. This Court rejects respondents' contention that, as federal judges can never fit within the county's exemption for those who hold licenses under other state or county laws, that exemption unlawfully disfavors them. The record shows no discrimination between similarly situated federal and state employees. Cf. *id.*, at 814. There is no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local officeholders whose services are rendered within the county. See *United States* v. *County of Fresno*, 429 U. S. 452, 462. Pp. 442–443.

137 F. 3d 1314, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, Parts I and III of which were unanimous, Part II of which was joined by STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., and Part IV of which was joined by REHNQUIST, C. J., and STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SOUTER and THOMAS, JJ., joined, *post*, p. 444. BREYER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 448.

Jeffrey M. Sewell argued the cause for petitioner. With him on the briefs was *Edwin A. Strickland.*

Kent L. Jones argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the

brief were *Solicitor General Waxman*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, and *David English Carmack*.

Alan B. Morrison argued the cause for respondents. With him on the brief were *Irwin W. Stolz, Jr.*, *Seaton D. Purdom*, and *David C. Vladeck*.*

JUSTICE GINSBURG delivered the opinion of the Court.†

Jefferson County, Alabama, imposes an occupational tax on persons working within the county who are not otherwise required to pay a license fee under state law. The controversy before us stems from proceedings the county commenced to collect the tax from two federal judges who hold court in the county. Preliminarily, the parties dispute whether, as the federal judges assert, the collection proceedings may be removed to, and adjudicated in, federal court. On the merits, the judges maintain that they are shielded from payment of the tax by the intergovernmental tax immunity doctrine, while the county urges that the doctrine does not apply unless the tax discriminates against an officeholder because of the source of his pay or compensation.

We hold that the case was properly removed under the federal officer removal statute, 28 U. S. C. § 1442(a)(3), and that the Tax Injunction Act, § 1341, does not bar federal-court adjudication. We further conclude that Jefferson County's tax operates as a nondiscriminatory tax on the judges' compensation, to which the Public Salary Tax Act of 1939, 4 U. S. C. § 111, consents.

**Charles DuBose Cole* filed a brief for Seven United States District Judges of the Northern District of Alabama as *amici curiae* urging affirmance.

†For the reasons stated in the opinion of JUSTICE SCALIA, THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS do not believe this case was properly removed from state court. The Court having concluded otherwise, they join Parts I, III, and IV of this opinion.

I

A

Alabama counties, as entities created by the State, can impose no tax absent state authorization. See *Estes* v. *Gadsden*, 266 Ala. 166, 170, 94 So. 2d 744, 747 (1957). Alabama, the parties to this litigation agree, has not authorized its counties to levy an income tax. See *Jefferson County* v. *Acker*, 850 F. Supp. 1536, 1537–1538, n. 2 (ND Ala. 1994); *McPheeter* v. *Auburn*, 288 Ala. 286, 292, 259 So. 2d 833, 837 (1972); *Estes*, 266 Ala., at 171–172, 94 So. 2d, at 748–750.[1] In 1967, Alabama authorized its counties to levy a "license or privilege tax" upon persons who do not pay any other license tax to either the State or county. 1967 Ala. Acts 406, § 3. As stated in the authorization, a county may impose the tax "upon any person for engaging in any business" for which a license or privilege tax is not required by either the State of Alabama or the county under the laws of the State of Alabama. § 4.

Pursuant to Alabama's authorization, Jefferson County, in 1987, enacted Ordinance Number 1120, "establish[ing] a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in [the] County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County." Ordinance No. 1120, preamble (1987) (Ordinance or Ordinance No. 1120). The Ordinance declares it "unlawful . . . to engage in" a covered occupation without paying the tax. § 2. Included among those subject to the tax are "hold[ers] of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services

[1] Most States, it appears, like Alabama, have not authorized local imposition of an "income tax." See J. Aronson & J. Hilley, Financing State and Local Governments 149 (4th ed. 1986) ("Eleven states have authorized their local governments to levy wage or income taxes."); cf. 1 CCH State Tax Guide ¶ 15–100, p. 3512 (1998) (listing cities in 11 States that impose personal income taxes).

of such official or employee are rendered within Jefferson County." § 1(C). The fee is measured by one-half percent of the "gross receipts" of the person subject to the tax. § 2. "[G]ross receipts" is defined as having "the same meaning" as "compensation," and includes "all salaries, wages, commissions, [and] bonuses." § 1(F). Ordinance No. 1120 thus implements the taxing authority accorded counties by the Alabama Legislature. The State's permission left no room for a local tax on compensation of a different name or order.

B

Respondents William M. Acker, Jr., and U. W. Clemon are United States District Judges for the Northern District of Alabama. Both maintain their principal office in Jefferson County, and both resist payment of the county's "license or privilege tax" on the ground that it violates the intergovernmental tax immunity doctrine. The county instituted a collection suit in Alabama small claims court against each of the judges, which each removed to the Federal District Court under the federal officer removal statute, 28 U. S. C. § 1442 (1994 ed. and Supp. III). After denying the county's motions to remand, the federal court consolidated the cases, and eventually granted summary judgment for respondents; the court held Jefferson County's tax unconstitutional under the intergovernmental tax immunity doctrine to the extent that the tax reached the compensation of federal judges. See *Jefferson County*, 850 F. Supp., at 1537, 1545–1546.[2]

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[2] The District Court also held that applying the tax to the judges diminished their pay and therefore violated the Compensation Clause of Article III of the Constitution. See *Jefferson County* v. *Acker*, 850 F. Supp., at 1548; U. S. Const., Art. III, § 1 (federal judges "shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). The Court of Appeals declined to address that question, and it is not before this Court. See *Jefferson County* v. *Acker*, 92 F. 3d 1561, 1566 (CA11 1996) (en banc).

A panel of the United States Court of Appeals for the Eleventh Circuit initially reversed the District Court's judgment, *Jefferson County* v. *Acker*, 61 F. 3d 848 (1995), but the Circuit, sitting en banc, affirmed the District Court's disposition, *Jefferson County* v. *Acker*, 92 F. 3d 1561, 1576 (1996). We granted Jefferson County's initial petition for certiorari and remanded the case for further consideration of the question whether the Tax Injunction Act, 28 U. S. C. § 1341, deprived the District Court of jurisdiction to adjudicate the matter. *Jefferson County* v. *Acker*, 520 U. S. 1261 (1997). On remand, the Eleventh Circuit adhered to its prior en banc decision. See 137 F. 3d 1314, 1324 (1998) (en banc). We again granted certiorari to consider both the threshold Tax Injunction Act issue and the merits of the case. 525 U. S. 1039–1040 (1998). We take up as well an anterior question raised by the Solicitor General: Was removal from state court to federal court unauthorized by the federal officer removal statute?

II

The federal officer removal provision at issue states:

> "(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> . . . . . .
>
> "(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties." 28 U. S. C. § 1442 (1994 ed. and Supp. III).[3]

It is the general rule that an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit. See 28 U. S. C. § 1441(a). To remove a case as one falling within

[3] Other subsections of § 1442 establish similar removal rights for other federal officers. See 28 U. S. C. §§ 1442(a), (b) (1994 ed. and Supp. III).

federal-question jurisdiction, the federal question ordinarily must appear on the face of a properly pleaded complaint; an anticipated or actual federal defense generally does not qualify a case for removal. See *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). Suits against federal officers are exceptional in this regard. Under the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law.

To qualify for removal, an officer of the federal courts must both raise a colorable federal defense, see *Mesa* v. *California*, 489 U. S. 121, 139 (1989), and establish that the suit is "*for* a[n] act under color of office," 28 U. S. C. § 1442(a)(3) (emphasis added). To satisfy the latter requirement, the officer must show a nexus, a "'causal connection' between the charged conduct and asserted official authority." *Willingham* v. *Morgan*, 395 U. S. 402, 409 (1969) (quoting *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 33 (1926)).

In construing the colorable federal defense requirement, we have rejected a "narrow, grudging interpretation" of the statute, recognizing that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." 395 U. S., at 407. We therefore do not require the officer virtually to "win his case before he can have it removed." *Ibid.* Here, the judges argued, and the Eleventh Circuit held, that Jefferson County's tax falls on "the performance of federal judicial duties in Jefferson County" and "risk[s] interfering with the operation of the federal judiciary" in violation of the intergovernmental tax immunity doctrine; that argument, although we ultimately reject it, see *infra*, at 435–443, presents a colorable federal defense. *Jefferson County*, 92 F. 3d, at 1572. There is no dispute on this point. See *post*, at 448 (SCALIA, J., concurring in part and dissenting in part).

We next consider whether the judges have shown that the county's tax collection suits are "*for* a[n] act under color of office." 28 U. S. C. § 1442(a)(3) (emphasis added). The essence of the judges' colorable defense is that Jefferson County's Ordinance expressly declares it "unlawful" for them to "engage in [their] occupation" without paying the tax, Ordinance No. 1120, § 2, and thus subjects them to an impermissible licensing scheme. The judges accordingly see Jefferson County's enforcement actions as suits "for" their having "engage[d] in [their] occupation." The Solicitor General, in contrast, argues that there is no causal connection between the suits and the judges' official acts because "[t]he tax . . . was imposed only upon [the judges] personally and not upon the United States or upon any instrumentality of the United States." Brief for United States as *Amicus Curiae* 20. To choose between those readings of the Ordinance is to decide the merits of this case. Just as requiring a "clearly sustainable defense" rather than a colorable defense would defeat the purpose of the removal statute, *Willingham*, 395 U. S., at 407, so would demanding an airtight case on the merits in order to show the required causal connection. Accordingly, we credit the judges' theory of the case for purposes of both elements of our jurisdictional inquiry and conclude that the judges have made an adequate threshold showing that the suit is "for a[n] act under color of office." 28 U. S. C. § 1442(a)(3).

JUSTICE SCALIA maintains that the county's lawsuit was not grandly "for" the judges' performance of their official duties, but narrowly "for" their having refused to pay the tax. The judges' resistance to payment of the tax, he states, was neither required by the responsibilities of their offices nor undertaken in the course of job performance. See *post*, at 447. The county's lawsuit, however, was not simply "for" a refusal; it was "for" payment of a tax. The county asserted that the judges had failed to comply with the Ordinance; read literally, as the judges urge and as we accept

solely for purposes of this jurisdictional inquiry, that measure required the judges to pay a license fee before "engag-[ing] in [their] occupation." Ordinance No. 1120, § 2. The circumstances that gave rise to the tax liability, not just the taxpayers' refusal to pay, "constitute the basis" for the tax collection lawsuits at issue. See *Willingham*, 395 U. S., at 409 (" It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis . . . of the state prosecution." (internal quotation marks omitted)). Here, those circumstances encompass holding court in the county and receiving income for that activity. In this light, we are satisfied that the judges have shown the essential nexus between their activity "under color of office" and the county's demand, in the collection suits, for payment of the local tax.

III

The Tax Injunction Act provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341.

This statutory text "is to be enforced according to its terms" and should be interpreted to advance "its purpose" of "confin[ing] federal-court intervention in state government." *Arkansas* v. *Farm Credit Servs. of Central Ark.*, 520 U. S. 821, 826–827 (1997). By its terms, the Act bars anticipatory relief, suits to stop ("enjoin, suspend or restrain") the collection of taxes. Recognizing that there is "little practical difference" between an injunction and anticipatory relief in the form of a declaratory judgment, the Court has held that declaratory relief falls within the Act's compass. *California* v. *Grace Brethren Church*, 457 U. S. 393, 408 (1982). But a suit to collect a tax is surely not brought to restrain state

action, and therefore does not fit the Act's description of suits barred from federal district court adjudication. See *Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F. 2d 816, 818 (CA5 1990) ("The Tax Injunction Act does not bar federal court jurisdiction [of a] suit . . . to collect a state tax.").

Nevertheless, in *Keleher* v. *New England Telephone & Telegraph Co.*, 947 F. 2d 547 (CA2 1991), the Court of Appeals concluded:

> "[I]n removing the federal courts' power to 'enjoin, suspend or restrain' state and local taxes, [Congress] necessarily intended for federal courts to abstain from hearing tax enforcement actions in which the validity of a state or local tax might reasonably be raised as a defense." *Id.*, at 551.[4]

We do not agree that the Act's purpose requires us to disregard the text formulation Congress adopted.

Congress modeled the Tax Injunction Act, which passed in 1937, upon previously enacted federal "statutes of similar import," measures that parallel state laws barring "actions in State courts to enjoin the collection of State and county taxes." S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937). The federal statute Congress had in plain view was an 1867 measure depriving courts of jurisdiction over suits brought "for the purpose of restraining the assessment or collection" of any federal tax. Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475, now codified at 26 U. S. C. § 7421(a) (1994 ed., Supp. III). The 1867 provision, of course, does not bar federal-court ad-

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[4] The Second Circuit further stated that "[e]ven if Congress did not intend the Act's jurisdictional bar to reach so far, . . . we believe that general principles of federal court abstention would nonetheless require us to stay our hand here." 947 F. 2d, at 551. *Keleher* was a diversity action raising "'difficult questions of state law bearing on policy problems of substantial public import.'" *Ibid.* (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 814 (1976)). See *infra*, at 435, n. 5.

judication of suits initiated by the United States to collect federal taxes; it precludes only suits brought by taxpayers to restrain the United States from assessing or collecting such taxes. Similarly, the state laws to which Congress referred surely do not preclude the States from enforcing their taxes in court.

The Tax Injunction Act was thus shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings. It was not the design of these provisions to prohibit taxpayers from defending suits brought by a government to obtain collection of a tax. Congress, it appears, sought particularly to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law. See S. Rep. No. 1035, *supra*, at 2. In sum, we hold that the Tax Injunction Act, as indicated by its terms and purpose, does not bar collection suits, nor does it prevent taxpayers from urging defenses in such suits that the tax for which collection is sought is invalid.[5]

IV

The Eleventh Circuit held that Jefferson County's license tax, as applied to federal judges, amounts to "a direct tax on the federal government or its instrumentalities" in violation of the intergovernmental tax immunity doctrine. *Jefferson*

[5] As noted in *Keleher* v. *New England Telephone & Telegraph Co.*, 947 F. 2d 547, 551 (CA2 1991), see *supra*, at 434, n. 4, abstention and stay doctrines may counsel federal courts to withhold adjudication, according priority to state courts on questions concerning the meaning and proper application of a state tax law. Cf. *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 332–334 (1943); *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 719–721 (1996) (in a case seeking damages, rather than equitable relief, a federal court may not abstain, but can stay the action pending resolution of the state-law issue). No one has argued for the application of such doctrines here.

County, 92 F. 3d, at 1576. That ruling extends the doctrine beyond the tight limits this Court has set and is inconsistent with the controlling federal statute. The county's Ordinance lays no "demands directly on the Federal Government," *United States* v. *New Mexico*, 455 U. S. 720, 735 (1982); it is, and operates as, a tax on employees' compensation. The Public Salary Tax Act allows a State and its taxing authorities to tax the pay federal employees receive "if the taxation does not discriminate against the [federal] employee because of the source of the pay or compensation." 4 U. S. C. § 111. We hold that Jefferson County's tax falls within that allowance.

A

Until 1938, the intergovernmental tax immunity doctrine was expansively applied to prohibit Federal and State Governments from taxing the salaries of another sovereign's employees. See, *e. g.*, *Dobbins* v. *Commissioners of Erie Cty.*, 16 Pet. 435, 450 (1842); *Collector* v. *Day*, 11 Wall. 113, 124 (1871). In *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 486–487 (1939), the Court expressly overruled prior decisions and held that a State's imposition of a tax on federal employees' salaries "lays [no] unconstitutional burden upon [the Federal Government]."[6] Although taxes "upon the incomes of employees of a government, state or national, . . . may be passed on economically to that government," the Court reasoned, the federal design tolerates such "indirect [and] incidental" burdens. *Id.*, at 487. Since *Graves*, we

[6] *Graves* carried out the doctrinal contraction presaged in *Helvering* v. *Gerhardt*, 304 U. S. 405, 424 (1938), which held that the Federal Government could tax the salaries of employees of the Port of New York Authority. See also *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 138, 149, 159–161 (1937) (in determining that a state "privilege ta[x]" on federal contractors did not violate the intergovernmental tax immunity doctrine, the Court rejected the theory that a tax on income is a tax on its source (internal quotation marks omitted)).

have reaffirmed "a narrow approach to governmental tax immunity," *New Mexico*, 455 U. S., at 735;[7] we have closely confined the doctrine to "ba[r] only those taxes that [are] imposed directly on one sovereign by the other or that discriminat[e] against a sovereign or those with whom it deal[s]," *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 811 (1989). In contracting the once expansive intergovernmental tax immunity doctrine, we have recognized that the area is one over which Congress is the principal superintendent. See *New Mexico*, 455 U. S., at 737–738.

Indeed, congressional action coincided with the *Graves* turnaround. In the Public Salary Tax Act, under consideration before *Graves* was announced and enacted shortly thereafter, see *Davis*, 489 U. S., at 811–812, Congress consented to nondiscriminatory state and local taxation of federal employees' "pay or compensation for personal service," 4 U. S. C. § 111.[8] Section 111 effectively "codified the result in *Graves*," and thereby "foreclosed the possibility that subsequent judicial reconsideration . . . might reestablish the broader interpretation of the immunity doctrine." *Davis*, 489 U. S., at 812; see also *id.*, at 813 (the immunity for which § 111 provides is "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity").

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[7] *New Mexico* held that New Mexico transgressed no constitutional limit when it required federal contractors to pay the State's gross receipts tax for the "privilege" of doing business with the Federal Government in the State. 455 U. S., at 727, 744 (internal quotation marks omitted).

[8] Section 111 provides:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

In *Howard* v. *Commissioners of Sinking Fund of Louisville*, 344 U. S. 624 (1953), the Court held that a "license fee" similar in relevant respects to Jefferson County's was an "income tax" for purposes of a federal statute that defines "income tax" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts," 4 U. S. C. § 110(c). See 344 U. S., at 625, n. 2, 629.[9] The Court so concluded even though the local tax was styled as "a tax upon the privilege of working within [the municipality]," was not an "income tax" under state law, and deviated from textbook income tax characteristics. *Id.*, at 628–629; see also *id.*, at 629 (Douglas, J., dissenting) ("Many kinds of income are excluded, *e. g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in [the municipality].").[10]

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[9] *Howard* construed the Buck Act, which authorizes state and local governments to collect "income tax[es]" from individuals who work in a "Federal area" "to the same extent . . . as though such area was not a Federal area." 4 U. S. C. § 106(a). The Buck Act defines "Federal area" to mean "any lands or premises held or acquired by or for the use of the United States." § 110(e). The United States submits that "[t]his definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse," but further notes that the "origin and purpose of the Buck Act . . . were . . . limited . . . to ensur[ing] that federal officers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas." Brief for United States as *Amicus Curiae* 28, n. 8 (citing S. Rep. No. 1625, 76th Cong., 3d Sess., 3 (1940)). As we conclude that the Public Salary Tax Act consents to Jefferson County's tax, we need not decide whether the Buck Act applies to this case.

[10] JUSTICE BREYER both recapitulates the reasoning of Justice Douglas' dissenting opinion in *Howard* and endeavors to distinguish the Court's decision in that case as involving "only [a] jurisdictional issue." *Post*, at 457 (opinion concurring in part and dissenting in part). One of the two questions on which the Court granted certiorari in *Howard*, however, explicitly asked the Court to determine "[t]he validity of the Louisville occupational tax or license fee ordinance as applied to employees of the [Naval] Ordnance Plant." 344 U. S., at 625. The Court squarely held: "[T]he tax is valid." *Id.*, at 629.

As *Howard* indicates, whether Jefferson County's license tax fits within the Public Salary Tax Act's allowance is a question of federal law. The practical impact, not the State's name tag, determines the answer to that question. See also *Detroit* v. *Murray Corp. of America*, 355 U. S. 489, 492 (1958) ("[I]n determining whether th[e] ta[x] violate[s] the Government's constitutional immunity we must look through form and behind labels to substance."); cf. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159 (1930) (compatibly with the Fourteenth Amendment, a State "may impose different specific taxes upon different trades and professions"; "[i]n levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value"). This much is beyond genuine debate.

B

The judges acknowledge that Jefferson County's Ordinance is valid if it "impose[s] a true tax on . . . income," but argue that the Ordinance ranks instead as an impermissible licensing scheme. Brief for Respondents 13–14, 27–33. Two aspects of the Ordinance, they say, remove the tax from the Public Salary Tax Act shelter for "taxation of pay or compensation for personal service," 4 U. S. C. § 111, and render the tax unconstitutional. First, the judges urge, the very words of the Ordinance make it unlawful for them and others to engage in their occupations without paying the license fee. Second, they maintain, the complete exclusion of persons who hold other Alabama licenses, however low the fee in comparison to Jefferson County's tax, is inconsistent with a true tax on income, but entirely consistent with a regulatory scheme requiring persons to have one and only one occupational license in a State. We are not persuaded.

Jefferson County's Ordinance declares it "unlawful . . . to engage in" a covered occupation (as pertinent here, to carry out the duties of a federal judge) without paying the license fee. Ordinance No. 1120, § 2. Based on the quoted words,

the respondent judges urge, as the Eleventh Circuit ruled, that the Ordinance is invalid under *Johnson* v. *Maryland*, 254 U. S. 51, 57 (1920), which held that a State could not require a federal postal employee to obtain a state driver's license before performing his federal duties. See *Jefferson County*, 92 F. 3d, at 1572–1573. In reading the Ordinance to impose a license requirement resembling the driver's license at issue in *Johnson*, the judges stress the Ordinance's incautious "unlawful . . . to engage in" language. Those words, however, likely were written with nonfederal employees, the vast majority of the occupational taxpayers, in front view. As earlier observed, see *supra*, at 439, the actual operation of the Ordinance, *i. e.*, its practical impact, is critical. See *Murray Corp.*, 355 U. S., at 492.

In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory, purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as licensed taxpayers. Cf. *Johnson*, 254 U. S., at 57 ("[The state license requirement] lays hold of [Federal Government employees] in their specific attempt to obey [federal] orders and requires qualifications in addition to those that the [Federal] Government has pronounced sufficient."); *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187, 189, 190 (1956) *(per curiam)* (holding that private contractors, seeking to bid on federal contracts, cannot be required first to submit to state licensing procedures that "determin[e]" a contractor's "qualifications"; such state regulation is inconsistent with the governing federal procurement statute and regulations, which provide standards for judging the "responsibility" of competitive bidders (internal quotation marks omitted)). In response to the judges' refusal to pay the tax, Jefferson County has done no more than institute a collection suit. See *Jefferson County*, 92 F. 3d, at 1565. Alabama, of course, cannot make it unlawful to carry out the

duties of a federal office without local permission, and in fact does not endeavor to do so.[11]

We consider next the judges' argument that the wholesale exemption for those who hold another state or county license reveals the Ordinance's true character as a licensing scheme, not an income tax. If the tax were genuinely an income tax, they urge, those license holders would not be excluded, although they might be allowed to claim their other license fees as credits or deductions against the county tax. Alabama's enabling Act does not allow its counties to so provide; those otherwise subject to license or privilege taxes under

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[11] The shortcomings JUSTICE BREYER identifies in his first three objections, *post,* at 449–452, are of a sort this Court routinely rejects as cause for federal curtailment of the taxing power of state and local governments. See *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159 (1930). His fourth objection, *post,* at 452–453, speaks of burdens Jefferson County imposes directly on the Federal Government—obligations to withhold the tax, to make complicated calculations, to keep detailed records. JUSTICE BREYER overlooks that it is the actual operation of the Ordinance—what is and not what might be—that counts in determining the merits of this case. See *Detroit* v. *Murray Corp. of America,* 355 U. S. 489, 492 (1958).

As a matter of undisputed fact, the burdens JUSTICE BREYER posits are hypothetical, not real. As the parties stipulated, "[a]ll active judges of the Northern District of Alabama except [respondents] have paid the County Occupational Tax on differing percentages of their judicial salaries," but "neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama . . . has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County," and "[t]he Administrative Office . . . has never withheld County Occupational Tax from any federal judge or court employee." *Jefferson County,* 850 F. Supp., at 1549; see also 5 U. S. C. § 5520(a) (authorizing the Secretary of the Treasury to enter into tax withholding agreements with local taxing authorities). Should Jefferson County someday exceed constitutional limits in its enforcement endeavors, a federal court would no doubt conserve what is constitutional, in line with the severability clauses contained in the state law and county Ordinance. See 1967 Ala. Acts 406, § 8; Jefferson County Ordinance No. 1120, § 13 (1987).

Alabama's laws may not be reached by a county's occupational tax. See 1967 Ala. Acts 406, § 4.[12] The dispositive measure, however, is the Public Salary Tax Act, which does not require the local tax to be a typical "income tax." Just as the statute in *Howard* consented broadly to "*any tax* measured by net income, gross income, or gross receipts," 344 U. S., at 629, the Public Salary Tax Act consents to any tax on "pay or compensation," which Jefferson County's surely is. The sole caveat is that the tax "not discriminate . . . because of the [federal] source of the pay or compensation," 4 U. S. C. § 111, and we next consider that matter.[13]

C

In *Davis*, the Court held that a state tax exempting retirement benefits paid by the State but not those paid by the Federal Government violated the Public Salary Tax Act's nondiscrimination requirement. See 489 U. S., at 817–818. Jefferson County's tax, by contrast, does not discriminate

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[12] JUSTICE BREYER observes that these exemptions are various, numerous, and large. See *post*, at 451–452, 458–464. In this regard, we note the representation of counsel for Jefferson County at oral argument that "92 percent of the people who earn wages in [the] county pay [the] tax." Tr. of Oral Arg. 14. Counsel further stated that federal employees are at least proportionately represented among the eight percent exempt from the county's tax because they pay license fees to the State of Alabama. These figures are not in the record, counsel explained, "because this issue was never raised until we got to this Court." *Ibid.*; see also *id.*, at 14–15 (counsel for Jefferson County represented that of 12,000 federal employees in the county, 1,209 pay state license taxes and do not pay the county's occupational tax).

[13] The District Court ruled that the judges had failed to establish that the county's tax discriminates against federal officers or employees because of the source of their pay or compensation. See *Jefferson County*, 850 F. Supp., at 1539–1540. On appeal there was no contention that this determination was erroneous. See *Jefferson County*, 92 F. 3d, at 1566, n. 9. The judges nevertheless press the argument that the tax is discriminatory as an alternative ground for affirmance. See Brief for Respondents 34–37.

against federal judges in particular, or federal officeholders in general, based on the federal *source* of their pay or compensation. The tax is paid by all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices in the county. See *Jefferson County*, 850 F. Supp., at 1549.

The judges urge that, as federal judges can never fit within the county's exemption for those who hold licenses under other state or county laws, that exemption unlawfully disfavors them. See Brief for Respondents 14–15. The record shows no discrimination, however, between similarly situated federal and state employees. Cf. *Davis*, 489 U. S., at 814 ("It is undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees."). Should Alabama or Jefferson County authorities take to exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case. Here, however, there is no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local officeholders whose services are rendered within the county. See *United States* v. *County of Fresno*, 429 U. S. 452, 462 (1977) (upholding requirement that employees of U. S. Forest Service pay California property tax on homes located on federal land and provided to employees as part of their compensation; Court observed that state tax does not discriminate unconstitutionally against federal employees if the tax is "imposed equally on . . . similarly situated constituents of the State").

* * *

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE THOMAS join, concurring in part and dissenting in part.

An officer of the federal courts may remove an action commenced against him in state court "*for* any act under color of office or in the performance of his duties." 28 U. S. C. § 1442(a)(3) (emphasis added). In my view, respondents have failed to show a "'causal connection' between the charged conduct and asserted official authority," *Willingham* v. *Morgan*, 395 U. S. 402, 409 (1969). I therefore dissent from Part II of the Court's opinion.

Respondents read Ordinance No. 1120 as creating more than tax liability; in their view, the ordinance makes it unlawful to work if the tax goes unpaid. Building upon this reading, they assert that the county has sued them for performing their duties without a license, a complaint that would clearly establish the causal connection required by 28 U. S. C. § 1442(a)(3). This theory, however, is simply inconsistent with the complaints the county filed. It may perhaps be possible under Alabama law for the county to bring a misdemeanor prosecution against one who engages in a business or profession without having paid the required license fee; and the county may perhaps have a right to enjoin the conduct of a business or the practice of a profession when the license fee has not been paid. But no such action is before us here. Instead, the county has sued each of these respondents for refusing to pay the fee, as evidenced by the fact that the only relief it sought was the money due. See Complaints in Nos. DV9209643 and DV9209695 (Jefferson County District Court). When identifying, for purposes of § 1442(a)(3), what a suit is "for," it is necessary to focus, not on grounds of liability that the plaintiff *could* assert, but on the ground *actually* asserted. Regardless of whether Ordinance No. 1120 also purports to proscribe working without a license, *these* suits were only about respondents' refusal to pay the tax. That refusal is thus the act to which

we should look in determining whether these suits were brought "for any act under color of office or in the performance of [official] duties."

Refusing to pay a tax, even an unconstitutional one, is not an action required by respondents' official duties, nor an action taken in the *course* of performing their official duties (as was, for example, the alleged physical abuse of an inmate by prison officials in *Willingham*, *supra*). Judges Acker and Clemon may well have been motivated by a desire to vindicate the interests of the Federal Judiciary. But their refusal to turn over money from their personal funds was not related to the responsibilities of their judicial office.

The opinion for the Court does not dispute this. Instead, it claims that holding the causation requirement unsatisfied would merge the merits issue with the removal issue. *Ante*, at 432. Since, the Court appears to reason, this fee might be unconstitutional if it is imposed upon the function of being a federal judge (the merits question), holding that these suits were not brought "for" their being federal judges would in effect decide the merits. That is illogical. What the *fee* is imposed *upon*, and what the *suits* are *for* are two different questions.[1] If the cases were remanded to state court, respondents would remain free to argue that the burden of this exaction is upon the function of being a federal judge, rather than upon income. To be sure, the facts would be more favorable for that argument if the ordinance had been enforced by a different sort of suit, which *would* have qualified for removal—for example, suits seeking to en-

[1] Some confusion may have resulted from the fact that the Government argued this issue in a way that did conflate the merits with removal. See *ante*, at 432. It said that there was no causal connection because "[t]he tax . . . was imposed only upon [the judges] personally and not upon the United States or upon any instrumentality of the United States." Brief for United States as *Amicus Curiae* 20. As I explain above, however, proving who the fee was imposed *upon* does not answer the question of what the suit is *for*.

join respondents from performing their duties rather than suits to collect the unpaid "license fee." But even in the present suits, which do not qualify for removal, respondents could argue that this is a charge prohibited by the intergovernmental tax immunity doctrine. Deciding that the cases were improperly removed would simply mean that that defense would have to be made in state court. For although the removal statute creates an exception to the well-pleaded-complaint doctrine, the exception is not for all federal-question defenses asserted by federal officials, but rather for all suits "*for* any act under color of office or in the performance of [official] duties."

It is enough for the Court that respondents have identified some connection, albeit remote, with their federal offices. See *ibid.* The majority says that all the circumstances giving rise to these suits must be considered, and "those circumstances encompass holding court in the county and receiving income for that activity." *Ante*, at 433. In other words, *but for* the judges' working—an act unquestionably within the scope of their official duties—they would not have owed taxes under Ordinance No. 1120 and thus would not have been sued. "But for" causation, however, is not enough.

In *Maryland* v. *Soper (No. 2)*, 270 U. S. 36 (1926), four prohibition agents and their chauffeur were prosecuted in state court for lying under oath to the state coroner, and they sought to remove the case under a predecessor of the current federal-officer removal statute.[2] According to the

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[2] Section 33 of the Judicial Code provided:

"That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States . . . or against any person acting under or by authority of any such officer, on account of any act done under color of his office . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending . . . ." 39 Stat. 532, ch. 399.

agents, they were on their way to report to their superior about a freshly discovered illegal still when they came upon a mortally wounded man in the road. Had they not been *en route* to their superior, the agents argued, they would never have made the discovery that required them to testify before the coroner. We rejected the argument that this established a sufficient connection between their official duty and the obstruction-of-justice prosecution. Although reporting to their superior was certainly among their official duties, the act of testifying before the coroner was not, and it was *the latter* act "on account of" which (or in the terms of the current removal statute, "for" which) they were prosecuted. *Id.*, at 42. So also here, it is not enough that respondents' performance of their judicial duties was a link in the chain of events that brought about these suits—that had they not performed their official duties, the fee would not have been assessed, and had the fee not been assessed they would not have been sued for failure to pay it. Acker and Clemon were sued *for* their refusal to pay the tax—and that, as I have said, is not an act required by, or even performed in connection with, cf. *Willingham* v. *Morgan*, 395 U. S. 402 (1969), the duties of their judicial office.

None of this is to suggest, of course, that removal is justified only when the federal officer can prove that the act prompting suit is, beyond doubt, an official one. If that were the case, the merits truly would be subsumed within the jurisdictional question of removal; the defense of qualified immunity, for example, would always be resolved as a threshold jurisdictional question—an odd result when the main point of 28 U. S. C. § 1443 is to give officers a federal forum in which to litigate the merits of immunity defenses. See *Willingham* v. *Morgan*, *supra*, at 407. The point is only that the officer should have to identify as the gravamen of the suit an act that was, if not required by, at least closely connected with, the performance of his official functions. 28

U. S. C. § 1443; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 33 (1926); *Willingham* v. *Morgan*, *supra*, at 407–409. What should defeat respondents here is that even though their federal defense is colorable, their claim to have acted in official capacity in not paying the fee is not.

* * *

For the foregoing reasons, I would hold that this case was improperly removed. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I, III, and IV of the Court's opinion. Cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 646 (1982) (Powell, J., concurring in part); *United States* v. *Jorn*, 400 U. S. 470, 488 (1971) (Black, J., concurring in judgment).

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

I agree that we have jurisdiction to hear the merits of this case, and I join Parts I, II, and III of the Court's opinion. I do not agree with the majority, however, about the constitutionality of the tax.

If Jefferson County's license fee amounts to a tax imposed directly upon a federal official's performance of his official duties, it runs afoul of the intergovernmental tax immunity doctrine. See *United States* v. *New Mexico*, 455 U. S. 720, 733 (1982) ("[A] State may not, consistent with the Supremacy Clause, U. S. Const., Art. VI, cl. 2, lay a tax 'directly upon the United States'" (citation omitted)); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157 (1937); *e. g., Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187, 190 (1956) *(per curiam)* ("'[I]mmunity'" of federal "'instruments'" from state control in performance of duties extends to state requirement that "'they desist from performance'" until they take an examination to satisfy the State "'that they are competent'" *and* "'pay a fee for permission to go on'") (quoting *Johnson* v. *Maryland*, 254 U. S. 51, 57 (1920)). On the other

hand, if Jefferson County's license fee amounts to an income tax, there is no constitutional problem. See *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 486 (1939); Public Salary Tax Act of 1939, 4 U. S. C. § 111. The question here is whether Jefferson County's license fee is a fee for the performance of official federal duties or, rather, whether it is an income tax on federal employees. In my view, it is the former.

I

I concede that Jefferson County measures the amount of its tax by taking a small percentage of the "gross receipts" or income derived from the licensed activity. Jefferson County Ordinance No. 1120, § 1(F) (1987). The way in which a State measures a tax, however, is only one relevant feature. A state law, for example, that imposed fines upon all appellate judges who took too long in issuing decisions, cf. Cal. Govt. Code Ann. § 68210 (West 1997) (salary withheld from tardy judges), would not suddenly become an "income tax" if the State began to measure the tax or fine, say, in terms of a small percentage of the judge's federal income tax liability. Nor would a similar tax imposed upon a judge each time he administers an official oath automatically become an "income tax." Neither would a driver's license fee or a motor vehicle license fee become an "income tax" should imaginative state legislators make the fees "progressive" by devising some similar system of measurement. Consequently, one must look beyond that single feature of measurement in order to determine the nature of the tax as it operates in practice. Cf. *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U. S. 276, 280 (1932). And four specific features of this rather unusual tax, taken together, convince me that it is not an "income tax."

First, the language, structure, and purpose of the ordinance indicate that it imposes a fee upon the performance of work, not a tax upon income. The ordinance is entitled "Occupational Tax." It describes its purpose as establishing

a "license . . . tax" or a "tax" on the "privilege" of engaging in a "vocation, occupation, calling or profession." Ordinance No. 1120, preamble. And its operative language speaks in terms of a condition imposed upon work, not of a tax upon income. It says that it

> "*shall be unlawful* for any person *to engage in* or follow [with certain exceptions] any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession . . . ." § 2 (emphasis added).

The state law that authorizes the county's tax describes its own purpose as one of "equaliz[ing] the burden of taxation," and it authorizes the county "to levy a license or privilege tax upon any person for engaging in any business" *other* than a business already subject to other state or county licensing fees, liability for which is triggered, not by income, but by engaging in the work. See 1967 Ala. Acts 406, §§ 3, 4; see generally Appendix, *infra*, at 458–464. Indeed, the Alabama Supreme Court has found as a matter of state law that a municipal tax very similar in substance to Jefferson County's tax was an occupational license tax, rather than an income tax. See *McPheeter* v. *Auburn*, 288 Ala. 286, 292, 259 So. 2d 833, 837 (1972).

Second, the tax, as measured, works more like a licensing fee than an income tax. On the one hand, the tax calculation *does not include* many kinds of *income*, such as retirement income, dividends, interest, or other unearned income, or earned income if that income is earned outside the county—irrespective of how much income is involved. See Ordinance No. 1120, § 1(F). On the other hand, by the terms of the ordinance, not only a county resident but also a nonresident who works some of the time in Jefferson County, §§ 1(B), 3, must pay the tax as long as he becomes "entitled to receive" pay for his work, even if he receives that pay

only in a later year or *never receives any income* at all, see § 1(F). And, of course, as I mentioned earlier, the event that triggers liability is not the receipt of income but the person's "engag[ing]" in certain work. § 2.

Third, Jefferson County's tax is riddled with exceptions, which make sense only if one sees the tax as part of a statewide occupational *licensing* scheme, not as an income tax. See 1967 Ala. Acts 406, § 4 (authorizing counties to impose a license tax only in respect to occupations not subject to state, or other county, licensing taxes). The ordinance excludes from its definition of "vocation, occupation, calling and profession" domestic servants, those engaged in occupations licensed elsewhere by the county, and those engaged in the more than 150 occupations licensed by the State. Ordinance No. 1120, § 1(B). This last-mentioned category is large. Its members range from architects to amusement park operators, from detectives to dentists, from laundry owners to lawyers, from sewing machine operators to scientists. See generally Ala. Code § 40–12–41 *et seq.* (1993); Appendix, *infra*, at 458–464. And the licensing fees that the State exacts from this range of individuals are, with only a few exceptions, all unrelated to income. Each attorney, for example, pays "an annual license tax to the state" in the amount of $250, § 40–12–49; each civil, electrical, or mechanical engineer pays $20, § 40–12–99; and each ticket scalper pays $100, § 40–12–167. Some fees vary depending upon special industry-related features, such as population (*e. g.*, advertising, § 40–12–45; amusement park operators, § 40–12–47), number of employees (*e. g.*, automobile garages or shops, § 40–12–54), or business size (*e. g.*, soft-drink bottlers, number of bottles per minute, § 40–12–65; construction companies, value of orders accepted, § 40–12–84; vending machine operators, total sales, § 40–12–176). License fees for a handful of businesses are measured by the income or gross receipts of the company (not of a private person). See § 40–16–4 (certain financial institutions); §§ 40–21–50, 40–21–53

(public utilities); § 40–21–57 (railroad operators); § 40–21–60 ("express" shipping companies).

These many exceptions to the ordinance mean that individuals with identical pay earned from work performed within Jefferson County will pay very different amounts in license fees. Such differences are not surprising where occupational licensing fees are at issue, as different license charges with different legislative pedigrees and applied to different industries often vary dramatically one to the next. Cf. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159 (1930) (State "may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products" without violating the Fourteenth Amendment's Equal Protection and Due Process Clauses). But I am not aware of any *income tax* that would produce such widespread differences in the tax owed by persons with identical incomes. Nor can Jefferson County separate its own tax from the rest of the State's licensing system by claiming that its own tax is different in kind. It would not make sense for a county income tax to exempt an engineer entirely, simply because he had paid the State $20 for a license; at most a county income tax might provide a $20 deduction from, or credit against, the amount of income tax due to the county. But, of course, if the county's tax is simply another *licensing* fee, then this structure makes sense. The engineer does not pay the county anything at all, because he has already paid a licensing fee to the State; the county charge would be redundant. The empirical significance of these factors depends upon the makeup of the work force in Jefferson County (*e. g.*, to what extent is Jefferson County made up of bedroom communities whose residents work elsewhere), a matter about which the record tells us nothing.

Fourth, Jefferson County's ordinance directly imposes upon the Federal Government (the federal official's employer) burdens that to a limited extent exceed those imposed by an ordinary state or local income tax. The ordi-

nance requires the employer, obliged to withhold the tax, to determine where the employee has spent each working day and apportion related wages accordingly. Ordinance No. 1120, §§3, 4. The task of apportioning an employee's workday is more complicated and more closely connected to official duties than simply determining where an employee resides—the conventional "income tax" recordkeeping requirement. Similarly, a tax liability that arises from having worked on a particular day in a particular place, together with related and complex recordkeeping requirements, creates a risk that the tax will have a practical influence upon official decisions in a way that an ordinary income tax will not. (Consider, for example, a federal criminal case in which the defendant seeks a change of venue to Jefferson County. *E. g.*, *United States* v. *Tokars*, 839 F. Supp. 1578 (ND Ga. 1993); see *Jefferson County* v. *Acker*, 92 F. 3d 1561, 1573, and n. 18 (CA11 1996).) Further, the ordinance's language says it is unlawful for a federal employee who has not paid the tax to perform his work—that is, it prohibits "engag[ing]" in that work. Ordinance No. 1120, §2. This language, which I assume could not actually authorize an injunction against the performance of federal work, could nonetheless have an unwelcome impact on a conscientious but tax-delinquent judge who has sworn to uphold the law.

I recognize that one might find income taxes that embody one or two of the features that I have just discussed. Income taxes come in many shapes and sizes. But I do not claim that any one or two of the considerations I have mentioned is sufficient to prove my point. Rather, it is all these features taken together that tip the balance.

The majority either ignores or attempts to distinguish each of these features on its own, as by itself potentially unconsitutional or found in other income taxes. *Ante*, at 439–442. But it is a consideration of the whole, not of each separate part, that leads to my conclusion. To properly characterize a tax, all of its distinguishing features must be

properly taken into account. Each of the features discussed above seems an *odd* or *unusual* feature of an income tax but an *ordinary* feature of a licensing fee. *Taken together*, these features show that the tax before us is so different from an ordinary income tax, and so much like a licensing fee, that for federal constitutional purposes I must conclude that Jefferson County has imposed an occupational or license tax—that is, a fee for obtaining a license to engage in official work—just as the county in its ordinance purports to do.

II

Jefferson County argues that, in any event, the United States has consented to the imposition of the tax. It points first to the Public Salary Tax Act of 1939, which grants federal consent "to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority." 4 U. S. C. § 111.

This statute cannot help Jefferson County, however, because in *Graves*, this Court held only that the intergovernmental tax immunity doctrine does not prevent a State from imposing a nondiscriminatory tax upon "the salaries of officers or employees of the national . . . government." 306 U. S., at 486. And the Public Salary Tax Act

> "simply codified the result in *Graves* and foreclosed the possibility that subsequent judicial reconsideration of that case might reestablish the broader interpretation of the immunity doctrine." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 812 (1989).

See also *id.*, at 811–812 ("[D]uring most of the legislative process leading to adoption of the Act it was unclear whether state taxation of federal employees was still barred by intergovernmental tax immunity"); H. R. Rep. No. 26, 76th Cong., 1st Sess., 2 (1939). If Jefferson County's tax is not an income tax and hence falls outside the scope of *Graves*, this statute cannot save it.

The second statute upon which the county relies, the Buck Act, presents a more difficult question. It says:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein . . . by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; and such . . . taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area . . . to the same extent and with the same effect as though such area was not a Federal area." 4 U. S. C. § 106(a).

A special definitional provision, which applies through cross-reference to the Buck Act (but *not* to the Public Salary Tax Act) defines the term "income tax" broadly to include "any tax . . . measured by . . . income, or . . . gross receipts." § 110(c). And in *Howard* v. *Commissioners of Sinking Fund of Louisville,* 344 U. S. 624, 628–629 (1953), this Court held that a city's "license fee" measured by income and levied on employees working at a federal plant fell within this definition.

Nonetheless, the Buck Act does not apply here. Congress passed the Buck Act in 1940 because it was uncertain whether the consent to taxation provided in the 1939 Public Salary Tax Act would extend to income taxes on those who lived or worked in federal areas; Congress feared that these taxes would be barred for a special reason—namely, that States might lack jurisdiction to apply their laws to those who lived or worked in such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess., 3 (1940). Consequently, the Buck Act's language consents to nothing. Rather, it says "[n]o person shall be *relieved*" of liability for "any income tax" by virtue of a particular circumstance, specifically, "by reason of" that person's "residing within a Federal area" or his "receiving income from transactions occurring or services performed"

in that "area." 4 U. S. C. § 106(a) (emphasis added). The Buck Act seeks to prevent a person who lives or works in a federal area from making a certain kind of legal defense to taxation, namely, the defense that the State lacks jurisdiction to impose an income tax upon a person who lives or works in such an area.

The Buck Act's very next phrase makes clear that the Act is limited so as to accomplish only the purpose I have just described. It says that the state or local

> "taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area . . . *to the same extent and with the same effect* as though such area was not a Federal area." *Ibid.* (emphasis added).

And the Buck Act adds that in any event, it "shall not be deemed to authorize the levy or collection of any tax on . . . the United States." § 107(a). Thus, the Buck Act's own language indicates that the Act is not intended to alter the contours of the intergovernmental tax immunity doctrine itself.

The case before us falls outside the Buck Act because no one here has asked to "be relieved" of tax liability "*by reason of* his residing within a Federal area or receiving income from . . . services performed in such area." § 106(a). Rather, the respondents claim that Jefferson County's ordinance is unconstitutional, not by reason of the federal nature of *where they work*, but by reason of the federal nature of *what they do*. And for the reasons discussed above, the county's ordinance would violate the intergovernmental tax immunity doctrine *whether or not* the respondents lived or worked in a federal area. The Buck Act cannot help the county's claim because it gives the State power to tax income earned in a federal area only "to the same extent" and "with the same effect as," not to a greater extent than, if that income were earned elsewhere. *Ibid.* Indeed, for the reasons I discussed earlier, Jefferson County's tax falls outside the Act because it is a "tax on . . . the United States." § 107(a).

Nor does the Court's decision in *Howard* govern the outcome here. As an initial matter, *Howard* considered only the jurisdictional issue I have referred to above and did not expressly discuss whether Louisville's tax nonetheless violated the intergovernmental tax immunity doctrine for reasons independent of *where* the federal employees lived or worked. 344 U. S., at 627–629; see also *id.*, at 626 (taxpayers argued that the tax was "invalid" as applied to them because the plant, being a federal enclave, was "not within the City"); *id.*, at 629 (taxpayers "conceded" that the city could "levy such a tax within its boundaries outside the federal area").

More importantly, the tax at issue in *Howard*, though styled a "license fee for the privilege of engaging in [certain] activities," Louisville Ordinance No. 83, § 1 (1950) (attachment to Lodging of Respondents, Mar. 25, 1999), differed from the tax at issue here in two critical ways. First, the Louisville ordinance at issue in *Howard* did not make it "unlawful" to *engage in work* without paying the tax. Compare Louisville Ordinance No. 83, § 1, with Jefferson County Ordinance No. 1120, § 2. And second, the Louisville ordinance did not exempt everyone who paid license fees under state law. Indeed, the ordinance specified that its license fee was to be paid *in addition to* certain other license fees imposed by the city or the State. Compare Louisville Ordinance No. 83, § 12, with Jefferson County Ordinance No. 1120, preamble, § 1(B). Thus, the provisions of the Louisville ordinance made clear that the tax it imposed was a separate and additional tax—not an alternative—to the licensing scheme already in place.

The Jefferson County ordinance is different from the Louisville ordinance in these significant respects. And as I have explained, it is the cumulative nature of the unusual aspects of the Jefferson County tax that make it an occupational or licensing tax.

* * *

For these reasons, I would affirm the decision of the Court of Appeals.

APPENDIX TO OPINION OF BREYER, J.

Persons and Businesses Subject to Alabama License or Privilege Taxes*

Persons engaged in furnishing abstracts of title
Persons manufacturing acetylene gas and carbide
Actuaries, auditors, and public accountants
Persons engaged in selling adding machines, calculating machines, typewriters, etc.
Persons engaged in advertising
Persons who sell or install air-conditioning with water connections
Persons who sell or install air-conditioning without water connections
Owners/operators of amusement parks
Architects
Attorneys
Auctioneers
Dealers in automobiles, trucks, or other self-propelled vehicles
Automobile accessory dealers
Automobile garages or shops
Automobile storage garages
Automobile storage other than in garages
Automobile tire retreading shops
Barbers
Owners/lessees of baseball parks
Battery shops
Battery manufacturers
Beauty parlor operators
Persons who deal in, rent, or hire bicycles or motorcycles
Persons engaged in the business of making blueprints

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*See Ala. Code §§ 40–12–40 *et seq.*, 40–16–4, 40–21–50, 40–21–52 through 40–21–55, 40–21–57 through 40–21–60 (1993); Ala. Code § 27–4–9 (1986). Each of these provisions is specifically mentioned among the exclusions in Jefferson County Ordinance No. 1120, § 1(B) (1987).

Bond makers
Persons engaged in manufacturing, producing, or bottling soda water, soft drinks, or fruit juices
Bowling alleys and tenpin alleys
Agents and brokers of iron or railway, furnace, or mining supplies
Persons operating plants that manufacture brooms, brushes, mops, etc.
Persons engaged in selling cereal or soft drinks in sealed containers at retail
Persons engaged in selling soft drinks via dispensing devices or taps
Persons engaged in selling soft drinks at wholesale
Certified public accountants
Retail dealers in cigars, cigarettes, snuff, tobacco, etc.
Wholesalers of cigars, cigarettes, snuff, tobacco, etc.
Persons operating circuses
Persons operating cleaning or pressing establishments (*e. g.*, dry cleaners)
Persons dealing in coal or coke and maintaining one or more "yards"
Persons who sell, distribute, haul, or deliver coal or coke by truck
Manufacturers of coffins or caskets
People who sell or solicit orders for coffins or caskets
Collection agencies
Commission merchants and merchandise brokers
Operators of for-profit concerts, public lectures, and musical entertainment
Persons engaged in discounting or buying conditional sales contracts, drafts, notes, or mortgages
Persons who engage in lending money on salaries or making industrial or personal loans
Contractors and construction companies
Persons whose principal business is buying cotton

Persons operating a compress for the purpose of compressing cotton
Persons operating various types of mills and factories
Persons who operate cotton warehouses
Credit agencies
Persons operating creosoting or other preservative wood treatment plants
Delicatessens
Dentists
Persons operating detective agencies or companies doing business as such
Persons engaged in developing and printing films or photographic plates
Devices for testing skill and strength used for profit
Persons compiling, selling, or offering for sale directories
Dealers in refrigerators, heaters, and stoves, and repair shops for such devices
Embalmers
Engineers
Owners/operators of fertilizer factories
Fertilizer mixing plants
Persons selling goods in insurance, bankruptcy, or close-out sales, or persons selling goods damaged by fire, etc.
Fireworks dealers
Flying jennies, merry-go-rounds, roller coasters, etc.
Fortunetellers, palmists, clairvoyants, astrologers, phrenologists, and crystal gazers
Fruit dealers (selling from fruit stands or stores)
Persons operating gas stations or pumps
Persons who sell glass
Persons operating golf or miniature golf courses
Persons operating hat-cleaning establishments
Dealers in hides or furs, other than cattle, sheep, goat, or horse hides

Horse shows, rodeos, or dog and pony shows
Persons engaged in buying, selling, or exchanging horses, mules, or donkeys
Wholesale ice cream manufacturers
Ice factories
Innkeepers and hotels
Junk dealers
Persons renting or supplying laundered towels, aprons, coats, or linens (not including diapers)
Persons furnishing diaper service
Persons or other entities operating power or steam laundries
Self-service laundries
Hand-power laundries
Exhibitions of feats of sleight of hand
Persons who sell or install lightning rods
Persons who sell or install lightning rods, though not as a primary business
Wholesale dealers of lumber and timber
Persons operating lumberyards
Persons operating machinery repair shops
Manicurists, hairdressers, etc.
Persons engaged in manufacturing, cleaning, or upholstering cushions, mattresses, pillows, or rugs
Persons engaged in the practice of medicine, chemistry, bacteriology, etc., except chemists employed full time by doctors or nonprofits and doctors who work full time at medical schools
Persons engaged in selling mimeographs, duplicating machines, dictaphones, teletypes, etc.
Persons engaged in iron ore mining
Persons who sell or erect monuments or tombstones (other than fraternal associations)
Persons operating transient moving picture shows (in tents or otherwise)
Persons operating moving picture shows

Persons operating newsstands
Oculists, optometrists, and opticians
Osteopaths and chiropractors
Cold storage plants, packinghouses, and refrigerated warehouses
Pawnbrokers
Itinerant vendors and peddlers who sell drugs, ointments, or medicines claimed to treat or cure diseases
Itinerant vendors and peddlers who sell spices, toilet articles, and household remedies, etc.
Photographers and photograph galleries
Transient or traveling photographers with no fixed place of business
Persons who sell, rent, or deliver pianos, organs, and small musical instruments
General merchants who sell small musical instruments
Pig iron storage operators
Persons dealing in handguns, knives, and other similar weapons
Persons and other entities that sell, store, use, or otherwise consume packages of playing cards
Plumbers, steam fitters, tin shop operators, etc.
Pool tables in commercial establishments
Owners of racetracks, athletic fields, etc., charging more than $0.50 admission
Persons who sell radios, etc.
Real estate brokers and agents dealing in realty within the State
Real estate brokers and agents dealing in realty outside the State
Restaurants, cafes, cafeterias, etc.
Roadhouses, nightclubs, and dance halls
Sandwich shops, barbecue stands, and hamburger or hot dog stands
Persons and corporations who operate sawmills, heading mills, or stave mills

Scientists, naturopaths, and chiropodists
Persons selling or delivering sewing machines
Operators of shooting galleries
Persons dealing in shotguns, rifles, and ammunition for such weapons
Skating rink operators
Soliciting brokers
Persons selling eyeglasses, other than nonprescription sunglasses
Stock and bond brokers
Operators of street fairs or carnivals
Owners, conductors, and people in charge of railroad supply cars from which goods are sold
Operators of syrup or sugar factories, plants, or refineries
Persons engaged in conducting a theater, vaudeville, or variety show or other performance
Ticket scalpers
Persons operating public tourist camps
Dealers in tractors, road machinery, or trailers
Persons who issue or sell trading stamps or similar certificates
Persons transferring freight
Transient dealers
Persons operating transient theatrical and vaudeville shows
Transient vendors and peddlers, traveling by animal or using a vehicle other than a motor vehicle
Persons operating turpentine stills
Persons and other entities operating vending machines
Persons and other entities engaged in the operation of veneer mills or any other factories where lumber or timber is made into a finished product
Veterinary surgeons
Persons operating warehouses or storage yards
Persons who purchase and receive or collect grease and animal byproducts for rendering or recycling
Persons operating public utilities

Persons and other entities operating freight lines or equipment companies (*i. e.*, by rail)
Railroad operators
Persons operating "express" shipping companies
Financial institutions

MARYLAND *v.* DYSON

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 98–1062. Decided June 21, 1999

After receiving a tip from a reliable informant, sheriff's deputies stopped and searched respondent's vehicle and found 23 grams of cocaine in the trunk. The Court of Special Appeals reversed his drug conviction, holding that in order for the automobile exception to the Fourth Amendment's warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the car, but also a separate finding of exigency precluding the police from obtaining a warrant.

Held: The automobile exception does not require a separate finding of exigency in addition to a finding of probable cause. This Court's established precedent makes clear that in cases where there was probable cause to search a vehicle, a search is not unreasonable if based on facts that would justify issuing a warrant, even though a warrant has not been actually obtained. *E. g.*, *United States* v. *Ross*, 456 U. S. 798, 809. Here, the lower court found "abundant probable cause" that the car contained contraband, which alone satisfies the warrant requirement's automobile exception.

Certiorari granted; 122 Md. App. 413, 712 A. 2d 573, reversed.

PER CURIAM.

In this case, the Maryland Court of Special Appeals held that the Fourth Amendment requires police to obtain a search warrant before searching a vehicle which they have probable cause to believe contains illegal drugs. Because this holding rests upon an incorrect interpretation of the automobile exception to the Fourth Amendment's warrant requirement, we grant the petition for certiorari and reverse.

At 11 a.m. on the morning of July 2, 1996, a St. Mary's County (Maryland) Sheriff's Deputy received a tip from a reliable confidential informant that respondent had gone to New York to buy drugs, and would be returning to Maryland in a rented red Toyota, license number DDY 787, later that day with a large quantity of cocaine. The deputy investi-

gated the tip and found that the license number given to him by the informant belonged to a red Toyota Corolla that had been rented to respondent, who was a known drug dealer in St. Mary's County. When respondent returned to St. Mary's County in the rented car at 1 a.m. on July 3, the deputies stopped and searched the vehicle, finding 23 grams of crack cocaine in a duffel bag in the trunk. Respondent was arrested, tried, and convicted of conspiracy to possess cocaine with intent to distribute. He appealed, arguing that the trial court had erroneously denied his motion to suppress the cocaine on the alternative grounds that the police lacked probable cause, or that even if there was probable cause, the warrantless search violated the Fourth Amendment because there was sufficient time after the informant's tip to obtain a warrant.

The Maryland Court of Special Appeals reversed, 122 Md. App. 413, 712 A. 2d 573 (1998), holding that in order for the automobile exception to the warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the automobile, but also a separate finding of exigency precluding the police from obtaining a warrant. *Id.*, at 424, 712 A. 2d, at 578. Applying this rule to the facts of the case, the Court of Special Appeals concluded that although there was "abundant probable cause," the search violated the Fourth Amendment because there was no exigency that prevented or even made it significantly difficult for the police to obtain a search warrant. *Id.*, at 426, 712 A. 2d, at 579. The Maryland Court of Appeals denied certiorari. 351 Md. 287, 718 A. 2d 235 (1998). We grant certiorari and now reverse.

The Fourth Amendment generally requires police to secure a warrant before conducting a search. *California* v. *Carney*, 471 U. S. 386, 390–391 (1985). As we recognized nearly 75 years ago in *Carroll* v. *United States*, 267 U. S. 132, 153 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency re-

quirement. We made this clear in *United States* v. *Ross*, 456 U. S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.) In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania* v. *Labron*, 518 U. S. 938 (1996) *(per curiam)*, we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.*, at 940.

In this case, the Court of Special Appeals found that there was "abundant probable cause" that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment's warrant requirement, a conclusion correctly reached by the trial court when it denied respondent's motion to suppress. The holding of the Court of Special Appeals that the "automobile exception" requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron*. We therefore grant the petition for writ of certiorari and reverse the judgment of the Court of Special Appeals.*

It is so ordered.

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*JUSTICE BREYER in dissent suggests that we should not summarily reverse a judgment in a criminal case, even though he agrees with this opinion as a matter of law. But to adopt that position would simply leave it in the hands of a respondent—who had obtained a lower court judgment manifestly wrong as a matter of federal constitutional law—to avoid summary reversal by the simple expedient of refusing to file a response. While we have on occasion appointed an attorney to file a brief as *amicus curiae* in a case where we have *granted* certiorari, in order to be sure that the argued case is fully briefed, we have never done so in cases which we have summarily reversed. The reason for this is that a summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I agree that the Court's *per curiam* opinion correctly states the law, but because respondent's counsel is not a member of this Court's bar and did not wish to become one, respondent has not filed a brief in opposition to the petition for certiorari. I believe we should not summarily reverse in a criminal case, irrespective of the merits, where the respondent is represented by a counsel unable to file a response, without first inviting an attorney to file a brief as *amicus curiae* in response to the petition for certiorari. For this reason, I dissent.

FERTEL-RUST *v.* MILWAUKEE COUNTY MENTAL HEALTH CENTER ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–8952. Decided June 21, 1999

Pro se petitioner seeks leave to proceed *in forma pauperis* on her certiorari petition. The instant petition brings her total number of frivolous filings to eight.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. She is barred from filing any further certiorari petitions in noncriminal cases unless she first pays the docketing fee and submits her petition in compliance with this Court's Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1.

Motion denied.

PER CURIAM.

Pro se petitioner Fertel-Rust seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request pursuant to Rule 39.8. Fertel-Rust is allowed until July 12, 1999, within which to pay the docketing fee required by Rule 38 and to submit her petition in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari from Fertel-Rust in noncriminal matters unless she pays the docketing fee required by Rule 38 and submits her petition in compliance with Rule 33.1.

Fertel-Rust has abused this Court's certiorari process. Four times in the last five years, we invoked Rule 39.8 to deny Fertel-Rust *in forma pauperis* status. See *Fertel-Rust* v. *Dane County Social Servs.*, 513 U. S. 1145 (1995); *Fertel-Rust* v. *Ambassador Hotel*, 513 U. S. 1013 (1994); *Fertel-Rust* v. *Milwaukee Police Dept.*, 513 U. S. 1013 (1994); *Fertel-Rust* v. *Milwaukee Police Dept.*, 513 U. S. 945 (1994). Before these four denials, Fertel-Rust had filed three petitions for certiorari, all of which were both patently frivolous and denied without recorded dissent. The instant petition

for certiorari thus brings Fertel-Rust's total number of frivolous filings to eight.

We enter the order barring prospective filings for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Fertel-Rust's abuse of the writ of certiorari has been in noncriminal cases, and so we limit our sanction accordingly. The order therefore will not prevent Fertel-Rust from petitioning to challenge criminal sanctions which might be imposed on her, nor will it prevent her from filing appropriate petitions for an extraordinary writ. The order, however, will allow this Court to devote its limited resources to the claims of petitioners who have not abused our process.

It is so ordered.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Cross* v. *Pelican Bay State Prison*, 526 U. S. 811, 812 (1999) (STEVENS, J., dissenting); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

SUTTON ET AL. *v.* UNITED AIR LINES, INC.

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

No. 97–1943. Argued April 28, 1999—Decided June 22, 1999

Petitioners, severely myopic twin sisters, have uncorrected visual acuity of 20/200 or worse, but with corrective measures, both function identically to individuals without similar impairments. They applied to respondent, a major commercial airline carrier, for employment as commercial airline pilots but were rejected because they did not meet respondent's minimum requirement of uncorrected visual acuity of 20/100 or better. Consequently, they filed suit under the Americans with Disabilities Act of 1990 (ADA), which prohibits covered employers from discriminating against individuals on the basis of their disabilities. Among other things, the ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more . . . major life activities," 42 U. S. C. § 12102(2)(A), or as "being regarded as having such an impairment," § 12102(2)(C). The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. The court held that petitioners were not actually disabled under subsection (A) of the disability definition because they could fully correct their visual impairments. The court also determined that petitioners were not "regarded" by respondent as disabled under subsection (C) of this definition. Petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job, global airline pilot. These allegations were insufficient to state a claim that petitioners were regarded as substantially limited in the major life activity of working. Employing similar logic, the Tenth Circuit affirmed.

Held: Petitioners have not alleged that they are "disabled" within the ADA's meaning. Pp. 477–494.

(a) No agency has been delegated authority to interpret the term "disability" as it is used in the ADA. The EEOC has, nevertheless, issued regulations that, among other things, define "physical impairment" to mean "[a]ny physiological disorder . . . affecting . . . special sense organs," "substantially limits" to mean "[u]nable to perform a major life activity that the average person in the general population can perform," and "[m]ajor [l]ife [a]ctivities [to] mea[n] functions such as . . . working." Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this

case, the Court has no occasion to consider what deference they are due, if any. The EEOC and the Justice Department have also issued interpretive guidelines providing that the determination whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as assistive or prosthetic devices. Although the parties dispute the guidelines' persuasive force, the Court has no need in this case to decide what deference is due. Pp. 477–480.

(b) Petitioners have not stated a § 12102(2)(A) claim that they have an actual physical impairment that substantially limits them in one or more major life activities. Three separate ADA provisions, read in concert, lead to the conclusion that the determination whether an individual is disabled should be made with reference to measures, such as eyeglasses and contact lenses, that mitigate the individual's impairment, and that the approach adopted by the agency guidelines is an impermissible interpretation of the ADA. First, because the phrase "substantially limits" appears in subsection (A) in the present indicative verb form, the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if corrective measures were not taken. Second, because subsection (A) requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the individual's "major life activities," the question whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon* v. *Abbott*, 524 U. S. 624, 641–642. The guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to this mandated individualized inquiry. The former would create a system in which persons would often be treated as members of a group having similar impairments, rather than as individuals. It could also lead to the anomalous result that courts and employers could not consider any negative side effects suffered by the individual resulting from the use of mitigating measures, even when those side effects are very severe. Finally, and critically, the congressional finding that 43 million Americans have one or more physical or mental disabilities, see § 12101(a)(1), requires the conclusion that Congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities. That group would include more than 160 million people. Because petitioners allege that with corrective measures their vision is 20/20 or better, they are not actually disabled under subsection (A). Pp. 481–489.

(c) Petitioners have also failed to allege properly that they are "regarded as," see § 12102(2)(C), having an impairment that "substantially limits" a major life activity, see § 12102(2)(A). Generally, these claims arise when an employer *mistakenly* believes that an individual has a substantially limiting impairment. To support their claims, petitioners allege that respondent has an impermissible vision requirement that is based on myth and stereotype and that respondent mistakenly believes that, due to their poor vision, petitioners are unable to work as "global airline pilots" and are thus substantially limited in the major life activity of working. Creating physical criteria for a job, without more, does not violate the ADA. The ADA allows employers to prefer some physical attributes over others, so long as those attributes do not rise to the level of substantially limiting impairments. An employer is free to decide that physical characteristics or medical conditions that are not impairments are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job. In addition, petitioners have not sufficiently alleged that they are regarded as substantially limited in the major life activity of working. When the major life activity under consideration is that of working, the ADA requires, at least, that one's ability to work be significantly reduced. The EEOC regulations similarly define "substantially limits" to mean significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The Court assumes without deciding that work is a major life activity and that this regulation is reasonable. It observes, however, that defining "major life activities" to include work has the potential to make the ADA circular. Assuming work is a major life activity, the Court finds that petitioners' allegations are insufficient because the position of global airline pilot is a single job. Indeed, a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor, are available to them. The Court also rejects petitioners' argument that they would be substantially limited in their ability to work if it is assumed that a substantial number of airlines have vision requirements similar to respondent's. This argument is flawed because it is not enough to say that if the otherwise permissible physical criteria or preferences of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*. Rather, an employer's physical criteria are permissible so long as they do not cause the employer to make an employment decision based on an impairment, real or imagined, that it regards as *substantially limiting* a major

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life activity. Petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that their vision substantially limits them. Pp. 489–494.

130 F. 3d 893, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. GINSBURG, J., filed a concurring opinion, *post,* p. 494. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post,* p. 495. BREYER, J., filed a dissenting opinion, *post,* p. 513.

Van Aaron Hughes argued the cause for petitioners. With him on the briefs were *Tucker K. Trautman* and *Shawn D. Mitchell.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. On the briefs were *Solicitor General Waxman, Acting Assistant Attorney General Lee, Deputy Solicitor General Underwood, James A. Feldman, Jessica Dunsay Silver, Seth M. Galanter, Philip B. Sklover,* and *Carolyn L. Wheeler.*

Roy T. Englert, Jr., argued the cause for respondent. With him on the brief were *Lisa Hogan* and *Patrick F. Carrigan.**

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*Briefs of *amici curiae* urging reversal were filed for AIDS Action et al. by *Claudia Center* and *Guy Wallace;* for the American Civil Liberties Union by *Louis M. Bograd, Chai R. Feldblum, Steven R. Shapiro,* and *Matthew A. Coles;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, Marsha S. Berzon,* and *Laurence Gold;* and for the National Employment Lawyers Association by *Gary Phelan* and *Paula A. Brantner.*

Briefs of *amici curiae* urging affirmance were filed for the Air Transport Association of America, Inc., by *John J. Gallagher, Neal D. Mollen,* and *Margaret H. Spurlin;* and for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman, Corrie L. Fischel, Stephen A. Bokat, Robin S. Conrad,* and *J. Walker Henry.*

Briefs of *amici curiae* were filed for LPA, Inc., by *Daniel V. Yager;* for the Society for Human Resource Management by *Peter J. Petesch, Thomas J. Walsh, Jr., Timothy S. Bland,* and *David S. Harvey, Jr.;* and for Senator Tom Harkin et al. by *Arlene B. Mayerson.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 328, 42 U. S. C. § 12101 *et seq.*, prohibits certain employers from discriminating against individuals on the basis of their disabilities. See § 12112(a). Petitioners challenge the dismissal of their ADA action for failure to state a claim upon which relief can be granted. We conclude that the complaint was properly dismissed. In reaching that result, we hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses. In addition, we hold that petitioners failed to allege properly that respondent "regarded" them as having a disability within the meaning of the ADA.

I

Petitioners' amended complaint was dismissed for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). Accordingly, we accept the allegations contained in their complaint as true for purposes of this case. See *United States* v. *Gaubert*, 499 U. S. 315, 327 (1991).

Petitioners are twin sisters, both of whom have severe myopia. Each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but "[w]ith the use of corrective lenses, each . . . has vision that is 20/20 or better." App. 23. Consequently, without corrective lenses, each "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores," *id.*, at 24, but with corrective measures, such as glasses or contact lenses, both "function identically to individuals without a similar impairment," *ibid.*

In 1992, petitioners applied to respondent for employment as commercial airline pilots. They met respondent's basic age, education, experience, and Federal Aviation Adminis-

tration certification qualifications. After submitting their applications for employment, both petitioners were invited by respondent to an interview and to flight simulator tests. Both were told during their interviews, however, that a mistake had been made in inviting them to interview because petitioners did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. Due to their failure to meet this requirement, petitioners' interviews were terminated, and neither was offered a pilot position.

In light of respondent's proffered reason for rejecting them, petitioners filed a charge of disability discrimination under the ADA with the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue letter, petitioners filed suit in the United States District Court for the District of Colorado, alleging that respondent had discriminated against them "on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability" in violation of the ADA. App. 26. Specifically, petitioners alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such an impairment, see *id.*, at 23–26, and are thus disabled under the Act.

The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. See Civ. A. No. 96–5–121 (Aug. 28, 1996), App. to Pet. for Cert. A–27. Because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA. *Id.*, at A–32 to A–36. The court also determined that petitioners had not made allegations sufficient to support their claim that they were "regarded" by respondent as having an impairment that substantially limits a major life activity. *Id.*, at A–36 to A–37. The court observed that "[t]he statutory reference to a substantial limi-

tation indicates . . . that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." *Ibid.* But petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job, global airline pilot. Consequently, the court held that petitioners had not stated a claim that they were regarded as substantially limited in the major life activity of working. Employing similar logic, the Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. 130 F. 3d 893 (1997).

The Tenth Circuit's decision is in tension with the decisions of other Courts of Appeals. See, *e. g.*, *Bartlett* v. *New York State Bd. of Law Examiners*, 156 F. 3d 321, 329 (CA2 1998) (holding self-accommodations cannot be considered when determining a disability), cert. pending, No. 98–1285; *Baert* v. *Euclid Beverage, Ltd.*, 149 F. 3d 626, 629–630 (CA7 1998) (holding disabilities should be determined without reference to mitigating measures); *Matczak* v. *Frankford Candy & Chocolate Co.*, 136 F. 3d 933, 937–938 (CA3 1997) (same); *Arnold* v. *United Parcel Service, Inc.*, 136 F. 3d 854, 859–866 (CA1 1998) (same); see also *Washington* v. *HCA Health Servs. of Texas, Inc.*, 152 F. 3d 464, 470–471 (CA5 1998) (holding that only some impairments should be evaluated in their uncorrected state), cert. pending, No. 98–1365. We granted certiorari, 525 U. S. 1063 (1999), and now affirm.

II

The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. Specifically, it provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges

of employment." 42 U. S. C. § 12112(a); see also § 12111(2) ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee"). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). In turn, a "disability" is defined as:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." § 12102(2).

Accordingly, to fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C)).

The parties agree that the authority to issue regulations to implement the Act is split primarily among three Government agencies. According to the parties, the EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, §§ 12111–12117, pursuant to § 12116 ("Not later than 1 year after [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5"). The Attorney General is granted authority to issue regulations with respect to Title II, subtitle A, §§ 12131–12134, which relates to public services. See § 12134 ("Not later than 1 year after [the date of enactment of this Act], the Attorney General shall promulgate regulations in an accessible format that implement this part"). Finally, the Secretary of Transportation has authority to issue regulations pertaining to the transportation provisions of Titles II and III. See § 12149(a)

("Not later than 1 year after [the date of enactment of this Act], the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title)"); § 12164 (substantially same); § 12186(a)(1) (substantially same); § 12143(b) ("Not later than one year after [the date of enactment of this Act], the Secretary shall issue final regulations to carry out this section"). See also § 12204 (granting authority to the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design). Moreover, each of these agencies is authorized to offer technical assistance regarding the provisions they administer. See § 12206(c)(1) ("Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility").

No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101–12102, which fall outside Titles I–V. Most notably, no agency has been delegated authority to interpret the term "disability." § 12102(2). JUSTICE BREYER's contrary, imaginative interpretation of the Act's delegation provisions, see *post*, at 514–515 (dissenting opinion), is belied by the terms and structure of the ADA. The EEOC has, nonetheless, issued regulations to provide additional guidance regarding the proper interpretation of this term. After restating the definition of disability given in the statute, see 29 CFR § 1630.2(g) (1998), the EEOC regulations define the three elements of disability: (1) "physical or mental impairment," (2) "substantially limits," and (3) "major life activities." See §§ 1630.2(h)–(j). Under the regulations, a "physical impairment" includes "[a]ny physiological disorder, or condition, cosmetic disfigurement,

or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." § 1630.2(h)(1). The term "substantially limits" means, among other things, "[u]nable to perform a major life activity that the average person in the general population can perform"; or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." § 1630.2(j). Finally, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 1630.2(i). Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.

The agencies have also issued interpretive guidelines to aid in the implementation of their regulations. For instance, at the time that it promulgated the above regulations, the EEOC issued an "Interpretive Guidance," which provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 CFR pt. 1630, App. § 1630.2(j) (1998) (describing § 1630.2(j)). The Department of Justice has issued a similar guideline. See 28 CFR pt. 35, App. A, § 35.104 ("The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services"); pt. 36, App. B, § 36.104 (same). Although the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due.

III

With this statutory and regulatory framework in mind, we turn first to the question whether petitioners have stated a claim under subsection (A) of the disability definition, that is, whether they have alleged that they possess a physical impairment that substantially limits them in one or more major life activities. See 42 U. S. C. § 12102(2)(A). Because petitioners allege that with corrective measures their vision "is 20/20 or better," App. 23, they are not actually disabled within the meaning of the Act if the "disability" determination is made with reference to these measures. Consequently, with respect to subsection (A) of the disability definition, our decision turns on whether disability is to be determined with or without reference to corrective measures.

Petitioners maintain that whether an impairment is substantially limiting should be determined without regard to corrective measures. They argue that, because the ADA does not directly address the question at hand, the Court should defer to the agency interpretations of the statute, which are embodied in the agency guidelines issued by the EEOC and the Department of Justice. These guidelines specifically direct that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures. See 29 CFR pt. 1630, App. § 1630.2(j); 28 CFR pt. 35, App. A § 35.104 (1998); 28 CFR pt. 36, App. B § 36.104.

Respondent, in turn, maintains that an impairment does not substantially limit a major life activity if it is corrected. It argues that the Court should not defer to the agency guidelines cited by petitioners because the guidelines conflict with the plain meaning of the ADA. The phrase "substantially limits one or more major life activities," it explains, requires that the substantial limitations actually and presently exist. Moreover, respondent argues, disregarding mitigating measures taken by an individual defies the statu-

tory command to examine the effect of the impairment on the major life activities "of such individual." And even if the statute is ambiguous, respondent claims, the guidelines' directive to ignore mitigating measures is not reasonable, and thus this Court should not defer to it.

We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act. JUSTICE STEVENS relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. See *post*, at 499–501 (dissenting opinion). Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.

Three separate provisions of the ADA, read in concert, lead us to this conclusion. The Act defines a "disability" as "a physical or mental impairment that *substantially limits* one or more of the major life activities" of an individual. § 12102(2)(A) (emphasis added). Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "sub-

stantially limits" a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.

The definition of disability also requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon* v. *Abbott*, 524 U. S. 624, 641–642 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA); 29 CFR pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual").

The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than

as individuals. This is contrary to both the letter and the spirit of the ADA.

The guidelines approach could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe. See, *e. g.*, Johnson, Antipsychotics: Pros and Cons of Antipsychotics, RN (Aug. 1997) (noting that antipsychotic drugs can cause a variety of adverse effects, including neuroleptic malignant syndrome and painful seizures); Liver Risk Warning Added to Parkinson's Drug, FDA Consumer (Mar. 1, 1999) (warning that a drug for treating Parkinson's disease can cause liver damage); Curry & Kulling, Newer Antiepileptic Drugs, American Family Physician (Feb. 1, 1998) (cataloging serious negative side effects of new antiepileptic drugs). This result is also inconsistent with the individualized approach of the ADA.

Finally, and critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." § 12101(a)(1). This figure is inconsistent with the definition of disability pressed by petitioners.

Although the exact source of the 43 million figure is not clear, the corresponding finding in the 1988 precursor to the ADA was drawn directly from a report prepared by the National Council on Disability. See Burgdorf, The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. Civ. Rights-Civ. Lib. L. Rev. 413, 434, n. 117 (1991) (reporting, in an article authored by the drafter of the original ADA bill introduced in Congress in 1988, that the report was the source for a

figure of 36 million disabled persons quoted in the versions of the bill introduced in 1988). That report detailed the difficulty of estimating the number of disabled persons due to varying operational definitions of disability. National Council on Disability, Toward Independence 10 (1986). It explained that the estimates of the number of disabled Americans ranged from an overinclusive 160 million under a "health conditions approach," which looks at all conditions that impair the health or normal functional abilities of an individual, to an underinclusive 22.7 million under a "work disability approach," which focuses on individuals' reported ability to work. *Id.*, at 10–11. It noted that "a figure of 35 or 36 million [was] the most commonly quoted estimate." *Id.*, at 10. The 36 million number included in the 1988 bill's findings thus clearly reflects an approach to defining disabilities that is closer to the work disabilities approach than the health conditions approach.

This background also provides some clues to the likely source of the figure in the findings of the 1990 Act. Roughly two years after issuing its 1986 report, the National Council on Disability issued an updated report. See On the Threshold of Independence (1988). This 1988 report settled on a more concrete definition of disability. It stated that 37.3 million individuals have "difficulty performing one or more basic physical activities," including "seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed." *Id.*, at 19. The study from which it drew this data took an explicitly functional approach to evaluating disabilities. See U. S. Dept. of Commerce, Bureau of Census, Disability, Functional Limitation, and Health Insurance Coverage: 1984/85, p. 2 (1986). It measured 37.3 million persons with a "functional limitation" on performing certain basic activities when using, as the questionnaire put it, "special aids," such as glasses or hearing aids, if the person usually used such aids. *Id.*, at 1, 47. The number of dis-

abled provided by the study and adopted in the 1988 report, however, includes only noninstitutionalized persons with physical disabilities who are over age 15. The 5.7 million gap between the 43 million figure in the ADA's findings and the 37.3 million figure in the report can thus probably be explained as an effort to include in the findings those who were excluded from the National Council figure. See, *e. g.*, National Institute on Disability and Rehabilitation Research, Data on Disability from the National Health Interview Survey 1983–1985, pp. 61–62 (1988) (finding approximately 943,000 noninstitutionalized persons with an activity limitation due to mental illness; 947,000 noninstitutionalized persons with an activity limitation due to mental retardation; 1,900,000 noninstitutionalized persons under 18 with an activity limitation); U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 106 (1989) (Table 168) (finding 1,553,000 resident patients in nursing and related care facilities (excluding hospital-based nursing homes) in 1986).

Regardless of its exact source, however, the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not "disabled" within the meaning of the ADA. The estimate is consistent with the numbers produced by studies performed during this same time period that took a similar functional approach to determining disability. For instance, Mathematica Policy Research, Inc., drawing on data from the National Center for Health Statistics, issued an estimate of approximately 31.4 million civilian noninstitutionalized persons with "chronic activity limitation status" in 1979. Digest of Data on Persons with Disabilities 25 (1984). The 1989 Statistical Abstract offered the same estimate based on the same data, as well as an estimate of 32.7 million noninstitutionalized persons with "activity limitation" in 1985. Statistical Abstract, *supra*, at 115 (Table 184). In both cases, individuals with "activity limitations" were those who,

relative to their age-sex group could not conduct "usual" activities: *e. g.*, attending preschool, keeping house, or living independently. See National Center for Health Statistics, U. S. Dept. of Health and Human Services, Vital and Health Statistics, Current Estimates from the National Health Interview Survey, 1989, Series 10, pp. 7–8 (1990).

By contrast, nonfunctional approaches to defining disability produce significantly larger numbers. As noted above, the 1986 National Council on Disability report estimated that there were over 160 million disabled under the "health conditions approach." Toward Independence, *supra*, at 10; see also Mathematica Policy Research, *supra*, at 3 (arriving at similar estimate based on same Census Bureau data). Indeed, the number of people with vision impairments alone is 100 million. See National Advisory Eye Council, U. S. Dept. of Health and Human Services, Vision Research—A National Plan: 1999–2003, p. 7 (1998) ("[M]ore than 100 million people need corrective lenses to see properly"). "It is estimated that more than 28 million Americans have impaired hearing." National Institutes of Health, National Strategic Research Plan: Hearing and Hearing Impairment v (1996). And there were approximately 50 million people with high blood pressure (hypertension). Tindall, Stalking a Silent Killer; Hypertension, Business & Health 37 (August 1998) ("Some 50 million Americans have high blood pressure").

Because it is included in the ADA's text, the finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term "disability." Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

The dissents suggest that viewing individuals in their corrected state will exclude from the definition of "disab[led]"

those who use prosthetic limbs, see *post,* at 497–498 (opinion of STEVENS, J.), *post,* at 513 (opinion of BREYER, J.), or take medicine for epilepsy or high blood pressure, see *post,* at 507, 509 (opinion of STEVENS, J.). This suggestion is incorrect. The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection (A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited. Alternatively, one whose high blood pressure is "cured" by medication may be regarded as disabled by a covered entity, and thus disabled under subsection (C) of the definition. The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.

Applying this reading of the Act to the case at hand, we conclude that the Court of Appeals correctly resolved the issue of disability in respondent's favor. As noted above, petitioners allege that with corrective measures, their visual acuity is 20/20, App. 23, Amended Complaint ¶ 36, and that they "function identically to individuals without a similar impairment," *id.,* at 24, Amended Complaint ¶ 37e. In addition, petitioners concede that they "do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment." Brief for Petitioners 9, n. 11. Accordingly, because we decide that disability under the Act is to be determined with reference to corrective measures, we agree with the courts below that petitioners have not stated

a claim that they are substantially limited in any major life activity.

IV

Our conclusion that petitioners have failed to state a claim that they are actually disabled under subsection (A) of the disability definition does not end our inquiry. Under subsection (C), individuals who are "regarded as" having a disability are disabled within the meaning of the ADA. See § 12102(2)(C). Subsection (C) provides that having a disability includes "being regarded as having," § 12102(2)(C), "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," § 12102(2)(A). There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often "resul[t] from stereotypic assumptions not truly indicative of . . . individual ability." See 42 U. S. C. § 12101(7). See also *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 284 (1987) ("By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment"); 29 CFR pt. 1630, App. § 1630.2(l) (explaining that the purpose of the regarded as prong is to cover individuals "re-

jected from a job because of the 'myths, fears and stereotypes' associated with disabilities").

There is no dispute that petitioners are physically impaired. Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing. They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working. To support this claim, petitioners allege that respondent has a vision requirement that is allegedly based on myth and stereotype. Further, this requirement substantially limits their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which they argue is a "class of employment." See App. 24–26, Amended Complaint ¶ 38. In reply, respondent argues that the position of global airline pilot is not a class of jobs and therefore petitioners have not stated a claim that they are regarded as substantially limited in the major life activity of working.

Standing alone, the allegation that respondent has a vision requirement in place does not establish a claim that respondent regards petitioners as substantially limited in the major life activity of working. See Post-Argument Brief for Respondent 2–3 (advancing this argument); Post-Argument Brief for United States et al. as *Amici Curiae* 5–6 ("[U]nder the EEOC's regulations, an employer may make employment decisions based on physical characteristics"). By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to

decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.

Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as *substantially limiting* their ability to work. The ADA does not define "substantially limits," but "substantially" suggests "considerable" or "specified to a large degree." See Webster's Third New International Dictionary 2280 (1976) (defining "substantially" as "in a substantial manner" and "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main"); see also 17 Oxford English Dictionary 66–67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions"). The EEOC has codified regulations interpreting the term "substantially limits" in this manner, defining the term to mean "[u]nable to perform" or "[s]ignificantly restricted." See 29 CFR §§ 1630.2(j)(1)(i), (ii) (1998).

When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term "substantially limits" when referring to the major life activity of working:

> "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." § 1630.2(j)(3)(i).

The EEOC further identifies several factors that courts should consider when determining whether an individual is

substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." §§ 1630.2(j)(3)(ii)(A), (B). To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Because the parties accept that the term "major life activities" includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." Tr. of Oral Arg. in *School Bd. of Nassau Co.* v. *Arline*, O. T. 1986, No. 85–1277, p. 15 (argument of Solicitor General). Indeed, even the EEOC has expressed reluctance to define "major life activities" to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* "[i]f an individual is not substantially limited with respect to *any other* major life activity." 29 CFR pt. 1630, App. § 1630.2(j) (1998) (emphasis added) ("If an individual is substantially limited in *any other* major life activity, no determination should be made as to whether the individual is substantially limited in working" (emphasis added)).

Assuming without deciding that working is a major life activity and that the EEOC regulations interpreting the term "substantially limits" are reasonable, petitioners have

failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that respondent regards their poor vision as precluding them from holding positions as a "global airline pilot." See App. 25–26, Amended Complaint ¶ 38f. Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment. See 29 CFR § 1630.2(j)(3)(i) (1998) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working"). Indeed, there are a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor to name a few, that are available to them. Even under the EEOC's Interpretative Guidance, to which petitioners ask us to defer, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline copilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 CFR pt. 1630, App. § 1630.2 (1998).

Petitioners also argue that if one were to assume that a substantial number of airline carriers have similar vision requirements, they would be substantially limited in the major life activity of working. See Brief for Petitioners 44–45. Even assuming for the sake of argument that the adoption of similar vision requirements by other carriers would represent a substantial limitation on the major life activity of working, the argument is nevertheless flawed. It is not enough to say that if the physical criteria of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it *would* limit a person's employment opportunities in a substantial way *if* it were

adopted by a substantial number of employers. Because petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them, we agree with the decision of the Court of Appeals affirming the dismissal of petitioners' claim that they are regarded as disabled.

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

JUSTICE GINSBURG, concurring.

I agree that 42 U. S. C. § 12102(2)(A) does not reach the legions of people with correctable disabilities. The strongest clues to Congress' perception of the domain of the Americans with Disabilities Act of 1990 (ADA), as I see it, are legislative findings that "some 43,000,000 Americans have one or more physical or mental disabilities," § 12101(a)(1), and that "individuals with disabilities are a discrete and insular minority," persons "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society," § 12101(a)(7). These declarations are inconsistent with the enormously embracing definition of disability petitioners urge. As the Court demonstrates, see *ante*, at 483–487, the inclusion of correctable disabilities within the ADA's domain would extend the Act's coverage to far more than 43 million people. And persons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination. In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a "discrete and insular minority." I do not mean to suggest that any of the constitutional presumptions or doctrines that may apply to "discrete and insular" minorities in other contexts are relevant here; there is no con-

stitutional dimension to this case. Congress' use of the phrase, however, is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

When it enacted the Americans with Disabilities Act of 1990 (ADA or Act), Congress certainly did not intend to require United Air Lines to hire unsafe or unqualified pilots. Nor, in all likelihood, did it view every person who wears glasses as a member of a "discrete and insular minority." Indeed, by reason of legislative myopia it may not have foreseen that its definition of "disability" might theoretically encompass, not just "some 43,000,000 Americans," 42 U. S. C. § 12101(a)(1), but perhaps two or three times that number. Nevertheless, if we apply customary tools of statutory construction, it is quite clear that the threshold question whether an individual is "disabled" within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication. One might reasonably argue that the general rule should not apply to an impairment that merely requires a nearsighted person to wear glasses. But I believe that, in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction.

There are really two parts to the question of statutory construction presented by this case. The first question is whether the determination of disability for people that Congress unquestionably intended to cover should focus on their unmitigated or their mitigated condition. If the correct answer to that question is the one provided by eight of the

nine Federal Courts of Appeals to address the issue,[1] and by all three of the Executive agencies that have issued regulations or interpretive bulletins construing the statute—namely, that the statute defines "disability" without regard to ameliorative measures—it would still be necessary to decide whether that general rule should be applied to what might be characterized as a "minor, trivial impairment." *Arnold* v. *United Parcel Service, Inc.*, 136 F. 3d 854, 866, n. 10 (CA1 1998) (holding that unmitigated state is determinative but suggesting that it "might reach a different result" in a case in which "a simple, inexpensive remedy," such as eyeglasses, is available "that can provide total and relatively permanent control of all symptoms"). See also *Washington* v. *HCA Health Servs. of Texas*, 152 F. 3d 464 (CA5 1998) (same), cert. pending, No. 98–1365. I shall therefore first consider impairments that Congress surely had in mind before turning to the special facts of this case.

I

"As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 608 (1979). Congress

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[1] See *Bartlett* v. *New York State Bd. of Law Examiners*, 156 F. 3d 321, 329 (CA2 1998), cert. pending, No. 98–1285; *Washington* v. *HCA Health Servs. of Texas*, 152 F. 3d 464, 470–471 (CA5 1998), cert. pending, No. 98–1365; *Baert* v. *Euclid Beverage, Ltd.*, 149 F. 3d 626, 629–630 (CA7 1998); *Arnold* v. *United Parcel Service, Inc.*, 136 F. 3d 854, 859–866 (CA1 1998); *Matcza* v. *Frankford Candy & Chocolate Co.*, 136 F. 3d 933, 937–938 (CA3 1997); *Doane* v. *Omaha*, 115 F. 3d 624, 627 (CA8 1997); *Harris* v. *H & W Contracting Co.*, 102 F. 3d 516, 520–521 (CA11 1996); *Holihan* v. *Lucky Stores, Inc.*, 87 F. 3d 362, 366 (CA9 1996). While a Sixth Circuit decision could be read as expressing doubt about the majority rule, see *Gilday* v. *Mecosta County*, 124 F. 3d 760, 766–768 (1997) (Kennedy, J., concurring in part and dissenting in part); *id.*, at 768 (Guy, J., concurring in part and dissenting in part), the sole holding contrary to this line of authority is the Tenth Circuit's opinion that the Court affirms today.

expressly provided that the "purpose of [the ADA is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U. S. C. § 12101(b)(1). To that end, the ADA prohibits covered employers from "discriminat[ing] against a qualified individual *with a disability* because of the disability" in regard to the terms, conditions, and privileges of employment. 42 U. S. C. § 12112(a) (emphasis added).

The Act's definition of disability is drawn "almost verbatim" from the Rehabilitation Act of 1973, 29 U. S. C. § 706(8)(B). *Bragdon* v. *Abbott*, 524 U. S. 624, 631 (1998). The ADA's definition provides:

> "The term 'disability' means, with respect to an individual—
>
> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U. S. C. § 12102(2).

The three parts of this definition do not identify mutually exclusive, discrete categories. On the contrary, they furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are covered by the Act.

An example of a rather common condition illustrates this point: There are many individuals who have lost one or more limbs in industrial accidents, or perhaps in the service of their country in places like Iwo Jima. With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato. If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as dis-

abilities. Similarly, if the statute were solely concerned with whether these individuals viewed themselves as disabled—or with whether a majority of employers regarded them as unable to perform most jobs—many of these individuals would lack statutory protection from discrimination based on their prostheses.

The sweep of the statute's three-pronged definition, however, makes it pellucidly clear that Congress intended the Act to cover such persons. The fact that a prosthetic device, such as an artificial leg, has restored one's ability to perform major life activities surely cannot mean that subsection (A) of the definition is inapplicable. Nor should the fact that the individual considers himself (or actually is) "cured," or that a prospective employer considers him generally employable, mean that subsections (B) or (C) are inapplicable. But under the Court's emphasis on "the present indicative verb form" used in subsection (A), *ante*, at 482, that subsection presumably would not apply. And under the Court's focus on the individual's "presen[t]—not potentia[l] or hypothetica[l]"—condition, *ibid.*, and on whether a person is "precluded from a broad range of jobs," *ante*, at 492, subsections (B) and (C) presumably would not apply.

In my view, when an employer refuses to hire the individual "because of" his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act. Subsection (B) of the definition, in fact, sheds a revelatory light on the question whether Congress was concerned only about the corrected or mitigated status of a person's impairment. If the Court is correct that "[a] 'disability' exists only where" a person's "present" or "actual" condition is substantially impaired, *ante*, at 482, there would be no reason to include in the protected class those who were once disabled but who are now fully recovered. Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impair-

ment that has since been completely cured. See *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 281 (1987). Still, if I correctly understand the Court's opinion, it holds that one who *continues to wear* a hearing aid that she has worn all her life might not be covered—fully cured impairments are covered, but merely treatable ones are not. The text of the Act surely does not require such a bizarre result.

The three prongs of the statute, rather, are most plausibly read together not to inquire into whether a person is currently "functionally" limited in a major life activity, but only into the existence of an impairment—present or past—that substantially limits, or did so limit, the individual before amelioration. This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.

To the extent that there may be doubt concerning the meaning of the statutory text, ambiguity is easily removed by looking at the legislative history. As then-JUSTICE REHNQUIST stated for the Court in *Garcia* v. *United States*, 469 U. S. 70 (1984): "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Id.*, at 76 (quoting *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969)). The Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures.

The ADA originated in the Senate. The Senate Report states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."

S. Rep. No. 101–116, p. 23 (1989). The Report further explained, in discussing the "regarded as" prong:

> "[An] important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation." *Id.*, at 24.

When the legislation was considered in the House of Representatives, its Committees reiterated the Senate's basic understanding of the Act's coverage, with one minor modification: They clarified that "correctable" or "controllable" disabilities were covered in the first definitional prong as well. The Report of the House Committee on the Judiciary states, in discussing the first prong, that, when determining whether an individual's impairment substantially limits a major life activity, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." H. R. Rep. No. 101–485, pt. III, p. 28 (1990). The Report continues that "a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test," *ibid.*, as is a person with poor hearing, "even if the hearing loss is corrected by the use of a hearing aid," *id.*, at 29.

The Report of the House Committee on Education and Labor likewise states that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." *Id.*, pt. II, at 52. To make matters perfectly plain, the Report adds:

> "For example, a person who is hard of hearing is substantially limited in the major life activity of hearing,

> *even though the loss may be corrected through the use of a hearing aid.* Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, *even if the effects of the impairment are controlled by medication.*" *Ibid.* (emphasis added).

All of the Reports, indeed, are replete with references to the understanding that the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly "correctable" with medication or treatment. See *id.*, at 74 (citing with approval *Straithe* v. *Department of Transportation*, 716 F. 2d 227 (CA3 1983), which held that an individual with poor hearing was "handicapped" under the Rehabilitation Act even though his hearing could be corrected with a hearing aid); H. R. Rep. No. 101–485, pt. III, at 51 ("[t]he term" disability includes "epilepsy, . . . heart disease, diabetes"); *id.*, pt. III, at 28 (listing same impairments); S. Rep. No. 101–116, at 22 (same).[2]

In addition, each of the three Executive agencies charged with implementing the Act has consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state. We have traditionally accorded respect to such views when, as here, the agencies "played a pivotal role in setting [the statutory] machinery in motion." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980) (brackets in original; internal quotation marks and

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[2] The House's decision to cover correctable impairments under subsection (A) of the statute seems, in retrospect, both deliberate and wise. Much of the structure of the House Reports is borrowed from the Senate Report; thus it appears that the House Committees consciously decided to move the discussion of mitigating measures. This adjustment was prudent because in a case in which an employer refuses, out of animus or fear, to hire an individual who has a condition such as epilepsy that the employer knows is controlled, it may be difficult to determine whether the employer is viewing the individual in her uncorrected state or "regards" her as substantially limited.

citation omitted). At the very least, these interpretations "constitute a body of experience and informed judgment to which [we] may properly resort" for additional guidance. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). See also *Bragdon*, 524 U. S., at 642 (invoking this maxim with regard to the Equal Employment Opportunity Commission's (EEOC) interpretation of the ADA).

The EEOC's Interpretive Guidance provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 CFR pt. 1630, App. § 1630.2(j) (1998). The EEOC further explains:

> "[A]n individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." *Ibid.*

The Department of Justice has reached the same conclusion. Its regulations provide that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 CFR pt. 35, App. A, § 35.104 (1998). The Department of Transportation has issued a regulation adopting this same definition of "disability." See 49 CFR pt. 37.3 (1998).

In my judgment, the Committee Reports and the uniform agency regulations merely confirm the message conveyed by the text of the Act—at least insofar as it applies to impairments such as the loss of a limb, the inability to hear, or any condition such as diabetes that is substantially limiting without medication. The Act generally protects individuals who have "correctable" substantially limiting impairments

from unjustified employment discrimination on the basis of those impairments. The question, then, is whether the fact that Congress was specifically concerned about protecting a class that included persons characterized as a "discrete and insular minority" and that it estimated that class to include "some 43,000,000 Americans" means that we should construe the term "disability" to exclude individuals with impairments that Congress probably did not have in mind.

II

The EEOC maintains that, in order to remain allegiant to the Act's structure and purpose, courts should always answer "the question whether an individual has a disability . . . without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment." Brief for United States et al. as *Amici Curiae* 6. "[T]here is nothing about poor vision," as the EEOC interprets the Act, "that would justify adopting a different rule in this case." *Ibid.*

If a narrow reading of the term "disability" were necessary in order to avoid the danger that the Act might otherwise force United to hire pilots who might endanger the lives of their passengers, it would make good sense to use the "43,000,000 Americans" finding to confine its coverage. There is, however, no such danger in this case. If a person is "disabled" within the meaning of the Act, she still cannot prevail on a claim of discrimination unless she can prove that the employer took action "because of" that impairment, 42 U. S. C. § 12112(a), and that she can, "with or without reasonable accommodation, . . . perform the essential functions" of the job of a commercial airline pilot. See § 12111(8). Even then, an employer may avoid liability if it shows that the criteria of having uncorrected visual acuity of at least 20/100 is "job-related and consistent with business necessity" or if such vision (even if correctable to 20/20) would pose a health or safety hazard. §§ 12113(a) and (b).

This case, in other words, is not about whether petitioners are genuinely qualified or whether they can perform the job of an airline pilot without posing an undue safety risk. The case just raises the threshold question whether petitioners are members of the ADA's protected class. It simply asks whether the ADA lets petitioners in the door in the same way as the Age Discrimination in Employment Act of 1967 does for every person who is at least 40 years old, see 29 U. S. C. § 631(a), and as Title VII of the Civil Rights Act of 1964 does for every single individual in the work force. Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person's control. Hence, this particular case, at its core, is about whether, assuming that petitioners can prove that they are "qualified," the airline has any duty to come forward with some legitimate explanation for refusing to hire them because of their uncorrected eyesight, or whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype.

I think it quite wrong for the Court to confine the coverage of the Act simply because an interpretation of "disability" that adheres to Congress' method of defining the class it intended to benefit may also provide protection for "significantly larger numbers" of individuals, *ante*, at 487, than estimated in the Act's findings. It has long been a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967). Congress sought, in enacting the ADA, to "provide a . . . comprehensive national mandate for the discrimination against individuals with disabilities." 42 U. S. C. § 12101(b)(1). The ADA, following the lead of the Rehabilitation Act before it, seeks to implement this mandate by encouraging employers "to replace . . . reflexive reactions to actual or perceived handicaps with actions based on medically sound judg-

ments." *Arline*, 480 U. S., at 284–285. Even if an authorized agency could interpret this statutory structure so as to pick and choose certain correctable impairments that Congress meant to exclude from this mandate, Congress surely has not authorized us to do so.

When faced with classes of individuals or types of discrimination that fall outside the core prohibitions of antidiscrimination statutes, we have consistently construed those statutes to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress' immediate concern in passing the legislation. Congress, for instance, focused almost entirely on the problem of discrimination against African-Americans when it enacted Title VII of the Civil Rights Act of 1964. See, *e. g.*, *Steelworkers* v. *Weber*, 443 U. S. 193, 202–203 (1979). But that narrow focus could not possibly justify a construction of the statute that excluded Hispanic-Americans or Asian-Americans from its protection—or as we later decided (ironically enough, by relying on legislative history and according "great deference" to the EEOC's "interpretation"), Caucasians. See *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 279–280 (1976).

We unanimously applied this well-accepted method of interpretation last Term with respect to construing Title VII to cover claims of same-sex sexual harassment. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). We explained our holding as follows:

> "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions'

> of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." *Id.*, at 79–80.

This approach applies outside of the discrimination context as well. In *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229 (1989), we rejected the argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) should be construed to cover only "organized crime" because Congress included findings in the Act's preamble emphasizing only that problem. See Pub. L. 91–452 § 1, 84 Stat. 941. After surveying RICO's legislative history, we concluded that even though "[t]he occasion for Congress' action was the perceived need to combat organized crime, . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." 492 U. S., at 248.[3]

Under the approach we followed in *Oncale* and *H. J. Inc.*, visual impairments should be judged by the same standard as hearing impairments or any other medically controllable condition. The nature of the discrimination alleged is of the same character and should be treated accordingly.

Indeed, it seems to me eminently within the purpose and policy of the ADA to require employers who make hiring and firing decisions based on individuals' uncorrected vision to clarify why having, for example, 20/100 uncorrected vision

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[3] The one notable exception to our use of this method of interpretation occurred in the decision in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), in which the majority rejected an EEOC guideline and the heavy weight of authority in the federal courts of appeals in order to hold that Title VII did not prohibit discrimination on the basis of pregnancy-related conditions. Given the fact that Congress swiftly "overruled" that decision in the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U. S. C. § 2000e(k), I submit that the views expressed in the dissenting opinions in that case, 429 U. S., at 146 (opinion of Brennan, J.), and *id.*, at 160 (opinion of STEVENS, J.), should be followed today.

or better is a valid job requirement. So long as an employer explicitly makes its decision based on an impairment that in some condition is substantially limiting, it matters not under the structure of the Act whether that impairment is widely shared or so rare that it is seriously misunderstood. Either way, the individual has an impairment that is covered by the purpose of the ADA, and she should be protected against irrational stereotypes and unjustified disparate treatment on that basis.

I do not mean to suggest, of course, that the ADA should be read to prohibit discrimination on the basis of, say, blue eyes, deformed fingernails, or heights of less than six feet. Those conditions, to the extent that they are even "impairments," do not substantially limit individuals in any condition and thus are different in kind from the impairment in the case before us. While not all eyesight that can be enhanced by glasses is substantially limiting, having 20/200 vision in one's better eye is, without treatment, a significant hindrance. Only two percent of the population suffers from such myopia.[4] Such acuity precludes a person from driving, shopping in a public store, or viewing a computer screen from a reasonable distance. Uncorrected vision, therefore, can be "substantially limiting" in the same way that unmedicated epilepsy or diabetes can be. Because Congress obviously intended to include individuals with the latter impairments in the Act's protected class, we should give petitioners the same protection.

III

The Court does not disagree that the logic of the ADA requires petitioners' visual impairments to be judged the same as other "correctable" conditions. Instead of including petitioners within the Act's umbrella, however, the Court

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[4] J. Roberts, Binocular Visual Acuity of Adults, United States, 1960–1962, p. 3 (National Center for Health Statistics, Series 11, No. 30, Department of Health and Welfare, 1968).

decides, in this opinion and its companion, to expel all individuals who, by using "measures [to] mitigate [their] impairment[s]," *ante*, at 475, are able to overcome substantial limitations regarding major life activities. The Court, for instance, holds that severe hypertension that is substantially limiting without medication is not a "disability," *Murphy* v. *United Parcel Service, Inc.*, *post*, p. 516, and—perhaps even more remarkably—indicates (directly contrary to the Act's legislative history, see *supra*, at 500–501) that diabetes that is controlled only with insulin treatments is not a "disability" either, *ante*, at 483–484.

The Court claims that this rule is necessary to avoid requiring courts to "speculate" about a person's "hypothetical" condition and to preserve the Act's focus on making "individualized inquiries" into whether a person is disabled. *Ante*, at 483. The Court also asserts that its rejection of the general rule of viewing individuals in their unmitigated state prevents distorting the scope of the Act's protected class to cover a "much higher number" of persons than Congress estimated in its findings. And, I suspect, the Court has been cowed by respondent's persistent argument that viewing all individuals in their unmitigated state will lead to a tidal wave of lawsuits. None of the Court's reasoning, however, justifies a construction of the Act that will obviously deprive many of Congress' intended beneficiaries of the legal protection it affords.

The agencies' approach, the Court repeatedly contends, "would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than individuals, [which] is both contrary to the letter and spirit of the ADA." *Ante*, at 483–484. The Court's mantra regarding the Act's "individualized approach," however, fails to support its holding. I agree that the letter and spirit of the ADA is designed to deter decisionmaking based on group stereotypes, but the agencies' interpretation of the Act does not lead to this result. Nor does it require courts to "speculate" about people's "hypothetical"

conditions. Viewing a person in her "unmitigated" state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition. It is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off.[5]

Ironically, it is the Court's approach that actually condones treating individuals merely as members of groups. That misdirected approach permits any employer to dismiss out of hand every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome their impairment. In much the same way, the Court's approach would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb.

Under the Court's reasoning, an employer apparently could not refuse to hire persons with these impairments who are substantially limited even with medication, see *ante*, at 487–488, but that group-based "exception" is more perverse still. Since the purpose of the ADA is to dismantle employment barriers based on society's accumulated myths

[5] For much the same reason, the Court's concern that the agencies' approach would "lead to the anomalous result" that courts would ignore "negative side effects suffered by an individual resulting from the use of mitigating measures," *ante*, at 484, is misplaced. It seems safe to assume that most individuals who take medication that itself substantially limits a major life activity would be substantially limited in some other way if they did not take the medication. The Court's examples of psychosis, Parkinson's disease, and epilepsy certainly support this presumption. To the extent that certain people may be substantially limited only when taking "mitigating measures," it might fairly be said that just as contagiousness is symptomatic of a disability because an individual's "contagiousness and her physical impairment each [may result] from the same underlying condition," *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 282 (1987), side effects are symptomatic of a disability because side effects and a physical impairment may flow from the same underlying condition.

and fears, see 42 U. S. C. § 12101(a)(8); *Arline,* 480 U. S., at 283–284, it is especially ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully able and employable. Insofar as the Court assumes that the majority of individuals with impairments such as prosthetic limbs or epilepsy will still be covered under its approach because they are substantially limited "notwithstanding the use of a corrective device," *ante,* at 488, I respectfully disagree as an empirical matter. Although it is of course true that some of these individuals are substantially limited in any condition, Congress enacted the ADA in part because such individuals are *not* ordinarily substantially limited in their mitigated condition, but rather are often the victims of "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U. S. C. § 12101(a)(7).

It has also been suggested that if we treat as "disabilities" impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue. The suggestion is misguided. Although vision is of critical importance for airline pilots, in most segments of the economy whether an employee wears glasses—or uses any of several other mitigating measures—is a matter of complete indifference to employers. It is difficult to envision many situations in which a qualified employee who needs glasses to perform her job might be fired—as the statute requires—"because of," § 12112, the fact that she cannot see well without them. Such a proposition would be ridiculous in the garden-variety case. On the other hand, if an accounting firm, for example, adopted a guideline refusing to hire any incoming accountant who has uncorrected vision of less than 20/100—or, by the same token, any person who is unable without medication to avoid having seizures—such a rule would seem to be the essence of invidious discrimination.

In this case the quality of petitioners' uncorrected vision is relevant only because the airline regards the ability to see

without glasses as an employment qualification for its pilots. Presumably it would not insist on such a qualification unless it has a sound business justification for doing so (an issue we do not address today). But if United regards petitioners as unqualified because they cannot see well without glasses, it seems eminently fair for a court also to use uncorrected vision as the basis for evaluating petitioners' life activity of seeing.

Under the agencies' approach, individuals with poor eyesight and other correctable impairments will, of course, be able to file lawsuits claiming discrimination on that basis. Yet all of those same individuals can already file employment discrimination claims based on their race, sex, or religion, and—provided they are at least 40 years old—their age. Congress has never seen this as reason to restrict classes of antidiscrimination coverage. Indeed, it is hard to believe that providing individuals with one more antidiscrimination protection will make any more of them file baseless or vexatious lawsuits. To the extent that the Court is concerned with requiring employers to answer in litigation for every employment practice that draws distinctions based on physical attributes, that anxiety should be addressed not in this case, but in one that presents an issue regarding employers' affirmative defenses.

In the end, the Court is left only with its tenacious grip on Congress' finding that "some 43,000,000 Americans have one or more physical or mental disabilities," 42 U. S. C. § 12101(a)(1)—and that figure's legislative history extrapolated from a law review "article authored by the drafter of the original ADA bill introduced in Congress in 1988." *Ante*, at 484. We previously have observed that a "statement of congressional findings is a rather thin reed upon which to base" a statutory construction. *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 260 (1994). Even so, as I have noted above, I readily agree that the agencies' approach to the Act would extend coverage to more than that number of people (although the Court's lofty esti-

mates, see *ante,* at 487, may be inflated because they do not appear to exclude impairments that are not substantially limiting). It is equally undeniable, however, that "43 million" is not a fixed cap on the Act's protected class: By including the "record of" and "regarded as" categories, Congress fully expected the Act to protect individuals who lack, in the Court's words, "actual" disabilities, and therefore are not counted in that number.

What is more, in mining the depths of the history of the 43 million figure—surveying even agency reports that predate the drafting of any of this case's controlling legislation—the Court fails to acknowledge that its narrow approach may have the perverse effect of denying coverage for a sizeable portion of the core group of 43 million. The Court appears to exclude from the Act's protected class individuals with controllable conditions such as diabetes and severe hypertension that were expressly understood as substantially limiting impairments in the Act's Committee Reports, see *supra,* at 500–501—and even, as the footnote in the margin shows, in the studies that produced the 43 million figure.[6] Given the inability to make the 43 million figure fit any consistent method of interpreting the word "disabled," it would be far wiser for the Court to follow—or at least to mention—the documents reflecting Congress' contemporaneous understanding of the term: the Committee Reports on the actual legislation.

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[6] See National Council on Disability, Toward Independence 12 (1986) (hypertension); U. S. Dept. of Commerce, Bureau of Census, Disability, Functional Limitation, and Health Insurance Coverage: 1984/85, p. 51 (1986) (hypertension, diabetes); National Institute on Disability and Rehabilitation Research, Data on Disability from the National Health Interview Survey 1983–1985, p. 33 (1988) (epilepsy, diabetes, hypertension); U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 114–115 (1989) (Tables 114 and 115) (diabetes, hypertension); Mathematica Policy Research, Inc., Digest of Data on Persons with Disabilities 3 (1984) (hypertension, diabetes).

IV

Occupational hazards characterize many trades. The farsighted pilot may have as much trouble seeing the instrument panel as the nearsighted pilot has in identifying a safe place to land. The vision of appellate judges is sometimes subconsciously obscured by a concern that their decision will legalize issues best left to the private sphere or will magnify the work of an already-overburdened judiciary. See *Jackson* v. *Virginia*, 443 U. S. 307, 326, 337–339 (1979) (STEVENS, J., dissenting). Although these concerns may help to explain the Court's decision to chart its own course—rather than to follow the one that has been well marked by Congress, by the overwhelming consensus of circuit judges, and by the Executive officials charged with the responsibility of administering the ADA—they surely do not justify the Court's crabbed vision of the territory covered by this important statute.

Accordingly, although I express no opinion on the ultimate merits of petitioners' claim, I am persuaded that they have a disability covered by the ADA. I therefore respectfully dissent.

JUSTICE BREYER, dissenting.

We must draw a statutory line that either (1) will include within the category of persons authorized to bring suit under the Americans with Disabilities Act of 1990 some whom Congress may not have wanted to protect (those who wear ordinary eyeglasses), or (2) will exclude from the threshold category those whom Congress certainly did want to protect (those who successfully use corrective devices or medicines, such as hearing aids or prostheses or medicine for epilepsy). Faced with this dilemma, the statute's language, structure, basic purposes, and history require us to choose the former statutory line, as JUSTICE STEVENS (whose opinion I join) well explains. I would add that, if the more generous choice of threshold led to too many lawsuits that ultimately proved

without merit or otherwise drew too much time and attention away from those whom Congress clearly sought to protect, there is a remedy. The Equal Employment Opportunity Commission (EEOC), through regulation, might draw finer definitional lines, excluding some of those who wear eyeglasses (say, those with certain vision impairments who readily can find corrective lenses), thereby cabining the overly broad extension of the statute that the majority fears.

The majority questions whether the EEOC could do so, for the majority is uncertain whether the EEOC possesses typical agency regulation-writing authority with respect to the statute's definitions. See *ante*, at 479–480. The majority poses this question because the section of the statute, 42 U. S. C. § 12116, that says the EEOC "shall issue regulations" also says these regulations are "to carry out *this subchapter*" (namely, § 12111 to § 12117, the employment subchapter); and the section of the statute that contains the three-pronged definition of "disability" precedes "*this* subchapter," the employment subchapter, to which § 12116 specifically refers. (Emphasis added.)

Nonetheless, the employment subchapter, *i. e.*, "*this* subchapter," includes other provisions that use the defined terms, for example a provision that forbids "discriminat[ing] against a qualified individual with a disability because of the disability." § 12112(a). The EEOC might elaborate, through regulations, on the meaning of "disability" in this last-mentioned provision, if elaboration is needed in order to "carry out" the substantive provisions of "this subchapter." An EEOC regulation that elaborated on the meaning of this use of the word "disability" would fall within the scope *both* of the basic definitional provision and also the substantive provisions of "*this*" later subchapter, for the word "disability" appears in both places.

There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier

statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of "*this* subchapter['s]" words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.

Syllabus

MURPHY *v.* UNITED PARCEL SERVICE, INC.

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

No. 97–1992. Argued April 27, 1999—Decided June 22, 1999

Respondent United Parcel Service, Inc. (UPS), hired petitioner as a mechanic, a position that required him to drive commercial vehicles. To drive, he had to satisfy certain Department of Transportation (DOT) health certification requirements, including having "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." 49 CFR § 391.41(b)(6). Despite petitioner's high blood pressure, he was erroneously granted certification and commenced work. After the error was discovered, respondent fired him on the belief that his blood pressure exceeded the DOT's requirements. Petitioner brought suit under Title I of the Americans with Disabilities Act of 1990 (ADA), the District Court granted respondent summary judgment, and the Tenth Circuit affirmed. Citing its decision in *Sutton* v. *United Air Lines, Inc.*, 130 F. 3d 893, 902, aff'd, *ante*, p. 471, that an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed, the Court of Appeals held that petitioner's hypertension is not a disability because his doctor testified that when medicated, petitioner functions normally in everyday activities. The court also affirmed the District Court's determination that petitioner is not "regarded as" disabled under the ADA, explaining that respondent did not terminate him on an unsubstantiated fear that he would suffer a heart attack or stroke, but because his blood pressure exceeded the DOT's requirements for commercial vehicle drivers.

Held:

1. Under the ADA, the determination of whether petitioner's impairment "substantially limits" one or more major life activities is made with reference to the mitigating measures he employs. *Sutton*, *ante*, p. 471. The Tenth Circuit concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity. Because the question whether petitioner is disabled when taking medication is not before this Court, there is no occasion here to consider whether he is "disabled" due to limitations that persist despite his medication or the negative side effects of his medication. P. 521.

2. Petitioner is not "regarded as" disabled because of his high blood pressure. Under *Sutton*, *ante*, at 489, a person is "regarded as" dis-

abled within the ADA's meaning if, among other things, a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. Here, respondent argues that it does not regard petitioner as substantially limited in the major life activity of working, but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification. When referring to the major life activity of working, the Equal Employment Opportunity Commission (EEOC) defines "substantially limits" as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i). Thus, one must be regarded as precluded from more than a particular job. Assuming without deciding that the EEOC regulations are valid, the Court concludes that the evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether he is regarded as unable to perform a class of jobs utilizing his skills. At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce. He has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification. Indeed, it is undisputed that he is generally employable as a mechanic, and there is uncontroverted evidence that he could perform a number of mechanic jobs. Consequently, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working. Pp. 521–525.

141 F. 3d 1185, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, Souter, Thomas, and Ginsburg, JJ., joined. Stevens, J., filed a dissenting opinion, in which Breyer, J., joined, *post*, p. 525.

Stephen R. McAllister argued the cause for petitioner. With him on the briefs was *Kirk W. Lowry.*

James A. Feldman argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the

brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *Jessica Dunsay Silver*, *Seth M. Galanter*, *C. Gregory Stewart*, *Philip B. Sklover*, and *Carolyn L. Wheeler*.

William J. Kilberg argued the cause for respondent. With him on the brief were *Thomas G. Hungar*, *Brian J. Finucane*, and *James R. Holland II*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Respondent United Parcel Service, Inc. (UPS), dismissed petitioner Vaughn L. Murphy from his job as a UPS mechanic because of his high blood pressure. Petitioner filed suit under Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 328, 42 U. S. C. § 12101 *et seq.*, in Federal District Court. The District Court granted summary judgment to respondent, and the Court of Appeals for the Tenth Circuit affirmed. We must decide whether the Court of Appeals correctly considered petitioner in his medicated state when it held that petitioner's impairment does

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*Briefs of *amici curiae* urging reversal were filed for the State of Massachusetts et al. by *Thomas F. Reilly*, Attorney General of Massachusetts, *Catherine C. Ziehl*, Assistant Attorney General, *Darrell V. McGraw*, Attorney General of West Virginia, and *Mary C. Buchmelter*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *Joseph P. Mazurek* of Montana, and *Patricia A. Madrid* of New Mexico; for the American Diabetes Association by *Michael A. Greene;* for the National Employment Lawyers Association by *Gary Phelan* and *Paul A. Brantner;* and for Senator Harkin et al. by *Arlene B. Mayerson*.

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Association et al. by *James D. Holzhauer*, *Timothy S. Bishop*, *Robert Digges*, *Jan Amundson*, and *Quentin Riegel;* for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman*, *Corrie L. Fischel*, *Stephen A. Bokat*, *Robin S. Conrad*, and *J. Walker Henry;* and for the Society for Human Resource Management by *Peter J. Petesch*, *Thomas J. Walsh, Jr.*, *Timothy S. Bland*, and *David S. Harvey, Jr.*

not "substantially limi[t]" one or more of his major life activities and whether it correctly determined that petitioner is not "regarded as disabled." See § 12102(2). In light of our decision in *Sutton* v. *United Air Lines, Inc.*, *ante*, p. 471, we conclude that the Court of Appeals' resolution of both issues was correct.

I

Petitioner was first diagnosed with hypertension (high blood pressure) when he was 10 years old. Unmedicated, his blood pressure is approximately 250/160. With medication, however, petitioner's "hypertension does not significantly restrict his activities and . . . in general he can function normally and can engage in activities that other persons normally do." 946 F. Supp. 872, 875 (Kan. 1996) (discussing testimony of petitioner's physician).

In August 1994, respondent hired petitioner as a mechanic, a position that required petitioner to drive commercial motor vehicles. Petitioner does not challenge the District Court's conclusion that driving a commercial motor vehicle is an essential function of the mechanic's job at UPS. *Id.*, at 882–883. To drive such vehicles, however, petitioner had to satisfy certain health requirements imposed by the Department of Transportation (DOT). 49 CFR § 391.41(a) (1998) ("A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and . . . has on his/her person . . . a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle"). One such requirement is that the driver of a commercial motor vehicle in interstate commerce have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." § 391.41(b)(6).

At the time respondent hired him, petitioner's blood pressure was so high, measuring at 186/124, that he was not qualified for DOT health certification, see App. 98a–102a (Department of Transportation, Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), attached as exhibit to

Affidavit and Testimony of John R. McMahon) (hereinafter Medical Regulatory Criteria). Nonetheless, petitioner was erroneously granted certification, and he commenced work. In September 1994, a UPS medical supervisor who was reviewing petitioner's medical files discovered the error and requested that petitioner have his blood pressure retested. Upon retesting, petitioner's blood pressure was measured at 160/102 and 164/104. See App. 48a (testimony of Vaughn Murphy). On October 5, 1994, respondent fired petitioner on the belief that his blood pressure exceeded the DOT's requirements for drivers of commercial motor vehicles.

Petitioner brought suit under Title I of the ADA in the United States District Court for the District of Kansas. The court granted respondent's motion for summary judgment. It held that, to determine whether petitioner is disabled under the ADA, his "impairment should be evaluated in its medicated state." 946 F. Supp., at 881. Noting that when petitioner is medicated he is inhibited only in lifting heavy objects but otherwise functions normally, the court held that petitioner is not "disabled" under the ADA. *Id.*, at 881–882. The court also rejected petitioner's claim that he was "regarded as" disabled, holding that respondent "did not regard Murphy as disabled, only that he was not certifiable under DOT regulations." *Id.*, at 882.

The Court of Appeals affirmed the District Court's judgment. 141 F. 3d 1185 (CA10 1999) (judgt. order). Citing its decision in *Sutton* v. *United Air Lines, Inc.*, 130 F. 3d 893, 902 (CA10 1997), aff'd, *ante*, p. 471, that an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed, the court held that petitioner's hypertension is not a disability because his doctor had testified that when petitioner is medicated, he "'functions normally doing everyday activity that an everyday person does.'" App. to Pet. for Cert. 4a. The court also affirmed the District Court's determination that petitioner is not "regarded as" disabled under the ADA. It

explained that respondent did not terminate petitioner "on an unsubstantiated fear that he would suffer a heart attack or stroke," but "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." *Id.*, at 5a. We granted certiorari, 525 U. S. 1063 (1999), and we now affirm.

II

The first question presented in this case is whether the determination of petitioner's disability is made with reference to the mitigating measures he employs. We have answered that question in *Sutton* in the affirmative. Given that holding, the result in this case is clear. The Court of Appeals concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity. Petitioner did not seek, and we did not grant, certiorari on whether this conclusion was correct. Because the question whether petitioner is disabled when taking medication is not before us, we have no occasion here to consider whether petitioner is "disabled" due to limitations that persist despite his medication or the negative side effects of his medication. Instead, the question granted was limited to whether, under the ADA, the determination of whether an individual's impairment "substantially limits" one or more major life activities should be made without consideration of mitigating measures. Consequently, we conclude that the Court of Appeals correctly affirmed the grant of summary judgment in respondent's favor on the claim that petitioner is substantially limited in one or more major life activities and thus disabled under the ADA.

III

The second issue presented is also largely resolved by our opinion in *Sutton*. Petitioner argues that the Court of Appeals erred in holding that he is not "regarded as" disabled because of his high blood pressure. As we held in *Sutton*, *ante*, at 489, a person is "regarded as" disabled within the

meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. Here, petitioner alleges that his hypertension is regarded as substantially limiting him in the major life activity of working, when in fact it does not. To support this claim, he points to testimony from respondent's resource manager that respondent fired petitioner due to his hypertension, which he claims evidences respondent's belief that petitioner's hypertension—and consequent inability to obtain DOT certification—substantially limits his ability to work. In response, respondent argues that it does not regard petitioner as substantially limited in the major life activity of working but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification.

As a preliminary matter, we note that there remains some dispute as to whether petitioner meets the requirements for DOT certification. As discussed above, petitioner was incorrectly granted DOT certification at his first examination when he should have instead been found unqualified. See *supra*, at 519–520. Upon retesting, although petitioner's blood pressure was not low enough to qualify him for the 1-year certification that he had incorrectly been issued, it was sufficient to qualify him for optional temporary DOT health certification. App. 98a–102a (Medical Regulatory Criteria). Had a physician examined petitioner and, in light of his medical history, declined to issue a temporary DOT certification, we would not second-guess that decision. Here, however, it appears that UPS determined that petitioner could not meet the DOT standards and did not allow him to attempt to obtain the optional temporary certification. *Id.*, at 84a–86a (testimony of Monica Sloan, UPS' company nurse); *id.*, at 54a–55a (testimony and affidavit of Vaughn Murphy). We need not resolve the question whether petitioner could meet the standards for DOT health certification, however, as it goes only to whether petitioner is qualified

and whether respondent has a defense based on the DOT regulations, see *Albertson's, Inc.* v. *Kirkingburg*, *post*, p. 555, issues not addressed by the court below or raised in the petition for certiorari.

The only issue remaining is whether the evidence that petitioner is regarded as unable to obtain DOT certification (regardless of whether he can, in fact, obtain optional temporary certification) is sufficient to create a genuine issue of material fact as to whether petitioner is regarded as substantially limited in one or more major life activities. As in *Sutton*, *ante*, at 491–492, we assume, *arguendo*, that the Equal Employment Opportunity Commission (EEOC) regulations regarding the disability determination are valid. When referring to the major life activity of working, the EEOC defines "substantially limits" as: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i) (1998). The EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographical area [reasonably accessible to the individual], from which the individual is also disqualified." § 1630.2(j)(3)(ii)(B). Thus, to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job. See § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working").

Again, assuming without deciding that these regulations are valid, petitioner has failed to demonstrate that there is a genuine issue of material fact as to whether he is regarded as disabled. Petitioner was fired from the position of UPS mechanic because he has a physical impairment—hyperten-

sion—that is regarded as preventing him from obtaining DOT health certification. See App. to Pet. for Cert. 5a (UPS terminated Murphy because "his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles"); 946 F. Supp., at 882 ("[T]he court concludes UPS did not regard Murphy as disabled, only that he was not certifiable under DOT regulations"); App. 125a, ¶ 18 (Defendant's Memorandum in Support of Motion for Summary Judgment) ("UPS considers driving commercial motor vehicles an essential function of plaintiff's job as mechanic"); *id.*, at 103a (testimony of John R. McMahon) (stating that the reason why petitioner was fired was that he "did not meet the requirements of the Department of Transportation").

The evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills. At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce. 49 CFR § 390.5 (1998) (defining "commercial motor vehicle" as a vehicle weighing over 10,000 pounds, designed to carry 16 or more passengers, or used in the transportation of hazardous materials). Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification. Indeed, it is undisputed that petitioner is generally employable as a mechanic. Petitioner has "performed mechanic jobs that did not require DOT certification" for "over 22 years," and he secured another job as a mechanic shortly after leaving UPS. 946 F. Supp., at 875, 876. Moreover, respondent presented uncontroverted evidence that petitioner could perform jobs such as diesel mechanic, automotive mechanic, gas-engine repairer, and gas-

welding equipment mechanic, all of which utilize petitioner's mechanical skills. See App. 115a (report of Lewis Vierling).

Consequently, in light of petitioner's skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working. See *Sutton*, *ante*, at 492–493. Accordingly, the Court of Appeals correctly granted summary judgment in favor of respondent on petitioner's claim that he is regarded as disabled. For the reasons stated, we affirm the judgment of the Court of Appeals for the Tenth Circuit.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

For the reasons stated in my dissenting opinion in *Sutton* v. *United Air Lines, Inc.*, *ante*, at 495, I respectfully dissent. I believe that petitioner has a "disability" within the meaning of the ADA because, assuming petitioner's uncontested evidence to be true, his very severe hypertension—in its unmedicated state—"substantially limits" his ability to perform several major life activities. Without medication, petitioner would likely be hospitalized. See App. 81. Indeed, unlike *Sutton*, this case scarcely requires us to speculate whether Congress intended the Act to cover individuals with this impairment. Severe hypertension, in my view, easily falls within the ADA's nucleus of covered impairments. See *Sutton*, *ante*, at 496–503 (STEVENS, J., dissenting).

Because the Court of Appeals did not address whether petitioner was qualified or whether he could perform the essential job functions, App. to Pet. for Cert. 5a, I would reverse and remand for further proceedings.

Syllabus

KOLSTAD *v.* AMERICAN DENTAL ASSOCIATION

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

No. 98–208. Argued March 1, 1999—Decided June 22, 1999

Petitioner sued respondent under Title VII of the Civil Rights Act of 1964 (Title VII), asserting that respondent's decision to promote Tom Spangler over her was a proscribed act of gender discrimination. Petitioner alleged, and introduced testimony to prove, that, among other things, the entire selection process was a sham, the stated reasons of respondent's executive director for selecting Spangler were pretext, and Spangler had been chosen before the formal selection process began. The District Court denied petitioner's request for a jury instruction on punitive damages, which are authorized by the Civil Rights Act of 1991 (1991 Act) for Title VII cases in which the employee "demonstrates" that the employer has engaged in intentional discrimination and has done so "with malice or with reckless indifference to [the employee's] federally protected rights." 42 U. S. C. § 1981a(b)(1). In affirming that denial, the en banc Court of Appeals concluded that, before the jury can be instructed on punitive damages, the evidence must demonstrate that the defendant has engaged in some "egregious" misconduct, and that petitioner had failed to make the requisite showing in this case.

Held:

1. An employer's conduct need not be independently "egregious" to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the "malice" or "reckless indifference" needed to qualify for such an award. The 1991 Act provided for compensatory and punitive damages in addition to the backpay and other equitable relief to which prevailing Title VII plaintiffs had previously been limited. Section 1981a's two-tiered structure—it limits compensatory and punitive awards to cases of "intentional discrimination," § 1981a(a)(1), and further qualifies the availability of punitive awards to instances of "malice" or "reckless indifference"—suggests a congressional intent to impose two standards of liability, one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. The terms "malice" and "reckless indifference" ultimately focus on the actor's state of mind, however, and § 1981a does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the stat-

ute's structure imply an independent role for "egregiousness" in the face of congressional silence. On the contrary, the view that § 1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief. Intent determines which remedies are open to a plaintiff here as well. This focus on the employer's state of mind does give effect to the statute's two-tiered structure. The terms "malice" and "reckless indifference" pertain not to the employer's awareness that it is engaging in discrimination, but to its knowledge that it may be acting in violation of federal law, see, *e. g.*, *Smith* v. *Wade*, 461 U. S. 30, 37, n. 6, 41, 50. There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard, as where the employer is unaware of the relevant federal prohibition or discriminates with the distinct belief that its discrimination is lawful, where the underlying theory of discrimination is novel or otherwise poorly recognized, or where the employer reasonably believes that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. See *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 616, 617. Although there is some support for respondent's assertion that the common law punitive awards tradition includes an "egregious misconduct" requirement, eligibility for such awards most often is characterized in terms of a defendant's evil motive or intent. Egregious or outrageous acts may serve as evidence supporting an inference of such evil motive, but § 1981a does not limit plaintiffs to this form of evidence or require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Pp. 533–539.

2. The inquiry does not end with a showing of the requisite mental state by certain employees, however. Petitioner must impute liability for punitive damages to respondent. Common law limitations on a principal's vicarious liability for its agents' acts apply in the Title VII context. See, *e. g.*, *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 754. The Court's discussion of this question is informed by the general common law of agency, as codified in the Restatement (Second) of Agency, see, *e. g.*, *id.*, at 755, which, among other things, authorizes punitive damages "against a . . . principal because of an [agent's] act . . . if . . . the agent was employed in a managerial capacity and was acting in the scope of employment," § 217 C(c), and declares that even intentional, specifically forbidden torts are within such scope if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve the" employer, §§ 228(1), 230, Comment *b*. Under these rules, even an employer who made every good faith

effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a "managerial capacity." Holding such an employer liable, however, is in some tension with the principle that it is "improper . . . to award punitive damages against one who himself is personally innocent and therefore liable only vicariously," Restatement (Second) of Torts § 909, Comment *b*. Applying the Restatement of Agency's "scope of employment" rule in this context, moreover, would reduce the incentive for employers to implement antidiscrimination programs and would, in fact, likely exacerbate employers' concerns that 42 U. S. C. § 1981a's "malice" and "reckless indifference" standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. Dissuading employers from implementing programs or policies to prevent workplace discrimination is directly contrary to Title VII's prophylactic purposes. See, *e. g.*, *Burlington Industries, Inc.*, 524 U. S., at 764. Thus, the Court is compelled to modify the Restatement rules to avoid undermining Title VII's objectives. See, *e. g.*, *ibid.* The Court therefore agrees that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. Pp. 539–546.

3. The question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent is left for remand. The parties have not yet had an opportunity to marshal the record evidence in support of their views on the application of agency principles in this case, and the en banc Court of Appeals had no reason to resolve the issue because it concluded that petitioner had failed to demonstrate the requisite "egregious" misconduct. P. 546.

139 F. 3d 958, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, Part I of which was unanimous, Part II–A of which was joined by STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., and Part II–B of which was joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 547. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 547.

Eric Schnapper argued the cause for petitioner. With him on the briefs was *Joseph A. Yablonski.*

Solicitor General Waxman argued the cause for the United States et al. as *amici curiae* in support of petitioner. With him on the brief were *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *Patricia A. Millett*, *Dennis J. Dimsey*, *Gregory B. Friel*, *C. Gregory Stewart*, *Philip B. Sklover*, and *Robert J. Gregory.*

Raymond C. Fay argued the cause for respondent. With him on the brief were *Stephen D. Shawe*, *Bruce S. Harrison*, and *Peter M. Sfikas.**

JUSTICE O'CONNOR delivered the opinion of the Court.

Under the terms of the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071, punitive damages are available in claims under Title VII of the Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1994 ed. and Supp. III), and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 328, 42 U. S. C. § 12101 *et seq.* Punitive damages are limited, however, to cases in which the em-

*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey L. Needle* and *Mark S. Mandell;* for the National Employment Lawyers Association et al. by *Janice Goodman*, *Paula A. Brantner*, and *Peter S. Rukin;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Advisory Council by *Robert E. Williams* and *Ann Elizabeth Reesman;* for the National Retail Federation by *Robert P. Joy;* for the Society for Human Resource Management by *D. Gregory Valenza* and *Roger S. Kaplan;* and for the Washington Legal Foundation by *Michael J. Connolly*, *David A. Lawrence*, *Clifford J. Scharman*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States by *Timothy B. Dyk*, *Daniel H. Bromberg*, *John B. Kennedy*, *Stephen A. Bokat*, and *Robin S. Conrad;* and for the Lawyers' Committee for Civil Rights Under Law et al. by *James M. Finberg*, *Daniel F. Kolb*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Richard T. Seymour*, *Teresa A. Ferrante*, *Dennis C. Hayes*, *Willie Abrams*, *Antonia Hernandez*, *Patricia Mendoza*, *Judith L. Lichtman*, *Donna R. Lenhoff*, *Judith C. Appelbaum*, *Martha F. Davis*, *Yolanda S. Wu*, and *Steven R. Shapiro.*

ployer has engaged in intentional discrimination and has done so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Rev. Stat. § 1977, as amended, 42 U. S. C. § 1981a(b)(1). We here consider the circumstances under which punitive damages may be awarded in an action under Title VII.

I

A

In September 1992, Jack O'Donnell announced that he would be retiring as the Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services for respondent, American Dental Association (respondent or Association). Petitioner, Carole Kolstad, was employed with O'Donnell in respondent's Washington, D. C., office, where she was serving as respondent's Director of Federal Agency Relations. When she learned of O'Donnell's retirement, she expressed an interest in filling his position. Also interested in replacing O'Donnell was Tom Spangler, another employee in respondent's Washington office. At this time, Spangler was serving as the Association's Legislative Counsel, a position that involved him in respondent's legislative lobbying efforts. Both petitioner and Spangler had worked directly with O'Donnell, and both had received "distinguished" performance ratings by the acting head of the Washington office, Leonard Wheat.

Both petitioner and Spangler formally applied for O'Donnell's position, and Wheat requested that Dr. William Allen, then serving as respondent's Executive Director in the Association's Chicago office, make the ultimate promotion decision. After interviewing both petitioner and Spangler, Wheat recommended that Allen select Spangler for O'Donnell's post. Allen notified petitioner in December 1992 that he had, in fact, selected Spangler to serve as O'Donnell's re-

placement. Petitioner's challenge to this employment decision forms the basis of the instant action.

B

After first exhausting her avenues for relief before the Equal Employment Opportunity Commission, petitioner filed suit against the Association in Federal District Court, alleging that respondent's decision to promote Spangler was an act of employment discrimination proscribed under Title VII. In petitioner's view, the entire selection process was a sham. Tr. 8 (Oct. 26, 1995) (closing argument for plaintiff's counsel). Counsel for petitioner urged the jury to conclude that Allen's stated reasons for selecting Spangler were pretext for gender discrimination, *id.*, at 19, 24, and that Spangler had been chosen for the position before the formal selection process began, *id.*, at 19. Among the evidence offered in support of this view, there was testimony to the effect that Allen modified the description of O'Donnell's post to track aspects of the job description used to hire Spangler. See *id.*, at 132–136 (Oct. 19, 1995) (testimony of Cindy Simms); *id.*, at 48–51 (Oct. 20, 1995) (testimony of Leonard Wheat). In petitioner's view, this "preselection" procedure suggested an intent by the Association to discriminate on the basis of sex. *Id.*, at 24. Petitioner also introduced testimony at trial that Wheat told sexually offensive jokes and that he had referred to certain prominent professional women in derogatory terms. See *id.*, at 120–124 (Oct. 18, 1995) (testimony of Carole Kolstad). Moreover, Wheat allegedly refused to meet with petitioner for several weeks regarding her interest in O'Donnell's position. See *id.*, at 112–113. Petitioner testified, in fact, that she had historically experienced difficulty gaining access to meet with Wheat. See *id.*, at 114–115. Allen, for his part, testified that he conducted informal meetings regarding O'Donnell's position with both petitioner and Spangler, see *id.*, at 148 (Oct. 23, 1995), although petitioner

stated that Allen did not discuss the position with her, see *id.*, at 127–128 (Oct. 18, 1995).

The District Court denied petitioner's request for a jury instruction on punitive damages. The jury concluded that respondent had discriminated against petitioner on the basis of sex and awarded her backpay totaling $52,718. App. 109–110. Although the District Court subsequently denied respondent's motion for judgment as a matter of law on the issue of liability, the court made clear that it had not been persuaded that respondent had selected Spangler over petitioner on the basis of sex, and the court denied petitioner's requests for reinstatement and for attorney's fees. 912 F. Supp. 13, 15 (DC 1996).

Petitioner appealed from the District Court's decisions denying her requested jury instruction on punitive damages and her request for reinstatement and attorney's fees. Respondent cross-appealed from the denial of its motion for judgment as a matter of law. In a split decision, a panel of the Court of Appeals for the District of Columbia reversed the District Court's decision denying petitioner's request for an instruction on punitive damages. 108 F. 3d 1431, 1435 (1997). In so doing, the court rejected respondent's claim that punitive damages are available under Title VII only in "'extraordinarily egregious cases.'" *Id.*, at 1437. The panel reasoned that, "because 'the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable,'" *id.*, at 1438 (quoting *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F. 2d 194, 205 (CA1 1987)), the fact that the jury could reasonably have found intentional discrimination meant that the jury should have been permitted to consider punitive damages. The court noted, however, that not all cases involving intentional discrimination would support a punitive damages award. 108 F. 3d, at 1438. Such an award might be improper, the panel reasoned, in instances where the employer justifiably believes that intentional discrimination is permitted or

where an employee engages in discrimination outside the scope of that employee's authority. *Id.*, at 1438–1439. Here, the court concluded, respondent "neither attempted to justify the use of sex in its promotion decision nor disavowed the actions of its agents." *Id.*, at 1439.

The Court of Appeals subsequently agreed to rehear the case en banc, limited to the punitive damages question. In a divided opinion, the court affirmed the decision of the District Court. 139 F. 3d 958 (1998). The en banc majority concluded that, "before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination." *Id.*, at 961. Based on the 1991 Act's structure and legislative history, the court determined, specifically, that a defendant must be shown to have engaged in some "egregious" misconduct before the jury is permitted to consider a request for punitive damages. *Id.*, at 965. Although the court declined to set out the "egregiousness" requirement in any detail, it concluded that petitioner failed to make the requisite showing in the instant case. Judge Randolph concurred, relying chiefly on § 1981a's structure as evidence of a congressional intent to "limi[t] punitive damages to exceptional cases." *Id.*, at 970. Judge Tatel wrote in dissent for five judges, who agreed generally with the panel majority.

We granted certiorari, 525 U. S. 960 (1998), to resolve a conflict among the Federal Courts of Appeals concerning the circumstances under which a jury may consider a request for punitive damages under § 1981a(b)(1). Compare 139 F. 3d 958 (CADC 1998) (case below), with *Luciano* v. *Olsten Corp.*, 110 F. 3d 210, 219–220 (CA2 1997) (rejecting contention that punitive damages require showing of "extraordinarily egregious" conduct).

II

A

Prior to 1991, only equitable relief, primarily backpay, was available to prevailing Title VII plaintiffs; the statute pro-

vided no authority for an award of punitive or compensatory damages. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 252–253 (1994). With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and ADA violations.

The 1991 Act limits compensatory and punitive damages awards, however, to cases of "intentional discrimination"—that is, cases that do not rely on the "disparate impact" theory of discrimination. 42 U. S. C. § 1981a(a)(1). Section 1981a(b)(1) further qualifies the availability of punitive awards:

> "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices *with malice or with reckless indifference to the federally protected rights of an aggrieved individual.*" (Emphasis added.)

The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstrat[ion]" of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

The Court of Appeals sought to give life to this two-tiered structure by limiting punitive awards to cases involving intentional discrimination of an "egregious" nature. We credit the en banc majority's effort to effectuate congressional intent, but, in the end, we reject its conclusion that eligibility for punitive damages can only be described in

terms of an employer's "egregious" misconduct. The terms "malice" and "reckless" ultimately focus on the actor's state of mind. See, *e. g.*, Black's Law Dictionary 956–957, 1270 (6th ed. 1990); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton, Law of Torts 212–214 (5th ed. 1984) (defining "willful," "wanton," and "reckless"). While egregious misconduct is evidence of the requisite mental state, see *infra*, at 538–539; Keeton, *supra*, at 213–214, § 1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for "egregiousness" in the face of congressional silence. On the contrary, the view that § 1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief. Intent determines which remedies are open to a plaintiff here as well; compensatory awards are available only where the employer has engaged in "*intentional* discrimination." § 1981a(a)(1) (emphasis added).

Moreover, § 1981a's focus on the employer's state of mind gives some effect to Congress' apparent intent to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination. The employer must act with "malice or with reckless indifference *to the [plaintiff's] federally protected rights.*" § 1981a(b)(1) (emphasis added). The terms "malice" or "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.

We gain an understanding of the meaning of the terms "malice" and "reckless indifference," as used in § 1981a, from this Court's decision in *Smith* v. *Wade*, 461 U. S. 30 (1983). The parties, as well as both the en banc majority and dissent, recognize that Congress looked to the Court's decision in *Smith* in adopting this language in § 1981a. See Tr. of Oral

Arg. 28–29; Brief for Petitioner 24; 139 F. 3d, at 964–965; *id.*, at 971 (Tatel, J., dissenting). Employing language similar to what later appeared in § 1981a, the Court concluded in *Smith* that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U. S., at 56. While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award, *id.*, at 45–48, its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a "subjective consciousness" of a risk of injury or illegality and a "'criminal indifference to civil obligations.'" *Id.*, at 37, n. 6, 41 (quoting *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202, 214 (1859)); see also *Farmer* v. *Brennan*, 511 U. S. 825, 837 (1994) (explaining that criminal law employs a subjective form of recklessness, requiring a finding that the defendant "disregards a risk of harm of which he is aware"); see generally 1 T. Sedgwick, Measure of Damages §§ 366, 368, pp. 528, 529 (8th ed. 1891) (describing "wantonness" in punitive damages context in terms of "criminal indifference" and "gross negligence" in terms of a "conscious indifference to consequences"). The Court thus compared the recklessness standard to the requirement that defendants act with "'knowledge of falsity or reckless disregard for the truth'" before punitive awards are available in defamation actions, *Smith*, *supra*, at 50 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349 (1974)), a subjective standard, *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 688 (1989). Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.

There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply

be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. See, *e. g.*, 42 U. S. C. § 2000e–2(e)(1) (setting out Title VII defense "where religion, sex, or national origin is a bona fide occupational qualification"); see also § 12113 (setting out defenses under ADA). In *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 616 (1993), we thus observed that, in light of statutory defenses and other exceptions permitting age-based decisionmaking, an employer may knowingly rely on age to make employment decisions without recklessly violating the Age Discrimination in Employment Act of 1967 (ADEA). Accordingly, we determined that limiting liquidated damages under the ADEA to cases where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," without an additional showing of outrageous conduct, was sufficient to give effect to the ADEA's two-tiered liability scheme. *Id.*, at 616, 617.

At oral argument, respondent urged that the common law tradition surrounding punitive awards includes an "egregious misconduct" requirement. See, *e. g.*, Tr. of Oral Arg. 26–28; see also Brief for Chamber of Commerce of the United States as *Amicus Curiae* 8–22 (advancing this argument). We assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief. See, *e. g.*, *Molzof* v. *United States*, 502 U. S. 301, 307 (1992). Moreover, some courts and commentators have described punitive awards as requiring both a specified state of mind and egregious or aggravated misconduct. See, *e. g.*, 1 D. Dobbs, Law of Remedies 468 (2d ed. 1993) ("Punitive damages are awarded when the defendant is guilty of both a bad state of mind and highly serious misconduct").

Most often, however, eligibility for punitive awards is characterized in terms of a defendant's motive or intent. See, *e. g.*, 1 Sedgwick, *supra*, at 526, 528; C. McCormick, Law of Damages 280 (1935). Indeed, "[t]he justification of exemplary damages lies in the evil intent of the defendant." 1 Sedgwick, *supra*, at 526; see also 2 J. Sutherland, Law of Damages § 390, p. 1079 (3d ed. 1903) (discussing punitive damages under rubric of "[c]ompensation for wrongs done with bad motive"). Accordingly, "a positive element of conscious wrongdoing is always required." McCormick, *supra*, at 280.

Egregious misconduct is often associated with the award of punitive damages, but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind. Conduct warranting punitive awards has been characterized as "egregious," for example, *because* of the defendant's mental state. See Restatement (Second) of Torts § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"). Respondent, in fact, appears to endorse this characterization. See, *e. g.*, Brief for Respondent 19 ("Malicious and reckless conduct [is] by definition egregious"); see also *id.*, at 28–29. That conduct committed with the specified mental state may be characterized as egregious, however, is not to say that employers must engage in conduct with some independent, "egregious" quality before being subject to a punitive award.

To be sure, egregious or outrageous acts may serve as evidence supporting an inference of the requisite "evil motive." "The allowance of exemplary damages depends upon the bad motive of the wrong-doer *as exhibited by his acts.*" 1 Sedgwick, *supra*, at 529 (emphasis added); see also 2 Sutherland, *supra*, § 394, at 1101 ("The spirit which actuated the wrong-doer may doubtless be inferred from the circumstances surrounding the parties and the transaction"); see, *e. g.*, *Chizmar* v. *Mackie*, 896 P. 2d 196, 210 (Alaska 1995)

("[W]here there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not, and indeed should not, submit the issue of punitive damages to the jury" (internal quotation marks omitted)); *Horton* v. *Union Light, Heat & Power Co.*, 690 S. W. 2d 382, 389 (Ky. 1985) (observing that "malice . . . may be implied from outrageous conduct"). Likewise, under § 1981a(b)(1), pointing to evidence of an employer's egregious behavior would provide one means of satisfying the plaintiff's burden to "demonstrat[e]" that the employer acted with the requisite "malice or . . . reckless indifference." See 42 U. S. C. § 1981a(b)(1); see, *e. g.*, 3 BNA EEOC Compliance Manual N:6085–N6084 (1992) (Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991) (listing "[t]he degree of egregiousness and nature of the respondent's conduct" among evidence tending to show malice or reckless disregard). Again, however, respondent has not shown that the terms "reckless indifference" and "malice," in the punitive damages context, have taken on a consistent definition including an independent, "egregiousness" requirement. Cf. *Morissette* v. *United States*, 342 U. S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed").

B

The inquiry does not end with a showing of the requisite "malice or . . . reckless indifference" on the part of certain individuals, however. 42 U. S. C. § 1981a(b)(1). The plaintiff must impute liability for punitive damages to respondent. The en banc dissent recognized that agency principles place limits on vicarious liability for punitive damages. 139 F. 3d,

at 974 (Tatel, J., dissenting). Likewise, the Solicitor General as *amicus* acknowledged during argument that common law limitations on a principal's liability in punitive awards for the acts of its agents apply in the Title VII context. Tr. of Oral Arg. 23.

JUSTICE STEVENS urges that we should not consider these limitations here. See *post*, at 552–553 (opinion concurring in part and dissenting in part). While we decline to engage in any definitive application of the agency standards to the facts of this case, see *infra*, at 546, it is important that we address the proper legal standards for imputing liability to an employer in the punitive damages context. This issue is intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award, and it is easily subsumed within the question on which we granted certiorari—namely, "[i]n what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?" Pet. for Cert. i; see also this Court's Rule 14.1(a). "On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 37 (1991) (STEVENS, J., dissenting) (citing cases). The Court has not always confined itself to the set of issues addressed by the parties. See, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 93–102, and n. 1 (1998); *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 243–249 (1989); *Continental Ill. Nat. Bank & Trust Co.* v. *Chicago R. I. & P. R. Co.*, 294 U. S. 648, 667–675 (1935). Here, moreover, limitations on the extent to which principals may be liable in punitive damages for the torts of their agents was the subject of discussion by both the en banc majority and dissent, see 139 F. 3d, at 968; *id.*, at 974 (Tatel, J., dissenting), *amicus*

briefing, see Brief for Chamber of Commerce of the United States as *Amicus Curiae* 22–27, and substantial questioning at oral argument, see Tr. of Oral Arg. 11–17, 19–24, 49–50, 54–55. Nor did respondent discount the notion that agency principles may place limits on an employer's vicarious liability for punitive damages. See *post*, at 552. In fact, respondent advanced the general position "that the higher agency principles, under common law, would apply to punitive damages." Tr. of Oral Arg. 49. Accordingly, we conclude that these potential limitations on the extent of respondent's liability are properly considered in the instant case.

The common law has long recognized that agency principles limit vicarious liability for punitive awards. See, *e. g.*, G. Field, Law of Damages §§ 85–87 (1876); 1 Sedgwick, Damages § 378; McCormick, Damages § 80; 2 F. Mechem, Law of Agency §§ 2014–2015 (2d ed. 1914). This is a principle, moreover, that this Court historically has endorsed. See, *e. g.*, *Lake Shore & Michigan Southern R. Co.* v. *Prentice*, 147 U. S. 101, 114–115 (1893); *The Amiable Nancy*, 3 Wheat. 546, 558–559 (1818). Courts of Appeals, too, have relied on these liability limits in interpreting 42 U. S. C. § 1981a. See, *e. g.*, *Dudley* v. *Wal-Mart Stores, Inc.*, 166 F. 3d 1317, 1322–1323 (CA11 1999); *Harris* v. *L & L Wings, Inc.*, 132 F. 3d 978, 983–985 (CA4 1997). See also *Fitzgerald* v. *Mountain States Telephone & Telegraph Co.*, 68 F. 3d 1257, 1263–1264 (CA10 1995) (same in suit under 42 U. S. C. § 1981). But see *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F. 3d 581, 592–594 (CA5 1998), rehearing en banc ordered, 169 F. 3d 215 (1999).

We have observed that, "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 754 (1998); see also *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 72 (1986) (noting that, in interpreting Title VII, "Congress wanted courts to look to agency principles for guidance"). Observing the limits on liability

that these principles impose is especially important when interpreting the 1991 Act. In promulgating the Act, Congress conspicuously left intact the "limits of employer liability" established in *Meritor*. *Faragher* v. *Boca Raton*, 524 U. S. 775, 804, n. 4 (1998); see also *Burlington Industries, Inc.*, *supra*, at 763–764 ("[W]e are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment").

Although jurisdictions disagree over whether and how to limit vicarious liability for punitive damages, see, *e. g.*, 2 J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice § 24.01 (1998) (discussing disagreement); 22 Am. Jur. 2d, Damages § 788 (1988) (same), our interpretation of Title VII is informed by "the general common law of agency, rather than . . . the law of any particular State." *Burlington Industries, Inc.*, *supra*, at 754 (internal quotation marks omitted). The common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point for defining this general common law. See *Burlington Industries, Inc.*, *supra*, at 755 ("[T]he Restatement . . . is a useful beginning point for a discussion of general agency principles"); see also *Meritor*, *supra*, at 72. The Restatement of Agency places strict limits on the extent to which an agent's misconduct may be imputed to the principal for purposes of awarding punitive damages:

> "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
>
> "(a) the principal authorized the doing and the manner of the act, or
>
> "(b) the agent was unfit and the principal was reckless in employing him, or
>
> "(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

> "(d) the principal or a managerial agent of the principal ratified or approved the act." Restatement (Second) of Agency, *supra,* § 217 C.

See also Restatement (Second) of Torts § 909 (same).

The Restatement, for example, provides that the principal may be liable for punitive damages if it authorizes or ratifies the agent's tortious act, or if it acts recklessly in employing the malfeasing agent. The Restatement also contemplates liability for punitive awards where an employee serving in a "managerial capacity" committed the wrong while "acting in the scope of employment." Restatement (Second) of Agency, *supra,* § 217 C; see also Restatement (Second) of Torts, *supra,* § 909 (same). "Unfortunately, no good definition of what constitutes a 'managerial capacity' has been found," 2 Ghiardi, Punitive Damages, § 24.05, at 14, and determining whether an employee meets this description requires a fact-intensive inquiry, *id.*, § 24.05; 1 L. Schlueter & K. Redden, Punitive Damages, § 4.4(B)(2)(a), p. 181 (3d ed. 1995). "In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." *Id.*, § 4.4(B)(2)(a), at 181. Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be "important," but perhaps need not be the employer's "top management, officers, or directors," to be acting "in a managerial capacity." *Ibid.;* see also 2 Ghiardi, *supra,* § 24.05, at 14; Restatement (Second) of Torts, *supra,* § 909, at 468, Comment *b* and Illus. 3.

Additional questions arise from the meaning of the "scope of employment" requirement. The Restatement of Agency provides that even intentional torts are within the scope of an agent's employment if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve the" employer. Restate-

ment (Second) of Agency, § 228(1), at 504. According to the Restatement, so long as these rules are satisfied, an employee may be said to act within the scope of employment even if the employee engages in acts "specifically forbidden" by the employer and uses "forbidden means of accomplishing results." *Id.*, § 230, at 511, Comment *b;* see also *Burlington Industries, Inc.*, 524 U. S., at 756; Keeton, Torts § 70. On this view, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a "managerial capacity."

Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages—that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." Restatement (Second) of Torts, *supra*, § 909, at 468, Comment *b*. Where an employer has undertaken such good faith efforts at Title VII compliance, it "demonstrat[es] that it never acted in reckless disregard of federally protected rights." 139 F. 3d, at 974 (Tatel, J., dissenting); see also *Harris*, 132 F. 3d, at 983, 984 (observing that, "[i]n some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages" and concluding that "the institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer's 'reckless' or 'malicious' state of mind").

Applying the Restatement of Agency's "scope of employment" rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. In fact, such a rule would likely exacerbate concerns among employers that § 1981a's "malice" and "reckless indifference" standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. See Brief for Equal Employment

Advisory Council as *Amicus Curiae* 12 ("[I]f an employer has made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed 'with malice or with reckless indifference' "). Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's "primary objective" is "a prophylactic one," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417 (1975); it aims, chiefly, "not to provide redress but to avoid harm," *Faragher*, 524 U. S., at 806. With regard to sexual harassment, "[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc.*, 524 U. S., at 764. The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.

In light of the perverse incentives that the Restatement's "scope of employment" rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII. See generally *ibid.* See also *Faragher*, *supra*, at 802, n. 3 (noting that Court must "adapt agency concepts to the practical objectives of Title VII"); *Meritor Savings Bank, FSB*, 477 U. S., at 72 ("[C]ommon-law principles may not be transferable in all their particulars to Title VII"). Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII." 139 F. 3d, at 974 (Tatel, J., dissenting). As the dissent recognized, "[g]iving punitive damages protection to employers

who make good-faith efforts to prevent discrimination in the workplace accomplishes" Title VII's objective of "motivat-[ing] employers to detect and deter Title VII violations." *Ibid.*

We have concluded that an employer's conduct need not be independently "egregious" to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof. We leave for remand the question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent. The parties have not yet had an opportunity to marshal the record evidence in support of their views on the application of agency principles in the instant case, and the en banc majority had no reason to resolve the issue because it concluded that petitioner had failed to demonstrate the requisite "egregious" misconduct. 139 F. 3d, at 968. Although trial testimony established that Allen made the ultimate decision to promote Spangler while serving as petitioner's interim executive director, respondent's highest position, Tr. 159 (Oct. 19, 1995), it remains to be seen whether petitioner can make a sufficient showing that Allen acted with malice or reckless indifference to petitioner's Title VII rights. Even if it could be established that Wheat effectively selected O'Donnell's replacement, moreover, several questions would remain, *e. g.*, whether Wheat was serving in a "managerial capacity" and whether he behaved with malice or reckless indifference to petitioner's rights. It may also be necessary to determine whether the Association had been making good faith efforts to enforce an antidiscrimination policy. We leave these issues for resolution on remand.

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

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

For the reasons stated by Judge Randolph in his concurring opinion in the Court of Appeals, I would hold that Congress' two-tiered scheme of Title VII monetary liability implies that there is an egregiousness requirement that reserves punitive damages only for the worst cases of intentional discrimination. See 139 F. 3d 958, 970 (CADC 1998). Since the Court has determined otherwise, however, I join Part I and that portion of Part II–B of the Court's opinion holding that principles of agency law place a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

The Court properly rejects the Court of Appeals' holding that defendants in Title VII actions must engage in "egregious" misconduct before a jury may be permitted to consider a request for punitive damages. Accordingly, I join Parts I and II–A of its opinion. I write separately, however, because I strongly disagree with the Court's decision to volunteer commentary on an issue that the parties have not briefed and that the facts of this case do not present. I would simply remand for a trial on punitive damages.

I

In enacting the Civil Rights Act of 1991 (1991 Act), Congress established a three-tiered system of remedies for a broad range of discriminatory conduct, including violations of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, as well as some violations of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. III). Equitable remedies are available

for disparate impact violations; compensatory damages for intentional disparate treatment; and punitive damages for intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." § 1981a(b)(1).

The 1991 Act's punitive damages standard, as the Court recognizes, *ante*, at 535–536, is quite obviously drawn from our holding in *Smith* v. *Wade*, 461 U. S. 30 (1983). There, we held that punitive damages may be awarded under 42 U. S. C. § 1983 (1976 ed., Supp. V) "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U. S., at 56.* The 1991 Act's standard is also the same intent-based standard used in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.* (1994 ed. and Supp. III). The ADEA provides for an award of liquidated damages—damages that are "punitive in nature," *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125 (1985)—when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 617 (1993); accord, *Thurston*, 469 U. S., at 126.

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*Lest there be any doubt that Congress looked to *Smith* in crafting the statute, the Report of the House Judiciary Committee explains that the "standard for punitive damages is taken directly from civil rights case law," H. R. Rep. No. 102–40, pt. 2, p. 29 (1991), and proceeds to quote and cite with approval the very page in *Smith* that announced the punitive damages standard requiring "evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others," 461 U. S., at 56, quoted in H. R. Rep. No. 102–40, at 29. The Report of the House Education and Labor Committee echoed this sentiment. See H. R. Rep. No. 102–40, p. 74 (1991) (citing *Smith* with approval). Congress' substitution in the 1991 Act of the word "malice" for *Smith*'s phrase "evil motive or intent" is inconsequential; in *Smith*, we noted that "malice . . . may be an appropriate" term to denote ill will or an intent to injure. See 461 U. S., at 37, n. 6.

In *Smith*, we carefully noted that our punitive damages standard separated the "quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other," 461 U. S., at 38, n. 6, and held that punitive damages are permissible only when the latter component is satisfied by a deliberate or recklessly indifferent violation of federal law. In *Thurston*, we interpreted the ADEA's standard the same way and explained that the relevant mental distinction between intentional discrimination and "reckless disregard" for federally protected rights is essentially the same as the well-known difference between a "knowing" and a "willful" violation of a criminal law. See 469 U. S., at 126–127. While a criminal defendant, like an employer, need not have knowledge of the law to act "knowingly" or intentionally, he must know that his acts violate the law or must "careless[ly] disregard whether or not one has the right so to act" in order to act "willfully." *United States* v. *Murdock*, 290 U. S. 389, 395 (1933), quoted in *Thurston*, 469 U. S., at 127. We have interpreted the word "willfully" the same way in the civil context. See *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 133 (1988) (holding that the "plain language" of the Fair Labor Standards Act's "willful" liquidated damages standard requires that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," without regard to the outrageousness of the conduct at issue).

Construing § 1981a(b)(1) to impose a purely mental standard is perfectly consistent with the structure and purpose of the 1991 Act. As with the ADEA, the 1991 Act's "willful" or "reckless disregard" standard respects the Act's "two-tiered" damages scheme while deterring future intentionally unlawful discrimination. See *Hazen Paper*, 507 U. S., at 614–615. There are, for reasons the Court explains, see *ante*, at 536–537, numerous instances in which an employer might intentionally treat an individual differently because of her race,

gender, religion, or disability without knowing that it is violating Title VII or the ADA. In order to recover compensatory damages under the 1991 Act, victims of unlawful disparate treatment must prove that the defendants' *conduct* was intentional, but they need not prove that the defendants either knew or should have known that they were *violating the law.* It is the additional element of willful or reckless disregard of the law that justifies a penalty of double damages in age discrimination cases and punitive damages in the broad range of cases covered by the 1991 Act.

It is of course true that as our society moves closer to the goal of eliminating intentional, invidious discrimination, the core mandates of Title VII and the ADA are becoming increasingly ingrained in employers' minds. As more employers come to appreciate the importance and the proportions of those statutes' mandates, the number of federal violations will continue to decrease accordingly. But at the same time, one could reasonably believe, as Congress did, that as our national resolve against employment discrimination hardens, deliberate violations of Title VII and the ADA become increasingly blameworthy and more properly the subject of "societal condemnation," *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995), in the form of punitive damages. Indeed, it would have been rather perverse for Congress to conclude that the increasing acceptance of antidiscrimination laws in the workplace somehow mitigates willful violations of those laws such that only those violations that are accompanied by particularly outlandish acts warrant special deterrence.

Given the clarity of our cases and the precision of Congress' words, the common-law tradition of punitive damages and any relationship it has to "egregious conduct" is quite irrelevant. It is enough to say that Congress provided in the 1991 Act its own punitive damages standard that focuses solely on willful mental state, and it did not suggest that there is any class of willful violations that are exempt from

exposure to punitive damages. Nor did it indicate that there is a point on the spectrum of deliberate or recklessly indifferent conduct that qualifies as "egregious." Thus, while behavior that merits that opprobrious label may provide probative evidence of wrongful motive, it is not a necessary prerequisite to proving such a motive under the 1991 Act. To the extent that any treatise or federal, state, or "common-law" case might suggest otherwise, it is wrong.

There are other means of proving that an employer willfully violated the law. An employer, may, for example, express hostility toward employment discrimination laws or conceal evidence regarding its "true" selection procedures because it knows they violate federal law. Whatever the case, so long as a Title VII plaintiff proffers sufficient evidence from which a jury could conclude that an employer acted willfully, judges have no place making their own value judgments regarding whether the conduct was "egregious" or otherwise presents an inappropriate candidate for punitive damages; the issue must go to the jury.

If we accept the jury's appraisal of the evidence in this case and draw, as we must when reviewing the denial of a jury instruction, all reasonable inferences in petitioner's favor, there is ample evidence from which the jury could have concluded that respondent willfully violated Title VII. Petitioner emphasized, at trial and in her briefs to this Court, that respondent took "a tangible employment action" against her in the form of denying a promotion. Brief for Petitioner 47. Evidence indicated that petitioner was the more qualified of the two candidates for the job. Respondent's decisionmakers, who were senior executives of the Association, were known occasionally to tell sexually offensive jokes and referred to professional women in derogatory terms. The record further supports an inference that these executives not only deliberately refused to consider petitioner fairly and to promote her because she is a woman, but manipulated the job requirements and conducted a

"sham" selection procedure in an attempt to conceal their misconduct.

There is no claim that respondent's decisionmakers violated any company policy; that they were not acting within the scope of their employment; or that respondent has ever disavowed their conduct. Neither respondent nor its two decisionmakers claimed at trial any ignorance of Title VII's requirements, nor did either offer any "good-faith" reason for believing that being a man was a legitimate requirement for the job. Rather, at trial respondent resorted to false, pretextual explanations for its refusal to promote petitioner.

The record, in sum, contains evidence from which a jury might find that respondent acted with reckless indifference to petitioner's federally protected rights. It follows, in my judgment, that the three-judge panel of the Court of Appeals correctly decided to remand the case to the District Court for a trial on punitive damages. See 108 F. 3d 1431, 1440 (CADC 1997). To the extent that the Court's opinion fails to direct that disposition, I respectfully dissent.

II

In Part II–B of its opinion, the Court discusses the question whether "[t]he plaintiff must impute liability for punitive damages to respondent" under "agency principles." *Ante*, at 539. That is a question that neither of the parties has ever addressed in this litigation and that respondent, at least, has expressly disavowed. When prodded at oral argument, counsel for respondent twice stood firm on this point. "[W]e all agree," he twice repeated, "that that precise issue is not before the Court" Tr. of Oral Arg. 49. Nor did any of the 11 judges in the Court of Appeals believe that it was applicable to the dispute at hand—presumably because promotion decisions are quintessential "company acts," see 139 F. 3d 958, 968 (CADC 1998), and because the two executives who made this promotion decision were the executive direc-

tor of the Association and the acting head of its Washington office. *Id.*, at 974, 979 (Tatel, J., dissenting). See also 108 F. 3d, at 1434, 1439. Judge Tatel, who the Court implies raised the agency issue, in fact explicitly (and correctly) concluded that "[t]his case does not present these or analogous circumstances." 108 F. 3d, at 1439.

The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised. It is not this Court's practice to consider arguments—specifically, alternative defenses of the judgment under review—that were not presented in the brief in opposition to the petition for certiorari. See this Court's Rule 15.2. Indeed, on two occasions in this very Term, we refused to do so despite the fact that the issues were briefed and argued by the parties. See *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999); *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253–254 (1999) *(per curiam)*. If we declined to reach alternative defenses under those circumstances, surely we should do so here.

Nor is it accurate for the Court to imply that the Solicitor General, representing Government *amici*, advocates a course similar to that which the Court takes regarding the agency question. Cf. *ante*, at 540. The Solicitor General, like the parties, did not brief any agency issue. At oral argument, he correspondingly stated that the issue "is not really presented here." Tr. of Oral Arg. 19. He then responded to the Court's questions by stating that the Federal Government believes that whenever a tangible employment consequence is involved § 1981a incorporates the "managerial capacity" principles espoused by § 217 C of the Restatement (Second) of Agency. See Tr. of Oral Arg. 23. But to the extent that the Court tinkers with the Restatement's standard, it is rejecting the Government's view of its own statute without giving it an opportunity to be heard on the issue.

Accordingly, while I agree with the Court's rejection of the en banc majority's holding on the only issue that it confronted, I respectfully dissent from the Court's failure to order a remand for trial on the punitive damages issue.

Syllabus

ALBERTSON'S, INC. *v.* KIRKINGBURG

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

No. 98–591. Argued April 28, 1999—Decided June 22, 1999

Before beginning a truckdriver's job with petitioner, Albertson's, Inc., in 1990, respondent, Kirkingburg, was examined to see if he met the Department of Transportation's basic vision standards for commercial truckdrivers, which require corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. Although he has amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and thus effectively monocular vision, the doctor erroneously certified that he met the DOT standards. When his vision was correctly assessed at a 1992 physical, he was told that he had to get a waiver of the DOT standards under a waiver program begun that year. Albertson's, however, fired him for failing to meet the basic DOT vision standards and refused to rehire him after he received a waiver. Kirkingburg sued Albertson's, claiming that firing him violated the Americans with Disabilities Act of 1990 (ADA). In granting summary judgment for Albertson's, the District Court found that Kirkingburg was not qualified without an accommodation because he could not meet the basic DOT standards and that the waiver program did not alter those standards. The Ninth Circuit reversed, finding that Kirkingburg had established a disability under the Act by demonstrating that the manner in which he sees differs significantly from the manner in which most people see; that although the ADA allowed Albertson's to rely on Government regulations in setting a job-related vision standard, Albertson's could not use compliance with the DOT regulations to justify its requirement because the waiver program was a legitimate part of the DOT's regulatory scheme; and that although Albertson's could set a vision standard different from the DOT's, it had to justify its independent standard and could not do so here.

Held:

1. The ADA requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation on a major life activity caused by their impairment is substantial. The Ninth Circuit made three missteps in determining that Kirkingburg's amblyopia meets the ADA's first definition of disability, *i. e.*, a physical or mental impairment that "substantially limits" a major life activity, 42 U. S. C. § 12101(2)(A). First,

although it relied on an Equal Employment Opportunity Commission regulation that defines "substantially limits" as requiring a "significant restrict[ion]" in an individual's manner of performing a major life activity, see 29 CFR § 1630.2(j)(ii), the court actually found that there was merely a significant "difference" between the manner in which Kirkingburg sees and the manner in which most people see. By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments that substantially limit the ability to perform a major life activity constitute disabilities. Second, the court appeared to suggest that it need not take account of a monocular individual's ability to compensate for the impairment, even though it acknowledged that Kirkingburg's brain had subconsciously done just that. Mitigating measures, however, must be taken into account in judging whether an individual has a disability, *Sutton* v. *United Airlines, Inc.*, *ante*, at 482, whether the measures taken are with artificial aids, like medications and devices, or with the body's own systems. Finally, the Ninth Circuit did not pay much heed to the statutory obligation to determine a disability's existence on a case-by-case basis. See 42 U. S. C. § 12101(2). Some impairments may invariably cause a substantial limitation of a major life activity, but monocularity is not one of them, for that category embraces a group whose members vary by, *e. g.*, the degree of visual acuity in the weaker eye, the extent of their compensating adjustments, and the ultimate scope of the restrictions on their visual abilities. Pp. 562–567.

2. An employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case. Pp. 567–578.

(a) Petitioner's job qualification was not of its own devising, but was the visual acuity standard of the Federal Motor Carrier Safety Regulations, and is binding on Albertson's, see 49 CFR § 391.11. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations. Were it not for the waiver program, there would be no basis for questioning petitioner's decision, and right, to follow the regulations. Pp. 567–570.

(b) The regulations establishing the waiver program did not modify the basic visual acuity standard in a way that disentitles an employer like Albertson's to insist on the basic standard. One might assume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, but that is not the case here. In setting the basic standards, the Federal Highway Admin-

Syllabus

istration, the DOT agency responsible for overseeing the motor carrier safety regulations, made a considered determination about the visual acuity level needed for safe operation of commercial motor vehicles in interstate commerce. In contrast, the regulatory record made it plain that the waiver program at issue in this case was simply an experiment proposed as a means of obtaining data, resting on a hypothesis whose confirmation or refutation would provide a factual basis for possibly relaxing existing standards. Pp. 570–576.

(c) The ADA should not be read to require an employer to defend its decision not to participate in such an experiment. It is simply not credible that Congress enacted the ADA with the understanding that employers choosing to respect the Government's visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms. Pp. 577–578.

143 F. 3d 1228, reversed.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 578.

Corbett Gordon argued the cause for petitioner. With her on the briefs were *Heidi Guettler* and *Kelliss Collins.*

Scott N. Hunt argued the cause for respondent. With him on the brief was *Richard C. Busse.*

Edward C. DuMont argued the cause for the United States et al. as *amici curiae* urging affirmance. On the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *James A. Feldman*, *Jessica Dunsay Silver*, *Timothy J. Moran*, *Philip B. Sklover*, *Lorraine C. Davis*, and *Robert J. Gregory.**

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*Briefs of *amici curiae* urging reversal were filed for the American Trucking Associations, Inc., et al. by *James D. Holzhauer*, *Timothy S. Bishop*, and *Robert Digges;* for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman*, *Corrie L. Fischel*, *Stephen A. Bokat*, and *Robin S. Conrad;* and for the United Parcel Service of America, Inc.,

JUSTICE SOUTER delivered the opinion of the Court.*

The question posed is whether, under the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 327, as amended, 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. III), an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case. We answer no.

I

In August 1990, petitioner, Albertson's, Inc., a grocery-store chain with supermarkets in several States, hired respondent, Hallie Kirkingburg, as a truckdriver based at its Portland, Oregon, warehouse. Kirkingburg had more than a decade's driving experience and performed well when petitioner's transportation manager took him on a road test.

Before starting work, Kirkingburg was examined to see if he met federal vision standards for commercial truckdrivers. 143 F. 3d 1228, 1230–1231 (CA9 1998). For many decades the Department of Transportation and its predecessors have been responsible for devising these standards for individuals who drive commercial vehicles in interstate commerce.[1] Since 1971, the basic vision regulation has required corrected distant visual acuity of at least 20/40 in each eye

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by *William J. Kilberg, Thomas G. Hungar, Pamela L. Hemminger,* and *Patricia S. Radez.*

Briefs of *amici curiae* urging affirmance were filed for Justice for All et al. by *Catherine A. Hanssens, Beatrice Dohrn, Bennett Klein,* and *Wendy Parmet;* for the National Employment Lawyers Association by *Gary Phelan, Paula A. Brantner,* and *Daniel S. Goldberg;* and for James Strickland, Sr., et al. by *Douglas L. Parker.*

*JUSTICE STEVENS and JUSTICE BREYER join Parts I and III of this opinion.

[1] See Motor Carrier Act, § 204(a), 49 Stat. 546; Department of Transportation Act, § 6(e)(6)(C), 80 Stat. 939–940; 49 CFR § 1.4(c)(9) (1968); Motor Carrier Safety Act of 1984, § 206, 98 Stat. 2835, as amended, 49 U. S. C. § 31136(a)(3); 49 CFR § 1.48(aa) (1998).

and distant binocular acuity of at least 20/40. See 35 Fed. Reg. 6458, 6463 (1970); 57 Fed. Reg. 6793, 6794 (1992); 49 CFR § 391.41(b)(10) (1998).[2] Kirkingburg, however, suffers from amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and monocular vision in effect.[3] Despite Kirkingburg's weak left eye, the doctor erroneously certified that he met the DOT's basic vision standards, and Albertson's hired him.[4]

In December 1991, Kirkingburg injured himself on the job and took a leave of absence. Before returning to work in November 1992, Kirkingburg went for a further physical as required by the company. This time, the examining physician correctly assessed Kirkingburg's vision and explained that his eyesight did not meet the basic DOT standards. The physician, or his nurse, told Kirkingburg that in order to be legally qualified to drive, he would have to obtain a waiver of its basic vision standards from the DOT. See 143

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[2] Visual acuity has a number of components but most commonly refers to "the ability to determine the presence of or to distinguish between more than one identifying feature in a visible target." G. von Noorden, Binocular Vision and Ocular Motility 114 (4th ed. 1990). Herman Snellen was a Dutch ophthalmologist who, in 1862, devised the familiar letter chart still used to measure visual acuity. The first figure in the Snellen score refers to distance between the viewer and the visual target, typically 20 feet. The second corresponds to the distance at which a person with normal acuity could distinguish letters of the size that the viewer can distinguish at 20 feet. See C. Snyder, Our Ophthalmic Heritage 97–99 (1967); D. Vaughan, T. Asburg, & P. Riordan-Eva, General Ophthalmology 30 (15th ed. 1999).

[3] "Amblyopia," derived from Greek roots meaning dull vision, is a general medical term for "poor vision caused by abnormal visual development secondary to abnormal visual stimulation." K. Wright et al., Pediatric Ophthalmology and Strabismus 126 (1995); see *id.*, at 126–131; see also Von Noorden, *supra,* at 208–245.

[4] Several months later, Kirkingburg's vision was recertified by a physician, again erroneously. Both times Kirkingburg received certification although his vision as measured did not meet the DOT minimum requirement. See 143 F. 3d 1228, 1230, and n. 2 (CA9 1998); App. 49–50, 297–298, 360–361.

F. 3d, at 1230; App. 284–285. The doctor was alluding to a scheme begun in July 1992 for giving DOT certification to applicants with deficient vision who had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the applicant was cited for a moving violation, conviction for certain driving-related offenses, citation for certain serious traffic violations, or more than two convictions for any other moving violations. A waiver applicant had to agree to have his vision checked annually for deterioration, and to report certain information about his driving experience to the Federal Highway Administration (FHWA or Administration), the agency within the DOT responsible for overseeing the motor carrier safety regulations. See 57 Fed. Reg. 31458, 31460–31461 (1992).[5] Kirkingburg applied for a waiver, but because he could not meet the basic DOT vision standard Albertson's fired him from his job as a truckdriver.[6] In early 1993, after he had left Albertson's, Kirkingburg received a DOT waiver, but Albertson's refused to rehire him. See 143 F. 3d, at 1231.

Kirkingburg sued Albertson's, claiming that firing him violated the ADA.[7] Albertson's moved for summary judgment

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[5] In February 1992, the FHWA issued an advance notice of proposed rulemaking to review its vision standards. See 57 Fed. Reg. 6793. Shortly thereafter, the FHWA announced its intent to set up a waiver program and its preliminary acceptance of waiver applications. See *id.*, at 10295. It modified the proposed conditions for the waivers and requested comments in June. See *id.*, at 23370. After receiving and considering the comments, the Administration announced its final decision to grant waivers in July.

[6] Albertson's offered Kirkingburg at least one and possibly two alternative jobs. The first was as a "yard hostler," a truckdriver within the premises of petitioner's warehouse property, the second as a tire mechanic. The company apparently withdrew the first offer, though the parties dispute the exact sequence of events. Kirkingburg turned down the second because it paid much less than driving a truck. See App. 14–16, 41–42.

[7] The ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement,

solely on the ground that Kirkingburg was "not 'otherwise qualified' to perform the job of truck driver with or without reasonable accommodation." App. 39–40; see *id.*, at 119. The District Court granted the motion, ruling that Albertson's had reasonably concluded that Kirkingburg was not qualified without an accommodation because he could not, as admitted, meet the basic DOT vision standards. The court held that giving Kirkingburg time to get a DOT waiver was not a required reasonable accommodation because the waiver program was "a flawed experiment that has not altered the DOT vision requirements." *Id.*, at 120.

A divided panel of the Ninth Circuit reversed. In addition to pressing its claim that Kirkingburg was not otherwise qualified, Albertson's for the first time on appeal took the position that it was entitled to summary judgment because Kirkingburg did not have a disability within the meaning of the Act. See *id.*, at 182–185. The Court of Appeals considered but rejected the new argument, concluding that because Kirkingburg had presented "uncontroverted evidence" that his vision was effectively monocular, he had demonstrated that "the *manner* in which he sees differs significantly from the *manner* in which most people see." 143 F. 3d, at 1232. That difference in manner, the court held, was sufficient to establish disability. *Ibid.*

The Court of Appeals then addressed the ground upon which the District Court had granted summary judgment, acknowledging that Albertson's consistently required its truckdrivers to meet the DOT's basic vision standards and that Kirkingburg had not met them (and indeed could not). The court recognized that the ADA allowed Albertson's to establish a reasonable job-related vision standard as a prerequisite for hiring and that Albertson's could rely on Government regulations as a basis for setting its standard. The court held, however, that Albertson's could not use compli-

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or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U. S. C. § 12112(a).

ance with a Government regulation as the justification for its vision requirement because the waiver program, which Albertson's disregarded, was "a lawful and legitimate part of the DOT regulatory scheme." *Id.*, at 1236. The Court of Appeals conceded that Albertson's was free to set a vision standard different from that mandated by the DOT, but held that under the ADA, Albertson's would have to justify its independent standard as necessary to prevent "'a direct threat to the health or safety of other individuals in the workplace.'" *Ibid.* (quoting 42 U. S. C. § 12113(b)). Although the court suggested that Albertson's might be able to make such a showing on remand, 143 F. 3d, at 1236, it ultimately took the position that the company could not, interpreting petitioner's rejection of DOT waivers as flying in the face of the judgment about safety already embodied in the DOT's decision to grant them, *id.*, at 1237.

Judge Rymer dissented. She contended that Albertson's had properly relied on the basic DOT vision standards in refusing to accept waivers because, when Albertson's fired Kirkingburg, the waiver program did not rest upon "a rule or a regulation with the force of law," but was merely a way of gathering data to use in deciding whether to refashion the still-applicable vision standards. *Id.*, at 1239.

II

Though we need not speak to the issue whether Kirkingburg was an individual with a disability in order to resolve this case, that issue falls within the first question on which we granted certiorari,[8] 525 U. S. 1064 (1999), and we think it worthwhile to address it briefly in order to correct three missteps the Ninth Circuit made in its discussion of the matter. Under the ADA:

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[8] "Whether a monocular individual is 'disabled' per se, under the Americans with Disabilities Act." Pet. for Cert. i (citation omitted).

"The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment." 42 U. S. C. § 12102(2).

We are concerned only with the first definition.[9] There is no dispute either that Kirkingburg's amblyopia is a physical impairment within the meaning of the Act, see 29 CFR § 1630.2(h)(1) (1998) (defining "physical impairment" as "[a]ny physiological disorder, or condition . . . affecting one or more of the following body systems: . . . special sense organs"), or that seeing is one of his major life activities, see § 1630.2(i) (giving seeing as an example of a major life activity).[10] The question is whether his monocular vision alone "substantially limits" Kirkingburg's seeing.

In giving its affirmative answer, the Ninth Circuit relied on a regulation issued by the Equal Employment Opportunity Commission (EEOC), defining "substantially limits" as "[s]ignificantly restrict[s] as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the gen-

[9] The Ninth Circuit also discussed whether Kirkingburg was disabled under the third, "regarded as," definition of "disability." See 143 F. 3d, at 1233. Albertson's did not challenge that aspect of the Court of Appeals's decision in its petition for certiorari, and we therefore do not address it. See this Court's Rule 14.1(a); see also, *e. g.*, *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992).

[10] As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, 42 U. S. C. § 12102, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due, see *Sutton* v. *United Airlines, Inc.*, *ante*, at 479–480.

eral population can perform that same major life activity." § 1630.2(j)(ii). The Ninth Circuit concluded that "the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see" because, "[t]o put it in its simplest terms [he] sees using only one eye; most people see using two." 143 F. 3d, at 1232. The Ninth Circuit majority also relied on a recent Eighth Circuit decision, whose holding it characterized in similar terms: "It was enough to warrant a finding of disability . . . that the plaintiff could see out of only one eye: the *manner* in which he performed the major life activity of seeing was different." *Ibid.* (characterizing *Doane* v. *Omaha*, 115 F. 3d 624, 627–628 (1997)).[11]

But in several respects the Ninth Circuit was too quick to find a disability. First, although the EEOC definition

[11] Before the Ninth Circuit, Albertson's presented the issue of Kirkingburg's failure to meet the Act's definition of disability as an alternative ground for affirmance, *i. e.*, for a grant of summary judgment in the company's favor. It thus contended that Kirkingburg had "failed to produce any material issue of fact" that he was disabled. App. 182. Parts of the Ninth Circuit's discussion suggest that it was merely denying the company's request for summary judgment, leaving the issue open for factual development and resolution on remand. See, *e. g.*, 143 F. 3d, at 1232 ("Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled"); *ibid.* ("Kirkingburg has presented uncontroverted evidence showing that . . . [his] inability to see out of one eye affects his peripheral vision and his depth perception"); *ibid.* ("if the facts are as Kirkingburg alleges"). Moreover the Government (and at times even Albertson's, see Pet. for Cert. 15) understands the Ninth Circuit to have been simply explaining why the company was not entitled to summary judgment on this score. See Brief for United States et al. as *Amici Curiae* 11, and n. 5 ("The Ninth Circuit therefore correctly declined to grant summary judgment to petitioner on the ground that monocular vision is not a disability"). Even if that is an accurate reading, the statements the Ninth Circuit made setting out the standards governing the finding of disability would have largely dictated the outcome. Whether one views the Ninth Circuit's opinion as merely denying summary judgment for the company or as tantamount to a grant of summary judgment for Kirkingburg, our rejection of the sweeping character of the Court of Appeals's pronouncements remains the same.

of "substantially limits" cited by the Ninth Circuit requires a "significant restrict[ion]" in an individual's manner of performing a major life activity, the court appeared willing to settle for a mere difference. By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments causing "substantial limitat[ions]" in individuals' ability to perform major life activities constitute disabilities. While the Act "addresses substantial limitations on major life activities, not utter inabilities," *Bragdon* v. *Abbott*, 524 U. S. 624, 641 (1998), it concerns itself only with limitations that are in fact substantial.

Second, the Ninth Circuit appeared to suggest that in gauging whether a monocular individual has a disability a court need not take account of the individual's ability to compensate for the impairment. The court acknowledged that Kirkingburg's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." 143 F. 3d, at 1232. But in treating monocularity as itself sufficient to establish disability and in embracing *Doane*, the Ninth Circuit apparently adopted the view that whether "the individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects," 143 F. 3d, at 1232, was irrelevant to the determination of disability. See, *e. g.*, *Sutton* v. *United Air Lines, Inc.*, 130 F. 3d 893, 901, n. 7 (CA10 1997) (characterizing *Doane* as standing for the proposition that mitigating measures should be disregarded in assessing disability); *EEOC* v. *Union Pacific R. Co.*, 6 F. Supp. 2d 1135, 1137 (Idaho 1998) (same). We have just held, however, in *Sutton* v. *United Airlines, Inc.*, *ante*, at 482, that mitigating measures must be taken into account in judging whether an individual possesses a disability. We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and

measures undertaken, whether consciously or not, with the body's own systems.

Finally, and perhaps most significantly, the Court of Appeals did not pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis. The Act expresses that mandate clearly by defining "disability" "with respect to an individual," 42 U. S. C. § 12102(2), and in terms of the impact of an impairment on "such individual," § 12102(2)(A). See *Sutton*, *ante*, at 483; cf. 29 CFR pt. 1630, App. § 1630.2(j) (1998) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"); *ibid.* ("The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis"). While some impairments may invariably cause a substantial limitation of a major life activity, cf. *Bragdon*, *supra*, at 642 (declining to address whether HIV infection is a *per se* disability), we cannot say that monocularity does. That category, as we understand it, may embrace a group whose members vary by the degree of visual acuity in the weaker eye, the age at which they suffered their vision loss, the extent of their compensating adjustments in visual techniques, and the ultimate scope of the restrictions on their visual abilities. These variables are not the stuff of a *per se* rule. While monocularity inevitably leads to some loss of horizontal field of vision and depth perception,[12] consequences the Ninth

[12] Individuals who can see out of only one eye are unable to perform stereopsis, the process of combining two retinal images into one through which two-eyed individuals gain much of their depth perception, particularly at short distances. At greater distances, stereopsis is relatively less important for depth perception. In their distance vision, monocular individuals are able to compensate for their lack of stereopsis to varying degrees by relying on monocular cues, such as motion parallax, linear perspective, overlay of contours, and distribution of highlights and shadows. See Von Noorden, *supra* n. 2, at 23–30; App. 300–302.

Circuit mentioned, see 143 F. 3d, at 1232, the court did not identify the degree of loss suffered by Kirkingburg, nor are we aware of any evidence in the record specifying the extent of his visual restrictions.

This is not to suggest that monocular individuals have an onerous burden in trying to show that they are disabled. On the contrary, our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision "ordinarily" will meet the Act's definition of disability, Brief for United States et al. as *Amici Curiae* 11, and we suppose that defendant companies will often not contest the issue. We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.

III

Petitioner's primary contention is that even if Kirkingburg was disabled, he was not a "qualified" individual with a disability, see 42 U. S. C. § 12112(a), because Albertson's merely insisted on the minimum level of visual acuity set forth in the DOT's Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998). If Albertson's was entitled to enforce that standard as defining an "essential job functio[n] of the employment position," see 42 U. S. C. § 12111(8), that is the end of the case, for Kirkingburg concededly could not satisfy it.[13]

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[13] Kirkingburg asserts that in showing that Albertson's initially allowed him to drive with a DOT certification, despite the fact that he did not meet the DOT's minimum visual acuity requirement, he produced evidence from which a reasonable juror could find that he satisfied the legitimate prerequisites of the job. See Brief for Respondent 36, 37; see also *id.*, at 6. But petitioner's argument is a legal, not a factual, one. In any event, the ample evidence in the record on petitioner's policy of requiring adherence to minimum DOT vision standards for its truckdrivers, see, *e. g.*,

Under Title I of the ADA, employers may justify their use of "qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability," so long as such standards are "job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation . . . ." § 12113(a). See also § 12112(b)(6) (defining discrimination to include "using qualification standards . . . that screen out or tend to screen out an individual with a disability . . . unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity").[14]

Kirkingburg and the Government argue that these provisions do not authorize an employer to follow even a facially applicable regulatory standard subject to waiver without making some enquiry beyond determining whether the applicant or employee meets that standard, yes or no. Before an employer may insist on compliance, they say, the employer must make a showing with reference to the particular job that the waivable regulatory standard is "job-related . . . and . . . consistent with business necessity," see § 12112(b)(6), and that after consideration of the capabilities of the individual a reasonable accommodation could not fairly resolve the competing interests when an applicant or employee cannot wholly satisfy an otherwise justifiable job qualification.

App. 53, 55–56, 333, would bar any inference that petitioner's failure to detect the discrepancy between the level of visual acuity Kirkingburg was determined to have had during his first two certifications and the DOT's minimum visual acuity requirement raised a genuine factual dispute on this issue.

[14] The EEOC's regulations implementing Title I define "[q]ualification standards" to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 CFR § 1630.2(q) (1998).

The Government extends this argument by reference to a further section of the statute, which at first blush appears to be a permissive provision for the employer's and the public's benefit. An employer may impose as a qualification standard "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," § 12113(b), with "direct threat" being defined by the Act as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," § 12111(3); see also 29 CFR § 1630.2(r) (1998). The Government urges us to read subsections (a) and (b) together to mean that when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's "direct threat" criterion, see Brief for United States et al. as *Amici Curiae* 22. That criterion ordinarily requires "an individualized assessment of the individual's present ability to safely perform the essential functions of the job," 29 CFR § 1630.2(r) (1998), "based on medical or other objective evidence," *Bragdon*, 524 U. S., at 649 (citing *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 288 (1987)); see 29 CFR § 1630.2(r) (1998) (assessment of direct threat "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence").[15]

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[15] This appears to be the position taken by the EEOC in the Interpretive Guidance promulgated under its authority to issue regulations to carry out Title I of the ADA, 42 U. S. C. § 12116, see 29 CFR pt. 1630, App. §§ 1630.15(b) and (c) (1998) (requiring safety-related standards to be evaluated under the ADA's direct threat standard); see also App. § 1630.10 (noting that selection criteria that screen out individuals with disabilities, including "safety requirements, vision or hearing requirements," must be job-related, consistent with business necessity, and not amenable to reasonable accommodation); *EEOC* v. *Exxon Corp.*, 1 F. Supp. 2d 635, 645 (ND Tex. 1998) (adopting the EEOC's position that safety-related qualification standards must meet the ADA's direct-threat standard). Although it might be questioned whether the Government's interpretation, which

Albertson's answers essentially that even assuming the Government has proposed a sound reading of the statute for the general run of cases, this case is not in the general run. It is crucial to its position that Albertson's here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable. The job qualification it was applying was the distant visual acuity standard of the Federal Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998), which is made binding on Albertson's by § 391.11: "[A] motor carrier shall not . . . permit a person to drive a commercial motor vehicle unless that person is qualified to drive," by, among other things, meeting the physical qualification standards set forth in § 391.41. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.

If we looked no further, there would be no basis to question petitioner's unconditional obligation to follow the regulations and its consequent right to do so. This, indeed, was the understanding of Congress when it enacted the ADA, see *infra*, at 573–574.[16] But there is more: the waiver program.

The Court of Appeals majority concluded that the waiver program "precludes [employers] from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability," and that in the face of a waiver

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might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one, we have no need to confront the validity of the reading in this case.

[16] The implementing regulations of Title I also recognize a defense to liability under the ADA that "a challenged action is required or necessitated by another Federal law or regulation," 29 CFR § 1630.15(e) (1998). As the parties do not invoke this specific regulation, we have no occasion to consider its effect.

an employer "will not be able to avoid the [ADA's] strictures by showing that its standards are necessary to prevent a direct safety threat," 143 F. 3d, at 1237. The Court of Appeals thus assumed that the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule had been modified by some different safety standard made applicable by grant of a waiver. Cf. *Conroy* v. *Aniskoff*, 507 U. S. 511, 515 (1993) (noting the "'cardinal rule that a statute is to be read as a whole'" (quoting *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991))). On this reading, an individualized determination under a different substantive safety rule was an element of the regulatory regime, which would easily fit with any requirement of 42 U. S. C. §§ 12113(a) and (b) to consider reasonable accommodation. An employer resting solely on the federal standard for its visual acuity qualification would be required to accept a waiver once obtained, and probably to provide an applicant some opportunity to obtain a waiver whenever that was reasonably possible. If this was sound analysis, the District Court's summary judgment for Albertson's was error.

But the reasoning underlying the Court of Appeals's decision was unsound, for we think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard in a way that disentitled an employer like Albertson's to insist on it. To be sure, this is not immediately apparent. If one starts with the statutory provisions authorizing regulations by the DOT as they stood at the time the DOT began the waiver program, one would reasonably presume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, so that the content of any general regulation would as a matter of law be deemed modified by the terms of any waiver standard thus applied to it. Compare 49 U. S. C. App. § 2505(a)(3) (1988 ed.) ("Such regulation shall . . . ensure that . . . the physical

condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely"),[17] with 49 U. S. C. App. § 2505(f) (1988 ed.) ("After notice and an opportunity for comment, the Secretary may waive, in whole or in part, application of any regulation issued under this section with respect to any person or class of persons if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles").[18] Safe operation is supposed to be the touchstone of regulation in each instance.

As to the general visual acuity regulations in force under the former provision,[19] affirmative determinations that the selected standards were needed for safe operation were indeed the predicates of the DOT action. Starting in 1937, the federal agencies authorized to regulate commercial motor vehicle safety set increasingly rigorous visual acuity standards, culminating in the current one, which has remained unchanged since it became effective in 1971.[20] When

[17] This provision is currently codified at 49 U. S. C. § 31136(a)(3).

[18] Congress recently amended the waiver provision in the Transportation Equity Act for the 21st Century, Pub. L. 105–178, 112 Stat. 107. It now provides that the Secretary of Transportation may issue a 2-year renewable "exemption" if "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." See § 4007, 112 Stat. 401, 49 U. S. C. § 31315(b) (1994 ed., Supp. IV).

[19] At the time the FHWA promulgated the current visual acuity standard, the agency was acting pursuant to § 204(a) of the Interstate Commerce Act, as amended by the Motor Carrier Act, 49 U. S. C. § 304(a) (1970 ed.), see n. 1, *supra*, which likewise required the agency to regulate to ensure "safety of operation."

[20] The Interstate Commerce Commission promulgated the first visual acuity regulations for interstate commercial drivers in 1937, requiring "[g]ood eyesight in both eyes (either with or without glasses, or by correction with glasses), including adequate perception of red and green colors." 2 Fed. Reg. 113120 (1937). In 1939, the vision standard was changed to require "visual acuity (either without glasses or by correction with glasses) of not less than 20/40 (Snellen) in one eye, and 20/100 (Snellen) in the other eye; form field of not less than 45 degrees in all meridians from the point of fixation; ability to distinguish red, green,

the FHWA proposed it, the agency found that "[a]ccident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention," 34 Fed. Reg. 9080, 9081 (1969) (Notice of Proposed Rule Making); the current standard was adopted to reflect the agency's conclusion that "drivers of modern, more complex vehicles" must be able to "withstand the increased physical and mental demands that their occupation now imposes." 35 Fed. Reg. 6458 (1970). Given these findings and "in the light of discussions with the Administration's medical advisers," *id.*, at 6459, the FHWA made a considered determination about the level of visual acuity needed for safe operation of commercial motor vehicles in interstate commerce, an "area [in which] the risks involved are so well known and so serious as to dictate the utmost caution." *Id.*, at 17419.

For several reasons, one would expect any regulation governing a waiver program to establish a comparable substantive standard (albeit for exceptional cases), grounded on known facts indicating at least that safe operation would not be jeopardized. First, of course, safe operation was the criterion of the statute authorizing an administrative waiver scheme, as noted already. Second, the impetus to develop a waiver program was a concern that the existing substantive standard might be more demanding than safety required. When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law. The Senate Labor and Human Resources Committee Report on the ADA stated that "a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation."

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and yellow." 57 Fed. Reg. 6793–6794 (1992) (internal quotation marks omitted). In 1952, the visual acuity standard was strengthened to require at least 20/40 (Snellen) in each eye. *Id.*, at 6794.

S. Rep. No. 101–116, pp. 27–28 (1998). The two primary House Committees shared this understanding, see H. R. Rep. No. 101–485, pt. 2, p. 57 (1990) (House Education and Labor Committee Report); *id.*, pt. 3, at 34 (House Judiciary Committee Report). Accordingly, two of these Committees asked "the Secretary of Transportation [to] undertake a thorough review" of current knowledge about the capabilities of individuals with disabilities and available technological aids and devices, and make "any necessary changes" within two years of the enactment of the ADA. S. Rep. No. 101–116, at 27–28; see H. R. Rep. No. 101–485, pt. 2, at 57; see also *id.*, pt. 3, at 34 (expressing the expectation that the Secretary of Transportation would "review these requirements to determine whether they are valid under this Act"). Finally, when the FHWA instituted the waiver program it addressed the statutory mandate by stating in its notice of final disposition that the scheme would be "consistent with the safe operation of commercial motor vehicles," just as 49 U. S. C. App. § 2505(f) (1988 ed.) required, 57 Fed. Reg. 31460 (1992).

And yet, despite this background, the regulations establishing the waiver program did not modify the general visual acuity standards. It is not that the waiver regulations failed to do so in a merely formal sense, as by turning waiver decisions on driving records, not sight requirements. The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety. When, in 1992, the FHWA published an "[a]dvance notice of proposed rulemaking" requesting comments "on the need, if any, to amend its driver qualification requirements relating to the vision standard," *id.*, at 6793, it candidly proposed its waiver scheme as simply a means of obtaining information bearing on the justifiability of revising the binding standards already in place, see *id.*, at 10295. The agency explained that the "object of the waiver program is to provide objective data

to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards in 49 CFR part 391 in favor of a more individualized standard." *Ibid.* As proposed, therefore, there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter. After a bumpy stretch of administrative procedure, see *Advocates for Highway and Auto Safety* v. *FHWA*, 28 F. 3d 1288, 1290 (CADC 1994), the FHWA's final disposition explained again that the waivers were proposed as a way to gather facts going to the wisdom of changing the existing law. The waiver program "will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of [commercial motor vehicles]. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology." 57 Fed. Reg. 31458 (1992). And if all this were not enough to show that the FHWA was planning to give waivers solely to collect information, it acknowledged that a study it had commissioned had done no more than "'illuminat[e] the lack of empirical data to establish a link between vision disorders and commercial motor vehicle safety,'" and "'failed to provide a sufficient foundation on which to propose a satisfactory vision standard for drivers of [commercial motor vehicles] in interstate commerce,'" *Advocates for Highway and Auto Safety*, *supra*, at 1293 (quoting 57 Fed. Reg. 31458 (1992)).

In sum, the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program was simply an experiment with safety, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.[21]

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[21] Though irrelevant to the disposition of this case, it is hardly surprising that two years after the events here the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway and Auto Safety* v. *FHWA*, 28 F. 3d 1288, 1289 (CADC 1994). On remand, the agency "revalidated" the waivers it had already issued, based in part on evidence relating to the safety of drivers in the program that had not been included in the record before the District of Columbia Circuit. See 59 Fed. Reg. 50887, 50889–50890 (1994); *id.*, at 59386, 59389. In the meantime the FHWA has apparently continued to want things both ways. It has said publicly, based on a review of the data it collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. See *id.*, at 50887, 50890. It has also recently noted that its medical panel has recommended "leaving the visual acuity standard unchanged," see 64 Fed. Reg. 16518 (1999) (citing F. Berson, M. Kuperwaser, L. Aiello, and J. Rosenberg, Visual Requirements and Commercial Drivers, Oct. 16, 1998), a recommendation which the FHWA has concluded supports its "view that the present standard is reasonable and necessary as a general standard to ensure highway safety." 64 Fed. Reg. 16518 (1999).

The waiver program in which Kirkingburg participated expired on March 31, 1996, at which point the FHWA allowed all still-active participants to continue to operate in interstate commerce, provided they continued to meet certain medical and other requirements. See 61 Fed. Reg. 13338, 13345 (1996); 49 CFR § 391.64 (1998). The FHWA justified this decision based on the safety record of participants in the original waiver program. See 61 Fed. Reg. 13338, 13345 (1996). In the wake of a 1996 decision from the United States Court of Appeals for the Eighth Circuit requiring the FHWA to justify the exclusion of further participants in the waiver program, see *Rauenhorst* v. *United States Dept. of Transporta-*

Nothing in the waiver regulation, of course, required an employer of commercial drivers to accept the hypothesis and participate in the Government's experiment. The only question, then, is whether the ADA should be read to require such an employer to defend a decision to decline the experiment. Is it reasonable, that is, to read the ADA as requiring an employer like Albertson's to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate? If the answer were yes, an employer would in fact have an obligation of which we can think of no comparable example in our law. The employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government had merely begun an experiment to provide data to consider changing the underlying specifications. And what is even more, the employer would be required to do so when the Government had made an affirmative record indicating that contemporary empirical evidence was hard to come by. It is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the

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tion, *FHWA*, 95 F. 3d 715, 723 (1996), the agency began taking new applicants for waivers, see, *e. g.*, 63 Fed. Reg. 66226 (1998). The agency has now initiated a program under the authority granted in the Transportation Equity Act for the 21st Century, Pub. L. 105–178, 112 Stat. 107, to grant exemptions on a more regular basis, see 63 Fed. Reg. 67600 (1998) (interim final rule implementing the Transportation Equity Act for the 21st Century). The effect of the current exemption program has not been challenged in this case, and we have no occasion to consider it.

face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

The judgment of the Ninth Circuit is accordingly reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

As the Government reads the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 327, as amended, 42 U. S. C. § 12101 *et seq.* (1994 ed. and Supp. III), it requires that petitioner justify the Department of Transportation's (DOT) visual acuity standards as job related, consistent with business necessity, and required to prevent employees from imposing a direct threat to the health and safety of others in the workplace. The Court assumes, for purposes of this case, that the Government's reading is, for the most part, correct. *Ante,* at 569, and n. 15. I agree with the Court's decision that, even when the case is analyzed through the Government's proposed lens, petitioner was entitled to summary judgment in this case. As the Court explains, *ante,* at 577 and this page, it would be unprecedented and nonsensical to interpret § 12113 to require petitioner to defend the application of the Government's regulation to respondent when petitioner has an unconditional obligation to enforce the federal law.

As the Court points out, though, *ante,* at 567, DOT's visual acuity standards might also be relevant to the question whether respondent was a "qualified individual with a disability" under 42 U. S. C. § 12112(a). That section provides that no covered entity "shall discriminate against a qualified individual with a disability because of the disability of such individual." Presumably, then, a plaintiff claiming a cause of action under the ADA bears the burden of proving, *inter alia,* that he is a qualified individual. The phrase "qualified individual with a disability" is defined to mean:

> "an individual with a disability who, *with or without reasonable accommodation*, can perform the *essential functions* of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job this description shall be considered evidence of the essential functions of the job." § 12111(8) (emphasis added).

In this case, respondent sought a job driving trucks in interstate commerce. The quintessential function of that job, it seems to me, is to be able to drive a commercial truck in interstate commerce, and it was respondent's burden to prove that he could do so.

As the Court explains, *ante*, at 570, DOT's Motor Carrier Safety Regulations have the force of law and bind petitioner—it may not, by law, "permit a person to drive a commercial motor vehicle unless that person is qualified to drive." 49 CFR § 391.11 (1999). But by the same token, DOT's regulations bind respondent, who "shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle." *Ibid.;* see also § 391.41 ("A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so"). Given that DOT's regulation equally binds petitioner and respondent, and that it is conceded in this case that respondent could not meet the federal requirements, respondent surely was not "qualified" to perform the essential functions of petitioner's truckdriver job without a reasonable accommodation. The waiver program might be thought of as a way to reasonably accommodate respondent, but for the fact, as the Court explains, *ante*, at 571–576, that the program did nothing to modify the regulation's unconditional requirements.

For that reason, requiring petitioner to make such an accommodation most certainly would have been *unreasonable.*

The result of this case is the same under either view of the statute. If forced to choose between these alternatives, however, I would prefer to hold that respondent, as a matter of law, was not qualified to perform the job he sought within the meaning of the ADA. I nevertheless join the Court's opinion. The Ninth Circuit below viewed respondent's ADA claim on the Government's terms and petitioner's argument here appears to be tailored around the Government's view. In these circumstances, I agree with the Court's approach. I join the Court's opinion, however, only on the understanding that it leaves open the argument that federal laws such as DOT's visual acuity standards might be critical in determining whether a plaintiff is a "qualified individual with a disability."

Syllabus

OLMSTEAD, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* L. C., BY ZIMRING, GUARDIAN AD LITEM AND NEXT FRIEND, ET AL.

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

No. 98–536. Argued April 21, 1999—Decided June 22, 1999

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination. 42 U. S. C. §§ 12101(a)(2), (5). Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. § 12132. Congress instructed the Attorney General to issue regulations implementing Title II's discrimination proscription. See § 12134(a). One such regulation, known as the "integration regulation," requires a "public entity [to] administer . . . programs . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d). A further prescription, here called the "reasonable-modifications regulation," requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," but does not require measures that would "fundamentally alter" the nature of the entity's programs. § 35.130(b)(7).

Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W., with a personality disorder. Both women were voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where they were confined for treatment in a psychiatric unit. Although their treatment professionals eventually concluded that each of the women could be cared for appropriately in a community-based program, the women remained institutionalized at GRH. Seeking placement in community care, L. C. filed this suit against petitioner state officials (collectively, the State) under 42 U. S. C. § 1983 and Title II. She alleged that the State violated Title II in failing to place her in a community-based program once her treating professionals determined that such placement was appropriate. E. W. intervened, stating an identical claim. The District Court granted partial summary judgment for the women, ordering their

placement in an appropriate community-based treatment program. The court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. "by reason of [their] disabilit[ies]," accounted for their retention at GRH. Under Title II, the court concluded, unnecessary institutional segregation constitutes discrimination *per se*, which cannot be justified by a lack of funding. The court also rejected the State's defense that requiring immediate transfers in such cases would "fundamentally alter" the State's programs. The Eleventh Circuit affirmed the District Court's judgment, but remanded for reassessment of the State's cost-based defense. The District Court had left virtually no room for such a defense. The appeals court read the statute and regulations to allow the defense, but only in tightly limited circumstances. Accordingly, the Eleventh Circuit instructed the District Court to consider, as a key factor, whether the additional cost for treatment of L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget.

Held: The judgment is affirmed in part and vacated in part, and the case is remanded.

138 F. 3d 893, affirmed in part, vacated in part, and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding that, under Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Pp. 596–603.

(a) The integration and reasonable-modifications regulations issued by the Attorney General rest on two key determinations: (1) Unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability prohibited by Title II, and (2) qualifying their obligation to avoid unjustified isolation of individuals with disabilities, States can resist modifications that would fundamentally alter the nature of their services and programs. The Eleventh Circuit essentially upheld the Attorney General's construction of the ADA. This Court affirms the Court of Appeals decision in substantial part. Pp. 596–597.

(b) Undue institutionalization qualifies as discrimination "by reason of . . . disability." The Department of Justice has consistently advocated that it does. Because the Department is the agency directed

by Congress to issue Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844, is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *E. g., Bragdon* v. *Abbott*, 524 U. S. 624, 642. According to the State, L. C. and E. W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities, nor were they subjected to "discrimination," for they identified no comparison class of similarly situated individuals given preferential treatment. In rejecting these positions, the Court recognizes that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. The ADA stepped up earlier efforts in the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The ADA both requires all public entities to refrain from discrimination, see § 12132, and specifically identifies unjustified "segregation" of persons with disabilities as a "for[m] of discrimination," see §§ 12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, cf., *e. g., Allen* v. *Wright*, 468 U. S. 737, 755; and institutional confinement severely diminishes individuals' everyday life activities. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. The State correctly uses the past tense to frame its argument that, despite Congress' ADA findings, the Medicaid statute "reflected" a congressional policy preference for institutional treatment over treatment in the community. Since 1981, Medicaid has in fact provided funding for state-run home and community-based care through a waiver program. This Court emphasizes that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. In this case, however, it is not genuinely disputed that L. C. and E. W. are individuals "quali-

fied" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. Pp. 597–603.

JUSTICE GINSBURG, joined by JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER, concluded in Part III–B that the State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. If, as the Eleventh Circuit indicated, the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. The ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms. For others, no placement outside the institution may ever be appropriate. To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. The case is remanded for further consideration of the appropriate relief, given the range of the State's facilities for the care of persons with diverse mental disabilities, and its obligation to administer services with an even hand. Pp. 603–606.

Syllabus

JUSTICE STEVENS would affirm the judgment of the Court of Appeals, but because there are not five votes for that disposition, joined the Court's judgment and Parts I, II, and III–A of its opinion. Pp. 607–608.

JUSTICE KENNEDY concluded that the case must be remanded for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed. On the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. Thus, respondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities). This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. Thus far, respondents have identified no class of similarly situated individuals, let alone shown them to have been given preferential treatment. Without additional information, the Court cannot address the issue in the way the statute demands. As a consequence, the partial summary judgment granted respondents ought not to be sustained. In addition, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. The lower courts should determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested. Pp. 611–615.

GINSBURG, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined, and an opin-

ion with respect to Part III–B, in which O'CONNOR, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 607. KENNEDY, J., filed an opinion concurring in the judgment, in which BREYER, J., joined as to Part I, *post*, p. 608. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 615.

Beverly Patricia Downing, Senior Assistant Attorney General of Georgia, argued the cause for petitioners. With her on the briefs were *Thurbert E. Baker*, Attorney General, *Kathleen M. Pacious*, Deputy Attorney General, *Jefferson James Davis*, Special Assistant Attorney General, and *Jeffrey S. Sutton*.

Michael H. Gottesman argued the cause for respondents. With him on the brief were *Steven D. Caley*, *Susan C. Jamieson*, and *David A. Webster*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *Jessica Dunsay Silver*, and *Gregory B. Friel*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Nevada et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *Anne B. Cathcart*, Special Assistant Attorney General, *Mike Moore*, Attorney General of Mississippi, and *Robert E. Sanders*, Assistant Attorney General, *John Cornyn*, Attorney General of Texas, *Andy Taylor*, First Assistant Attorney General, *Linda S. Eads*, Deputy Attorney General, and *Gregory S. Coleman*, Solicitor General, and by the Attorneys General for their respective States as follows: *Ken L. Salazar* of Colorado, *Jeffrey A. Modisett* of Indiana, *Margery S. Bronster* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Joseph P. Mazurek* of Montana, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley*.

Briefs of *amici curiae* urging affirmance were filed for the American Association on Mental Retardation et al. by *Alan M. Wiseman*, *Timothy K. Armstrong*, and *Ira A. Burnim;* for the American Civil Liberties Union et al. by *Laurie Webb Daniel* and *Steven R. Shapiro;* for the American

JUSTICE GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Part III–B, in which JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER join.

This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U. S. C. § 12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

Psychiatric Association et al. by *Richard G. Taranto;* for 58 Former State Commissioners and Directors of Mental Health and Developmental Disabilities et al. by *Neil V. McKittrick;* for the National Council on Disability by *Robert L. Burgdorf, Jr.;* for the National Mental Health Consumers' Self-Help Clearinghouse et al. by *Loralyn McKinley;* for Dick Thornburgh et al. by *Mr. Thornburgh, pro se, James E. Day,* and *David R. Fine;* for People First of Georgia et al. by *Thomas K. Gilhool;* and for the Voice of the Retarded et al. by *William J. Burke* and *Tamie Hopp.*

Stephen F. Gold filed a brief for ADAPT et al. as *amici curiae.*

I

This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L. C. and E. W. did include such an issue; L. C. and E. W. alleged that defendants-petitioners, Georgia health care officials, failed to afford them minimally adequate care and freedom from undue restraint, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. See Complaint ¶¶ 87–91; Intervenor's Complaint ¶¶ 30–34. But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims. See Civ. No. 1:95–cv–1210–MHS (ND Ga., Mar. 26, 1997), pp. 5–6, 11–13, App. to Pet. for Cert. 34a–35a, 40a–41a; 138 F. 3d 893, 895, and n. 3 (CA11 1998). Instead, the courts below resolved the case solely on statutory grounds. Our review is similarly confined. Cf. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 450 (1985) (Texas city's requirement of special use permit for operation of group home for mentally retarded, when other care and multiple-dwelling facilities were freely permitted, lacked rational basis and therefore violated Equal Protection Clause of Fourteenth Amendment). Mindful that it is a statute we are construing, we set out first the legislative and regulatory prescriptions on which the case turns.

In the opening provisions of the ADA, Congress stated findings applicable to the statute in all its parts. Most relevant to this case, Congress determined that

> "(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> "(3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ;
>
> . . . . .

> "(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation . . . ." 42 U. S. C. §§ 12101(a)(2), (3), (5).[1]

Congress then set forth prohibitions against discrimination in employment (Title I, §§ 12111–12117), public services furnished by governmental entities (Title II, §§ 12131–12165), and public accommodations provided by private entities (Title III, §§ 12181–12189). The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1).[2]

This case concerns Title II, the public services portion of the ADA.[3] The provision of Title II centrally at issue reads:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

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[1] The ADA, enacted in 1990, is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities. Earlier legislative efforts included the Rehabilitation Act of 1973, 87 Stat. 355, 29 U. S. C. § 701 *et seq.* (1976 ed.), and the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486, 42 U. S. C. § 6001 *et seq.* (1976 ed.), enacted in 1975. In the ADA, Congress for the first time referred expressly to "segregation" of persons with disabilities as a "for[m] of discrimination," and to discrimination that persists in the area of "institutionalization." §§ 12101(a)(2), (3), (5).

[2] The ADA defines "disability," "with respect to an individual," as

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment." § 12102(2).

There is no dispute that L. C. and E. W. are disabled within the meaning of the ADA.

[3] In addition to the provisions set out in Part A governing public services generally, see §§ 12131–12134, Title II contains in Part B a host of provisions governing public transportation services, see §§ 12141–12165.

> disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 201, as set forth in 42 U. S. C. § 12132.

Title II's definition section states that "public entity" includes "any State or local government," and "any department, agency, [or] special purpose district." §§ 12131(1)(A), (B). The same section defines "qualified individual with a disability" as

> "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

On redress for violations of § 12132's discrimination prohibition, Congress referred to remedies available under § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, 29 U. S. C. § 794a. See § 203, as set forth in 42 U. S. C. § 12133 ("The remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").[4]

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[4] Section 505 of the Rehabilitation Act incorporates the remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of § 504 of the Rehabilitation Act. See 29 U. S. C. § 794a(a)(2). Title VI, in turn, directs each federal department authorized to extend financial assistance to any department or agency of a State to issue rules and regulations consistent with achievement of the objectives of the statute authorizing financial assistance. See 78 Stat. 252, 42 U. S. C. § 2000d–1. Compliance with such requirements may be effected by the termination or denial of federal funds, or "by any other means authorized by law." *Ibid.* Remedies both at law and in equity are available for violations of the statute. See § 2000d–7(a)(2).

Congress instructed the Attorney General to issue regulations implementing provisions of Title II, including § 12132's discrimination proscription. See § 204, as set forth in § 12134(a) ("[T]he Attorney General shall promulgate regulations in an accessible format that implement this part.").[5] The Attorney General's regulations, Congress further directed, "shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act]." § 204, as set forth in 42 U. S. C. § 12134(b). One of the § 504 regulations requires recipients of federal funds to "administer programs and activities in the most integrated

[5] Congress directed the Secretary of Transportation to issue regulations implementing the portion of Title II concerning public transportation. See 42 U. S. C. §§ 12143(b), 12149, 12164. As stated in the regulations, a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by commencing a private lawsuit, or by filing a complaint with (a) a federal agency that provides funding to the public entity that is the subject of the complaint, (b) the Department of Justice for referral to an appropriate agency, or (c) one of eight federal agencies responsible for investigating complaints arising under Title II: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, and the Department of Transportation. See 28 CFR §§ 35.170(c), 35.172(b), 35.190(b) (1998).

The ADA contains several other provisions allocating regulatory and enforcement responsibility. Congress instructed the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing Title I, see 42 U. S. C. § 12116; the EEOC, the Attorney General, and persons alleging discrimination on the basis of disability in violation of Title I may enforce its provisions, see § 12117(a). Congress similarly instructed the Secretary of Transportation and the Attorney General to issue regulations implementing provisions of Title III, see §§ 12186(a)(1), (b); the Attorney General and persons alleging discrimination on the basis of disability in violation of Title III may enforce its provisions, see §§ 12188(a)(1), (b). Each federal agency responsible for ADA implementation may render technical assistance to affected individuals and institutions with respect to provisions of the ADA for which the agency has responsibility. See § 12206(c)(1).

setting appropriate to the needs of qualified handicapped persons." 28 CFR § 41.51(d) (1998).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the § 504 regulation just quoted; called the "integration regulation," it reads:

> "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d) (1998).

The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter[ation]"; called here the "reasonable-modifications regulation," it provides:

> "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

We recite these regulations with the caveat that we do not here determine their validity. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization. See Brief for Petitioners 16–17, 36, 40–41;

Reply Brief 15–16 (challenging the Attorney General's interpretation of the integration regulation).

II

With the key legislative provisions in full view, we summarize the facts underlying this dispute. Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W. with a personality disorder. Both women have a history of treatment in institutional settings. In May 1992, L. C. was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was confined for treatment in a psychiatric unit. By May 1993, her psychiatric condition had stabilized, and L. C.'s treatment team at GRH agreed that her needs could be met appropriately in one of the community-based programs the State supported. Despite this evaluation, L. C. remained institutionalized until February 1996, when the State placed her in a community-based treatment program.

E. W. was voluntarily admitted to GRH in February 1995; like L. C., E. W. was confined for treatment in a psychiatric unit. In March 1995, GRH sought to discharge E. W. to a homeless shelter, but abandoned that plan after her attorney filed an administrative complaint. By 1996, E. W.'s treating psychiatrist concluded that she could be treated appropriately in a community-based setting. She nonetheless remained institutionalized until a few months after the District Court issued its judgment in this case in 1997.

In May 1995, when she was still institutionalized at GRH, L. C. filed suit in the United States District Court for the Northern District of Georgia, challenging her continued confinement in a segregated environment. Her complaint invoked 42 U. S. C. § 1983 and provisions of the ADA, §§ 12131–12134, and named as defendants, now petitioners, the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Director of the Fulton County Regional Board (collectively,

the State). L. C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA. L. C.'s pleading requested, among other things, that the State place her in a community care residential program, and that she receive treatment with the ultimate goal of integrating her into the mainstream of society. E. W. intervened in the action, stating an identical claim.[6]

The District Court granted partial summary judgment in favor of L. C. and E. W. See App. to Pet. for Cert. 31a–42a. The court held that the State's failure to place L. C. and E. W. in an appropriate community-based treatment program violated Title II of the ADA. See *id.*, at 39a, 41a. In so ruling, the court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. "by reason of" their disabilities, accounted for their retention at GRH. Under Title II, the court concluded, "unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding." *Id.*, at 37a.

In addition to contending that L. C. and E. W. had not shown discrimination "by reason of [their] disabilit[ies]," the State resisted court intervention on the ground that requiring immediate transfers in cases of this order would "fundamentally alter" the State's activity. The State reasserted that it was already using all available funds to provide services to other persons with disabilities. See *id.*, at 38a. Re-

[6] L. C. and E. W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot. As the District Court and Court of Appeals explained, in view of the multiple institutional placements L. C. and E. W. have experienced, the controversy they brought to court is "capable of repetition, yet evading review." No. 1:95–cv–1210–MHS (ND Ga., Mar. 26, 1997), p. 6, App. to Pet. for Cert. 35a (internal quotation marks omitted); see 138 F. 3d 893, 895, n. 2 (CA11 1998) (citing *Honig* v. *Doe*, 484 U. S. 305, 318–323 (1988), and *Vitek* v. *Jones*, 445 U. S. 480, 486–487 (1980)).

jecting the State's "fundamental alteration" defense, the court observed that existing state programs provided community-based treatment of the kind for which L. C. and E. W. qualified, and that the State could "provide services to plaintiffs in the community at considerably *less* cost than is required to maintain them in an institution." *Id.*, at 39a.

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court, but remanded for reassessment of the State's cost-based defense. See 138 F. 3d, at 905. As the appeals court read the statute and regulations: When "a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting—the most integrated setting appropriate to that patient's needs"; "[w]here there is no such finding [by the treating professionals], nothing in the ADA requires the deinstitutionalization of th[e] patient." *Id.*, at 902.

The Court of Appeals recognized that the State's duty to provide integrated services "is not absolute"; under the Attorney General's Title II regulation, "reasonable modifications" were required of the State, but fundamental alterations were not demanded. *Id.*, at 904. The appeals court thought it clear, however, that "Congress wanted to permit a cost defense only in the most limited of circumstances." *Id.*, at 902. In conclusion, the court stated that a cost justification would fail "[u]nless the State can prove that requiring it to [expend additional funds in order to provide L. C. and E. W. with integrated services] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service [the State] provides." *Id.*, at 905. Because it appeared that the District Court had entirely ruled out a "lack of funding" justification, see App. to Pet. for Cert. 37a, the appeals court remanded, repeating that the District Court should consider, among other things, "whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreason-

able given the demands of the State's mental health budget." 138 F. 3d, at 905.[7]

We granted certiorari in view of the importance of the question presented to the States and affected individuals. See 525 U. S. 1054 (1998).[8]

III

Endeavoring to carry out Congress' instruction to issue regulations implementing Title II, the Attorney General, in the integration and reasonable-modifications regulations, see *supra*, at 591–592, made two key determinations. The first concerned the scope of the ADA's discrimination proscription, 42 U. S. C. § 12132; the second concerned the obligation of the States to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II. See 28 CFR § 35.130(d) (1998) ("A public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); Brief for United States as *Amicus Curiae* in *Helen L.* v. *DiDario*, No. 94–1243 (CA3 1994), pp. 8, 15–16 (unnecessary segregation of persons with disabilities constitutes a form of discrimination prohibited by the ADA and the integration

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[7] After this Court granted certiorari, the District Court issued a decision on remand rejecting the State's fundamental-alteration defense. See 1:95–cv–1210–MHS (ND Ga., Jan. 29, 1999), p. 1. The court concluded that the annual cost to the State of providing community-based treatment to L. C. and E. W. was not unreasonable in relation to the State's overall mental health budget. See *id.*, at 5. In reaching that judgment, the District Court first declared "irrelevant" the potential impact of its decision beyond L. C. and E. W. 1:95–cv–1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177. The District Court's decision on remand is now pending appeal before the Eleventh Circuit.

[8] Twenty-two States and the Territory of Guam joined a brief urging that certiorari be granted. Ten of those States joined a brief in support of petitioners on the merits.

regulation). Regarding the States' obligation to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that "would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

The Court of Appeals essentially upheld the Attorney General's construction of the ADA. As just recounted, see *supra*, at 595–596, the appeals court ruled that the unjustified institutionalization of persons with mental disabilities violated Title II; the court then remanded with instructions to measure the cost of caring for L. C. and E. W. in a community-based facility against the State's mental health budget.

We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

A

We examine first whether, as the Eleventh Circuit held, undue institutionalization qualifies as discrimination "by reason of . . . disability." The Department of Justice has consistently advocated that it does.[9] Because the Department

[9] See Brief for United States in *Halderman* v. *Pennhurst State School and Hospital*, Nos. 78–1490, 78–1564, 78–1602 (CA3 1978), p. 45 ("[I]nstitutionalization result[ing] in separation of mentally retarded persons for no

is the agency directed by Congress to issue regulations implementing Title II, see *supra*, at 591–592, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Bragdon* v. *Abbott*, 524 U. S. 624, 642 (1998) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944)).

The State argues that L. C. and E. W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities. See Brief for Petitioners 20. Nor were they subjected to "discrimination," the State contends, because "'discrimination' necessarily requires uneven treatment of similarly situated individuals," and L. C. and E. W. had identified no comparison class, *i. e.*, no similarly situated individuals given preferential treatment. *Id.*, at 21. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.[10]

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permissible reason . . . is 'discrimination,' and a violation of Section 504 [of the Rehabilitation Act] if it is supported by federal funds."); Brief for United States in *Halderman* v. *Pennhurst State School and Hospital*, Nos. 78–1490, 78–1564, 78–1602 (CA3 1981), p. 27 ("Pennsylvania violates Section 504 by indiscriminately subjecting handicapped persons to [an institution] without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives."); Brief for United States as *Amicus Curiae* in *Helen L.* v. *DiDario*, No. 94–1243 (CA3 1994), p. 7 ("Both the Section 504 coordination regulations and the rest of the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes."); *id.*, at 8–16.

[10] The dissent is driven by the notion that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class," *post*, at 616 (opinion of THOMAS, J.), that "[o]ur decisions construing various

The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The Developmentally Disabled Assistance and Bill of Rights Act, a 1975 measure, stated in aspirational terms that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty." 89 Stat. 502, 42 U. S. C. § 6010(2) (1976 ed.) (emphasis added); see also *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 24 (1981) (concluding that the § 6010 provisions "were intended to be hortatory, not mandatory"). In a related legislative endeavor, the Rehabilitation Act of 1973, Congress used mandatory language to proscribe discrimination against persons with disabilities. See 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed.) ("No otherwise qualified individual with a disability in the United States . . . *shall*, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal fi-

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statutory prohibitions against 'discrimination' have not wavered from this path," *post*, at 616, and that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," *post*, at 618. The dissent is incorrect as a matter of precedent and logic. See *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 312 (1996) (The Age Discrimination in Employment Act of 1967 "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."); cf. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 76 (1998) ("[W]orkplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex,' 42 U. S. C. § 2000e–2(a)(1), when the harasser and the harassed employee are of the same sex."); *Jefferies* v. *Harris County Community Action Assn.*, 615 F. 2d 1025, 1032 (CA5 1980) ("[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.").

nancial assistance." (Emphasis added.)) Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination, see 42 U. S. C. § 12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination." See § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . segregation").[11]

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Cf. *Allen* v. *Wright*, 468 U. S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978) (" 'In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " (quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7

[11] Unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations. See Brief for United States as *Amicus Curiae* 23–25.

1971)). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al. as *Amici Curiae* 20–22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as *Amicus Curiae* 6–7, 17.

The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute "reflected a congressional policy preference for treatment in the institution over treatment in the community." Brief for Petitioners 31. The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program. See 95 Stat. 812–813, as amended, 42 U. S. C. § 1396n(c); Brief for United States as *Amicus Curiae* 20–21.[12] Indeed, the United States points out that the Department of Health and Human Services (HHS) "has a policy of encouraging States to take advantage of the waiver program, and often approves more waiver slots than a State ultimately uses." *Id.*, at 25–26 (further observing that, by 1996, "HHS approved up to 2109 waiver slots for Georgia, but Georgia used only 700").

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community

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[12] The waiver program provides Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care, upon a showing that the average annual cost of such services is not more than the annual cost of institutional services. See § 1396n(c).

settings. Title II provides only that "qualified individual[s] with a disability" may not "be subjected to discrimination." 42 U. S. C. § 12132. "Qualified individuals," the ADA further explains, are persons with disabilities who, "with or without reasonable modifications to rules, policies, or practices, . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d) (1998) (public entity shall administer services and programs in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities" (emphasis added)); cf. *School Bd. of Nassau Cty.* v. *Arline*, 480 U. S. 273, 288 (1987) ("[C]ourts normally should defer to the reasonable medical judgments of public health officials.").[13] Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."). In this case, however, there is no genuine dispute concerning the status of L. C. and E. W. as individuals "quali-

[13] Georgia law also expresses a preference for treatment in the most integrated setting appropriate. See Ga. Code Ann. § 37–4–121 (1995) ("It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs.").

fied" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. See *supra*, at 593.[14]

B

The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. 28 CFR § 35.130(b)(7) (1998). The Court of Appeals construed this regulation to permit a cost-based defense "only in the most limited of circumstances," 138 F. 3d, at 902, and remanded to the District Court to consider, among other things, "whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget," *id.*, at 905.

The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. See Tr. of Oral Arg. 27 (State's attorney argues that Court of Appeals' understanding of the

[14] We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." Cf. *post*, at 623, 624 (THOMAS, J., dissenting). We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

fundamental-alteration defense, as expressed in its order to the District Court, "will always preclude the State from a meaningful defense"); cf. Brief for Petitioners 37–38 (Court of Appeals' remand order "mistakenly asks the district court to examine [the fundamental-alteration] defense based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care"); 1:95–cv–1210–MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177 (District Court, on remand, declares the impact of its decision beyond L. C. and E. W. "irrelevant"). Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

When it granted summary judgment for plaintiffs in this case, the District Court compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements. See App. to Pet. for Cert. 39a. As the United States recognizes, however, a comparison so simple overlooks costs the State cannot avoid; most notably, a "State . . . may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions." Brief for United States as *Amicus Curiae* 21.[15]

As already observed, see *supra*, at 601–602, the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Cf. *post*, at

[15] Even if States eventually were able to close some institutions in response to an increase in the number of community placements, the States would still incur the cost of running partially full institutions in the interim. See Brief for United States as *Amicus Curiae* 21.

610 (KENNEDY, J., concurring in judgment). Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. See *supra*, at 593. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time "to stabilize acute psychiatric symptoms." App. 98 (affidavit of Dr. Richard L. Elliott); see 138 F. 3d, at 903 ("[T]here may be times [when] a patient can be treated in the community, and others whe[n] an institutional placement is necessary."); Reply Brief 19 (placement in a community-based treatment program does not mean the State will no longer need to retain hospital accommodations for the person so placed). For other individuals, no placement outside the institution may ever be appropriate. See Brief for American Psychiatric Association et al. as *Amici Curiae* 22–23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"; for these persons, "institutional settings are needed and must remain available."); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution."); *Youngberg* v. *Romeo*, 457 U. S. 307, 327 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.").

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan

for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. See Tr. of Oral Arg. 5 (State's attorney urges that, "by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude [that] person by reason of disability, neither does Georgia discriminate against her by reason of disability"); see also *id.*, at 25 ("[I]t is reasonable for the State to ask someone to wait until a community placement is available."). In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions.[16]

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[16] We reject the Court of Appeals' construction of the reasonable-modifications regulation for another reason. The Attorney General's Title II regulations, Congress ordered, "shall be consistent with" the regulations in part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act. 42 U. S. C. § 12134(b). The § 504 regulation upon which the reasonable-modifications regulation is based provides now, as it did at the time the ADA was enacted:

"A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 CFR § 41.53 (1990 and 1998 eds.).

While the part 41 regulations do not define "undue hardship," other § 504 regulations make clear that the "undue hardship" inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a "case-by-case analysis weighing factors that include: (1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed." 28 CFR § 42.511(c) (1998); see 45 CFR § 84.12(c) (1998) (same).

Under the Court of Appeals' restrictive reading, the reasonable-modifications regulation would impose a standard substantially more

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For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. The judgment of the Eleventh Circuit is therefore affirmed in part and vacated in part, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Unjustified disparate treatment, in this case, "unjustified institutional isolation," constitutes discrimination under the Americans with Disabilities Act of 1990. See *ante,* at 600. If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs. In this case, the Court of Appeals appropriately remanded for consideration of the State's affirmative defense. On remand, the District Court rejected the State's "fundamental-alteration defense." See *ante,* at 596, n. 7. If the District Court was wrong in concluding that costs unrelated to the treatment of L. C. and E. W. do not support such a defense in this case, that arguable error should be corrected either by the Court of Appeals or by this Court in review of that decision. In my opinion, therefore, we should simply affirm the judgment of the Court of Appeals.

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difficult for the State to meet than the "undue burden" standard imposed by the corresponding § 504 regulation.

But because there are not five votes for that disposition, I join the Court's judgment and Parts I, II, and III–A of its opinion. Cf. *Bragdon* v. *Abbott*, 524 U. S. 624, 655–656 (1998) (STEVENS, J., concurring); *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

JUSTICE KENNEDY, with whom JUSTICE BREYER joins as to Part I, concurring in the judgment.

I

Despite remarkable advances and achievements by medical science, and agreement among many professionals that even severe mental illness is often treatable, the extent of public resources to devote to this cause remains controversial. Knowledgeable professionals tell us that our society, and the governments which reflect its attitudes and preferences, have yet to grasp the potential for treating mental disorders, especially severe mental illness. As a result, necessary resources for the endeavor often are not forthcoming. During the course of a year, about 5.6 million Americans will suffer from severe mental illness. E. Torrey, Out of the Shadows 4 (1997). Some 2.2 million of these persons receive no treatment. *Id.*, at 6. Millions of other Americans suffer from mental disabilities of less serious degree, such as mild depression. These facts are part of the background against which this case arises. In addition, of course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 461–464 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (discussing treatment of the mentally retarded).

Despite these obstacles, the States have acknowledged that the care of the mentally disabled is their special obligation. They operate and support facilities and programs, sometimes elaborate ones, to provide care. It is a continu-

ing challenge, though, to provide the care in an effective and humane way, particularly because societal attitudes and the responses of public authorities have changed from time to time.

Beginning in the 1950's, many victims of severe mental illness were moved out of state-run hospitals, often with benign objectives. According to one estimate, when adjusted for population growth, "the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1994 was 92 percent." Brief for American Psychiatric Association et al. as *Amici Curiae* 21, n. 5 (citing Torrey, *supra*, at 8–9). This was not without benefit or justification. The so-called "deinstitutionalization" has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity. It may be, moreover, that those who remain institutionalized are indeed the most severe cases. With reference to this case, as the Court points out, *ante*, at 593, 603, it is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents. Nevertheless, the depopulation of state mental hospitals has its dark side. According to one expert:

> "For a substantial minority . . . deinstitutionalization has been a psychiatric *Titanic*. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies." Torrey, *supra*, at 11.

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind,

which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment. JUSTICE GINSBURG's opinion takes account of this background. It is careful, and quite correct, to say that it is not "the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter . . . ." *Ante*, at 605.

In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

II

With these reservations made explicit, in my view we must remand the case for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed.

At the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled. Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them. Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities. Discrimination under this statute might in principle be shown in the case before us, though further proceedings should be required.

Putting aside issues of animus or unfair stereotype, I agree with JUSTICE THOMAS that on the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she "received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic." *Post,* at 616 (dissenting opinion). In my view, however, discrimination so defined might be shown here. Although the Court seems to reject JUSTICE THOMAS' definition of discrimination, *ante,* at 598, it asserts that unnecessary institutional care does lead to "[d]issimilar treatment," *ante,* at 601. According to the Court, "[i]n order to receive needed medical services, persons with mental dis-

abilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." *Ibid.*

Although this point is not discussed at length by the Court, it does serve to suggest the theory under which respondents might be subject to discrimination in violation of § 12132. If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established. In terms more specific to this case, if respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities), I believe it would demonstrate discrimination on the basis of mental disability.

Of course, it is a quite different matter to say that a State without a program in place is required to create one. No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute. Grave constitutional concerns are raised when a federal court is given the author-

ity to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions. In addition, as the Court notes, *ante*, at 592, by regulation a public entity is required only to make "reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination and is not even required to make those if "the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998). It follows that a State may not be forced to create a community-treatment program where none exists. See Brief for United States as *Amicus Curiae* 19–20, and n. 3. Whether a different statutory scheme would exceed constitutional limits need not be addressed.

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence. On any reasonable reading of the statute, § 12132 cannot cover all types of differential treatment of disabled and nondisabled persons, no matter how minimal or innocuous. To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment. Regulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA. The congressional findings in 42 U. S. C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned. Indeed, those findings have clear bearing on the issues raised in this case, and support the conclusion that unnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.

Unlike JUSTICE THOMAS, I deem it relevant and instructive that Congress in express terms identified the "isolat[ion] and segregat[ion]" of disabled persons by society as a "for[m]

of discrimination," §§ 12101(a)(2), (5), and noted that discrimination against the disabled "persists in such critical areas as . . . institutionalization," § 12101(a)(3). These findings do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination. Nor do they necessitate a regime in which individual treatment plans are required, as distinguished from broad and reasonable classifications for the provision of health care services. Instead, they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory. Both of those concerns are consistent with the normal definition of discrimination—differential treatment of similarly situated groups. The findings inform application of that definition in specific cases, but absent guidance to the contrary, there is no reason to think they displace it. The issue whether respondents have been discriminated against under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State.

The possibility therefore remains that, on the facts of this case, respondents would be able to support a claim under § 12132 by showing that they have been subject to discrimination by Georgia officials on the basis of their disability. This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. For example, the evidence might show that, apart from services for the mentally disabled, medical treatment is rarely offered in a community setting but also is rarely offered in facilities comparable to state mental hospitals. Determining the relevance of that type of evidence would require considerable judgment and anal-

ysis. However, as petitioners observe, "[i]n this case, no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment." Brief for Petitioners 21. Without additional information regarding the details of state-provided medical services in Georgia, we cannot address the issue in the way the statute demands. As a consequence, the judgment of the courts below, granting partial summary judgment to respondents, ought not to be sustained. In addition, as JUSTICE GINSBURG's opinion is careful to note, *ante*, at 604, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. We must be cautious when we seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute.

I would remand the case to the Court of Appeals or the District Court for it to determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested above.

For these reasons, I concur in the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, as set forth in 42 U. S. C. § 12132, provides:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities

> of a public entity, *or be subjected to discrimination* by any such entity." (Emphasis added.)

The majority concludes that petitioners "discriminated" against respondents—as a matter of law—by continuing to treat them in an institutional setting after they became eligible for community placement. I disagree. Temporary exclusion from community placement does not amount to "discrimination" in the traditional sense of the word, nor have respondents shown that petitioners "discriminated" against them "by reason of" their disabilities.

Until today, this Court has never endorsed an interpretation of the term "discrimination" that encompassed disparate treatment among members of the *same* protected class. Discrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. This interpretation comports with dictionary definitions of the term discrimination, which means to "distinguish," to "differentiate," or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." Random House Dictionary 564 (2d ed. 1987); see also Webster's Third New International Dictionary 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually").

Our decisions construing various statutory prohibitions against "discrimination" have not wavered from this path. The best place to begin is with Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, the paradigmatic antidiscrimination law.[1] Title VII makes it "an unlawful em-

[1] We have incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination. For example, Rev. Stat. § 1977, as amended, 42 U. S. C. § 1981, has been interpreted to forbid all racial discrimination in the making of private and

ployment practice for an employer . . . to *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1) (emphasis added). We have explained that this language is designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).[2]

Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute. See, *e. g.*, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 683 (1983) (explain-

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public contracts. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 609 (1987). This Court has applied the "framework" developed in Title VII cases to claims brought under this statute. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 186 (1989). Also, the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 623(a)(1), prohibits discrimination on the basis of an employee's age. This Court has noted that its "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978)). This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity. See *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 75 (1992) (relying on *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination).

[2] This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact. See *Griggs*, 401 U. S., at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). Both forms of "discrimination" require a comparison among classes of employees.

ing that Title VII discrimination occurs when an employee is treated "'in a manner which but for that person's sex would be different'") (quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978)). For this reason, we have described as "nonsensical" the comparison of the racial composition of different classes of job categories in determining whether there existed disparate impact discrimination with respect to a particular job category. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 651 (1989).[3] Courts interpreting Title VII have held that a plaintiff cannot prove "discrimination" by demonstrating that one member of a particular protected group has been favored over another member of that same group. See, *e. g.*, *Bush* v. *Commonwealth Edison Co.*, 990 F. 2d 928, 931 (CA7 1993), cert. denied, 511 U. S. 1071 (1994) (explaining that under Title VII, a fired black employee "had to show that although he was not a good employee, equally bad employees were treated more leniently by [his employer] if they happened not to be black").

Our cases interpreting § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, which prohibits "discrimination" against certain individuals with disabilities, have applied this commonly understood meaning of discrimination. Section 504 provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

[3] Following *Wards Cove*, Congress enacted the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071, as amended, which, *inter alia*, altered the burden of proof with respect to a disparate impact discrimination claim. See *id.*, § 105 (codified at 42 U. S. C. § 2000e–2(k)). This change highlights the principle that a departure from the traditional understanding of discrimination requires congressional action. Cf. *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (Congress legislates against the background rule of the common law and traditional notions of lawful conduct).

jected to discrimination under any program or activity receiving Federal financial assistance."

In keeping with the traditional paradigm, we have always limited the application of the term "discrimination" in the Rehabilitation Act to a person who is a member of a protected group and faces discrimination "by reason of his handicap." Indeed, we previously rejected the argument that § 504 requires the type of "affirmative efforts to overcome the disabilities caused by handicaps," *Southeastern Community College* v. *Davis*, 442 U. S. 397, 410 (1979), that the majority appears to endorse today. Instead, we found that § 504 required merely "the evenhanded treatment of handicapped persons" relative to those persons who do not have disabilities. *Ibid.* Our conclusion was informed by the fact that some provisions of the Rehabilitation Act envision "affirmative action" on behalf of those individuals with disabilities, but § 504 itself "does not refer at all" to such action. *Ibid.* Therefore, "[a] comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411.

Similarly, in *Alexander* v. *Choate*, 469 U. S. 287, 302 (1985), we found no discrimination under § 504 with respect to a limit on inpatient hospital care that was "neutral on its face" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having," *id.*, at 302. We said that § 504 does "not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." *Id.*, at 304.

Likewise, in *Traynor* v. *Turnage*, 485 U. S. 535, 548 (1988), we reiterated that the purpose of § 504 is to guarantee that individuals with disabilities receive "evenhanded treatment"

relative to those persons without disabilities. In *Traynor*, the Court upheld a Veterans' Administration regulation that excluded "primary alcoholics" from a benefit that was extended to persons disabled by alcoholism related to a mental disorder. *Id.*, at 551. In so doing, the Court noted that "[t]his litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons." *Id.*, at 548. Given the theory of the case, the Court explicitly held: "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.*, at 549.

This same understanding of discrimination also informs this Court's constitutional interpretation of the term. See *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298 (1997) (noting with respect to interpreting the Commerce Clause, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities"); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886) (condemning under the Fourteenth Amendment "illegal discriminations between persons in similar circumstances"); see also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 223–224 (1995); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–494 (1989) (plurality opinion).

Despite this traditional understanding, the majority derives a more "comprehensive" definition of "discrimination," as that term is used in Title II of the ADA, one that includes "institutional isolation of persons with disabilities." *Ante*, at 600. It chiefly relies on certain congressional findings contained within the ADA. To be sure, those findings appear to equate institutional isolation with segregation, and thereby discrimination. See *ibid.* (quoting §§ 12101(a)(2) and 12101(a)(5), both of which explicitly identify "segregation" of persons with disabilities as a form of "discrimination"); see also *ante,* at 588–589. The congressional findings, however, are written in general, hortatory terms and pro-

vide little guidance to the interpretation of the specific language of § 12132. See *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 260 (1994) ("We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement"). In my view, the vague congressional findings upon which the majority relies simply do not suffice to show that Congress sought to overturn a well-established understanding of a statutory term (here, "discrimination").[4] Moreover, the majority fails to explain why terms in the findings should be given a medical content, pertaining to the place where a mentally retarded person is treated. When read in context, the findings instead suggest that terms such as "segregation" were used in a more general sense, pertaining to matters such as access to employment, facilities, and transportation. Absent a clear directive to the contrary, we must read "discrimination" in light of the common understanding of the term. We cannot expand the meaning of the term "discrimination" in order to invalidate policies we may find unfortunate. Cf. *NLRB* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325 (1951) (explaining that if Congress intended statutory terms "to have other than their ordinarily accepted meaning,

[4] If such general hortatory language is sufficient, it is puzzling that this or any other court did not reach the same conclusion long ago by reference to the general purpose language of the Rehabilitation Act itself. See 29 U. S. C. § 701 (1988 ed.) (describing the statute's purpose as "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps *in order to maximize their employability, independence, and integration* into the workplace and the community" (emphasis added)). Further, this section has since been amended to proclaim in even more aspirational terms that the policy under the statute is driven by, *inter alia*, "respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities," "respect for the privacy, rights, and equal access," and "inclusion, integration, and full participation of the individuals." 29 U. S. C. §§ 701(c)(1)–(3).

it would and should have given them a special meaning by definition").[5]

Elsewhere in the ADA, Congress chose to alter the traditional definition of discrimination. Title I of the ADA, § 12112(b)(1), defines discrimination to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee." Notably, however, Congress did not provide that this definition of discrimination, unlike other aspects of the ADA, applies to Title II. Ordinary canons of construction require that we respect the limited applicability of this definition of "discrimination" and not import it into other parts of the law where Congress did not see fit. See, *e. g.*, *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)). The majority's definition of discrimination—although not specifically delineated—substantially imports the definition of Title I into Title II by necessarily assuming that it is sufficient to focus exclusively on members of one particular

[5] Given my conclusion, the Court need not review the integration regulation promulgated by the Attorney General. See 28 CFR § 35.130(d) (1998). Deference to a regulation is appropriate only "'if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.'" *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 483 (1997) (quoting *Presley* v. *Etowah County Comm'n*, 502 U. S. 491, 508 (1992)). Here, Congress has expressed its intent in § 12132, and the Attorney General's regulation—insofar as it contradicts the settled meaning of the statutory term—cannot prevail against it. See *NLRB* v. *Town & Country Elec., Inc.*, 516 U. S. 85, 94 (1995) (explaining that courts interpreting a term within a statute "must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term" (internal quotation marks omitted)).

group. Under this view, discrimination occurs when some members of a protected group are treated differently from other members of that same group. As the preceding discussion emphasizes, absent a special definition supplied by Congress, this conclusion is a remarkable and novel proposition that finds no support in our decisions in analogous areas. For example, the majority's conclusion that petitioners "discriminated" against respondents is the equivalent to finding discrimination under Title VII where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of lack of funding) because other similarly situated black employees are given the in-house training. Such a claim would fly in the face of our prior case law, which requires more than the assertion that a person belongs to a protected group and did not receive some benefit. See, *e. g.*, *Griggs*, 401 U. S., at 430–431 ("Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group").

At bottom, the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather concerns imposition of a standard of care.[6] As such, the major-

[6] In mandating that government agencies minimize the institutional isolation of disabled individuals, the majority appears to appropriate the concept of "mainstreaming" from the Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.* But IDEA is not an antidiscrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a "free appropriate public education" and to establish "procedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." §§ 1412(1), (5). Ironically, even under this broad affirmative mandate, we previously rejected a claim that IDEA required the "standard of care"

ity can offer no principle limiting this new species of "discrimination" claim apart from an affirmative defense because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive. By adopting such a broad view of discrimination, the majority drains the term of any meaning other than as a proxy for decisions disapproved of by this Court.

Further, I fear that the majority's approach imposes significant federalism costs, directing States how to make decisions about their delivery of public services. We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct state officers or to interfere with the functions of state governments. See, *e. g.*, *Printz* v. *United States*, 521 U. S. 898 (1997); *New York* v. *United* States, 505 U. S. 144 (1992). We have suggested that these principles specifically apply to whether States are required to provide a certain level of benefits to individuals with disabilities. As noted in *Alexander*, in rejecting a similar theory under § 504 of the Rehabilitation Act: "[N]othing . . . suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services . . . ." 469 U. S., at 307. See also *Bowen* v. *American Hospital Assn.*, 476 U. S. 610, 642 (1986) (plurality opinion) ("[N]othing in [§ 504] authorizes [the Secretary of Health and Human Services (HHS)] to commandeer state agencies . . . . [These] agencies are

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analysis adopted by the majority today. See *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 198 (1982) ("We think . . . that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children" (internal quotation marks omitted)).

not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade"). The majority's affirmative defense will likely come as cold comfort to the States that will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual. In keeping with our traditional deference in this area, see *Alexander*, *supra*, the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.

The majority may remark that it actually does properly compare members of different groups. Indeed, the majority mentions in passing the "[d]issimilar treatment" of persons with and without disabilities. *Ante*, at 601. It does so in the context of supporting its conclusion that institutional isolation is a form of discrimination. It cites two cases as standing for the unremarkable proposition that discrimination leads to deleterious stereotyping, *ante*, at 600 (citing *Allen* v. *Wright*, 468 U. S. 737, 755 (1984); *Manhart*, 435 U. S., at 707, n. 13)), and an *amicus* brief which indicates that confinement diminishes certain everyday life activities, *ante*, at 601 (citing Brief for American Psychiatric Association et al. as *Amici Curiae* 20–22). The majority then observes that persons without disabilities "can receive the services they need without" institutionalization and thereby avoid these twin deleterious effects. *Ante*, at 601. I do not quarrel with the two general propositions, but I fail to see how they assist in resolving the issue before the Court. Further, the majority neither specifies what services persons with disabilities might need nor contends that persons without disabilities need the same services as those with disabilities, leading to the inference that the dissimilar treatment the majority observes results merely from the fact that different classes of persons receive different services—not from "discrimination" as traditionally defined.

Finally, it is also clear petitioners did not "discriminate" against respondents "by reason of [their] disabili[ties]," as § 12132 requires. We have previously interpreted the phrase "by reason of" as requiring proximate causation. See, *e. g.*, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–266 (1992); see also *id.*, at 266, n. 11 (citation of cases). Such an interpretation is in keeping with the vernacular understanding of the phrase. See American Heritage Dictionary 1506 (3d ed. 1992) (defining "by reason of" as "because of"). This statute should be read as requiring proximate causation as well. Respondents do not contend that their disabilities constituted the proximate cause for their exclusion. Nor could they—community placement simply is not available to those without disabilities. Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement does not establish that the denial of community placement occurred "by reason of" their disability. Rather, it establishes no more than the fact that petitioners have limited resources.

* * *

For the foregoing reasons, I respectfully dissent.

Syllabus

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD *v.* COLLEGE SAVINGS BANK ET AL.

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

No. 98–531. Argued April 20, 1999—Decided June 23, 1999

After the Patent and Plant Variety Protection Remedy Clarification Act (Act) amended the patent laws to expressly abrogate the States' sovereign immunity, respondent College Savings Bank filed a patent infringement suit against petitioner Florida Prepaid Postsecondary Education Expenses Board (Florida Prepaid), a Florida state entity. When this Court decided *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, Florida Prepaid moved to dismiss the action, claiming that the Act was an unconstitutional attempt by Congress to use its Article I powers to abrogate state sovereign immunity. College Savings countered that Congress had properly exercised its power pursuant to § 5 of the Fourteenth Amendment in order to enforce the due process guarantees in § 1 of the Amendment. The United States intervened to defend the statute's constitutionality. Agreeing with College Savings, the District Court denied the motion, and the Federal Circuit affirmed.

Held: The Act's abrogation of States' sovereign immunity is invalid because it cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause. Pp. 634–648.

(a) Florida has not expressly consented to suit, or impliedly waived its immunity, see *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *post*, p. 666. To determine whether the Act nonetheless validly abrogated that immunity, the Court must ask: first, whether Congress has "'unequivocally expresse[d] its intent to abrogate,'" and second, whether Congress acted "'pursuant to a valid exercise of power.'" *Seminole Tribe*, *supra*, at 55. Congress clearly made known its intent to abrogate in the Act. Whether it had the power to do so is another matter. In *Seminole Tribe*, this Court held that Congress does not have such power under Article I but reaffirmed its holding in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, that Congress has such power under § 5 of the Fourteenth Amendment. Thus, legislation that is "appropriate" under § 5, as that term was construed in *City of Boerne* v. *Flores*, 521 U. S. 507, could abrogate state sovereignty. Since Congress' enforcement power is remedial, *id.*, at 519, to invoke § 5, Congress

must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. Pp. 634–639.

(b) Here, the underlying conduct is unremedied patent infringement by States. However, in enacting the Act, Congress identified no pattern of such infringement, let alone a pattern of constitutional violations. The House Report provided only two examples of patent infringement suits against States, and the Federal Circuit identified only eight such suits in 110 years. Testimony before the House Subcommittee acknowledged that States are willing and able to respect patent rights, and the Senate Report contains no evidence that unremedied patent infringement by States had become a problem of national import. Pp. 639–641.

(c) Although patents may be considered property within the meaning of the Due Process Clause, the legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Act. Under the plain terms of the Due Process Clause and the clear import of this Court's precedent, a State's infringement of a patent violates the Constitution only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent. Congress, however, barely considered the availability of state remedies for patent infringement. The primary point made by the limited testimony on state remedies was not whether the remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies and might undermine the uniformity of patent law. Congress itself said nothing about the existence or adequacy of state remedies in the statute or the Senate Report. The need for uniformity in patent law construction, though undoubtedly important, is a factor belonging to the Article I patent-power calculus. Moreover, a state actor's negligent act causing unintended injury to a person's property does not "deprive" that person of property within the meaning of the Due Process Clause, and the record suggests that state infringement of patents was at worst innocent. The legislative record thus suggests that the Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation. Because of the lack of legislative support for Congress' conclusion, the Act's provisions are so out of proportion to the supposed remedy or preventive object that they cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. Congress did not limit the Act's coverage to cases involving arguable constitutional violations or confine its reach by limiting the remedy to certain types of infringement. Instead Congress made all States immediately amenable to federal-court suits for all kinds of possible patent

Syllabus

infringement and for an indefinite duration. The statute's appearance and more basic aims—to present a uniform remedy for patent infringement and place States on the same footing as private parties under that regime—are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe.* Pp. 641–648.

148 F. 3d 1343, 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 SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 648.

Jonathan A. Glogau, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Louis F. Hubener*, Assistant Attorney General, *Anne S. Mason*, *Joseph C. Mason, Jr.*, *William B. Mallin*, *Lewis F. Gould, Jr.*, and *Joseph M. Ramirez.*

Kevin J. Culligan argued the cause for respondent College Savings Bank. With him on the brief were *Steven C. Cherny* and *Robert W. Morris.*

Solicitor General Waxman argued the cause for the United States, respondent under this Court's Rule 12.6, urging affirmance. With him on the brief were *Acting Assistant Attorney General Ogden*, *Deputy Solicitor General Wallace*, *Paul R. Q. Wolfson*, and *Mark B. Stern.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Edward B. Foley*, State Solicitor, and *Elise W. Porter*, Assistant Solicitor, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Margery S. Bronster* of Hawaii, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Jan Graham* of Utah, *Mark L. Earley* of Virginia, and *Gay Woodhouse* of Wyoming; for the National Con-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In 1992, Congress amended the patent laws and expressly abrogated the States' sovereign immunity from claims of patent infringement. Respondent College Savings then sued the State of Florida for patent infringement, and the Court of Appeals held that Congress had validly abrogated the State's sovereign immunity from infringement suits pursuant to its authority under § 5 of the Fourteenth Amendment. We hold that, under *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), the statute cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause, and accordingly reverse the decision of the Court of Appeals.

I

Since 1987, respondent College Savings Bank, a New Jersey chartered savings bank located in Princeton, New Jersey, has marketed and sold certificates of deposit known as the CollegeSure CD, which are essentially annuity contracts for financing future college expenses. College Savings obtained

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ference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for the Regents of the University of California by *Charles A. Miller, Caroline M. Brown, Jason A. Levine, Gerald P. Dodson, James E. Holst, P. Martin Simpson, Jr.,* and *Richard L. Stanley.*

Briefs of *amici curiae* urging affirmance were filed for the American Society of Composers, Authors, and Publishers et al. by *Michael R. Klipper;* for the Association of American Publishers, Inc., et al. by *Charles S. Sims;* for the Association of American Railroads by *Betty Jo Christian* and *Shannen W. Coffin;* for the Federal Circuit Bar Association by *George E. Hutchinson* and *William M. Atkinson;* for the New York Intellectual Property Law Association by *Charles P. Baker, Bruce M. Wexler,* and *Howard B. Barnaby;* and for the Pacific Legal Foundation by *Eric Grant* and *James S. Burling.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Joseph R. Re, Michael K. Friedland,* and *Don W. Martens;* and for the Association of the Bar of the City of New York by *Leon Friedman, Louis A. Craco, Jr.,* and *James F. Parver.*

a patent for its financing methodology, designed to guarantee investors sufficient funds to cover the costs of tuition for colleges. Petitioner Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid) is an entity created by the State of Florida that administers similar tuition prepayment contracts available to Florida residents and their children. See Fla. Stat. § 240.551(1) (Supp. 1998). College Savings claims that, in the course of administering its tuition prepayment program, Florida Prepaid directly and indirectly infringed College Savings' patent.

College Savings brought an infringement action under 35 U. S. C. § 271(a) against Florida Prepaid in the United States District Court for the District of New Jersey in November 1994.[1] By the time College Savings filed its suit, Congress had already passed the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U. S. C. §§ 271(h), 296(a). Before this legislation, the patent laws stated only that "whoever" without authority made, used, or sold a patented invention infringed the patent. 35 U. S. C. § 271(a) (1988 ed.).[2] Applying this Court's decision in *Atas-*

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[1] College Savings also filed a separate action alleging that Florida Prepaid had made false claims about its own product in violation of the Trademark Act of 1946 (Lanham Act), 15 U. S. C. § 1125(a). The District Court dismissed the Lanham Act suit on Eleventh Amendment grounds, the Third Circuit affirmed, and we granted College Savings' petition in that case on the same day we granted the petition in this case. See 525 U. S. 1063 (1999). The Lanham Act suit is the subject of our opinion in *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *post*, p. 666.

[2] Section 271 still provides in relevant part:

"(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

"(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

"(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture,

cadero State Hosp. v. *Scanlon*, 473 U. S. 234, 242–243 (1985), the Federal Circuit had held that the patent laws failed to contain the requisite statement of intent to abrogate state sovereign immunity from infringement suits. See, *e. g.*, *Chew* v. *California*, 893 F. 2d 331 (1989). In response to *Chew* and similar decisions, Congress enacted the Patent Remedy Act to "clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents and plant variety protections." Pub. L. 102–560, preamble, 106 Stat. 4230; see also H. R. Rep. No. 101–960, pt. 1, pp. 7, 33 (1990) (hereinafter H. R. Rep.); S. Rep. No. 102–280, pp. 1, 5–6 (1992) (hereinafter S. Rep.). Section 271(h) now states: "As used in this section, the term 'whoever' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity." Section 296(a) addresses the sovereign immunity issue even more specifically:

> "Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title."

Relying on these provisions, College Savings alleged that Florida Prepaid had willfully infringed its patent under

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combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." 35 U. S. C. § 271 (1994 ed. and Supp. III).

§ 271, as well as contributed to and induced infringement. College Savings sought declaratory and injunctive relief as well as damages, attorney's fees, and costs.

After this Court decided *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), Florida Prepaid moved to dismiss the action on the grounds of sovereign immunity.[3] Florida Prepaid argued that the Patent Remedy Act was an unconstitutional attempt by Congress to use its Article I powers to abrogate state sovereign immunity. College Savings responded that Congress had properly exercised its power pursuant to § 5 of the Fourteenth Amendment to enforce the guarantees of the Due Process Clause in § 1 of the Amendment. The United States intervened to defend the constitutionality of the statute. Agreeing with College Savings, the District Court denied Florida Prepaid's motion to dismiss, 948 F. Supp. 400 (N. J. 1996), and the Federal Circuit affirmed, 148 F. 3d 1343 (1998).

The Federal Circuit held that Congress had clearly expressed its intent to abrogate the States' immunity from suit in federal court for patent infringement, and that Congress had the power under § 5 of the Fourteenth Amendment to do so. *Id.*, at 1347. The court reasoned that patents are property subject to the protections of the Due Process Clause and that Congress' objective in enacting the Patent Remedy Act was permissible because it sought to prevent States from depriving patent owners of this property without due process. See *id.*, at 1349–1350. The court rejected Florida Prepaid's argument that it and other States had not deprived patent owners of their property *without due process*, and refused to "deny Congress the authority to subject all states to suit for patent infringement in the federal courts, regardless of the extent of procedural due process that may exist at any particular time." *Id.*, at 1351. Fi-

[3] The District Court concluded that, for purposes of immunity from suit, Florida Prepaid is an arm of the State of Florida, a conclusion the parties did not dispute before either the Federal Circuit or this Court.

nally, the court held that the Patent Remedy Act was a proportionate response to state infringement and an appropriate measure to protect patent owners' property under this Court's decision in *City of Boerne*, 521 U. S., at 519. The court concluded that significant harm results from state infringement of patents, 148 F. 3d, at 1353–1354, and "[t]here is no sound reason to hold that Congress cannot subject a state to the same civil consequences that face a private party infringer," *id.*, at 1355. We granted certiorari, 525 U. S. 1064 (1999), and now reverse.

II

The Eleventh Amendment provides:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

As the Court recently explained in *Seminole Tribe*, *supra*, at 54:

> "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.' That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that '"[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."' *Id.*, at 13 (emphasis deleted), quoting The Federalist No. 81 . . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by

> the Constitution when establishing the judicial power of the United States.' *Hans*, *supra*, at 15."

Here, College Savings sued the State of Florida in federal court, and it is undisputed that Florida has not expressly consented to suit. College Savings and the United States argue that Florida has impliedly waived its immunity under *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964). That argument, however, is foreclosed by our decision in the companion case overruling the constructive waiver theory announced in *Parden*. See *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *post*, p. 666.

College Savings and the United States nonetheless contend that Congress' enactment of the Patent Remedy Act validly abrogated the States' sovereign immunity. To determine the merits of this proposition, we must answer two questions: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' . . . and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, *supra*, at 55. We agree with the parties and the Federal Circuit that in enacting the Patent Remedy Act, Congress has made its intention to abrogate the States' immunity "'unmistakably clear in the language of the statute.'" *Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989). Indeed, Congress' intent to abrogate could not have been any clearer. See 35 U. S. C. § 296(a) ("Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court . . . for infringement of a patent").

Whether Congress had the power to compel States to surrender their sovereign immunity for these purposes, however, is another matter. Congress justified the Patent Remedy Act under three sources of constitutional authority: the Patent Clause, Art. I, § 8, cl. 8; the Interstate Commerce Clause, Art. I, § 8, cl. 3; and § 5 of the Fourteenth Amend-

ment. See S. Rep., at 7–8; H. R. Rep., at 39–40.[4] In *Seminole Tribe,* of course, this Court overruled the plurality opinion in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), our only prior case finding congressional authority to abrogate state sovereign immunity pursuant to an Article I power (the Commerce Clause). 517 U. S., at 72–73. *Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause. *Ibid.* The Federal Circuit recognized this, and College Savings and the United States do not contend otherwise.

Instead, College Savings and the United States argue that the Federal Circuit properly concluded that Congress enacted the Patent Remedy Act to secure the Fourteenth Amendment's protections against deprivations of property without due process of law. The Fourteenth Amendment provides in relevant part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law.
>
> . . . . . .
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

While reaffirming the view that state sovereign immunity does not yield to Congress' Article I powers, this Court in

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[4] The Patent Clause provides that "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The relevant portions of the Fourteenth Amendment are discussed below.

Seminole Tribe also reaffirmed its holding in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment. Our opinion explained that in *Fitzpatrick*, "we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, *supra*, at 59. The Court further described *Fitzpatrick* as holding that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole Tribe*, *supra*, at 59.

College Savings and the United States are correct in suggesting that "appropriate" legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty. Congress itself apparently thought the Patent Remedy Act could be so justified:

> "[T]he bill is justified as an acceptable method of enforcing the provisions of the fourteenth amendment. The Court in *Lemelson* v. *Ampex Corp.*[, 372 F. Supp. 708 (ND Ill. 1974),] recognized that a patent is a form of property, holding that a right to compensation exists for patent infringement. Additionally, because courts have continually recognized patent rights as property, the fourteenth amendment prohibits a State from depriving a person of property without due process of law." S. Rep., at 8 (footnotes omitted).

We have held that "[t]he 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment." *City of Boerne* v. *Flores*, 521 U. S., at 519.

But the legislation must nonetheless be "appropriate" under § 5 as that term was construed in *City of Boerne*.

There, this Court held that the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, exceeded Congress' authority under § 5 of the Fourteenth Amendment, insofar as RFRA was made applicable to the States. RFRA was enacted "in direct response to" this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which construed the Free Exercise Clause of the First Amendment to hold that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne*, *supra*, at 512, 514. Through RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith* by requiring that a generally applicable law placing a "substantial burden" on the free exercise of religion must be justified by a "compelling governmental interest" and must employ the "least restrictive means" of furthering that interest. 521 U. S., at 515–516.

In holding that RFRA could not be justified as "appropriate" enforcement legislation under § 5, the Court emphasized that Congress' enforcement power is "remedial" in nature. *Id.*, at 519. We recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.*, at 518 (citation omitted). We also noted, however, that "'[a]s broad as the congressional enforcement power is, it is not unlimited,'" *ibid.*, and held that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation," *id.*, at 519. Canvassing the history of the Fourteenth Amendment and

case law examining the propriety of Congress' various voting rights measures,[5] the Court explained:

> "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.*, at 519–520.

We thus held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.

RFRA failed to meet this test because there was little support in the record for the concerns that supposedly animated the law. *Id.*, at 530–531. And, unlike the measures in the voting rights cases, RFRA's provisions were "so out of proportion to a supposed remedial or preventive object" that RFRA could not be understood "as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532; see also *id.*, at 534 ("Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional").

Can the Patent Remedy Act be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment for patent owners? Following *City of Boerne*, we must first identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, guided

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[5] See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *City of Rome* v. *United States*, 446 U. S. 156 (1980).

by the principle that the propriety of any § 5 legislation "'must be judged with reference to the historical experience . . . it reflects.'" *Id.*, at 525. The underlying conduct at issue here is state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights. See H. R. Rep., at 37–38 ("[P]atent owners are effectively denied a remedy for damages resulting from infringement by a State or State entity"); S. Rep., at 6 ("[P]laintiffs in patent infringement cases against a State are foreclosed from damages, regardless of the State conduct"). It is this conduct then—unremedied patent infringement by the States—that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act.

In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases, see *City of Boerne*, *supra*, at 525–527, Congress came up with little evidence of infringing conduct on the part of the States. The House Report acknowledged that "many states comply with patent law" and could provide only two examples of patent infringement suits against the States. See H. R. Rep., at 38. The Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990. See 148 F. 3d, at 1353–1354.

Testimony before the House Subcommittee in favor of the bill acknowledged that "states are willing and able to respect patent rights. The fact that there are so few reported cases involving patent infringement claims against states underlies the point." Patent Remedy Clarification Act: Hearing on H. R. 3886 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101st Cong., 2d Sess., 56 (1990) (hereinafter House Hearings) (statement of William

S. Thompson); *id.*, at 32 (statement of Robert Merges) ("[S]tates do occasionally find themselves in patent infringement suits"). Even the bill's sponsor conceded that "[w]e do not have any evidence of massive or widespread violation of patent laws by the States either with or without this State immunity." *Id.*, at 22 (statement of Rep. Kastenmeier).[6] The Senate Report, as well, contains no evidence that unremedied patent infringement by States had become a problem of national import. At most, Congress heard testimony that patent infringement by States might increase in the future, see House Hearings 22 (statement of Jeffrey Samuels); *id.*, at 36–37 (statement of Robert Merges); *id.*, at 57 (statement of William Thompson), and acted to head off this speculative harm. See H. R. Rep., at 38.

College Savings argues that by infringing a patent and then pleading immunity to an infringement suit, a State not only infringes the patent, but deprives the patentee of property without due process of law and "takes" the property in the patent without paying the just compensation required

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[6] Representative Kastenmeier made this statement in the course of questioning Jeffrey M. Samuels, Acting Commissioner of Patents and Trademarks, U. S. Department of Commerce. The discussion continued:

"Mr. KASTENMEIER. . . .

"Accordingly, could one argue that this legislation may be premature. We really do not know whether it will have any affect *[sic]* or not.

"Mr. SAMUELS. Well, you are right, Mr. Chairman. There have not been many cases that have raised this issue. I guess our feeling is that it is a step that should be taken now because the possibility exists in light of *Atascadero* and in light of the *Chew* case that more States will get involved in infringing patents.

"I guess as a general policy statement, we believe that those engaged—those who do engage in patent infringement should be subject to all the remedies that are set forth in the Patent Act and that the rights of a patent owner should not be dependent upon the identity of the entity who is infringing, whether it be a private individual, or corporation, or State.

"So just as a general philosophical matter, we believe that this law needs to be passed."

by the Fifth Amendment.[7] The United States declines to defend the Act as based on the Just Compensation Clause, but joins in College Savings' defense of the Act as designed to prevent a State from depriving a patentee of property without due process of law. Florida Prepaid contends that Congress may not invoke § 5 to protect property interests that it has created in the first place under Article I. Patents, however, have long been considered a species of property. See *Brown* v. *Duchesne*, 19 How. 183, 197 (1857) ("For, by the laws of the United States, the rights of a party under a patent are his private property"); cf., *Consolidated Fruit-Jar Co.* v. *Wright*, 94 U. S. 92, 96 (1877) ("A patent for an invention is as much property as a patent for land"). As such, they are surely included within the "property" of which no person may be deprived by a State without due process of law. And if the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment.

Though patents may be considered "property" for purposes of our analysis, the legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act. The Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, *without due process of law.*" U. S. Const., Amdt. 14, § 1 (emphasis added). This Court has accordingly held that "[i]n procedural due process claims, the deprivation by

[7] There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment. Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon* v. *Burch*, 494 U. S. 113, 125 (1990) (emphasis deleted).

Thus, under the plain terms of the Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result. See *Parratt* v. *Taylor*, 451 U. S. 527, 539–541 (1981); *Hudson* v. *Palmer*, 468 U. S. 517, 532–533 (1984); *id.*, at 539 (O'Connor, J., concurring) ("[I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate . . . . When adequate remedies are provided and followed, no . . . deprivation of property without due process can result").

Congress, however, barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment. It did hear a limited amount of testimony to the effect that the remedies available in some States were uncertain.[8]

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[8] See, *e. g.*, House Hearings 33 (statement of Robert Merges) ("Thus a patentee . . . would apparently have to draft her cause of action as a general tort claim—or perhaps one for restitution—to come within the statute. This might be impossible, or at least difficult under California law"); *id.*, at 43 ("[I]t is true that you may have State remedies, alternative State remedies. . . . You could bring a deceit suit. You could try just a general unfair competition suit. A restitution is one that has occurred to me as a possible basis of recovery"); *id.*, at 34 ("Another problem with this approach is that it assumes that such state law remedies will be available in every state in which the patentee's product is sold. This may or may not be true"); *id.*, at 47 (statement of William Thompson) ("In this case

The primary point made by these witnesses, however, was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law. See, *e. g.*, House Hearings 43 (statement of Robert Merges) ("[U]niformity again dictates that that sovereign immunity is a mistake in this field because of the variance among the State's laws"), *id.*, at 34, 41 (Merges); *id.*, at 58 (statement of William Thompson).[9]

Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses. See H. R. Rep., at 37, n. 158 ("[T]he availability of a State remedy is tenuous and could vary significantly State to State"); *id.*, at 38 ("[I]f patentees turn to the State courts for alternative forms of relief from patent infringement, the result will be a patchwork of State laws, actually undermining the goal of national uniformity in

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there is no balance, since there are no—or at least there are not very effective patent remedies at the State level"); *id.*, at 57 ("The court in *Lane* [v. *First Nat. Bank of Boston*, 687 F. Supp. 11 (Mass. 1988),] pointed out that the appellant may be able to obtain money damages by recourse to the Massachusetts tort claims act or sue the state for deceit, conversion, or unfair competition under Massachusetts law. The court also noted a Massachusetts statute which provides that damages may be recovered from the state when private property is confiscated for a public purpose. While many states may have similar statutes, the courts' surmise that intellectual property infringement cases may be pursued in some state courts offer us little comfort"); *id.*, at 60 ("[I]t sounds to me like it is a very difficult area to predict what would happen. There is a rich variety of potential causes of action, as the prior speaker [Merges] pointed out").

[9] It is worth mentioning that the State of Florida provides remedies to patent owners for alleged infringement on the part of the State. Aggrieved parties may pursue a legislative remedy through a claims bill for payment in full, Fla. Stat. § 11.065 (1997), or a judicial remedy through a takings or conversion claim, see *Jacobs Wind Electric Co.* v. *Florida Dept. of Transp.*, 626 So. 2d 1333 (Fla. 1993).

our patent system"). The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.

We have also said that a state actor's negligent act that causes unintended injury to a person's property does not "deprive" that person of property within the meaning of the Due Process Clause. See *Daniels* v. *Williams*, 474 U. S. 327, 328 (1986). Actions predicated on direct patent infringement, however, do not require any showing of intent to infringe; instead, knowledge and intent are considered only with respect to damages. See 35 U. S. C. § 271(a) (1994 ed., Supp. III); 5 D. Chisum, Patents § 16.02[2], p. 16–31 (rev. ed. 1998) ("'It is, of course, elementary, that an infringement may be entirely inadvertent and unintentional and without knowledge of the patent'"). Congress did not focus on instances of intentional or reckless infringement on the part of the States. Indeed, the evidence before Congress suggested that most state infringement was innocent or at worst negligent. See S. Rep., at 10 ("'It is not always clear that with all the products that [government] buy[s], that anyone is really aware of the patent status of any particular invention or device or product'"); H. R. Rep., at 39 ("[I]t should be very rare for a court to find . . . willful infringement on the part of a State or State agency"). Such negligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment.

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of "widespread and persisting deprivation of constitutional rights" of the sort Congress has faced in enacting proper prophylactic § 5 legislation. *City of Boerne*, 521 U. S., at 526. Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not

necessarily violate the Constitution. Though the lack of support in the legislative record is not determinative, see *id.*, at 531, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *id.*, at 530. Here, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions.

Because of this lack, the provisions of the Patent Remedy Act are "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532. An unlimited range of state conduct would expose a State to claims of direct, induced, or contributory patent infringement, and the House Report itself cited testimony acknowledging "'it[']s difficult for us to identify a patented product or process which might not be used by a state.'" H. R. Rep., at 38.[10] Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any

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[10] The relevant testimony stated in full:

"The comments regarding copyright centered on substantial use of copyrighted textbooks by state universities as well as state use of copyrighted music and computer software. State use of patented products is more diverse and more substantial. Patented inventions are involved in all manner of commonly used machines, tools, instruments, chemicals, compounds, materials, and devices of all description and purpose. Furthermore, patented processes are commonplace. States and state instrumentalities own and operate hospitals, universities, prisons, and libraries. States build and maintain roads. States provide facilities and equipment for large numbers of employees who perform all manner of state supported activities. It[']s difficult for us to identify a patented product or process which might not be used by a state." House Hearings 55 (statement of William Thompson).

state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

Instead, Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration. Our opinion in *City of Boerne* discussed with approval the various limits that Congress imposed in its voting rights measures, see 521 U. S., at 532–533, and noted that where "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5," *id.*, at 533. The Patent Remedy Act's indiscriminate scope offends this principle, and is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy. In sum, it simply cannot be said that "many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.*, at 532.

The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment. The examples of States avoiding liability for patent infringement by pleading sovereign immunity in a federal-court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still. The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under

that regime.[11] These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.

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

It is so ordered.

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

The Constitution vests Congress with plenary authority over patents and copyrights. U. S. Const., Art. I, § 8, cl. 8. Nearly 200 years ago, Congress provided for exclusive jurisdiction of patent infringement litigation in the federal courts.[1] See *Campbell* v. *Haverhill*, 155 U. S. 610, 620

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[11] See 35 U. S. C. § 271(h) (stating that States and state entities "shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity"); see also H. R. Rep., at 40 ("The Committee believes that the full panoply of remedies provided in the patent law should be available to patentees whose legitimate rights have been infringed by States or State entities"); S. Rep., at 14. Thus, contrary to the dissent's intimation, see *post*, at 663 (opinion of STEVENS, J.), the Patent Remedy Act does not put States in the same position as the United States. Under the Patent Remedy Act, States are subject to all the remedies available to plaintiffs in infringement actions, which include punitive damages and attorney's fees, see 35 U. S. C. §§ 284, 285, as well as injunctive relief, see § 283. In waiving its own immunity from patent infringement actions in 28 U. S. C. § 1498(a) (1994 ed. and Supp. III), however, the United States did not consent to either treble damages or injunctive relief, and allowed reasonable attorney's fees only in a narrow class of specified instances.

[1] See Act of Apr. 17, 1800, ch. 25, 2 Stat. 37; Act of Feb. 19, 1819, ch. 19, 3 Stat. 481. There is some dispute about whether federal jurisdiction over patent cases became exclusive in 1800 or in 1836. See 7 D. Chisum, Patents § 20.02[1][a], n. 9 (1998). In any event, 28 U. S. C. § 1338(a) now provides: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such ju-

(1895). In 1992 Congress clarified that jurisdictional grant by an amendment to the patent law that unambiguously authorizes patent infringement actions against States, state instrumentalities, and any officer or employee of a State acting in his official capacity. Pub. L. 102–560, 106 Stat. 4230, 35 U. S. C. § 271(h). Given the absence of effective state remedies for patent infringement by States and the statutory pre-emption of such state remedies, the 1992 Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) was an appropriate exercise of Congress' power under § 5 of the Fourteenth Amendment to prevent state deprivations of property without due process of law.

This Court's recent decision in *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), amply supports congressional authority to enact the Patent Remedy Act, whether one assumes that States seldom infringe patents, see *ante*, at 640–641, 645–646, or that patent infringements potentially permeate an "unlimited range of state conduct," see *ante*, at 646. Before discussing *City of Boerne*, however, I shall comment briefly on the principle that undergirds all aspects of our patent system: national uniformity.

I

In his commentaries on the Federal Constitution, Justice Story said of the Patent and Copyright Clauses:

> "It is beneficial to all parties, that the national government should possess this power; to authors and inven-

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risdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." The second sentence of § 1338(a) (excluding the reference to plant variety protection cases) has been worded in essentially the same way since 1878. See Rev. Stat. § 711 (1878). This Court has used various criteria for determining when an action "arises under" the patent law, see, *e. g.*, *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46, 52–53 (1888), but it is well established that a patent infringement claim is "the paradigm of an action 'arising under' the patent laws." 8 Chisum, Patents § 21.02[1][b].

> tors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint." J. Story, Commentaries on the Constitution of the United States § 502, p. 402 (R. Rotunda & J. Nowak eds. 1987).

James Madison said of the same Clause, "The utility of this power will scarcely be questioned . . . . The States cannot separately make effectual provision for either [copyrights or patents], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress." The Federalist No. 43, p. 267 (H. Lodge ed. 1908) (J. Madison).

Sound reasons support both Congress' authority over patents and its subsequent decision in 1800 to vest exclusive jurisdiction over patent infringement litigation in the federal courts. The substantive rules of law that are applied in patent infringement cases are entirely federal. From the beginning, Congress has given the patentee the right to bring an action for patent infringement. § 4, 1 Stat. 111. There is, accordingly, a strong federal interest in an interpretation of the patent statutes that is both uniform and faithful to the constitutional goals of stimulating invention and rewarding the disclosure of novel and useful advances in technology. See *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 9 (1966). Federal interests are threatened, not only by inadequate protection for patentees, but also when overprotection may have an adverse impact on a competitive economy. See *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 162–163 (1989). Therefore, consistency, uniformity, and familiarity with the extensive and relevant body of patent jurisprudence are matters of overriding significance in this area of the law.

Patent infringement litigation often raises difficult technical issues that are unfamiliar to the average trial judge.[2] That consideration, as well as the divergence among the federal circuits in their interpretation of patent issues, provided support for the congressional decision in 1982 to consolidate appellate jurisdiction of patent appeals in the Court of Appeals for the Federal Circuit.[3] Although that court has jurisdiction over all appeals from federal trial courts in patent infringement cases, it has no power to review state-court decisions on questions of patent law. See 28 U. S. C. § 1295.

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[2] The Advisory Commission on Patent Law Reform recommended in 1992 that patent jurisdiction be restricted to a single district court per circuit and that district courts designate and use judges with special expertise in patent litigation. "With this increased expertise, courts would be able to more effectively control litigation proceedings, and ensure consistency in the application of substantive patent law . . . . Of course, the restricted jurisdictional provision would reduce the flexibility currently available to parties to file actions pursuant to the general jurisdictional authority. Yet patent practice is an essentially national practice in the United States. The 'costs' in terms of lost flexibility associated with this change would appear to be relatively minor in comparison to the prospective benefits in uniformity of practice." Advisory Commission on Patent Law Reform, D. Comer et al., Report to the Secretary of Commerce 99 (Aug. 1992).

[3] In its Report on the Federal Courts Improvement Act of 1982, the House stated, "Patent litigation long has been identified as a problem area, characterized by undue forum-shopping and unsettling inconsistency in adjudications. Based on the evidence it compiled during the course of thorough hearings on the subject, the Commission on Revision of the Federal Court Appellate System—created by Act of Congress—concluded that patent law is an area in which the application of the law to the facts of a case often produces different outcomes in different courtrooms in substantially similar cases. As a result, some circuit courts are regarded as 'pro-patent' and other 'anti-patent,' and much time and money is expended in 'shopping' for a favorable venue. In a Commission survey of practitioners, the patent bar reported that uncertainty created by the lack of national law precedent was a significant problem; the Commission found patent law to be an area in which widespread forum-shopping was particularly acute." H. R. Rep. No. 97–312, pp. 20–21 (1981) (footnotes omitted); see also S. Rep. No. 97–275, p. 5 (1981).

The reasons that motivated the creation of the Federal Circuit would be undermined by any exception that allowed patent infringement claims to be brought in state court.

Today the Court first acknowledges that the "need for uniformity in the construction of patent law is undoubtedly important," *ante*, at 645, but then discounts its significance as merely "a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law." *Ibid.* But the "Article I patent-power calculus" is directly relevant to this case because it establishes the constitutionality of the congressional decision to vest exclusive jurisdiction over patent infringement cases in the federal courts. That basic decision was unquestionably appropriate. It was equally appropriate for Congress to abrogate state sovereign immunity in patent infringement cases in order to close a potential loophole in the uniform federal scheme, which, if undermined, would necessarily decrease the efficacy of the process afforded to patent holders.

II

Our recent decision in *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), sets out the general test for determining whether Congress has enacted "appropriate" legislation pursuant to § 5 of the Fourteenth Amendment. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. The first step of the inquiry, then, is to determine what injury Congress sought to prevent or remedy with the relevant legislation.

As the Court recognizes, Congress' authority under § 5 of the Fourteenth Amendment extends to enforcing the Due Process Clause of that Amendment. *Ante*, at 637. Congress decided, and I agree, that the Patent Remedy Act was a proper exercise of this power.

The Court acknowledges, as it must, that patents are property. *Ante,* at 642; see also *Consolidated Fruit-Jar Co.* v. *Wright,* 94 U. S. 92, 96 (1877). Every valid patent "gives the patentee or his assignee the 'exclusive right to make, use, and vend the invention or discovery' for a limited period." *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, 643 (1947). The Court suggests, however, that a State's infringement of a patent does not necessarily constitute a "deprivation" within the meaning of the Due Process Clause, because the infringement may be done negligently. *Ante,* at 645.

As part of its attempt to stem the tide of prisoner litigation, and to avoid making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Daniels* v. *Williams*, 474 U. S. 327, 332–334 (1986), this Court has drawn a constitutional distinction between negligent and intentional misconduct. Injuries caused by the mere negligence of state prison officials—in leaving a pillow on the stairs of the jail, for example—do not "deprive" anyone of liberty or property within the meaning of the Due Process Clause of that Amendment. *Ibid.* On the other hand, willful misconduct, and perhaps "recklessness or gross negligence," may give rise to such a deprivation. *Id.*, at 334.

While I disagree with the Court's assumption that this standard necessarily applies to deprivations of patent rights, the *Daniels* line of cases has only marginal relevance to this case: Respondent College Savings Bank has alleged that petitioner's infringement was willful.[4] The question presented by this case, then, is whether the Patent Remedy Act,

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[4] Paragraph 7 of College Savings' complaint alleges that "'[d]efendant Florida Prepaid with actual knowledge of the '055 patent, with knowledge of its infringement, and without lawful justification, has willfully infringed the '055 patent.'" App. to Pet. for Cert. 30a.

which clarified Congress' intent to subject state infringers to suit in federal court, may be applied to willful infringement.[5]

As I read the Court's opinion, its negative answer to that question has nothing to do with the facts of this case. Instead, it relies entirely on perceived deficiencies in the evidence reviewed by Congress before it enacted the clarifying amendment. "In enacting the Patent Remedy Act . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Ante*, at 640.

It is quite unfair for the Court to strike down Congress' Act based on an absence of findings supporting a requirement this Court had not yet articulated. The legislative history of the Patent Remedy Act makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course—the "clear statement" rule of *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985).[6]

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[5] As a practical matter, infringement actions based on mere negligence rarely arise. Most patent infringers are put on notice that their conduct may be actionable before an infringement suit is filed. "The first step in enforcing a patent is usually to send a cease-and-desist or charge-of-infringement letter." Pokotilow & Siegal, Cease and Desist Letters: The Legal Pitfalls for Patentees, 4 Intellectual Property Strategist, No. 3, p. 1 (1997).

[6] The Chairman of the House Subcommittee considering the Patent Remedy Act, Representative Kastenmeier, engaged in the following dialogue with William Thompson, President of the American Intellectual Property Law Association, about whether States were definitively immune from suit under the Eleventh Amendment following the Federal Circuit's recent decision in *Chew* v. *California*, 893 F. 2d 331 (1990):

"Mr. KASTENMEIER. You mentioned that you do not see the likelihood of further cases in this area since the *Atascadero* and *Chew* cases seem to be fairly definitive on this question, unless there were in fact remedial legislation. Do you anticipate that remedial legislation, such as the bill before us, if passed into law, would be the subject of litigation?

"Mr. THOMPSON. No, I think it would be very clear. Your legislation is very clearly drawn. It seems to match the tests set forth in *Atascadero*

Nevertheless, Congress did hear testimony about inadequate state remedies for patent infringement when considering the Patent Remedy Act. The leading case referred to in the congressional hearing was *Chew* v. *California*, 893 F. 2d 331 (CA Fed. 1990). In fact, *Chew* prompted Congress to consider the legislation that became the Patent Remedy Act. See H. R. Rep. No. 101–960, pt. 1, p. 7, and n. 20 (1990). The Federal Circuit held in that case that congressional intent to abrogate state sovereign immunity under the patent laws was not "unmistakably clear," as this Court had required in *Atascadero*. *Chew*, 893 F. 2d, at 334.

The facts of *Chew* clearly support both Congress' decision and authority to enact the Patent Remedy Act. Marian Chew had invented a method for testing automobile engine exhaust emissions and secured a patent on her discovery. Her invention was primarily used by States and other governmental entities. In 1987, Chew, an Ohio resident, sued the State of California in federal court for infringing her patent. California filed a motion to dismiss on Eleventh Amendment grounds, which the District Court granted. The Federal Circuit affirmed, *id.*, at 332, expressly stating that the question whether Chew had a remedy under California law "is a question not before us." Nevertheless, it implied that its decision would have been the same even if Chew were left without any remedy. *Id.*, at 336. During its hearing on the Patent Remedy Act, Congress heard testimony about the *Chew* case. Professor Merges stated that Chew might not have been able to draft her infringement suit as a tort claim. "This might be impossible, o[r] at least

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of making it very clear that the patent statute is one that would qualify as an abrogation area *[sic]* in the 11th amendment.

"I can never guarantee exactly how attorneys are going to read statutes, Mr. Chairman, but all of the sane ones would not bring an action." Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101st Cong., 2d Sess., 60 (1990) (House Hearing).

difficult, under California law. Consequently, relief under [state statutes] may be not be a true alternative avenue of recovery." House Hearing 33.[7]

Congress heard other general testimony that state remedies would likely be insufficient to compensate inventors whose patents had been infringed. The Acting Commissioner of Patents stated: "If States and their instrumentalities were immune from suit in federal court for patent infringement, patent holders would be forced to pursue uncertain, perhaps even non-existent, remedies under State law." *Id.*, at 15. The legislative record references several cases of patent infringement involving States. See *Paperless Accounting, Inc.* v. *Mass Transit Administration*, Civil No. HAR 84–2922 (D. Md. 1985) (cited in House Hearing 56); *Hercules, Inc.* v. *Minnesota State Highway Dept.*, 337 F. Supp. 795 (Minn. 1972) (House Hearing 51); *Lemelson* v. *Ampex Corp.*, 372 F. Supp. 708 (ND Ill. 1974) (same).

In addition, Congress found that state infringement of patents was likely to increase. H. R. Rep. No. 101–960, pt. 1, at 38. The Court's opinion today dismisses this rationale: "At most, Congress heard testimony that patent infringement by States might increase in the future and acted to head off this speculative harm." *Ante*, at 641 (citations omitted). In fact, States and their instrumentalities, especially state universities, have been involved in many patent cases since 1992. See *Regents of Univ. of Minn.* v. *Glaxo Wellcome, Inc.*, 44 F. Supp. 2d 998 (Minn. 1999) (declaratory

[7] Merges continued: "Another problem with this approach is that it assumes that such state law remedies will be available in every state in which the patentee's product is sold. This may or may not be true. In any event, requiring a potential plaintiff (patentee) to ascertain the validity of her claims under the differing substantive and procedural laws of the fifty states may well prove a very substantial disincentive to the commencement of such suits. Moreover, it would vitiate a major goal of the federal intellectual property system: national uniformity. In short, these remedies are simply no substitute for patent infringement actions." *Id.*, at 34.

judgment action filed by the University of Minnesota); *University of Colo. Foundation, Inc.* v. *American Cyanamid Co.*, 974 F. Supp. 1339 (Colo. 1997) (patent infringement action filed by University of Colorado); *Gen-Probe, Inc.* v. *Amoco Corp., Inc.*, 926 F. Supp. 948 (SD Cal. 1996) (suit filed against various parties, alleging, *inter alia*, that Regents of the University of California induced patent infringement by Amoco); *Genentech* v. *Regents of Univ. of Cal.*, 143 F. 3d 1446 (CA Fed. 1998) (declaratory judgment suit filed by Genentech); *Ciba-Geigy* v. *Alza Corp.*, 804 F. Supp. 614 (NJ 1992) (counterclaim brought by Alza against Regents of the University of California).

Furthermore, States and their instrumentalities are heavily involved in the federal patent system.[8] The United States Patent and Trademark Office issued more than 2,000 patents to universities (both public and private) in 1986 alone. Chakansky, Patent Profiles, 13 Computer Law Strategist, No. 9, p. 8 (1997). Royalty earnings from licenses at United States universities totaled $273.5 million in 1995, a 12% increase over the prior year. 2 Eckstrom's Licensing in Foreign and Domestic Operations § 11.06 (D. Epstein ed. 1998). The State of Florida has obtained over 200 United States patents since the beginning of 1995. Brief for New York Intellectual Property Law Association as *Amicus Curiae* 2. All 50 States own or have obtained patents. Brief for United States 44.

It is true that, when considering the Patent Remedy Act, Congress did not review the remedies available in each State for patent infringements and surmise what kind of recovery

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[8] See generally Dueker, Biobusiness on Campus: Commercialization of University-Developed Biomedical Technologies, 52 Food & Drug L. J. 453 (1997); Bertha, Intellectual Property Activities in U. S. Research Universities, 36 IDEA: J. L. & Tech. 513 (1996); Eisenberg, Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research, 82 Va. L. Rev. 1663 (1996).

a plaintiff might obtain in a tort suit in all 50 jurisdictions.[9] See *ante*, at 643. But, it is particularly ironic that the Court should view this fact as support for its holding. Given that Congress had long ago pre-empted state jurisdiction over patent infringement cases, it was surely reasonable for Congress to assume that such remedies simply did not exist.[10] Furthermore, it is well known that not all States have

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[9] To the extent that a majority of this Court finds this factor dispositive, there is hope that the Copyright Remedy Clarification Act of 1990 may be considered "appropriate" § 5 legislation. The legislative history of that Act includes many examples of copyright infringements by States—especially state universities. See Hearings on H. R. 1131 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101st Cong., 1st Sess., 93, 148 (1989); Hearing on S. 497 before the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 148 (1989). Perhaps most importantly, the House requested that the Register of Copyrights prepare a study, which he described in his transmittal letter as, "a factual inquiry about enforcement of copyright against state governments and about unfair copyright licensing practices, if any, with respect to state government use of copyrighted works. I have also prepared an in-depth analysis of the current state of Eleventh Amendment law and the decisions relating to copyright liability of states, including an assessment of any constitutional limitations on Congressional action. Finally, as you requested, the American Law Division of the Congressional Research Service has conducted a 50 state survey of the statutes and case law concerning waiver of state sovereign immunity." Register of Copyrights, R. Oman, Copyright Liability of States and the Eleventh Amendment (June 1988) (transmittal letter). This report contains comments from industry groups, statistics, and legal analysis relating to copyright violations, actual and potential, by States. See *id.*, at 5, 12, 14, 93–95.

[10] After the 1992 Act was passed, the Florida Supreme Court did hold that a patentee might bring some sort of "takings" claim in a state court, or might seek a legislative remedy. See *Jacobs Wind Electric Co.* v. *Florida Dept. of Transp.*, 626 So. 2d 1333 (1993). Given the unambiguous text of 28 U. S. C. § 1338, there is (a) no reason why Congress could have anticipated that decision, and (b) good reason to believe a well-motivated court may have misinterpreted federal law. See *Jacobs Wind*, 626 So. 2d, at 1337–1338 (Harding, J., dissenting).

waived their sovereign immunity from suit,[11] and among those States that have, the contours of this waiver vary widely.[12]

Even if such remedies might be available in theory, it would have been "appropriate" for Congress to conclude that they would not guarantee patentees due process in infringement actions against state defendants. State judges have never had the exposure to patent litigation that federal judges have experienced for decades, and, unlike infringement actions brought in federal district courts, their decisions would not be reviewable in the Court of Appeals for the Federal Circuit. Surely this Court would not undertake the task of reviewing every state-court decision that arguably misapplied patent law.[13] And even if 28 U. S. C. § 1338 is amended or construed to permit state courts to entertain infringement actions when a State is named as a defendant, given the Court's opinion in *Alden* v. *Maine*, it is by no means clear that state courts could be required to hear these cases at all. *Post*, at 712.

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[11] See, *e. g.*, Ala. Code § 41–9–60 (1991) (claims may only be brought administratively); W. Va. Const., Art. VI, § 35 ("The State of West Virginia shall never be made a defendant in any court of law or equity . . .").

[12] See, *e. g.*, Colo. Rev. Stat. § 24–10–106 (1998) (waiving immunity in tort claims only for injuries resulting from operation of a motor vehicle, operation of a public hospital or a correctional facility, the dangerous condition of a public building, the dangerous condition of a public highway or road, a dangerous condition caused by snow or ice, or from the operation of any public utility facility); Minn. Stat. Ann. § 3.736 (Supp. 1998–1999) (waiver of immunity invalid when loss arises from state employee who exercises due care or performance or failure to perform discretionary duty); Md. Cts. & Jud. Proc. Code Ann. § 5–522(a)(5) (1998) (immunity not waived if a claim from a single occurrence exceeds $100,000).

[13] In the House Report advocating the creation of the Federal Circuit, Congress noted, "The infrequency of Supreme Court review of patent cases leaves the present judicial system without any effective means of assuring even-handedness nationwide in the administration of the patent laws." H. R. Rep. No. 97–312, at 22.

Even if state courts elected to hear patent infringement cases against state entities, the entire category of such cases would raise questions of impartiality. This concern underlies both the constitutional authorization of diversity jurisdiction and the statutory provisions for removal of certain cases from state to federal courts, 28 U. S. C. § 1441 *et seq.* The same concern justified John Marshall's narrow construction of the Eleventh Amendment in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821). As he there noted, when there is a conflict between a State's interest and a federal right, it "would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals." *Id.*, at 386.

Finally, this Court has never mandated that Congress must find "'widespread and persisting deprivation of constitutional rights,'" *ante*, at 645, in order to employ its § 5 authority. It is not surprising, therefore, that Congress did not compile an extensive legislative record analyzing the due process (or lack thereof) that each State might afford for a patent infringement suit retooled as an action in tort. In 1992, Congress had no reason to believe it needed to do such a thing; indeed, it should not have to do so today.

III

In my view, Congress had sufficient evidence of due process violations, whether actual or potential, to meet the requirement we expressed in *City of Boerne* that Congress can act under § 5 only to "remedy or prevent unconstitutional actions." See 521 U. S., at 519. The Court's opinion today threatens to read Congress' power to pass prophylactic legislation out of § 5 altogether; its holding is unsupported by *City of Boerne* and in fact conflicts with our reasoning in that case.

In *City of Boerne* we affirmed the well-settled principle that the broad sweep of Congress' enforcement power en-

compasses legislation that deters or remedies constitutional violations, even if it prohibits conduct that is not itself unconstitutional, and even if it intrudes into spheres of autonomy previously reserved to the States. *Id.*, at 518. Nevertheless, we held that the enactment of the Religious Freedom Restoration Act of 1993 (RFRA) was not an "appropriate" exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment. *Id.*, at 536.

By enacting RFRA Congress sought to change the meaning of the Free Exercise Clause of the First Amendment as it had been interpreted by this Court, rather than to remedy or to prevent violations of the Clause as we had interpreted it. We held that RFRA had crossed "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.*, at 519–520. Congress' § 5 power is "corrective or preventive, not definitional." *Id.*, at 525. Our extensive review of the legislative history of RFRA made it clear that the statute could not be fairly characterized as a remedial measure, but rather was a legislative attempt "to interpret and elaborate on the meaning" of the Free Exercise Clause. By doing so, Congress had violated the principle that the "power to interpret the Constitution in a case or controversy remains in the Judiciary." *Id.*, at 524.

The difference between the harm targeted by RFRA and the harm that motivated the enactment of the Patent Remedy Act is striking. In RFRA Congress sought to overrule this Court's interpretation of the First Amendment. The Patent Remedy Act, however, was passed to prevent future violations of due process, based on the substantiated fear that States would be unable or unwilling to provide adequate remedies for their own violations of patent holders' rights. Congress' "wide latitude" in determining remedial or preventive measures, see *id.*, at 520, has suddenly become very narrow indeed.

City of Boerne also identified a "proportionality" component to "appropriate" legislation under § 5. Our opinion expressly recognized that "preventive rules are sometimes appropriate" if there is

> "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. See *South Carolina* v. *Katzenbach*, 383 U. S., at 308. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. *Id.*, at 334." *Id.*, at 530.

In RFRA we found no such congruence, both because of the absence of evidence of widespread violations that were in need of redress, and because the sweeping coverage of the statute ensured "its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.*, at 532.

Again, the contrast between RFRA and the Act at issue in this case could not be more stark. The sole purpose of this amendment is to abrogate the States' sovereign immunity as a defense to a charge of patent infringement. It has no impact whatsoever on any substantive rule of state law, but merely effectuates settled federal policy to confine patent infringement litigation to federal judges. There is precise congruence between "the means used" (abrogation of sovereign immunity in this narrow category of cases) and "the ends to be achieved" (elimination of the risk that the defense of sovereign immunity will deprive some patentees of property without due process of law).

That congruence is equally precise whether infringement of patents by state actors is rare or frequent. If they are indeed unusual, the statute will operate only in those rare cases. But if such infringements are common, or should become common as state activities in the commercial

arena increase, the impact of the statute will likewise expand in precise harmony with the growth of the problem that Congress anticipated and sought to prevent. In either event the statute will have no impact on the States' enforcement of their own laws. None of the concerns that underlay our decision in *City of Boerne* are even remotely implicated in this case.

The Patent Remedy Act merely puts States in the same position as all private users of the patent system,[14] and in virtually the same posture as the United States.[15] "When

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[14] As the Senate said in its Report on the Act, "the current state of the law leaves the protection afforded to patent and trademark holders dependant on the status of the infringing party. A public school such as UCLA can sue a private school such as USC for patent infringement, yet USC cannot sue UCLA for the same act." S. Rep. No. 102–280, p. 9 (1992).

[15] The majority's assertion that "the Patent Remedy Act does not put States in the same position as the United States," *ante*, at 648, n. 11, is misleading. In the case of private infringement suits, treble damages are available only "where the infringer acted in wanton disregard of the patentee's patent rights, that is, where the infringement is willful." *Read Corp.* v. *Portec, Inc.*, 970 F. 2d 816, 826 (CA Fed. 1992) (reversing the District Court's award of enhanced damages). "On the other hand, a finding of willful infringement does not mandate that damages be enhanced, much less mandate treble damages." *Ibid.* Attorney's fees are available only in "exceptional" circumstances. 35 U. S. C. § 285. Once it has determined that the case is "exceptional," the district court has discretion whether or not to award attorney's fees and the fees "must be reasonable." *Gentry Gallery, Inc.* v. *Berkline Corp.*, 134 F. 3d 1473, 1480 (CA Fed. 1998). In addition, attorney's fees are available in limited circumstances in suits against the United States. *Ante*, at 648, n. 11.

The remaining differences between the United States' waiver of sovereign immunity and the Patent Remedy Act are supported by quintessentially federal concerns. This Court has found that "the procurement of equipment by the United States is an area of uniquely federal interest." *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507 (1988). Indeed, the importance of the federal interest in military procurement led this Court to fashion the doctrine of "Government contractors' immunity" without waiting for Congress to consider the question. *Id.*, at 531 (STEVENS, J., dissenting). Injunctions are not available against the United States be-

Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach." *Goldstein* v. *California*, 412 U. S. 546, 560 (1973) (analyzing Copyright Clause). Recognizing the injustice of sovereign immunity in this context, the United States has waived its immunity from suit for patent violations. In 1910, Congress enacted a statute entitled, "An Act to provide additional protection for owners of patents of the United States." Ch. 423, 36 Stat. 851. The Act provided that owners of patents infringed by the United States "may recover reasonable compensation for such use by suit in the Court of Claims." The United States has consistently maintained this policy for the last 90 years. See 28 U. S. C. § 1498.

In my judgment, the 1992 Act is a paradigm of an appropriate exercise of Congress' § 5 power.[16]

IV

For these reasons, I am convinced that the 1992 Act should be upheld even if full respect is given to the Court's recent cases cloaking the States with increasing protection from congressional legislation. I do, however, note my continuing dissent from the Court's aggressive sovereign immunity jurisprudence; today, this Court once again demonstrates itself to be the champion of States' rights. In this case, it seeks to guarantee rights the States themselves did not express any particular desire in possessing: during Congress' hearings on the Patent Remedy Act, although invited to do so,

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cause of the Federal Government's extensive investment in patented military inventions. "[T]he right to enjoin the officer of the United States . . . virtually asserts the existence of a judicial power to close every arsenal of the United States." *Crozier* v. *Krupp A. G.*, 224 U. S. 290, 302 (1912).

[16] I am also persuaded that a State like Florida that has invoked the benefits of the federal patent system should be deemed to have waived any defense of sovereign immunity in patent litigation. The reasoning in JUSTICE BREYER's dissent in *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *post*, at 693–699, applies with special force to this case.

the States chose not to testify in opposition to the abrogation of their immunity.[17]

The statute that the Court invalidates today was only one of several "clear statements" that Congress enacted in response to the decision in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985).[18] In each of those clarifications Congress was fully justified in assuming that it had ample authority to abrogate sovereign immunity defenses to federal claims, an authority that the Court squarely upheld in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989). It was that *holding*—not just the "plurality opinion," see *ante*, at 636—that was overruled in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). The full reach of that case's dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of constitutional penumbras rather than constitutional text. See *id.*, at 54 (acknowledging "'we have understood the Eleventh Amendment to stand not so much for what it says'" (citation omitted)). Until this expansive and judicially crafted protection of States' rights runs its course, I shall continue to register my agreement with the views expressed in the *Seminole* dissents and in the scholarly commentary on that case.

I respectfully dissent.

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[17] H. R. Rep. No. 101–960, p. 7 (1990) ("The Subcommittee invited State attorneys general and representatives of State universities to testify, but none made themselves available for the hearing").

[18] See, *e. g.*, 42 U. S. C. § 12202 (Americans with Disabilities Act of 1990); 11 U. S. C. § 106(a) (Bankruptcy Reform Act of 1994); 29 U. S. C. § 2617(a)(2) (Family and Medical Leave Act of 1993); 15 U. S. C. § 1125(a) (Trademark Remedy Clarification Act); 20 U. S. C. § 1403(a) (Individuals with Disabilities Education Act); 17 U. S. C. § 511 (Copyright Remedy Clarification Act).

Syllabus

COLLEGE SAVINGS BANK *v.* FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD ET AL.

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

No. 98–149. Argued April 20, 1999—Decided June 23, 1999

An individual may sue a State where Congress has authorized such a suit in the exercise of its power to enforce the Fourteenth Amendment, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, or where a State has waived its sovereign immunity by consenting to suit, *Clark* v. *Barnard*, 108 U. S. 436, 447–448. The Trademark Remedy Clarification Act (TRCA) subjects States to suits brought under § 43(a) of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising. Petitioner markets and sells certificates of deposit designed to finance college costs. When respondent Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), a Florida state entity, began its own tuition prepayment program, petitioner filed suit, alleging that Florida Prepaid violated § 43 by misrepresenting its own program. In granting Florida Prepaid's motion to dismiss on sovereign immunity grounds, the District Court rejected arguments made by petitioner and by the United States, which had intervened, that, under the constructive waiver doctrine of *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184, Florida Prepaid waived its immunity by engaging in interstate marketing and administration of its program after the TRCA made clear that such activity would subject it to suit; and that Congress's abrogation of sovereign immunity in the TRCA was effective, since it was enacted to enforce the Fourteenth Amendment's Due Process Clause. The Third Circuit affirmed.

Held: The federal courts have no jurisdiction to entertain this suit because Florida's sovereign immunity was neither validly abrogated by the TRCA nor voluntarily waived. Pp. 672–691.

(a) The TRCA did not abrogate Florida's sovereign immunity. Congress may legislate under § 5 of the Fourteenth Amendment to enforce the Amendment's other provisions, but the object of such legislation must be the remediation or prevention of constitutional violations. Petitioner's argument that Congress enacted the TRCA to remedy and prevent state deprivations of two property interests without due process is rejected, for neither a right to be free from a business competitor's false advertising about its own product nor a right to be secure in one's

business interests qualifies as a protected property right. As to the first: The hallmark of a constitutionally protected property interest is the right to exclude others. The Lanham Act's false-advertising provisions bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentation concerning its own products intruded upon no interest over which petitioner had exclusive dominion. As to the second asserted property interest: While a business's assets are property, and any state taking of those assets is a "deprivation," business in the sense of *the activity of doing business* or *of making a profit* is not property at all—and it is only *that* which is impinged upon by a competitor's false advertising about its own product. Pp. 672–675.

(b) Florida's sovereign immunity was not voluntarily waived by its activities in interstate commerce. Generally, waiver occurs when a State voluntarily invokes, or clearly declares that it intends to submit itself to, the jurisdiction of the federal courts. Petitioner and the United States maintain that an implied or constructive waiver is possible when Congress provides unambiguously that a State will be subject to private suit if it engages in certain federally regulated conduct and the State voluntarily elects to engage in that conduct. They rely on this Court's decision in *Parden, supra,* which held that the Federal Employers' Liability Act authorized private suit against States operating railroads by virtue of its general provision permitting suit against common carriers engaged in interstate commerce. This Court has never applied *Parden*'s holding to another statute, and in fact has narrowed the case in every subsequent opinion in which it has been under consideration. Even when supplemented by a requirement of unambiguous statement of congressional intent to subject the States to suit, *Parden* cannot be squared with this Court's cases requiring that a State's express waiver of sovereign immunity be unequivocal, see, *e. g., Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, and is also inconsistent with the Court's recent decision in *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44. Nor is it relevant that the asserted basis for constructive waiver is conduct by the State that is undertaken for profit, that is traditionally performed by private entities, and that otherwise resembles the behavior of market participants. Whatever may remain of this Court's decision in *Parden* is expressly overruled. Pp. 675–687.

131 F. 3d 353, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 691. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 693.

David C. Todd argued the cause for petitioner. With him on the briefs was *Deborah M. Lodge.*

Solicitor General Waxman argued the cause for the United States, respondent under this Court's Rule 12.6, urging reversal. With him on the briefs were *Acting Assistant Attorney General Ogden, Deputy Solicitor General Wallace, Malcolm L. Stewart, Mark B. Stern, Michael E. Robinson,* and *H. Thomas Byron III.*

William B. Mallin argued the cause for respondent Florida Prepaid Postsecondary Education Expense Board. With him on the brief were *Joseph M. Ramirez* and *Louis F. Hubener.**

JUSTICE SCALIA delivered the opinion of the Court.

The Trademark Remedy Clarification Act (TRCA), 106 Stat. 3567, subjects the States to suits brought under § 43(a)

**Martin H. Redish* and *Jerome Gilson* filed a brief for the International Trademark Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Betty D. Montgomery,* Attorney General of Ohio, *Edward B. Foley,* State Solicitor, and *Elise W. Porter,* Assistant Solicitor, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Margery S. Bronster* of Hawaii, *James E. Ryan* of Illinois, *J. Joseph Curran, Jr.,* of Maryland, *Jennifer Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.,* of West Virginia, and *Gay Woodhouse* of Wyoming; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley.*

Charles A. Miller, Caroline M. Brown, Gerald P. Dodson, James E. Holst, P. Martin Simpson, Jr., and *Richard L. Stanley* filed a brief for the Regents of the University of California as *amicus curiae.*

of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising, 60 Stat. 441, 15 U. S. C. § 1125(a). The question presented in this case is whether that provision is effective to permit suit against a State for its alleged misrepresentation of its own product—either because the TRCA effects a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA operates as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act.

I

In *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), we asserted jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia. In so doing, we reasoned that Georgia's sovereign immunity was qualified by the general jurisdictional provisions of Article III, and, most specifically, by the provision extending the federal judicial power to controversies "between a State and Citizens of another State." U. S. Const., Art. III, § 2, cl. 1. The "shock of surprise" created by this decision, *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934), prompted the immediate adoption of the Eleventh Amendment, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. This has been our understanding of the Amendment since the landmark

case of *Hans* v. *Louisiana*, 134 U. S. 1 (1890). See also *Ex parte New York*, 256 U. S. 490, 497–498 (1921); *Principality of Monaco*, *supra*, at 320–328, *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 97–98 (1984); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54, 66–68 (1996).

While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark* v. *Barnard*, 108 U. S. 436, 447–448 (1883). This case turns on whether either of these two circumstances is present.

II

Section 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), enacted in 1946, created a private right of action against "[a]ny person" who uses false descriptions or makes false representations in commerce. The TRCA amends § 43(a) by defining "any person" to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." § 3(c), 106 Stat. 3568. The TRCA further amends the Lanham Act to provide that such state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act," and that remedies shall be available against such state entities "to the same extent as such remedies are available . . . in a suit against" a nonstate entity. § 3(b) (codified in 15 U. S. C. § 1122).

Petitioner College Savings Bank is a New Jersey chartered bank located in Princeton, New Jersey. Since 1987,

it has marketed and sold CollegeSure certificates of deposit designed to finance the costs of college education. College Savings holds a patent upon the methodology of administering its CollegeSure certificates. Respondent Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid) is an arm of the State of Florida. Since 1988, it has administered a tuition prepayment program designed to provide individuals with sufficient funds to cover future college expenses. College Savings brought a patent infringement action against Florida Prepaid in United States District Court in New Jersey. That action is the subject of today's decision in *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, *ante*, p. 627. In addition, and in the same court, College Savings filed the instant action alleging that Florida Prepaid violated § 43(a) of the Lanham Act by making misstatements about its own tuition savings plans in its brochures and annual reports.

Florida Prepaid moved to dismiss this action on the ground that it was barred by sovereign immunity. It argued that Congress had not abrogated sovereign immunity in this case because the TRCA was enacted pursuant to Congress's powers under Article I of the Constitution and, under our decisions in *Seminole Tribe*, *supra*, and *Fitzpatrick*, *supra*, Congress can abrogate state sovereign immunity only when it legislates to enforce the Fourteenth Amendment. The United States intervened to defend the constitutionality of the TRCA. Both it and College Savings argued that, under the doctrine of constructive waiver articulated in *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964), Florida Prepaid had waived its immunity from Lanham Act suits by engaging in the interstate marketing and administration of its program after the TRCA made clear that such activity would subject Florida Prepaid to suit. College Savings also argued that Congress's purported abrogation of Florida Prepaid's sovereign immunity in the TRCA

was effective, since it was enacted not merely pursuant to Article I but also to enforce the Due Process Clause of the Fourteenth Amendment. The District Court rejected both of these arguments and granted Florida Prepaid's motion to dismiss. 948 F. Supp. 400 (N. J. 1996). The Court of Appeals affirmed. 131 F. 3d 353 (CA3 1997). We granted certiorari. 525 U. S. 1063 (1999).

III

We turn first to the contention that Florida's sovereign immunity was validly abrogated. Our decision three Terms ago in *Seminole Tribe, supra,* held that the power "to regulate Commerce" conferred by Article I of the Constitution gives Congress no authority to abrogate state sovereign immunity. As authority for the abrogation in the present case, petitioner relies upon § 5 of the Fourteenth Amendment, which we held in *Fitzpatrick* v. *Bitzer, supra,* and reaffirmed in *Seminole Tribe,* see 517 U. S., at 72–73, could be used for that purpose.

Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of . . . property . . . without due process of law." Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We made clear in *City of Boerne* v. *Flores,* 521 U. S. 507, 516–529 (1997), that the term "enforce" is to be taken seriously—that the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations. Petitioner claims that, with respect to § 43(a) of the Lanham Act, Congress enacted the TRCA to remedy and prevent state deprivations without due process of two species of "property" rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests. Neither of these qualifies as a property right protected by the Due Process Clause.

As to the first: The hallmark of a protected property interest is the right to exclude others. That is "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). That is why the right that we all possess to use the public lands is not the "property" right of anyone—hence the sardonic maxim, explaining what economists call the "tragedy of the commons,"[1] *res publica, res nullius.* The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the "property" of the owner because he can exclude others from using them. See, *e. g., K mart Corp.* v. *Cartier, Inc.*, 485 U. S. 176, 185–186 (1988) ("Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights"). The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion.

Unsurprisingly, petitioner points to no decision of this Court (or of any other court, for that matter) recognizing a property right in freedom from a competitor's false advertising about its own products. The closest petitioner comes is dicta in *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918), where the Court found equity jurisdiction over an unfair-competition claim because "[t]he rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right." But to say that a court of equity "*treats* any civil right of a pecuniary nature *as* a property right" is not to say that all civil rights of a pecuniary nature *are* property rights. In fact, when one reads the full pas-

[1] See Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

sage from which this statement is taken it is clear that the Court was saying just the opposite, namely, that equity will treat civil rights of a pecuniary nature as property rights even though they are properly not such:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . ; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. . . . It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." *Id.,* at 236–237.

We may also note that the unfair competition at issue in *International News Service* amounted to nothing short of theft of proprietary information, something in which a power to "exclude others" could be said to exist. See *id.*, at 233.

Petitioner argues that the common-law tort of unfair competition "by definition" protects property interests, Brief for Petitioner 15, and thus the TRCA "by definition" is designed to remedy and prevent deprivations of such interests in the false-advertising context. Even as a logical matter, that does not follow, since not everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests. A municipal ordinance prohibiting billboards in residential areas protects the property interests of homeowners, although erecting billboards would ordinarily not deprive them of property. To sweep within the Fourteenth Amendment the elusive property interests that are "by definition" protected by unfair-competition law would violate our frequent admonition that the Due Process Clause is not merely a "font of tort law." *Paul* v. *Davis,* 424 U. S. 693, 701 (1976).

Petitioner's second assertion of a property interest rests upon an argument similar to the one just discussed, and suffers from the same flaw. Petitioner argues that businesses are "property" within the meaning of the Due Process Clause, and that Congress legislates under § 5 when it passes a law that prevents state interference with business (which false advertising does). Brief for Petitioner 19–20. The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a "deprivation" under the Fourteenth Amendment. But business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense—and it is only *that*, and not any business asset, which is impinged upon by a competitor's false advertising.

Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves violations of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment. We turn next to the question whether Florida's sovereign immunity, though not abrogated, was voluntarily waived.

IV

We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark* v. *Barnard*, 108 U. S., at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers* v. *Arkansas*, 20 How. 527, 529 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdic-

tion, *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1944). See also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S., at 99 (State's consent to suit must be "unequivocally expressed"). Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. *Smith* v. *Reeves*, 178 U. S. 436, 441–445 (1900). Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," *Florida Dept. of Health and Rehabilitative Servs.* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 149–150 (1981) *(per curiam)*, or even by authorizing suits against it "'in any court of competent jurisdiction,'" *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573, 577–579 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers* v. *Arkansas*, *supra.*

There is no suggestion here that respondent Florida Prepaid expressly consented to being sued in federal court. Nor is this a case in which the State has affirmatively invoked our jurisdiction. Rather, petitioner College Savings and the United States both maintain that Florida Prepaid has "impliedly" or "constructively" waived its immunity from Lanham Act suit. They do so on the authority of *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)—an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign-immunity) jurisprudence. In *Parden*, we permitted employees of a railroad owned and operated by Alabama to bring an action under the Federal Employers' Liability Act (FELA) against their employer. Despite the absence of any provision in the statute specifically referring to the States, we held that the Act authorized suits against the States by virtue of its general provision subjecting to suit "[e]very common carrier by railroad . . .

engaging in commerce between . . . the several States," 45 U. S. C. § 51 (1940 ed.). We further held that Alabama had waived its immunity from FELA suit even though Alabama law expressly disavowed any such waiver:

> "By enacting the [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit." 377 U. S., at 192.

The four dissenting Justices in *Parden* refused to infer a waiver because Congress had not "expressly declared" that a *State* operating in commerce would be subject to liability, but they went on to acknowledge—in a concession that, strictly speaking, was not necessary to their analysis—that Congress possessed the power to effect such a waiver of the State's constitutionally protected immunity so long as it did so with clarity. *Id.*, at 198–200 (opinion of White, J.).

Only nine years later, in *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279 (1973), we began to retreat from *Parden*. That case held—in an opinion written by one of the *Parden* dissenters over the solitary dissent of *Parden*'s author—that the State of Missouri was immune from a suit brought under the Fair Labor Standards Act by employees of its state health facilities. Although the statute specifically covered the state hospitals in question, see 29 U. S. C. § 203(d) (1964 ed.), and such coverage was unquestionably enforceable in federal court by the United States, 411 U. S., at 285–286, we did not think that the statute expressed with clarity Congress's intention to supersede the States' immunity from suits brought by individuals. We "put to one side" the *Parden* case, which we characterized as involving "dramatic circumstances" and "a rather isolated state activity,"

411 U. S., at 285, unlike the provision of the Fair Labor Standards Act in question that applied to a broad class of state employees. We also distinguished the railroad in *Parden* on the ground that it was "operated for profit" "in the area where private persons and corporations normally ran the enterprise." 411 U. S., at 284. Justice Marshall, joined by Justice Stewart, went even further, concluding that although, in their view, Congress *had* clearly purported to subject the States to suits by individuals in federal courts, it lacked the constitutional authority to do so. *Id.*, at 287, 289–290 (opinion concurring in result).

The next year, we observed (in dictum) that there is "no place" for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974) (internal quotation marks omitted). Several Terms later, in *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468 (1987), although we expressly avoided addressing the constitutionality of Congress's conditioning a State's engaging in Commerce Clause activity upon the State's waiver of sovereign immunity, we said there was "no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law," and overruled *Parden* "to the extent [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language," 483 U. S., at 478, and n. 8.[2]

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[2] In response to this string of cases criticizing or narrowing the holding of *Parden*, JUSTICE BREYER holds up three post-*Parden* cases as decisions that "support[ed]" *Parden*, *post*, at 696, or at least "carefully avoided calling [it] into question," *post*, at 698. His perception of "support" in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), rests upon nothing more substantial than the fact that the case "suggest[ed] that a waiver

College Savings and the United States concede, as they surely must, that these intervening decisions have seriously limited the holding of *Parden*. They maintain, however, that *Employees* and *Welch* are distinguishable, and that a core principle of *Parden* remains good law. A *Parden*-style waiver of immunity, they say, is still possible after *Employees* and *Welch* so long as the following two conditions are satisfied: First, Congress must provide unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation. Second, the State must voluntarily elect to engage in the federally regulated conduct that subjects it to suit. In this latter regard, their argument goes, a State is never deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such

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may be found in a State's acceptance of a federal grant." *Post*, at 696. But we make the same suggestion today, while utterly rejecting *Parden*. As we explain elsewhere in detail, see *infra*, at 686–687, conditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity. JUSTICE BREYER's second case, *Welch*, overruled *Parden* in part, as we discuss above, and we think it quite impossible to believe that the following statement in the opinion did not "questio[n] the holding of *Parden* that the Court today discards," *post*, at 698: "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." 483 U. S., at 475. Calling what a prior case has flatly decided a "question" in need of "deciding," and (lest there be any doubt on the point) making it clear that we "intimat[e] no view" as to whether the answer given by that prior case was correct, surely was handwriting on the wall which even an inept cryptologist would recognize as spelling out the caption of today's opinion. As for *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), we explain elsewhere, see *infra*, at 682–684, how that case was logically and practically inconsistent with *Parden*, even though it did not expressly overrule it. JUSTICE BREYER realizes this well enough, or else his call for an overruling of that case, which occupies almost half of his dissent, see *post*, at 699–705, would be supremely irrelevant to the matter before us.

as the operation of a police force; but constructive waiver is appropriate where a State runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, engages in activities sufficiently removed from "core [state] functions," Reply Brief for United States 3, or otherwise acts as a "market participant" in interstate commerce, cf. *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 206–208 (1983). On this theory, Florida Prepaid constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational investment vehicle in interstate commerce after being put on notice by the clear language of the TRCA that it would be subject to Lanham Act liability for doing so.

We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

To begin with, we cannot square *Parden* with our cases requiring that a State's express waiver of sovereign immunity be unequivocal. See, *e. g.*, *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 (1944). The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's

expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity. *Beers*, 20 How., at 529.[3]

Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." 415 U. S., at 673. For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with

[3] In an attempt to cast doubt on our characterization of *Parden* as a groundbreaking case, JUSTICE BREYER points to three earlier decisions which allegedly demonstrate that *Parden* worked no major change. These cases, however, have only the most tenuous relation to *Parden*'s actual holding—as one might suspect from the dissent's soft-pedaled description of them as "roughly comparable" and involving (in quotation marks) "'waivers.'" *Post*, at 696. The first two, *United States* v. *California*, 297 U. S. 175 (1936), and *California* v. *Taylor*, 353 U. S. 553 (1957), involved neither state immunity from suit nor waiver, but the entirely different question whether substantive provisions of Commerce Clause legislation applied to the States. The former concerned a suit brought against a State by *the United States* (a situation in which state sovereign immunity does not exist, see *United States* v. *Texas*, 143 U. S. 621 (1892)), and the latter expressly acknowledged that "the Eleventh Amendment" was "not before us," 353 U. S., at 568, n. 16. The last case, *Gardner* v. *New Jersey*, 329 U. S. 565 (1947), which held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts. See *supra*, at 675–676. In sum, none of these cases laid any foundation for *Parden*—whose author was quite correct in acknowledging that it "presented a question of first impression," *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 299 (1973) (Brennan, J., dissenting).

the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash*, 301 U. S. 389, 393 (1937). See also *Ohio Bell Telephone Co.* v. *Public Util. Comm'n of Ohio*, 301 U. S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern*, *supra*, at 51; *Pennhurst*, 465 U. S., at 98. And in the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied. See, *e. g.*, *United States* v. *King*, 395 U. S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

Given how anomalous it is to speak of the "constructive waiver" of a constitutionally protected privilege, it is not surprising that the very cornerstone of the *Parden* opinion was the notion that state sovereign immunity is not constitutionally grounded. *Parden*'s discussion of waiver began with the observation:

> "By empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." 377 U. S., at 192.

See also *id.*, at 193–194, n. 11. Our more recent decision in *Seminole Tribe* expressly repudiates that proposition, and in formally overruling *Parden* we do no more than make explicit what that case implied.

Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin. "All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and—to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability—can be redescribed as invitations to 'waiver.'" *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 43 (1989) (SCALIA, J., dissenting). See also *Fitzpatrick*, 427 U. S., at 451–452 (referring to congressional intent to "abrogate" state sovereign immunity as a "necessary predicate" for *Parden*-style waiver). There is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce of its prepaid tuition program, and saying the same thing but adding

at the end "if Florida chooses to engage in such advertising." As further evidence that constructive waiver is little more than abrogation under another name, consider the revealing facts of this case: The statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity is the very same provision that purported to abrogate it.

Nor do we think that the constitutionally grounded principle of state sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of "market participants." Permitting abrogation or constructive waiver of the constitutional right only when these conditions exist would of course limit the evil—but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month. Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis. When we held in *Seminole Tribe* that sovereign immunity barred an action brought under the Indian Gaming Regulatory Act against the State of Florida for its alleged failure to negotiate a gambling compact with the Seminole Tribe of Indians, we did not pause to consider whether Florida's decision not to negotiate was somehow involuntary. Nor did we pause to consider whether running a tugboat towing service at "fair and reasonable rates" was for profit, was traditionally performed by private citizens and corporations, and otherwise resembled the behavior of "market participants" when we held, in *Ex parte New York*, 256 U. S. 490 (1921), that sovereign immunity foreclosed an admiralty action against the State of New

York for damages caused by the State's engaging in such activity. *Hans* itself involved an action against Louisiana to recover coupons on a bond—the issuance of which surely rendered Louisiana a participant in the financial markets.

The "market participant" cases from our dormant Commerce Clause jurisprudence, relied upon by the United States, are inapposite. See, *e. g.*, *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); and *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). Those cases hold that, where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator. Since "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants," "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause." *White*, *supra*, at 207–208, n. 3. The "market participant" exception to judicially created dormant Commerce Clause restrictions makes sense because the evil addressed by those restrictions—the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens, see *Hughes*, *supra*, at 808—is entirely absent where the States are buying and selling in the market. In contrast, a suit by an individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed—and it exists whether or not the State is acting for profit, in a traditionally "private" enterprise, and as a "market participant." In the sovereign-immunity context, moreover, "[e]venhandness" between individuals and States is not to be expected: "[T]he constitutional role of the States sets them apart from other

employers and defendants." *Welch*, 483 U. S., at 477. Cf. *Atascadero*, 473 U. S., at 246.[4]

The United States points to two other contexts in which it asserts we have permitted Congress, in the exercise of its Article I powers, to extract "constructive waivers" of state sovereign immunity. In *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), we held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact. And we have held in such cases as *South Dakota* v. *Dole*, 483 U. S. 203 (1987), that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. These cases seem to us fundamentally different from the present one. Under the Compact Clause, U. S. Const., Art. I, § 10, cl. 3, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such

[4] As for the suggestion of JUSTICE BREYER that we limit state sovereign immunity to noncommercial state activities because Congress has so limited *foreign* sovereign immunity, in accord with the "modern trend," see *post*, at 699 (dissenting opinion) (citing the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1605(a)(2)), see also JUSTICE STEVENS's dissent, *post*, at 692: This proposal ignores the fact that state sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends. The text of the Eleventh Amendment, of course, makes no distinction between commercial and noncommercial state activities—and so if we were to combine JUSTICE BREYER's literalistic interpretation of that Amendment with his affection for FSIA, we would have a "commercial activities" exception for all suits against States except those commenced in federal court by citizens of another State, a disposition that hardly "makes sense," *post*, at 699.

funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. JUSTICE BREYER's dissent acknowledges the intuitive difference between the two, but asserts that it disappears when the gift that is threatened to be withheld is substantial enough. *Post*, at 697. Perhaps so, which is why, in cases involving conditions attached to federal funding, we have acknowledged that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, *supra*, at 211, quoting *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 (1937). In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

V

The principal thrust of JUSTICE BREYER's dissent is an attack upon the very legitimacy of state sovereign immunity itself. In this regard, JUSTICE BREYER and the other dissenters proclaim that they are "not *yet* ready," *post*, at 699 (emphasis added), to adhere to the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision in *Hans* that supports it.[5] Accordingly, JUSTICE BREYER reiterates

[5] JUSTICE BREYER purports to "accept this Court's pre-*Seminole Tribe* sovereign immunity decisions," *post*, at 699 (dissenting opinion), but by that he could not mean *Hans*, but rather only the distorted view of *Hans* that prevailed briefly between *Parden* and *Seminole Tribe*. *Parden* was the first case to suggest that the sovereign immunity announced in *Hans* was so fragile a flower that it could be abrogated under Article I—a suggestion contrary to the reality that *Hans itself* involved a congressional conferral of jurisdiction enacted under Article I. See *Pennsylvania* v. *Union Gas*, 491 U. S. 1, 36–37 (1989) (SCALIA, J., dissenting). Moreover, that conferral of jurisdiction was combined, in *Hans*, with a substantive

(but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods. Compare *post*, at 700–701, with *Atascadero*, *supra*, at 258–302 (Brennan, J., dissenting); *Welch*, *supra*, at 504–516 (Brennan, J., dissenting); *Seminole Tribe*, 517 U. S., at 76–99 (STEVENS, J., dissenting); *id.*, at 100–185 (SOUTER, J., dissenting). But see *Alden* v. *Maine*, *post*, at 760–808 (SOUTER, J., dissenting). The arguments recited in these sources have been soundly refuted, and the position for which they have been marshaled has been rejected by constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury* v. *Madison*, 1 Cranch 137 (1803), was wrongly decided to forums more otherworldly than ours. See *Union Gas*, 491 U. S., at 33–34, 35–42 (SCALIA, J., dissenting); *Seminole Tribe*, *supra*, at 54–73; *Alden*, *post*, at 712–730. On this score, we think nothing further need be said except two minor observations peculiar to this case.

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claim under the Contracts Clause of the Constitution itself, which one would think to have greater, rather than lesser, abrogative force than a substantive statute enacted pursuant to the Commerce Clause. JUSTICE BREYER would apparently interpose that the statute in *Hans* did not expressly "'purpor[t] to pierce state immunity,'" *post*, at 700, quoting *Seminole Tribe*, 517 U. S., at 119 (SOUTER, J., dissenting)—but the opinion in *Hans* did not allude to that refinement, nor did *Parden* think it made any difference. The so-called "clear statement rule" was not even adumbrated until nine years after *Parden*, in *Employees*, 411 U. S., at 284–285. It is difficult to square JUSTICE BREYER's reliance upon the distinction that the present case involves a federal question (and is therefore not explicitly covered by the Eleventh Amendment), see *post*, at 700–701, with its professed fidelity to *Hans*, the whole point of which was that the sovereign immunity reflected in (rather than created by) the Eleventh Amendment transcends the narrow text of the Amendment itself. Or to put it differently, the "pre-*Seminole Tribe* sovereign immunity decisions" to which JUSTICE BREYER pledges allegiance appear to include *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). But see U. S. Const., Amdt. 11.

First, JUSTICE BREYER and the other dissenters have adopted a decidedly perverse theory of *stare decisis*. While finding themselves entirely unconstrained by a venerable precedent such as *Hans*, embedded within our legal system for over a century, see, *e. g.*, *Welch*, 483 U. S., at 494, n. 27; *Union Gas*, *supra*, at 34–35 (SCALIA, J., dissenting), at the same time they cling desperately to an anomalous and severely undermined decision *(Parden)* from the 1960's. Surely this approach to *stare decisis* is exactly backwards—unless, of course, one wishes to use it as a weapon rather than a guide, in which case any old approach will do. Second, while we stress that the following observation has no bearing upon our resolution of this case, we find it puzzling that JUSTICE BREYER would choose this occasion to criticize our sovereign-immunity jurisprudence as being ungrounded in constitutional text, since the present lawsuit that he would allow to go forward—having apparently been commenced against a State (Florida) by a citizen of another State (College Savings Bank of New Jersey), 948 F. Supp., at 401–402—seems to fall foursquare within the literal text of the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to *any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U. S. Const., Amdt. 11 (emphasis added). See *Seminole Tribe*, *supra*, at 82, n. 8 (STEVENS, J., dissenting).

As for the more diffuse treatment of the subject of federalism contained in the last portion of JUSTICE BREYER's opinion: It is alarming to learn that so many Members of this Court subscribe to a theory of federalism that rejects "the details of any particular federalist doctrine"—which it says can and should "change to reflect the Nation's changing needs"—and that puts forward as the only "unchanging goal" of federalism worth mentioning "the protection of liberty," which it believes is most directly achieved by "promoting the sharing among citizens of governmental decisionmaking

authority," which in turn demands (we finally come to the point) "necessary legislative flexibility" for the people's representatives in Congress. *Post*, at 702–703. The proposition that "the protection of liberty" is most directly achieved by "promoting the sharing among citizens of governmental decisionmaking authority" might well have dropped from the lips of Robespierre, but surely not from those of Madison, Jefferson, or Hamilton, whose north star was that governmental power, even—indeed, especially—governmental power wielded by the people, *had to be dispersed and countered.* And to say that the degree of dispersal to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly. (JUSTICE BREYER's opinion comes close to admitting this when the only example of a "federalism" constraint that it can bear to acknowledge as being appropriate for judicial recognition is the invalidation of a *State's* law under—of all things, given the passion for text that characterizes some parts of his opinion—the "dormant Commerce Clause," *post*, at 703.) Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course—but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace. Our opinion today has sought to discern what the bounds are; JUSTICE BREYER's dissent denies them any permanent place.

Finally, we must comment upon JUSTICE BREYER's comparison of our decision today with the discredited substantive-due-process case of *Lochner* v. *New York*, 198 U. S. 45 (1905). It resembles *Lochner*, of course, in the respect that it rejects a novel assertion of governmental power which the legislature believed to be justified. But if that alone were enough to qualify as a mini-*Lochner*, the list of mini-*Lochners* would be endless. Most of our judgments in-

validating state and federal laws fit that description. We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes's dissenting remark about "Mr. Herbert Spencer's Social Statics," *id.*, at 75, was that it sought to impose a particular economic philosophy upon the Constitution. And we think that feature aptly characterizes, not our opinion, but JUSTICE BREYER's dissent, which believes that States should not enjoy the normal constitutional protections of sovereign immunity when they step out of their proper economic role to engage in (we are sure Mr. Herbert Spencer would be shocked) "ordinary commercial ventures," *post*, at 694. What ever happened to the need for "legislative flexibility"?

* * *

Concluding, for the foregoing reasons, that the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce, we hold that the federal courts are without jurisdiction to entertain this suit against an arm of the State of Florida. The judgment of the Third Circuit dismissing the action is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

This case has been argued and decided on the basis of assumptions that may not be entirely correct. Accepting them, *arguendo*, the judgment of the Court of Appeals should be reversed for the reasons set forth in JUSTICE BREYER's dissent, which I have joined. I believe, however, that the importance of this case and the other two "states rights" cases decided today merits this additional comment.

The procedural posture of this case requires the Court to assume that Florida Prepaid is an "arm of the State" of Florida because its activities relate to the State's educational pro-

grams. *Ante,* at 671. But the validity of that assumption is doubtful if the Court's jurisprudence in this area is to be based primarily on present-day assumptions about the status of the doctrine of sovereign immunity in the 18th century. Sovereigns did not then play the kind of role in the commercial marketplace that they do today. In future cases, it may therefore be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976.[1]

The majority also assumes that petitioner's complaint has alleged a violation of the Lanham Act, but not one that is sufficiently serious to amount to a "deprivation" of its property. *Ante,* at 674–675. I think neither of those assumptions is relevant to the principal issue raised in this case, namely, whether Congress had the constitutional power to authorize suits against States and state instrumentalities for such a violation. In my judgment the Constitution granted it ample power to do so.[2] Section 5 of the Fourteenth Amendment authorizes Congress to enact appropriate legislation to prevent deprivations of property without due process. Unlike the majority, I am persuaded that the Trademark Remedy Clarification Act was a valid exercise of that power, even if Florida Prepaid's allegedly false advertising

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[1] See 28 U. S. C. § 1605(a)(2) (commercial activity exception to foreign sovereign immunity). The statute provides the following definition of "commercial activity": "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." § 1603(d).

[2] As we held in *Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1, 23 (1989), the Commerce Clause granted Congress the power to abrogate the States' common-law defense of sovereign immunity. I remain convinced that that case was correctly decided for the reasons stated in the principal and concurring opinions.

in this case did not violate the Constitution. My conclusion rests on two premises that the Court rejects.

First, in my opinion "*the activity of doing business*, or *the activity of making a profit*," *ante*, at 675, is a form of property. The asset that often appears on a company's balance sheet as "good will" is the substantial equivalent of that "activity." It is the same kind of "property" that Congress described in § 7 of the Sherman Act, 26 Stat. 210, and in § 4 of the Clayton Act, 38 Stat. 731. A State's deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause.

Second, the validity of a congressional decision to abrogate sovereign immunity in a category of cases does not depend on the strength of the claim asserted in a particular case within that category. Instead, the decision depends on whether Congress had a reasonable basis for concluding that abrogation was necessary to prevent violations that would otherwise occur. Given the presumption of validity that supports all federal statutes, I believe the Court must shoulder the burden of demonstrating why the judgment of the Congress of the United States should not command our respect. It has not done so.

For these reasons, as well as those expressed by JUSTICE BREYER, I respectfully dissent.

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

The Court holds that Congress, in the exercise of its commerce power, cannot require a State to waive its immunity from suit in federal court even where the State engages in activity from which it might readily withdraw, such as federally regulated commercial activity. This Court has previously held to the contrary. *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964). I would not abandon that precedent.

I

Thirty-five years ago this Court unanimously subscribed to the holding that the Court today overrules. Justice White, writing for four Members of the Court who dissented on a different issue, succinctly described that holding as follows:

> "[I]t is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby." *Id.*, at 198 (opinion of White, J., joined by Douglas, Harlan, and Stewart, JJ.).

The majority, seeking to justify the overruling of so clear a precedent, describes *Parden*'s holding as a constitutional "anomaly" that "broke sharply with prior cases," that is "fundamentally incompatible with later ones," and that has been "narrowed . . . in every subsequent opinion." *Ante,* at 680. *Parden* is none of those things.

Far from being anomalous, *Parden*'s holding finds support in reason and precedent. When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily

at private conduct. Compare, *e. g.*, 12 U. S. C. § 1841(b) (1994 ed., Supp. III) (exempting state companies from regulations covering federal bank holding companies); 15 U. S. C. § 77c(a)(2) (exempting state-issued securities from federal securities laws); and 29 U. S. C. § 652(5) (exempting States from the definition of "employer[s]" subject to federal occupational safety and health laws), with 11 U. S. C. § 106(a) (subjecting States to federal bankruptcy court judgments); 15 U. S. C. § 1122(a) (subjecting States to suit for violation of Lanham Act); 17 U. S. C. § 511(a) (subjecting States to suit for copyright infringement); and 35 U. S. C. § 271(h) (subjecting States to suit for patent infringement). And a Congress that includes the State not only within its substantive regulatory rules but also (expressly) within a related system of private remedies likely believes that a remedial exemption would similarly threaten that program. See *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, *ante*, at 656–657 (STEVENS, J., dissenting). It thereby avoids an enforcement gap which, when allied with the pressures of a competitive marketplace, could place the State's regulated private competitors at a significant disadvantage.

These considerations make Congress' need to possess the power to condition entry into the market upon a waiver of sovereign immunity (as "necessary and proper" to the exercise of its commerce power) unusually strong, for to deny Congress that power would deny Congress the power effectively to regulate *private* conduct. Cf. *California* v. *Taylor*, 353 U. S. 553, 566 (1957). At the same time they make a State's need to exercise sovereign immunity unusually weak, for the State is unlikely to *have to* supply what private firms already supply, nor may it fairly demand special treatment, even to protect the public purse, when it does so. Neither can one easily imagine what the Constitution's Founders would have thought about the assertion of sovereign immunity in this special context. These considerations, differing in kind or degree from those that would support a general

congressional "abrogation" power, indicate that *Parden*'s holding is sound, irrespective of this Court's decisions in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), and *Alden* v. *Maine*, *post*, p. 706.

Neither did *Parden* break "sharply with prior cases." *Parden* itself cited authority that found related "waivers" in at least roughly comparable circumstances. *United States* v. *California*, 297 U. S. 175 (1936), for example, held that a State, "by engaging in interstate commerce by rail, has subjected itself to the commerce power," *id.*, at 185, which amounted to a waiver of a (different though related) substantive immunity. See also *Taylor*, *supra*, at 568. *Parden* also relied on authority holding that States seeking necessary congressional approval for an interstate compact had, "by venturing into the [federal] realm 'assume[d] the [waiver of sovereign immunity] conditions . . . attached.'" 377 U. S., at 196 (quoting *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 281–282 (1959)). Earlier case law had found a waiver of sovereign immunity in a State's decision to bring a creditor's claim in bankruptcy. See *Gardner* v. *New Jersey*, 329 U. S. 565, 573–574 (1947). Later case law, suggesting that a waiver may be found in a State's acceptance of a federal grant, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985), supports *Parden*'s conclusion. Where is the sharp break?

The majority has only one answer to this question. It believes that this Court's case law requires any "waiver" to be "express" and "unequivocal." *Ante*, at 680. But the cases to which I have just referred show that is not so. The majority tries to explain some of those cases away with the statement that what is attached to the refusal to waive in those cases is "the denial of a gift or gratuity," while what is involved here is "the exclusion of the State from [an] otherwise lawful activity." *Ante*, at 687. This statement does not explain away a difference. It simply states a difference that demands an explanation.

The statement does appeal to an intuition, namely, that it is somehow easier for the State, and hence more voluntary, to forgo "a gift or gratuity" than to refrain from "otherwise lawful activity," or that it is somehow more compelling or oppressive for Congress to forbid the State to perform an "otherwise lawful" act than to withhold "beneficence." But the force of this intuition depends upon the example that one chooses as its illustration; and realistic examples suggest the intuition is not sound in the present context. Given the amount of money at stake, it may be harder, not easier, for a State to refuse highway funds than to refrain from entering the investment services business. See U. S. Dept. of Commerce, Bureau of Census, Federal Aid to States for Fiscal Year 1998, p. 17 (Apr. 1999) (Federal Government provided over $20 billion to States for highways in 1998). It is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children than to threaten to subject it to suit when it competes directly with a private investment company. See *id.*, at 5 (Federal Government provided over $21 billion to States for education in 1998). The distinction that the majority seeks to make—drawn in terms of gifts and entitlements—does not exist.

The majority is also wrong to say that this Court has "narrowed" *Parden* in its "subsequent opinion[s]," *ante*, at 680, at least in any way relevant to today's decision. *Parden* considered two separate issues: (1) Does Congress have the *power* to require a State to waive its immunity? (2) How *clearly* must Congress speak when it does so? The Court has narrowed *Parden* only in respect to the second issue, not the first; but today we are concerned only with the first. The Court in *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279 (1973), for example, discussed whether Congress *had, or had not*, "lift[ed]" sovereign immunity, not whether it *could, or could not*, have done so. *Id.*, at 285

("Congress *did not* lift the sovereign immunity of the States" (emphasis added)). And *Employees'* limitation of *Parden*, to "the area where private persons and corporations normally ran the enterprise," took place in the context of *clarity*, not *power*. 411 U. S., at 284 (specifying that "Congress *can* act" outside the limited area (emphasis added)). Although two Justices would have limited *Parden*'s holding in respect to power, that limitation would simply have required Congress to give the States advance notice of the consequence (loss of sovereign immunity), which, as they noted, happened in *Parden*. 411 U. S., at 296–297 (Marshall, J., concurring in result).

The remaining cases the majority mentions offer it no greater support. One said, "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 475 (1987). Two others also considered legislative clarity, not power. *Atascadero State Hospital*, *supra*, at 247 (Rehabilitation Act "falls far short" of clearly indicating a waiver by a State accepting funds under the Act); *Edelman* v. *Jordan*, 415 U. S. 651, 674 (1974) (same for Social Security Act). Even *Seminole Tribe* carefully avoided calling *Parden* into question. While specifying that Congress cannot, in the exercise of its Article I powers, "abrogate unilaterally the States' immunity from suit," 517 U. S., at 59, it left open the scope of the term "unilaterally" by referring to *Parden*, without criticism, as standing for the "unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity," 517 U. S., at 65. In short, except for those in today's majority, no member of this Court had ever questioned the holding of *Parden* that the Court today discards because it cannot find "merit in attempting to salvage any remnant of it." *Ante*, at 680.

Parden had never been questioned because, *Seminole Tribe* or not, it still makes sense. The line the Court today rejects has been drawn by this Court to place States outside the ordinary dormant Commerce Clause rules when they act as "market participants." *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 206–208 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 434–439 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 804–810 (1976). And Congress has drawn this same line in the related context of foreign state sovereign immunity. 28 U. S. C. § 1605(a)(2). In doing so, Congress followed the modern trend, which "spread rapidly after the Second World War," regarding foreign state sovereign immunity. 1 Restatement (Third) of Foreign Relations Law of the United States, ch. 5, Introductory Note, p. 391 (1986) (recognizing that "immunity . . . gave states an unfair advantage in competition with private commercial enterprise"); see also Report of the International Law Commission on the Work of its Thirty-Eighth Session, Art. 11, ¶ 1, p. 7 (United Nations Doc. A/41/498, Aug. 26, 1986) (when a State engages in a commercial contract with a foreign person, "the State is considered to have consented to the exercise" of foreign jurisdiction in a proceeding arising out of that contract). Indeed, given the widely accepted view among modern nations that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play, it is today's holding, not *Parden*, that creates the legal "anomaly."

II

I resist all the more strongly the Court's extension of *Seminole Tribe* in this case because, although I accept this Court's pre-*Seminole Tribe* sovereign immunity decisions, I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*. Cf. *EEOC* v. *Wyoming*, 460 U. S. 226, 249–250 (1983) (STEVENS, J., concurring). In my view, Congress does possess the authority to abrogate a State's sover-

eign immunity where "necessary and proper" to the exercise of an Article I power. My reasons include those that JUSTICES STEVENS and SOUTER already have described in detail.

(1) Neither constitutional text nor the surrounding debates support *Seminole Tribe*'s view that Congress lacks the Article I power to abrogate a State's sovereign immunity in federal-question cases (unlike diversity cases). *Seminole Tribe*, 517 U. S., at 82–83, and nn. 8, 9 (STEVENS, J., dissenting); *id.*, at 142–150 (SOUTER, J., dissenting); cf. the majority's characterization of this argument, *ante*, at 687–688.

(2) The precedents that offer important legal support for the doctrine of sovereign immunity do not help the *Seminole Tribe* majority. They all focus upon a critically different question, namely, whether *courts*, acting without legislative support, can abrogate state sovereign immunity, not whether Congress, acting legislatively, can do so. See *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934); *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Chisholm* v. *Georgia*, 2 Dall. 419, 429 (1793) (Iredell, J., dissenting); *Seminole Tribe*, *supra*, at 119 (SOUTER, J., dissenting) ("Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation").

(3) Sovereign immunity is a common-law doctrine. The new American Nation received common-law doctrines selectively, accepting some, abandoning others, and frequently modifying those it accepted in light of the new Nation's special needs and circumstances. *Seminole Tribe*, *supra*, at 130–142 (SOUTER, J., dissenting). The new Nation's federalist lodestar, dual sovereignty (of State and Nation), demanded modification of the traditional single-sovereign immunity doctrine, thereby permitting Congress to narrow or abolish state sovereign immunity where necessary.

(a) Dual sovereignty undercuts the doctrine's traditional "logical and practical" justification, namely (in the words of Justice Holmes), that "there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907). When a State is sued for violating federal law, the "authority" that would assert the immunity, the State, is not the "authority" that made the (federal) law. This point remains true even if the Court treats sovereign immunity as a principle of natural law. *Alden* v. *Maine*, *post*, at 762–764 (SOUTER, J., dissenting).

(b) Dual sovereignty, by granting Congress the power to create substantive rights that bind States (despite their sovereignty) must grant Congress the subsidiary power to create related private remedies that bind States (despite their sovereignty).

(c) Dual sovereignty means that Congress may need that lesser power lest States (if they are not subject to federal remedies) ignore the substantive federal law that binds them, thereby disabling the National Government and weakening the very Union that the Constitution creates. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407–408 (1819); *Cohens* v. *Virginia*, 6 Wheat. 264, 386–387 (1821).

(4) By interpreting the Constitution as rendering immutable this one common-law doctrine (sovereign immunity), *Seminole Tribe* threatens the Nation's ability to enact economic legislation needed for the future in much the way that *Lochner* v. *New York*, 198 U. S. 45 (1905), threatened the Nation's ability to enact social legislation over 90 years ago.

I shall elaborate upon this last-mentioned point. The similarity to *Lochner* lies in the risk that *Seminole Tribe* and the Court's subsequent cases will deprive Congress of necessary legislative flexibility. Their rules will make it more difficult for Congress to create, for example, a decentralized system of individual private remedies, say a private remedial system needed to protect intellectual property, including

computer-related educational materials, irrespective of the need for, or importance of, such a system in a 21st-century advanced economy. Cf. *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, *ante*, at 656–660 (STEVENS, J., dissenting) (illustrating the harm the rules work to the patent system). Similarly, those rules will inhibit the creation of innovative legal regimes, say, incentive-based or decentralized regulatory systems, that deliberately take account of local differences by assigning roles, powers, or responsibility, not just to federal administrators, but to citizens, at least if such a regime must incorporate a private remedy against a State (*e. g.*, a State as water polluter) to work effectively. Yet, ironically, Congress needs this kind of flexibility if it is to achieve one of federalism's basic objectives.

That basic objective should not be confused with the details of any particular federalist doctrine, for the contours of federalist doctrine have changed over the course of our Nation's history. Thomas Jefferson's purchase of Louisiana, for example, reshaped the great debate about the need for a broad, rather than a literal, interpretation of federal powers; the Civil War effectively ended the claim of a State's right to "nullify" a federal law; the Second New Deal, and its ultimate judicial ratification, showed that federal and state legislative authority were not mutually exclusive; this Court's "civil rights" decisions clarified the protection against state infringement that the Fourteenth Amendment offers to basic human liberty. In each instance the content of specific federalist doctrines had to change to reflect the Nation's changing needs (territorial expansion, the end of slavery, the Great Depression, and desegregation).

But those changing doctrines reflect at least one unchanging goal: the protection of liberty. Federalism helps to protect liberty not simply in our modern sense of helping the individual remain free of restraints imposed by a distant government, but more directly by promoting the sharing among

citizens of governmental decisionmaking authority. See B. Constant, Political Writings 307 (B. Fontana transl. 1988) (describing the "Liberty of the Ancients Compared with that of the Moderns"). The ancient world understood the need to divide sovereign power among a nation's citizens, thereby creating government in which all would exercise that power; and they called "free" the citizens who exercised that power so divided. Our Nation's Founders understood the same, for they wrote a Constitution that divided governmental authority, that retained great power at state and local levels, and which foresaw, indeed assumed, democratic citizen participation in government at all levels, including levels that facilitated citizen participation closer to a citizen's home.

In today's world, legislative flexibility is necessary if we are to protect this kind of liberty. Modern commerce and the technology upon which it rests need large markets and seek government large enough to secure trading rules that permit industry to compete in the global marketplace, to prevent pollution that crosses borders, and to assure adequate protection of health and safety by discouraging a regulatory "race to the bottom." Yet local control over local decisions remains necessary. Uniform regulatory decisions about, for example, chemical waste disposal, pesticides, or food labeling, will directly affect daily life in every locality. But they may reflect differing views among localities about the relative importance of the wage levels or environmental preferences that underlie them. Local control can take account of such concerns and help to maintain a sense of community despite global forces that threaten it. Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world.

Courts can remain sensitive to these needs when they interpret statutes and apply constitutional provisions, for example, the dormant Commerce Clause. But courts cannot easily draw the proper basic lines of authority. The proper

local/national/international balance is often highly context specific. And judicial rules that would allocate power are often far too broad. Legislatures, however, can write laws that more specifically embody that balance. Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched, or that involve States, local communities, or citizens directly through the grant of funds, powers, rights, or privileges. Depending upon context, Congress may encourage or require interaction among citizens working at various levels of government. That is why the modern substantive federalist problem demands a flexible, context-specific legislative response (and it does not help to constitutionalize an ahistoric view of sovereign immunity that, by freezing its remedial limitations, tends to place the State beyond the reach of law).

I recognize the possibility that Congress may achieve its objectives in other ways. *Ex parte Young*, 209 U. S. 123 (1908), is still available, though effective only where damages remedies are not important. Congress, too, might create a federal damages-collecting "enforcement" bureaucracy charged with responsibilities that Congress would prefer to place in the hands of States or private citizens, *Alden* v. *Maine*, *post*, at 755–756; *Printz* v. *United States*, 521 U. S. 898, 977 (1997) (BREYER, J., dissenting). Or perhaps Congress will be able to achieve the results it seeks (including decentralization) by embodying the necessary state "waivers" in federal funding programs—in which case, the Court's decisions simply impose upon Congress the burden of rewriting legislation, for no apparent reason.

But none of these alternatives is satisfactory. Unfortunately, *Seminole Tribe* and today's related decisions separate one formal strand from the federalist skein—a strand that has been understood as antirepublican since the time of Cicero—and they elevate that strand to the level of an immutable constitutional principle more akin to the thought of James I than of James Madison. They do so when the role

sovereign immunity once played in helping to assure the States that their political independence would remain even after joining the Union no longer holds center stage. See *Nevada* v. *Hall*, 440 U. S. 410, 418 (1979). They do so when a federal court's ability to enforce its judgment against a State is no longer a major concern. See The Federalist No. 81, p. 488 (C. Rossiter ed. 1961) (A. Hamilton). And they do so without adequate legal support grounded in either history or practical need. To the contrary, by making that doctrine immune from congressional Article I modification, the Court makes it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers. By diminishing congressional flexibility to do so, the Court makes it somewhat more difficult to satisfy modern federalism's more important liberty-protecting needs. In this sense, it is counterproductive.

III

I do not know whether the State has engaged in false advertising or unfair competition as College Savings Bank alleges. But this case was dismissed at the threshold. Congress has clearly said that College Savings Bank may bring a Lanham Act suit in these circumstances. For the reasons set forth in this opinion, I believe Congress has the constitutional power so to provide. I would therefore reverse the judgment of the Court of Appeals.

Syllabus

ALDEN ET AL. *v.* MAINE

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 98–436. Argued March 31, 1999—Decided June 23, 1999

After this Court decided, in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, that Congress lacks power under Article I to abrogate the States' sovereign immunity in federal court, the Federal District Court dismissed a Fair Labor Standards Act of 1938 suit filed by petitioners against their employer, respondent Maine. Subsequently, petitioners filed the same action in state court. Although the FLSA purports to authorize private actions against States in their own courts, the trial court dismissed the suit on the ground of sovereign immunity. The Maine Supreme Judicial Court affirmed.

Held:

1. The Constitution's structure and history and this Court's authoritative interpretations make clear that the States' immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution's ratification and retain today except as altered by the plan of the Convention or certain constitutional Amendments. Under the federal system established by the Constitution, the States retain a "residuary and inviolable sovereignty." The Federalist No. 39, p. 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty. The founding generation considered immunity from private suits central to this dignity. The doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. In addition, the leading advocates of the Constitution gave explicit assurances during the ratification debates that the Constitution would not strip States of sovereign immunity. This was also the understanding of those state conventions that addressed state sovereign immunity in their ratification documents. When, just five years after the Constitution's adoption, this Court held that Article III authorized a private citizen of another State to sue Georgia without its consent, *Chisholm* v. *Georgia*, 2 Dall. 419, the Eleventh Amendment was ratified. An examination of *Chisholm* indicates that the case, not the Amendment, deviated from the original understanding, which was to preserve States' traditional immunity from suit. The Amendment's text and history also suggest that Congress acted not to change but to restore the original constitutional design. Finally, the swiftness and near unanimity with which the Amendment was adopted indicate that

the Court had not captured the original understanding. This Court's subsequent decisions reflect a settled doctrinal understanding that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution. Since the Amendment confirmed rather than established sovereign immunity as a constitutional principal, it follows that that immunity's scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design. Pp. 712–730.

2. The States' immunity from private suit in their own courts is beyond congressional power to abrogate by Article I legislation. Pp. 730–754.

(a) Congress may exercise its Article I powers to subject States to private suits in their own courts only if there is compelling evidence that States were required to surrender this power to Congress pursuant to the constitutional design. *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 781. Pp. 730–731.

(b) Neither the Constitution's text nor the Court's recent sovereign immunity decisions establish that States were required to relinquish this portion of their sovereignty. Pp. 731–740.

(1) The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power. See, *e. g.*, *Hans* v. *Louisiana*, 134 U. S. 1. Moreover, the specific Article I powers delegated to Congress do not necessarily include the incidental authority to subject States to private suits as a means of achieving objectives otherwise within the enumerated powers' scope. Those decisions that have endorsed this contention, see, *e. g.*, *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184, 190–194, have been overruled, see, *e. g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *ante*, at 680. Pp. 731–735.

(2) Isolated statements in some of this Court's cases suggest that the Eleventh Amendment is inapplicable in state courts. This is a truism as to the Amendment's literal terms. However, the Amendment's bare text is not an exhaustive description of States' constitutional immunity, and the cases do not decide the question whether States retain immunity in their own courts notwithstanding an attempted abrogation by Congress. Pp. 735–740.

(c) Whether Congress has the authority under Article I to abrogate a State's immunity in its own courts is, then, a question of first impression. History, practice, precedent, and the Constitution's structure

show no compelling evidence that this derogation of the States' sovereignty is inherent in the constitutional compact. Pp. 741–754.

(1) Turning first to evidence of the original understanding of the Constitution: The Founders' silence regarding the States' immunity from suit in their own courts, despite the controversy regarding state sovereign immunity in federal court, suggests the sovereign's right to assert immunity from suit in its own courts was so well established that no one conceived the new Constitution would alter it. The arguments raised for and against the Constitution during ratification confirm this strong inference. Similarly, nothing in *Chisholm*, the catalyst for the Eleventh Amendment, suggested the States were not immune from suits in their own courts. The Amendment's language, furthermore, was directed toward Article III, the only constitutional provision believed to call state sovereign immunity into question; and nothing in that Article or in any other part of the Constitution suggested the States could not assert immunity in their own courts or that Congress had the power to abrogate such immunity. Finally, implicit in a proposal rejected by Congress—which would have limited the Amendment's scope to cases where States had made available a remedy in their own courts—was the premise that States retained their immunity and the concomitant authority to decide whether to allow private suits against the sovereign in their own courts. Pp. 741–743.

(2) The historical analysis is supported by early congressional practice. Early Congresses enacted no statutes purporting to authorize suits against nonconsenting States in state court, and statutes purporting to authorize such suits in any forum are all but absent from the Nation's historical experience. Even recent statutes provide no evidence of an understanding that Congress has a greater power to subject States to suit in their own courts than in federal courts. Pp. 743–745.

(3) The theory and reasoning of this Court's earlier cases also suggest that States retain constitutional immunity from suit in their own courts. The States' immunity has been described in sweeping terms, without reference to whether a suit was prosecuted in state or federal court. See, *e. g.*, *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 321–322. The Court has said on many occasions that the States retain their immunity in their own courts, see, *e. g.*, *Beers* v. *Arkansas*, 20 How. 527, 529, and has relied on that as a premise in its Eleventh Amendment rulings, see, *e. g.*, *Hans* v. *Louisiana*, *supra*, at 10. Pp. 745–748.

(4) A review of the essential principles of federalism and the state courts' special role in the constitutional design leads to the conclusion that a congressional power to subject nonconsenting States to private suits in their own courts is inconsistent with the Constitution's structure.

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Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance. Immunity from suit in federal courts is not enough to preserve that dignity, for the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum. In some ways, a congressional power to authorize suits against States in their own courts would be even more offensive to state sovereignty than a power to authorize suits in a federal forum, since a sovereign's immunity in its own courts has always been understood to be within the sole control of the sovereign itself. Further, because the Federal Government retains its own immunity from suit in state and federal court, this Court is reluctant to conclude that States are not entitled to a reciprocal privilege. Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States may threaten their financial integrity, and the surrender of immunity carries with it substantial costs to the autonomy, decisionmaking ability, and sovereign capacity of the States. A general federal power to authorize private suits for money damages would also strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc, necessitating difficult decisions involving the most sensitive and political of judgments. A national power to remove these decisions regarding the allocation of scarce resources from the political processes established by the citizens of the States and commit their resolution to judicial decrees mandated by the Federal Government and invoked by the private citizen would blur not only the State and National Governments' distinct responsibilities but also the separate duties of the state governments' judicial and political branches.

Congress cannot abrogate States' sovereign immunity in federal court; were the rule different here, the National Government would wield greater power in state courts than in federal courts. This anomaly cannot be explained by reference to the state courts' special role in the constitutional design. It would be unprecedented to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through state courts exceeds not only its power to press other branches of the State into its service but also its control over federal courts. The constitutional provisions upon which this Court has relied in finding state courts peculiarly amendable to federal command, moreover, do not distinguish those courts from the Federal Judiciary. No constitutional precept would admit of a congressional power to require state courts to entertain federal suits which are not within the

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United States' judicial power and could not be heard in federal courts. Pp. 748–754.

3. A State's constitutional privilege to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. States and their officers are bound by obligations imposed by the Constitution and federal statutes that comport with the constitutional design. Limits implicit in the constitutional principle of sovereign immunity strike the proper balance between the supremacy of federal law and the separate sovereignty of the States. The first limit is that sovereign immunity bars suits only in the absence of consent. Many States have enacted statutes consenting to suits and have consented to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments. The second important limit is that sovereign immunity bars suits against States but not against lesser entities, such as municipal corporations, or against a state officer for injunctive or declaratory relief or for money damages to be collected not from the state treasury but from the officer personally. Pp. 754–757.

4. Maine has not waived its immunity. It adheres to the general rule that a specific legislative enactment is required to waive sovereign immunity. Although petitioners contend that Maine discriminated against federal rights by claiming immunity from this suit, there is no evidence that it has manipulated its immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty. Pp. 757–758.

715 A. 2d 172, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 760.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Jonathan P. Hiatt*, *Timothy L. Belcher*, and *David L. Shapiro*.

Solicitor General Waxman argued the cause for intervenor United States. With him on the briefs were *Assistant Attorney General Hunger*, *Acting Assistant Attorney General Ogden*, *Deputy Solicitor General Kneedler*, *Irving L.*

Gornstein, *Mark B. Stern*, *Robert M. Loeb*, *Peter J. Smith*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Ellen L. Beard*.

Andrew Ketterer, Attorney General of Maine, argued the cause for respondent. With him on the brief were *Paul Stern*, Deputy Attorney General, and *Peter J. Brann*, State Solicitor.*

JUSTICE KENNEDY delivered the opinion of the Court.

In 1992, petitioners, a group of probation officers, filed suit against their employer, the State of Maine, in the United States District Court for the District of Maine. The officers alleged the State had violated the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Publishers, Inc., et al. by *Charles S. Sims;* and for the National Association of Police Organizations by *Stephen R. McSpadden.*

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Kentucky by *Stuart E. Alexander III;* for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida* and *Michele J. McDonald*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Peter Verniero* of New Jersey, *Eliot Spitzer* of New York, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, *Darrell V. McGraw* of West Virginia, *James E. Doyle* of Wisconsin, and *Guy Woodhouse* of Wyoming; for the Home School Legal Defense Association by *Michael P. Farris;* for the Pacific Legal Foundation by *M. Reed Hopper;* and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Richard H. Seamon.*

amended, 29 U. S. C. § 201 *et seq.* (1994 ed. and Supp. III), and sought compensation and liquidated damages. While the suit was pending, this Court decided *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), which made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts. Upon consideration of *Seminole Tribe*, the District Court dismissed petitioners' action, and the Court of Appeals affirmed. *Mills* v. *Maine*, 118 F. 3d 37 (CA1 1997). Petitioners then filed the same action in state court. The state trial court dismissed the suit on the basis of sovereign immunity, and the Maine Supreme Judicial Court affirmed. 715 A. 2d 172 (1998).

The Maine Supreme Judicial Court's decision conflicts with the decision of the Supreme Court of Arkansas, *Jacoby* v. *Arkansas Dept. of Ed.*, 331 Ark. 508, 962 S. W. 2d 773 (1998), and calls into question the constitutionality of the provisions of the FLSA purporting to authorize private actions against States in their own courts without regard for consent, see 29 U. S. C. §§ 216(b), 203(x). In light of the importance of the question presented and the conflict between the courts, we granted certiorari. 525 U. S. 981 (1998). The United States intervened as a petitioner to defend the statute.

We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.

I

The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S.

Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

A

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla.* v. *Florida*, *supra*, at 71, n. 15; accord, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. See *Printz* v. *United States*, 521 U. S. 898, 919 (1997) (citing Art. III, § 2; Art. IV, §§ 2–4; Art. V). The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design, see, *e. g.*, Art. I, § 8; Art. II, §§ 2–3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of

the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10; see also *Printz*, *supra*, at 919; *New York* v. *United States*, 505 U. S. 144, 156–159, 177 (1992).

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz, supra*, at 919–920 (quoting The Federalist No. 15, at 109); accord, *New York*, *supra*, at 166 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States"). In this the Founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had "exploded on all hands" the "practicality of making laws, with coercive sanctions, for the States as political bodies." 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison); accord, The Federalist No. 20, at 138 (J. Madison and A. Hamilton); James Iredell: Some

Objections to the Constitution Answered, reprinted in 3 Annals of America 249 (1976).

The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

B

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. See *Chisholm* v. *Georgia*, 2 Dall. 419, 437–446 (1793) (Iredell, J., dissenting) (surveying English practice); cf. *Nevada* v. *Hall*, 440 U. S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity"). In reciting the prerogatives of the Crown, Blackstone—whose works constituted the preeminent authority on English law for the founding generation—underscored the close and necessary relationship understood to exist between sovereignty and immunity from suit:

> "And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence. . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . ." 1 W. Blackstone, Commentaries on the Laws of England 234–235 (1765).

Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the

States when the Constitution was drafted and ratified. See *Chisholm*, *supra*, at 434–435 (Iredell, J., dissenting) ("I believe there is no doubt that neither in the State now in question, nor in any other in the *Union*, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed"); *Hans* v. *Louisiana*, 134 U. S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted").

The ratification debates, furthermore, underscored the importance of the States' sovereign immunity to the American people. Grave concerns were raised by the provisions of Article III, which extended the federal judicial power to controversies between States and citizens of other States or foreign nations. As we have explained:

> "Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the 'higher' sovereign." *Hall*, *supra*, at 418 (footnote omitted).

The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. One assurance was contained in The Federalist No. 81, written by Alexander Hamilton:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of

> mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*, at 487–488 (emphasis in original).

At the Virginia ratifying convention, James Madison echoed this theme:

> "Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. . . .
>
> ". . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." 3 Debates on the Federal Constitution 533 (J. Elliot 2d ed. 1854) (hereinafter Elliot's Debates).

When Madison's explanation was questioned, John Marshall provided immediate support:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant . . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff." 3 *id.*, at 555–556 (emphasis in original).

Although the state conventions which addressed the issue of sovereign immunity in their formal ratification documents sought to clarify the point by constitutional amendment, they made clear that they, like Hamilton, Madison, and Marshall, understood the Constitution as drafted to preserve the States' immunity from private suits. The Rhode Island Convention thus proclaimed that "[i]t is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." 1 *id.*, at 336. The convention sought, in addition, an express amendment "to remove all doubts or controversies respecting the same." *Ibid.* In a similar fashion, the New York Convention "declare[d] and ma[d]e known," 1 *id.*, at 327, its understanding "[t]hat the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit

by any person against a state," 1 *id.*, at 329. The convention proceeded to ratify the Constitution "[u]nder these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration." *Ibid.*

Despite the persuasive assurances of the Constitution's leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). Each of the four Justices who concurred in the judgment issued a separate opinion. The common theme of the opinions was that the case fell within the literal text of Article III, which by its terms granted jurisdiction over controversies "between a State and Citizens of another State," and "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U. S. Const., Art. III, § 2. The argument that this provision granted jurisdiction only over cases in which the State was a plaintiff was dismissed as inconsistent with the ordinary meaning of "between," and with the provision extending jurisdiction to "Controversies between two or more States," which by necessity contemplated jurisdiction over suits to which States were defendants. Two Justices also argued that sovereign immunity was inconsistent with the principle of popular sovereignty established by the Constitution, 2 Dall., at 454–458 (Wilson, J.); *id.*, at 470–472 (Jay, C. J.); although the others did not go so far, they contended that the text of Article III evidenced the States' surrender of sovereign immunity as to those provisions extending jurisdiction over suits to which States were parties, *id.*, at 452 (Blair, J.); *id.*, at 468 (Cushing, J.).

Justice Iredell dissented, relying on American history, *id.*, at 434–435, English history, *id.*, at 437–446, and the principles of enumerated powers and separate sovereignty, *id.*, at 435–436, 448, 449–450. See generally *Hans*, 134 U. S., at 12 ("The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage . . . . Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only . . . to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts").

The Court's decision "fell upon the country with a profound shock." 1 C. Warren, The Supreme Court in United States History 96 (rev. ed. 1926); accord, *Hans*, *supra*, at 11; *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934); *Seminole Tribe*, 517 U. S., at 69. "Newspapers representing a rainbow of opinion protested what they viewed as an unexpected blow to state sovereignty. Others spoke more concretely of prospective raids on state treasuries." D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, p. 196 (1997).

The States, in particular, responded with outrage to the decision. The Massachusetts Legislature, for example, denounced the decision as "repugnant to the first principles of a federal government," and called upon the Commonwealth's Senators and Representatives to take all necessary steps to "remove any clause or article of the . . . Constitution, which can be construed to imply or justify a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." 15 Papers of Alexander Hamilton 314 (H. Syrett & J. Cooke eds. 1969) (internal quotation marks omitted). Georgia's response was more intemperate: Its House of Representatives passed a bill

providing that anyone attempting to enforce the *Chisholm* decision would be "'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'" Currie, *supra*, at 196.

An initial proposal to amend the Constitution was introduced in the House of Representatives the day after *Chisholm* was announced; the proposal adopted as the Eleventh Amendment was introduced in the Senate promptly following an intervening recess. Currie, *supra*, at 196. Congress turned to the latter proposal with great dispatch; little more than two months after its introduction it had been endorsed by both Houses and forwarded to the States. 4 Annals of Congress 25, 30, 477, 499 (1794); 1 Stat. 402.

Each House spent but a single day discussing the Amendment, and the vote in each House was close to unanimous. See 4 Annals of Congress, at 30–31, 476–478 (the Senate divided 23 to 2; the House 81 to 9). All attempts to weaken the Amendment were defeated. Congress in succession rejected proposals to limit the Amendment to suits in which "'the cause of action shall have arisen before the ratification of the amendment,'" or even to cases "'where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect'"; it refused as well to make an exception for "'cases arising under treaties made under the authority of the United States.'" 4 *id.*, at 30, 476.

It might be argued that the *Chisholm* decision was a correct interpretation of the constitutional design and that the Eleventh Amendment represented a deviation from the original understanding. This, however, seems unsupportable. First, despite the opinion of Justice Iredell, the majority failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted. Second, even a casual reading of the opinions suggests the majority suspected the decision would be unpopular and surprising. See, *e. g.*, 2 Dall., at 454–455 (Wilson, J.)

(condemning the prevailing conception of sovereignty); *id.*, at 468 (Cushing, J.) ("If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment"); *id.*, at 478–479 (Jay, C. J.) ("[T]here is reason to hope that the people of [Georgia] will yet perceive that [sovereign immunity] would not have been consistent with [republican] equality"); cf. *id.*, at 419–420 (attorney for Chisholm) ("I did not want the remonstrance of *Georgia*, to satisfy me, that the motion, which I have made is unpopular. Before that remonstrance was read, I had learnt from the acts of another State, whose will must be always dear to me, that she too condemned it"). Finally, two Members of the majority acknowledged that the United States might well remain immune from suit despite Article III's grant of jurisdiction over "Controversies to which the United States shall be a Party," see *id.*, at 469 (Cushing, J.); *id.*, at 478 (Jay, C. J.), and, invoking the example of actions to collect debts incurred before the Constitution was adopted, one raised the possibility of "exceptions," suggesting the rule of the case might not "extend to all the demands, and to every kind of action," *id.*, at 479 (Jay, C. J.). These concessions undercut the crucial premise that either the Constitution's literal text or the principle of popular sovereignty necessarily overrode widespread practice and opinion.

The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. Although earlier drafts of the Amendment had been phrased as express limits on the judicial power granted in Article III, see, *e. g.*, 3 Annals of Congress 651–652 (1793) ("The Judicial Power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States . . ."), the adopted text addressed the proper interpretation of that provision of the original Constitution, see U. S. Const., Amdt. 11 ("The Judicial power of the United States shall not

be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States . . .''). By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court:

> "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. . . . The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled." *Hans*, 134 U. S., at 11.

The text reflects the historical context and the congressional objective in endorsing the Amendment for ratification. Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision. Cf. 15 Papers of Alexander Hamilton, at 314 (quoted *supra*, at 720). Given the outraged reaction to *Chisholm*, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment:

> "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein

> contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face." *Hans*, *supra*, at 14–15.

The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush.

Finally, the swiftness and near unanimity with which the Eleventh Amendment was adopted suggest "either that the Court had not captured the original understanding, or that the country had changed its collective mind most rapidly." D. Currie, The Constitution in the Supreme Court: The First Hundred Years: 1789–1888, p. 18, n. 101 (1985). The more reasonable interpretation, of course, is that regardless of the views of four Justices in *Chisholm*, the country as a whole—which had adopted the Constitution just five years earlier—had not understood the document to strip the States of their immunity from private suits. Cf. Currie, The Constitution in Congress, at 196 ("It is plain that just about everybody in Congress agreed the Supreme Court had misread the Constitution").

Although the dissent attempts to rewrite history to reflect a different original understanding, its evidence is unpersuasive. The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary. The constitutional amendments proposed by the New York and Rhode Island Conventions undercut rather than support the dissent's view

of history, see *supra*, at 718–719, and the amendments proposed by the Virginia and North Carolina Conventions do not cast light upon the original understanding of the States' immunity to suit. It is true that, in the course of all but eliminating federal-question and diversity jurisdiction, see 3 Elliot's Debates 660–661 (amendment proposed by the Virginia Convention limiting the federal-question jurisdiction to suits arising under treaties and the diversity jurisdiction to suits between parties claiming lands under grants from different States); 4 *id.*, at 246 (identical amendment proposed by the North Carolina Convention), the amendments would have removed the language in the Constitution relied upon by the *Chisholm* Court. While the amendments do reflect dissatisfaction with the scope of federal jurisdiction as a general matter, there is no evidence that they were directed toward the question of sovereign immunity or that they reflect an understanding that the States would be subject to private suits without consent under Article III as drafted.

The dissent's remaining evidence cannot bear the weight the dissent seeks to place on it. The views voiced during the ratification debates by Edmund Randolph and James Wilson, when reiterated by the same individuals in their respective capacities as advocate and Justice in *Chisholm*, were decisively rejected by the Eleventh Amendment, and General Pinkney did not speak to the issue of sovereign immunity at all. Furthermore, Randolph appears to have recognized that his views were in tension with the traditional understanding of sovereign immunity, see 3 Elliot's Debates 573 ("I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*"), and Wilson and Pinkney expressed a radical nationalist vision of the constitutional design that not only deviated from the views that prevailed at the time but, despite the dissent's apparent embrace of the position, remains startling even today, see *post*, at 776

(quoting with approval Wilson's statement that "'the government of each state ought to be subordinate to the government of the United States'"). Nor do the controversial early suits prosecuted against Maryland and New York reflect a widespread understanding that the States had surrendered their immunity to suit. Maryland's decision to submit to process in *Vanstophorst* v. *Maryland*, 2 Dall. 401 (1791), aroused great controversy, see Marcus & Wexler, Suits Against States: Diversity of Opinion in the 1790s, 1993 J. Sup. Ct. History 73, 74–75, and did not go unnoticed by the Supreme Court, see *Chisholm*, 2 Dall., at 429–430 (Iredell, J., dissenting). In *Oswald* v. *New York*, the State refused to respond to the plaintiff's summons until after the decision in *Chisholm* had been announced; even then it at first asserted the defense that it was "a free, sovereign and independent State," and could not be "drawn or compelled" to defend the suit. Marcus & Wexler, *supra*, at 76–77 (internal quotation marks omitted). And, though the Court's decision in *Chisholm* may have had "champions 'every bit as vigorous in defending their interpretation of the Constitution as were those partisans on the other side of the issue,'" *post*, at 794, the vote on the Eleventh Amendment makes clear that they were decidedly less numerous. See *supra*, at 721.

In short, the scanty and equivocal evidence offered by the dissent establishes no more than what is evident from the decision in *Chisholm*—that some members of the founding generation disagreed with Hamilton, Madison, Marshall, Iredell, and the only state conventions formally to address the matter. The events leading to the adoption of the Eleventh Amendment, however, make clear that the individuals who believed the Constitution stripped the States of their immunity from suit were at most a small minority.

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit; they also underscore the importance of sovereign

immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 239, n. 2 (1985); accord, *Edelman* v. *Jordan*, 415 U. S. 651, 660 (1974).

C

The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," *Seminole Tribe*, 517 U. S., at 69, and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. See, *e. g.*, *Hans*, 134 U. S., at 12, 14–15, 18–19; *Principality of Monaco*, 292 U. S., at 325; *Edelman*, *supra*, at 660, n. 9; *Seminole Tribe*, *supra*, at 70, and nn. 12–13. In accordance with this understanding, we have recognized a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted." *Hans*, 134 U. S., at 18; accord, *id.*, at 15. As a consequence, we have looked to "history and experience, and the established order of things," *id.*, at 14, rather than "[a]dhering to the mere letter" of the Eleventh Amendment, *id.*, at 13, in determining the scope of the States' constitutional immunity from suit.

Following this approach, the Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment. In *Hans*, the Court held that sovereign immunity barred a citizen from suing his own State under the federal-question head of jurisdiction. The Court was unmoved by the petitioner's argument that the Eleventh Amendment, by its

terms, applied only to suits brought by citizens of other States:

> "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*, at 14–15.

Later decisions rejected similar requests to conform the principle of sovereign immunity to the strict language of the Eleventh Amendment in holding that nonconsenting States are immune from suits brought by federal corporations, *Smith* v. *Reeves*, 178 U. S. 436 (1900), foreign nations, *Principality of Monaco*, *supra*, or Indian tribes, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991), and in concluding that sovereign immunity is a defense to suits in admiralty, though the text of the Eleventh Amendment addresses only suits "in law or equity," *Ex parte New York*, 256 U. S. 490 (1921).

These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. See, *e. g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 267–268 (1997) (acknowledging "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"); *Seminole Tribe*, *supra*, at 55–56; *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98–99 (1984); *Ex parte New York*, *supra*, at 497. The Eleventh Amendment confirmed, rather

than established, sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design. As we explained in *Principality of Monaco:*

> "Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" 292 U. S., at 322–323 (quoting The Federalist No. 81 (footnote omitted).

Or, as we have more recently reaffirmed:

> "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.' *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991). That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," ' *id.*, at 13 (emphasis deleted), quoting The Federalist No. 81, p. 487 . . . ." *Seminole Tribe*, *supra*, at 54.

Accord, *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 146 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity").

II

In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts. As the foregoing discussion makes clear, the fact that the Eleventh Amendment by its terms limits only "[t]he Judicial power of the United States" does not resolve the question. To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*. *Seminole Tribe*, 517 U. S., at 68; see also *id.*, at 69 (quoting *Principality of Monaco*, *supra*, at 326, in turn quoting *Hans*, 134 U. S., at 15) ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is '"to strain the Constitution and the law to a construction never imagined or dreamed of"'").

While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, see, *e. g.*, *Principality of Monaco*, 292 U. S., at 322–323, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "[t]here is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Ibid.* (quoting The Federalist No. 81; accord, *Blatchford*, *supra*, at 781; *Seminole Tribe*, *supra*, at 68. This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Con-

gress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design. *Blatchford*, 501 U. S., at 781.

A

Petitioners contend the text of the Constitution and our recent sovereign immunity decisions establish that the States were required to relinquish this portion of their sovereignty. We turn first to these sources.

1

Article I, § 8, grants, Congress broad power to enact legislation in several enumerated areas of national concern. The Supremacy Clause, furthermore, provides:

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

It is contended that, by virtue of these provisions, where Congress enacts legislation subjecting the States to suit, the legislation by necessity overrides the sovereign immunity of the States.

As is evident from its text, however, the Supremacy Clause enshrines as "the supreme Law of the Land" only those Federal Acts that accord with the constitutional design. See *Printz*, 521 U. S., at 924. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power. See The Federalist No. 33, at 204 (A. Hamilton) ("But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land"); *Printz*, *supra*, at 924–925.

The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power. A contrary view could not be reconciled with *Hans*, *supra*, which sustained Louisiana's immunity in a private suit arising under the Constitution itself; with *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 283 (1973), which recognized that the FLSA was binding upon Missouri but nevertheless upheld the State's immunity to a private suit to recover under that Act; or with numerous other decisions to the same effect. We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers. Although some of our decisions had endorsed this contention, see *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184, 190–194 (1964); *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 13–23 (1989) (plurality opinion), they have since been overruled, see *Seminole Tribe*, *supra*, at 63–67, 72; *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *ante*, at 680. As we have recognized in an analogous context:

> "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional

> provisions . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, *supra*, at 923–924 (quoting The Federalist No. 33, at 204) (ellipses and alterations in *Printz*).

The cases we have cited, of course, came at last to the conclusion that neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court. The logic of the decisions, however, does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well.

The dissenting opinion seeks to reopen these precedents, contending that state sovereign immunity must derive either from the common law (in which case the dissent contends it is defeasible by statute) or from natural law (in which case the dissent believes it cannot bar a federal claim). See *post*, at 797–798. As should be obvious to all, this is a false dichotomy. The text and the structure of the Constitution protect various rights and principles. Many of these, such as the right to trial by jury and the prohibition on unreasonable searches and seizures, derive from the common law. The common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights, however. They are, rather, constitutional rights, and form the fundamental law of the land.

Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design. The dissent has provided no persuasive evidence that the founding generation regarded the States' sovereign immunity as defeasible by federal statute. While the dissent implies this view was held by Madison and Marshall, see *post*, at 778, nothing in the comments made by either individual at the ratification

conventions states, or even implies, such an understanding. Although the dissent seizes upon Justice Iredell's statutory analysis in *Chisholm* in an attempt to attribute this view to Justice Iredell, see *post*, at 787–789, citing *Chisholm*, 2 Dall., at 449, Justice Iredell's views on the underlying constitutional question are clear enough from other portions of his dissenting opinion:

> "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power." *Id.*, at 449–450.

Despite the dissent's assertion to the contrary, the fact that a right is not defeasible by statute means only that it is protected by the Constitution, not that it derives from natural law. Whether the dissent's attribution of our reasoning and conclusions to natural law results from analytical confusion or rhetorical device, it is simply inaccurate. We do not contend the Founders could not have stripped the States of sovereign immunity and granted Congress power to subject them to private suit but only that they did not do so. By the same token, the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law.

The dissent has offered no evidence that the Founders believed sovereign immunity extended only to cases where the sovereign was the source of the right asserted. No such limitation existed on sovereign immunity in England, where sovereign immunity was predicated on a different theory al-

together. See 1 F. Pollock & F. Maitland, History of English Law 518 (2d ed. 1909), quoted in *Nevada* v. *Hall*, 440 U. S., at 415, n. 6 (" '[The King] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor' "); accord, 3 W. Holdsworth, A History of English Law 465 (3d ed. 1927) ("[N]o feudal lord could be sued in his own court"). It is doubtful whether the King was regarded, in any meaningful sense, as the font of the traditions and customs which formed the substance of the common law, yet he could not be sued on a common-law claim in his own courts. And it strains credibility to imagine that the King could have been sued in his own court on, say, a French cause of action.

In light of the ratification debates and the history of the Eleventh Amendment, there is no reason to believe the Founders intended the Constitution to preserve a more restricted immunity in the United States. On the contrary, Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties, see *supra*, at 721, suggests the States' sovereign immunity was understood to extend beyond state-law causes of action. And surely the dissent does not believe that sovereign immunity poses no bar to a state-law suit against the United States in federal court, or that the Federal Tort Claims Act effected a contraction, rather than an expansion, of the United States' amenability to suit.

2

There are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts. See *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 204–205 (1991); *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63 (1989); *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 239–240, n. 2; *Maine* v. *Thiboutot*, 448 U. S. 1, 9, n. 7 (1980); *Hall*, *supra*, at 418–421. This, of course, is a truism as to the literal terms of

the Eleventh Amendment. As we have explained, however, the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit. The cases, furthermore, do not decide the question presented here—whether the States retain immunity from private suits in their own courts notwithstanding an attempted abrogation by the Congress.

Two of the cases discussing state-court immunity may be dismissed out of hand. The footnote digressions in *Atascadero State Hospital* and *Thiboutot* were irrelevant to either opinion's holding or rationale. The discussion in *Will* was also unnecessary to the decision; our holding that 42 U. S. C. § 1983 did not create a cause of action against the States rendered it unnecessary to determine the scope of the States' constitutional immunity from suit in their own courts. Our opinions in *Hilton* and *Hall*, however, require closer attention, for in those cases we sustained suits against States in state courts.

In *Hilton* we held that an injured employee of a state-owned railroad could sue his employer (an arm of the State) in state court under the Federal Employers' Liability Act (FELA), 53 Stat. 1404, 45 U. S. C. §§ 51–60. Our decision was "controlled and informed" by *stare decisis.* 502 U. S., at 201. A generation earlier we had held that because the FELA made clear that all who operated railroads would be subject to suit by injured workers, States that chose to enter the railroad business after the statute's enactment impliedly waived their sovereign immunity from such suits. See *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964). Some States had excluded railroad workers from the coverage of their workers' compensation statutes on the assumption that the FELA provided adequate protection for those workers. *Hilton*, 502 U. S., at 202. Closing the courts to FELA suits against state employers would have dislodged settled expectations and required an extensive legislative response. *Ibid.*

There is language in *Hilton* which gives some support to the position of petitioners here but our decision did not squarely address, much less resolve, the question of Congress' power to abrogate States' immunity from suit in their own courts. The respondent in *Hilton*, the South Carolina Public Railways Commission, neither contested Congress' constitutional authority to subject it to suits for money damages nor raised sovereign immunity as an affirmative defense. See Brief for Respondent in No. 90–848, O. T. 1991, pp. 7, n. 14, 21. Nor was the State's litigation strategy surprising. *Hilton* was litigated and decided in the wake of *Union Gas*, and before this Court's decisions in *New York*, *Printz*, and *Seminole Tribe*. At that time it may have appeared to the State that Congress' power to abrogate its immunity from suit in any court was not limited by the Constitution at all, so long as Congress made its intent sufficiently clear.

Furthermore, our decision in *Parden* was based on concepts of waiver and consent. Although later decisions have undermined the basis of *Parden*'s reasoning, see, *e. g.*, *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 476–478 (1987) (recognizing that *Parden* erred in finding a clear congressional intent to subject the States to suit); *College Savings Bank*, *ante*, at 680 (overruling *Parden*'s theory of constructive waiver), we have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit, see *Seminole Tribe*, 517 U. S., at 65.

Hilton, then, must be read in light of the doctrinal basis of *Parden*, the issues presented and argued by the parties, and the substantial reliance interests drawn into question by the litigation. When so read, we believe the decision is best understood not as recognizing a congressional power to subject nonconsenting States to private suits in their own courts, nor even as endorsing the constructive waiver theory of *Parden*, but as simply adhering, as a matter of *stare decisis* and presumed historical fact, to the narrow proposition

that certain States had consented to be sued by injured workers covered by the FELA, at least in their own courts.

In *Hall* we considered whether California could subject Nevada to suit in California's courts and determined the Constitution did not bar it from doing so. We noted that "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." 440 U. S., at 414. We acknowledged that "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity," *ibid.*, that "the notion that immunity from suit is an attribute of sovereignty is reflected in our cases," *id.*, at 415, and that "[t]his explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent," *id.*, at 416. We sharply distinguished, however, a sovereign's immunity from suit in the courts of another sovereign:

> "[B]ut [this explanation] affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Ibid.*

Since we determined the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another, California was free to determine whether it would respect Nevada's sovereignty as a matter of comity.

Our opinion in *Hall* did distinguish a State's immunity from suit in federal court from its immunity in the courts of

other States; it did not, however, address or consider any differences between a State's sovereign immunity in federal court and in its own courts. Our reluctance to find an implied constitutional limit on the power of the States cannot be construed, furthermore, to support an analogous reluctance to find implied constitutional limits on the power of the Federal Government. The Constitution, after all, treats the powers of the States differently from the powers of the Federal Government. As we explained in *Hall:*

> "[I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Id.*, at 425 (footnote omitted).

The Federal Government, by contrast, "can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326 (1816); see also *City of Boerne* v. *Flores*, 521 U. S. 507, 516 (1997); *United States* v. *Lopez*, 514 U. S. 549, 552 (1995).

Our decision in *Hall* thus does not support the argument urged by petitioners here. The decision addressed neither Congress' power to subject States to private suits nor the States' immunity from suit in their own courts. In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here—that the Constitution reserves to the

States a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress.

Petitioners seek support in two additional decisions. In *Reich* v. *Collins*, 513 U. S. 106 (1994), we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be "a clear and certain" postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. *Id.*, at 108. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a "clear and certain" postdeprivation remedy. *Ibid.;* see also *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981). In this context, due process requires the State to provide the remedy it has promised. Cf. *Hudson* v. *Palmer*, 468 U. S. 517, 539 (1984) (O'CONNOR, J., concurring). The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts.

In *Howlett* v. *Rose*, 496 U. S. 356 (1990), we held that a state court could not refuse to hear a § 1983 suit against a school board on the basis of sovereign immunity. The school board was not an arm of the State, however, so it could not assert any constitutional defense of sovereign immunity to which the State would have been entitled. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 280 (1977). In *Howlett*, then, the only question was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." 496 U. S., at 358–359. The decision did not address the question of Congress' power to compel a state court to entertain an action against a nonconsenting State.

B

Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is, then, a question of first impression. In determining whether there is "compelling evidence" that this derogation of the States' sovereignty is "inherent in the constitutional compact," *Blatchford*, 501 U. S., at 781, we continue our discussion of history, practice, precedent, and the structure of the Constitution.

1

We look first to evidence of the original understanding of the Constitution. Petitioners contend that because the ratification debates and the events surrounding the adoption of the Eleventh Amendment focused on the States' immunity from suit in federal courts, the historical record gives no instruction as to the founding generation's intent to preserve the States' immunity from suit in their own courts.

We believe, however, that the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.

The arguments raised against the Constitution confirm this strong inference. In England, the rule was well established that "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord." *Hall*, 440 U. S., at 414–415. It was argued that, by analogy, the States could be sued without consent in federal court. *Id.*, at 418. The point of the argu-

ment was that federal jurisdiction under Article III would circumvent the States' immunity from suit in their own courts. The argument would have made little sense if the States were understood to have relinquished the immunity in all events.

The response the Constitution's advocates gave to the argument is also telling. Relying on custom and practice—and, in particular, on the States' immunity from suit in their own courts, see 3 Elliot's Debates 555 (remarks of J. Marshall)—they contended that no individual could sue a sovereign without its consent. It is true the point was directed toward the power of the Federal Judiciary, for that was the only question at issue. The logic of the argument, however, applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned. See *Hall*, *supra*, at 414.

Similarly, while the Eleventh Amendment by its terms addresses only "the Judicial power of the United States," nothing in *Chisholm*, the catalyst for the Amendment, suggested the States were not immune from suits in their own courts. The only Justice to address the issue, in fact, was explicit in distinguishing between sovereign immunity in federal court and in a State's own courts. See 2 Dall., at 452 (opinion of Blair, J.) ("When sovereigns are sued in their own Courts, such a method [a petition of right] may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty").

The language of the Eleventh Amendment, furthermore, was directed toward the only provisions of the constitutional text believed to call the States' immunity from private suits into question. Although Article III expressly contemplated

jurisdiction over suits between States and individuals, nothing in the Article or in any other part of the Constitution suggested the States could not assert immunity from private suit in their own courts or that Congress had the power to abrogate sovereign immunity there.

Finally, the Congress which endorsed the Eleventh Amendment rejected language limiting the Amendment's scope to cases where the States had made available a remedy in their own courts. See *supra*, at 721. Implicit in the proposal, it is evident, was the premise that the States retained their immunity and the concomitant authority to decide whether to allow private suits against the sovereign in their own courts.

In light of the language of the Constitution and the historical context, it is quite apparent why neither the ratification debates nor the language of the Eleventh Amendment addressed the States' immunity from suit in their own courts. The concerns voiced at the ratifying conventions, the furor raised by *Chisholm*, and the speed and unanimity with which the Amendment was adopted, moreover, underscore the jealous care with which the founding generation sought to preserve the sovereign immunity of the States. To read this history as permitting the inference that the Constitution stripped the States of immunity in their own courts and allowed Congress to subject them to suit there would turn on its head the concern of the founding generation—that Article III might be used to circumvent state-court immunity. In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.

2

Our historical analysis is supported by early congressional practice, which provides "contemporaneous and weighty evi-

dence of the Constitution's meaning." *Printz,* 521 U. S., at 905 (internal quotation marks omitted). Although early Congresses enacted various statutes authorizing federal suits in state court, see *id.*, at 906–907 (listing statutes); *Testa* v. *Katt,* 330 U. S. 386, 389–390 (1947), we have discovered no instance in which they purported to authorize suits against nonconsenting States in these fora. The "numerousness of these statutes [authorizing suit in state court], contrasted with the utter lack of statutes" subjecting States to suit, "suggests an assumed *absence* of such power." 521 U. S., at 907–908. It thus appears early Congresses did not believe they had the power to authorize private suits against the States in their own courts.

Not only were statutes purporting to authorize private suits against nonconsenting States in state courts not enacted by early Congresses; statutes purporting to authorize such suits in any forum are all but absent from our historical experience. The first statute we confronted that even arguably purported to subject the States to private actions was the FELA. See *Parden,* 377 U. S., at 187 ("Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress"). As we later recognized, however, even this statute did not clearly create a cause of action against the States. See *Welch,* 483 U. S., at 476–478. The provisions of the FLSA at issue here, which were enacted in the aftermath of *Parden,* are among the first statutory enactments purporting in express terms to subject nonconsenting States to private suits. Although similar statutes have multiplied in the last generation, "they are of such recent vintage that they are no more probative than the [FLSA] of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice." *Printz, supra,* at 918.

Even the recent statutes, moreover, do not provide evidence of an understanding that Congress has a greater power to subject States to suit in their own courts than in federal courts. On the contrary, the statutes purport to create causes of actions against the States which are enforceable in federal, as well as state, court. To the extent recent practice thus departs from longstanding tradition, it reflects not so much an understanding that the States have surrendered their immunity from suit in their own courts as the erroneous view, perhaps inspired by *Parden* and *Union Gas*, that Congress may subject nonconsenting States to private suits in any forum.

3

The theory and reasoning of our earlier cases suggest the States do retain a constitutional immunity from suit in their own courts. We have often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court. See, *e. g.*, *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 321–322 (1837) ("No sovereign state is liable to be sued without her consent"); *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 (1876) ("A State, without its consent, cannot be sued by an individual"); *In re Ayers*, 123 U. S. 443, 506 (1887) (same); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 51 (1944) ("The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent").

We have said on many occasions, furthermore, that the States retain their immunity from private suits prosecuted in their own courts. See, *e. g.*, *Beers* v. *Arkansas*, 20 How. 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission"); *Railroad Co.* v. *Tennessee*, 101 U. S. 337, 339 (1880) ("The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty"); *Cunningham* v. *Macon & Brunswick*

R. Co., 109 U. S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution"); *Louisiana ex rel. New York Guaranty & Indemnity Co.* v. *Steele*, 134 U. S. 230, 232 (1890) (finding a suit against a state official in state court to be "clearly within the principle" of the Eleventh Amendment decisions); *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 39 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals"); *Seminole Tribe*, 517 U. S., at 71, n. 14 ("[T]his Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit"); see also *Great Northern Life Ins. Co.* v. *Read*, 322 U. S., at 59 (Frankfurter, J., dissenting) ("The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent"); accord, *id.*, at 51, 53 (majority opinion); cf. *Quern* v. *Jordan*, 440 U. S. 332, 340 (1979); *Green* v. *Mansour*, 474 U. S. 64, 71 (1985).

We have also relied on the States' immunity in their own courts as a premise in our Eleventh Amendment rulings. See *Hans*, 134 U. S., at 10 ("It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result [that a State may be sued by its own citizen though not by the citizen of another State, and that a State] may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Con-

stitution and the law, the result is no less startling and unexpected than *[Chisholm]"); id.*, at 18 ("The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power?").

In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young*, 209 U. S. 123 (1908), is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land. As we explained in *General Oil Co.* v. *Crain*, 209 U. S. 211 (1908), a case decided the same day as *Ex parte Young* and extending the rule of that case to state-court suits:

> "It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution . . . . See *Ex parte Young*, [209 U. S., at] 123, where this subject is fully discussed and the cases reviewed." 209 U. S., at 226–227.

Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine. See *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S., at 270–271 (principal opinion).

As it is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court, see Part II–A–1, *supra*, our decisions suggesting that the States retain an analogous constitutional immunity from private suits in their own courts support the conclusion that Congress lacks the Article I power to subject the States to private suits in those fora.

4

Our final consideration is whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution. We look both to the essential principles of federalism and to the special role of the state courts in the constitutional design.

Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. See, *e. g., United States* v. *Lopez*, 514 U. S., at 583 (KENNEDY, J., concurring); *Printz*, 521 U. S., at 935; *New York*, 505 U. S., at 188. The founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons." *In re Ayers*, 123 U. S., at 505. The principle of sovereign immunity preserved by constitutional design "thus accords the States the respect owed them as members

of the federation." *Puerto Rico Aqueduct and Sewer Authority,* 506 U. S., at 146; accord, *Coeur d'Alene Tribe, supra,* at 268 (recognizing "the dignity and respect afforded a State, which the immunity is designed to protect").

Petitioners contend that immunity from suit in federal court suffices to preserve the dignity of the States. Private suits against nonconsenting States, however, present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *In re Ayers, supra,* at 505; accord, *Seminole Tribe,* 517 U. S., at 58, regardless of the forum. Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.

In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. See generally *Hall,* 440 U. S., at 414–418. A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Cf. *Coeur d'Alene Tribe, supra,* at 276. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system

recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.

Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

A congressional power to strip the States of their immunity from private suits in their own courts would pose more subtle risks as well. "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government." *Great Northern Life Ins. Co.* v. *Read*, 322 U. S., at 53. When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." *In re Ayers*, *supra*, at 505. While the States have relinquished their immunity from suit in some special contexts—at least as a practical matter—see Part III, *infra,* this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.

A general federal power to authorize private suits for money damages would place unwarranted strain on the

States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place." *Louisiana* v. *Jumel*, 107 U. S. 711, 727–728 (1883).

By "'split[ting] the atom of sovereignty,'" the Founders established "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz* v. *Roe*, 526 U. S. 489, 504, n. 17 (1999), quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring). "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U. S., at 920. When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.

The asserted authority would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments, displacing "state decisions that 'go to the heart of representative government.'" *Gregory* v.

Ashcroft, 501 U. S. 452, 461 (1991). A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts. See *id.*, at 460 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign"). If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very Constitution from which its existence derives.

Congress cannot abrogate the States' sovereign immunity in federal court; were the rule to be different here, the National Government would wield greater power in the state courts than in its own judicial instrumentalities. Cf. *Howlett*, 496 U. S., at 365 (noting the anomaly that would arise if "a State might be forced to entertain in its own courts suits from which it was immune in federal court"); *Hilton*, 502 U. S., at 206 (recognizing the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute").

The resulting anomaly cannot be explained by reference to the special role of the state courts in the constitutional design. Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, see *Printz*, *supra*, at 935; *New York*, 505 U. S., at 188, it may require state courts of "adequate and appropriate" jurisdiction, *Testa*, 330 U. S., at 394, "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," *Printz*, *supra*, at 907. It would be an unprecedented step, however, to infer from the fact that Congress may declare federal law binding and enforceable in state courts the fur-

ther principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds not only its power to press other branches of the State into its service but even its control over the federal courts themselves. The conclusion would imply that Congress may in some cases act only through instrumentalities of the States. Yet, as Chief Justice Marshall explained: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends." *McCulloch* v. *Maryland*, 4 Wheat. 316, 424 (1819); cf. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 821 (1824) ("It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State").

The provisions of the Constitution upon which we have relied in finding the state courts peculiarly amenable to federal command, moreover, do not distinguish those courts from the Federal Judiciary. The Supremacy Clause does impose specific obligations on state judges. There can be no serious contention, however, that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself. The text of Article III, § 1, which extends federal judicial power to enumerated classes of suits but grants Congress discretion whether to establish inferior federal courts, does give strong support to the inference that state courts may be opened to suits falling within the federal judicial power. The Article in no way suggests, however, that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.

We have recognized that Congress may require state courts to hear only "matters appropriate for the judicial power," *Printz*, 521 U. S., at 907. Our sovereign immunity precedents establish that suits against nonconsenting States are not "properly susceptible of litigation in courts," *Hans*, 134 U. S., at 12, and, as a result, that "[t]he 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent," *Principality of Monaco*, 292 U. S., at 329 (quoting *Ex parte New York*, 256 U. S., at 497); accord, 292 U. S., at 322–323 (private suits against nonconsenting sovereigns are not "of a justiciable character"). We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts. As we explained in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938):

> "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." *Id.*, at 78–79.

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

III

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the

State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U. S. Const., Art. VI.

Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

The first of these limits is that sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." *Great Northern Life Ins. Co.* v. *Read*, 322 U. S., at 53. Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U. S. 203 (1987).

The States have consented, moreover, to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government. *Principality of Monaco*, *supra*, at 328–329 (collecting cases). A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the

members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the Founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 517 U. S., at 59. When Congress enacts appropriate legislation to enforce this Amendment, see *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick*, *supra*, at 456.

The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State. See, *e. g.*, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S., at 280; *Lincoln County* v. *Luning*, 133 U. S. 529 (1890). Nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State. See, *e. g.*, *In re Ayers*, 123 U. S., at 505–506; *Idaho* v. *Coeur d'Alene Tribe of Idaho*,

521 U. S., at 270 ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading"). The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief. Compare *Ex parte Young*, 209 U. S. 123 (1908), and *In re Ayers*, *supra*, with *Coeur d'Alene Tribe of Idaho*, *supra*, *Seminole Tribe*, *supra*, and *Edelman* v. *Jordan*, 415 U. S. 651 (1974). Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally. *Scheuer* v. *Rhodes*, 416 U. S. 232, 237–238 (1974); *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, 462 (1945).

The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S., at 105. Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause. See *Green* v. *Mansour*, 474 U. S., at 68. That we have, during the first 210 years of our constitutional history, found it unnecessary to decide the question presented here suggests a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law.

IV

The sole remaining question is whether Maine has waived its immunity. The State of Maine "regards the immunity from suit as 'one of the highest attributes inherent in the nature of sovereignty,'" *Cushing* v. *Cohen*, 420 A. 2d 919, 923 (Me. 1981) (quoting *Drake* v. *Smith*, 390 A. 2d 541, 543 (Me. 1978)), and adheres to the general rule that "a specific authority conferred by an enactment of the legislature is req-

uisite if the sovereign is to be taken as having shed the protective mantle of immunity," 420 A. 2d, at 923. Petitioners have not attempted to establish a waiver of immunity under this standard. Although petitioners contend the State has discriminated against federal rights by claiming sovereign immunity from this FLSA suit, there is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit. The State, we conclude, has not consented to suit.

V

This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. Theirs was the unique insight that freedom is enhanced by the creation of two governments, not one. We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the Found-

ers must yield to the politics of the moment. Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control. The Framers of the Constitution did not share our dissenting colleagues' belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so, including by a proxy in which individual citizens are authorized to levy upon the state treasuries absent the States' consent to jurisdiction.

The case before us depends upon these principles. The State of Maine has not questioned Congress' power to prescribe substantive rules of federal law to which it must comply. Despite an initial good-faith disagreement about the requirements of the FLSA, it is conceded by all that the State has altered its conduct so that its compliance with federal law cannot now be questioned. The Solicitor General of the United States has appeared before this Court, however, and asserted that the federal interest in compensating the States' employees for alleged past violations of federal law is so compelling that the sovereign State of Maine must be stripped of its immunity and subjected to suit in its own courts by its own employees. Yet, despite specific statutory authorization, see 29 U. S. C. § 216(c), the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation. The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the

State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second. The judgment of the Supreme Judicial Court of Maine is

Affirmed.

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

In *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), a majority of this Court invoked the Eleventh Amendment to declare that the federal judicial power under Article III of the Constitution does not reach a private action against a State, even on a federal question. In the Court's conception, however, the Eleventh Amendment was understood as having been enhanced by a "background principle" of state sovereign immunity (understood as immunity to suit), see *id.*, at 72, that operated beyond its limited codification in the Amendment, dealing solely with federal citizen-state diversity jurisdiction. To the *Seminole Tribe* dissenters, of whom I was one, the Court's enhancement of the Amendment was at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism.

Today's issue arises naturally in the aftermath of the decision in *Seminole Tribe.* The Court holds that the Constitution bars an individual suit against a State to enforce a federal statutory right under the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. § 201 *et seq.* (1994 ed. and Supp. III), when brought in the State's courts over its objection. In thus complementing its earlier decision, the Court of course confronts the fact that the state forum renders the Eleventh Amendment beside the point, and it has responded by discerning a simpler and more straightforward theory of state sovereign immunity than it found in *Seminole Tribe:* a State's sovereign immunity from all individual suits is a "fun-

damental aspect" of state sovereignty "confirm[ed]" by the Tenth Amendment. *Ante*, at 713, 714. As a consequence, *Seminole Tribe*'s contorted reliance on the Eleventh Amendment and its background was presumably unnecessary; the Tenth would have done the work with an economy that the majority in *Seminole Tribe* would have welcomed. Indeed, if the Court's current reasoning is correct, the Eleventh Amendment itself was unnecessary. Whatever Article III may originally have said about the federal judicial power, the embarrassment to the State of Georgia occasioned by attempts in federal court to enforce the State's war debt could easily have been avoided if only the Court that decided *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), had understood a State's inherent, Tenth Amendment right to be free of any judicial power, whether the court be state or federal, and whether the cause of action arise under state or federal law.

The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law. Nor does the Court fare any better with its subsidiary lines of reasoning, that the state-court action is barred by the scheme of American federalism, a result supposedly confirmed by a history largely devoid of precursors to the action considered here. The Court's federalism ignores the accepted authority of Congress to bind States under the FLSA and to provide for enforcement of federal rights in state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding.

On each point the Court has raised it is mistaken, and I respectfully dissent from its judgment.

I

The Court rests its decision principally on the claim that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," *ante,* at 713, an aspect which the Court understands to have survived the ratification of the Constitution in 1788 and to have been "confirm[ed]" and given constitutional status, *ante,* at 714, by the adoption of the Tenth Amendment in 1791. If the Court truly means by "sovereign immunity" what that term meant at common law, see *ante,* at 737, its argument would be insupportable. While sovereign immunity entered many new state legal systems as a part of the common law selectively received from England, it was not understood to be indefeasible or to have been given any such status by the new National Constitution, which did not mention it. See *Seminole Tribe*, *supra*, at 132–142, 160–162, and n. 55 (SOUTER, J., dissenting). Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution. Congress exercising its conceded Article I power may unquestionably abrogate such immunity. I set out this position at length in my dissent in *Seminole Tribe* and will not repeat it here.[1]

The Court does not, however, offer today's holding as a mere corollary to its reasoning in *Seminole Tribe,* substituting the Tenth Amendment for the Eleventh as the occasion

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[1] The Court inexplicably protests that "the right to trial by jury and the prohibition on unreasonable searches and seizures . . . derive from the common law," *ante,* at 733, but are nonetheless indefeasible. I cannot imagine how this could be thought relevant to my argument. These rights are constitutional precisely because they are enacted in the Sixth and Fourth Amendments, respectively, while the general prerogative of sovereign immunity appears nowhere in the Constitution. My point is that the common law rights that were not enacted into the Constitution were universally thought defeasible by statute.

demands, and it is fair to read its references to a "fundamental aspect" of state sovereignty as referring not to a prerogative inherited from the Crown, but to a conception necessarily implied by statehood itself. The conception is thus not one of common law so much as of natural law, a universally applicable proposition discoverable by reason. This, I take it, is the sense in which the Court so emphatically relies on Alexander Hamilton's reference in The Federalist No. 81, p. 548 (J. Cooke ed. 1961), to the States' sovereign immunity from suit as an "inherent" right, see *ante*, at 716, a characterization that does not require, but is at least open to, a natural law reading.

I understand the Court to rely on the Hamiltonian formulation with the object of suggesting that its conception of sovereign immunity as a "fundamental aspect" of sovereignty was a substantially popular, if not the dominant, view in the periods of Revolution and Confederation. There is, after all, nothing else in the Court's opinion that would suggest a basis for saying that the ratification of the Tenth Amendment gave this "fundamental aspect" its constitutional status and protection against any legislative tampering by Congress.[2] The Court's principal rationale for today's result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)?

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[2] I am assuming that the Court does not put forward the theory of the "fundamental aspect" as a newly derived conception of its own, necessarily comprehended by the Tenth Amendment guarantee only as a result of logic independent of any intention of the Framers. Nor does the Court argue, and I know of no reason to suppose, that every legal advantage a State might have enjoyed at common law was assumed to be an inherent attribute of all sovereignties, or was constitutionalized wholesale by the Tenth Amendment, any more than the Ninth Amendment constitutionalized all common law individual rights.

The answer is certainly no. There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common law power defeasible, like other common law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.

A

The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states," 1 J. Story, Commentaries on the Constitution § 207, p. 149 (5th ed. 1891). Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued. See 5 Sources and Documents of United States Constitutions 36 (W. Swindler ed. 1975) (Massachusetts); 2 *id.*, at 131 (Connecticut); 8 *id.*, at 363 (Rhode Island); 2 *id.*, at 434 (Georgia). Other charters were given to individuals, who were necessarily subject to suit. See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1897 (1983). If a colonial lawyer had looked into Blackstone for the theory of sovereign immunity, as indeed many did, he would have found nothing clearly suggesting that the Colonies as such enjoyed any immunity

from suit. "[T]he law ascribes to the king the attribute of *sovereignty*, or pre-eminence," said Blackstone, 1 W. Blackstone, Commentaries *241 (hereinafter Blackstone), and for him, the sources for this notion were Bracton[3] and Acts of Parliament that declared the Crown imperial, *id.*, at *241–*242. It was simply the King against whom "no suit or action can be brought . . . even in civil matters, because no court can have jurisdiction over him." *Id.*, at *242.[4] If a

[3] Bracton is the earliest source for the common law immunity of the King, and his explanation is essentially practical: "*Si autem ab eo petatur, cum breve non currat contra ipsum, locus erit supplicationi, quod factum suum corrigat et emendet.*" That is, "If [justice] is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend his act." 2 Bracton, De Legibus et Consuetudinibus Angliae 33 (G. Woodbine ed., S. Thorne transl. 1968) (London 1569 ed., folio 5b, Bk. I, ch. 8). The fact that no writ ran against the King was "no peculiar privilege; for no feudal lord could be sued in his own court." 3 W. Holdsworth, History of English Law 465 (3d ed. 1927). "'He can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident.'" *Nevada* v. *Hall*, 440 U. S. 410, 415, n. 6 (1979) (quoting 1 F. Pollock & F. Maitland, History of English Law 518 (2d ed. 1899)). It was this same view of the immunity that came down to Blackstone, who cited Finch for the view that the King must be petitioned and not sued. See H. Finch, Law, or a Discourse thereof, in Four Books 255 (1678 ed., reprinted 1992) ("Here in place of action against the King petition must be made unto him in the Chancery, or in Parliament, for no action did ever lie against the K[ing] at the Common Law, but the party is driven to his petition" (footnotes omitted)); 1 Blackstone *242.

[4] As I explain, *infra*, at 767–768, this common law conception of sovereign immunity differed from the natural law version, which understood immunity as derived from the fact that the sovereign was the font of the law, which could not bind him. I do not dispute, indeed I insist, that in England it was the common law version that existed, and so it is beside the point for the Court to protest that the King could not be sued under French law in his own courts, see *ante*, at 735; naturally not, since the common law conception was not couched in terms of who was the font of the law. This said, I note that it is surprising for the Court to say that "[i]t is doubtful whether the King was regarded . . . as the font of the

person should have "a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion." *Id.*, at *243.

It is worth pausing here to note that after Blackstone had explained sovereign immunity at common law, he went on to say that the common law tradition was compatible with sovereign immunity as discussed by writers on "natural law":

> "And this is entirely consonant to what is laid down by the writers on natural law. 'A subject,' says Puffendorf, 'so long as he continues a subject, hath no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws.' For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him." *Ibid.* (footnote omitted).[5]

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traditions and customs which formed the substance of the common law," *ibid.* Although Bracton said that "law makes the king," 2 Bracton, at 33, he also said that the unwritten law of England could properly be called law only to the extent that "the authority of the king or prince [has] first been added thereto," *id.*, at 19, and he spoke of "these English laws and customs, by the authority of kings," *id.*, at 21. The judges who announced the common law sat "in the place of the king," *id.*, at 20, and so in practice the common law certainly derived from him. Thus, at least for the most part, "[t]he custom of the king's court is the custom of England, and becomes the common law." 1 Pollock & Maitland, *supra* n. 3, at 184. But for this, Blackstone would probably not have remarked that the natural law theory produced a result "consonant" with the common law, 1 Blackstone *243; see *infra* this page and 768.

[5] For the original of the quoted passage, see 1 S. Pufendorf, De Jure Naturae et Gentium Libri Octo 915 (1688 ed., reprinted 1934); for a modern translation, see 2 S. Pufendorf, De Jure Naturae et Gentium Libri Octo 1344–1345 (C. & W. Oldfather transl. 1934) (hereinafter Pufendorf). Else-

Next Blackstone quoted Locke's explanation for immunity, according to which the risks of overreaching by "'a heady prince'" are "'well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger.'" *Ibid.* (quoting J. Locke, Second Treatise of Civil Government § 205 (1690 J. Gough ed. 1947)). By quoting Pufendorf and Locke, Blackstone revealed to his readers a legal-philosophical tradition that derived sovereign immunity not from the immemorial practice of England but from general theoretical principles. But although Blackstone thus juxtaposed the common law and natural law[6] conceptions of sovereign im-

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where in the same chapter, Pufendorf expressly derives the impossibility of enforcing a King's promises against him from natural law theory: "Therefore, since a king enjoys natural liberty, if he has discovered any fault in a pact of his making, he can of his own authority serve notice upon the other party that he refuses to be obligated by reason of that fault; nor does he have to secure of the other [party to the pact] a release from a thing [namely, the pact] which, of its own nature, is incapable of producing an obligation or right." *Id.*, at 1342–1343.

[6] The Court says that to call its approach "natural law" is "an apparent attempt to disparage," *ante*, at 758. My object, however, is not to call names but to show that the majority is wrong, and in doing that it is illuminating to explain the conceptual tradition on which today's majority draws, one that can be traced to the Court's opinion from its origins in Roman sources. I call this conception the "natural law" view of sovereign immunity, despite the historical ambiguities associated with the term, because the expression by such figures as Pufendorf, Hobbes, and Locke, of the doctrine that the sovereign might not be sued, was associated with a concept of sovereignty itself derived from natural law. See Pufendorf 1103–1104; T. Hobbes, Leviathan Part 2, chs. 17–18 (1651), in 23 Great Books of the Western World 99–104 (1952) (hereinafter Leviathan) (describing sovereignty as the result of surrender of individual natural rights to single authority); J. Locke, Second Treatise of Civil Government §§ 95–99 (1690 J. Gough ed. 1947) (describing political community formed by individual consent out of a state of nature). The doctrine that the sovereign could not be sued by his subjects might have been thought by medieval civil lawyers to belong to *jus gentium*, the law of nations, which was a type of natural law; or perhaps in its original form it might have been understood as a precept of positive, written law. The earliest source

munity, he did not confuse them. It was as well he did not, for although the two conceptions were arguably "consonant" in England, where according to Blackstone, the Crown was sovereign,[7] their distinct foundations could make a difference in America, where the location of sovereignty was an issue that independence would raise with some exigence.

B

Starting in the mid-1760's, ideas about sovereignty in colonial America began to shift as Americans argued that, lacking a voice in Parliament, they had not in any express way consented to being taxed. See B. Bailyn, The Ideological Origins of the American Revolution 204–219 (1968); G. Wood, The Creation of the American Republic, 1776–1787, pp. 347–348 (1969). The story of the subsequent development of conceptions of sovereignty is complex and uneven;

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for this conception is a statement of Ulpian's recorded in the Digest, I.3.31, and much interpreted by medieval jurists, "*Princeps legibus solutus est*"; "The emperor is not bound by statutes." See 1 The Digest of Justinian 13 (T. Mommsen & P. Krueger eds., A. Watson transl. 1985); Tierney, The Prince Is Not Bound by the Laws: Accursius and the Origins of the Modern State, 5 Comparative Studies in Society and History 378 (1963); K. Pennington, The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition 77–79 (1993). Through its reception and discussion in the continental legal tradition, where it related initially to the Emperor, but also eventually to a King, to the Pope, and even to a city-state, see *id.*, at 90, this conception of sovereign immunity developed into a theoretical model applicable to any sovereign body. Thus Hobbes could begin his discussion of the subject by saying, "The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws." Leviathan, ch. 26, p. 130. There is debate on the degree to which different medieval interpreters of the maxim *Princeps legibus solutus est* understood natural or divine law to limit the prince's freedom from the statutes. See Tierney, *supra*, at 390–394; Pennington, *supra*, at 206–208; J. Canning, The Political Thought of Baldus de Ubaldis 74–79 (1987).

[7] A better formulation would have clarified that sovereignty resided in the King in Parliament, which was the dominant view by the later 17th century. See, *e. g.*, G. Wood, The Creation of the American Republic, 1776–1787, p. 347 (1969).

here, it is enough to say that by the time independence was declared in 1776, the locus of sovereignty was still an open question, except that almost by definition, advocates of independence denied that sovereignty with respect to the American Colonies remained with the King in Parliament.

As the concept of sovereignty was unsettled, so was that of sovereign immunity. Some States appear to have understood themselves to be without immunity from suit in their own courts upon independence.[8] Connecticut and Rhode Island adopted their pre-existing charters as constitutions, without altering the provisions specifying their suability. See Gibbons, 83 Colum. L. Rev., at 1898, and nn. 42–43. Other new States understood themselves to be inheritors of the Crown's common law sovereign immunity and so enacted statutes authorizing legal remedies against the State parallel to those available in England.[9] There, although the Crown

[8] The Court claims that the doctrine of sovereign immunity was "universal in the States when the Constitution was drafted and ratified," *ante*, at 715–716, but the examples of Connecticut and Rhode Island suggest that this claim is overstated. It is of course true that these States' preservation without comment of their colonial suability could be construed merely as a waiver of sovereign immunity, and not as a denial of the principle. But in light of these States' silence as to any change in their status as suable bodies, it would be tendentious so to understand it. The Court relies for its claim on Justice Iredell's statement in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), that there was "no doubt" that no State had "'any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State . . . either when the Constitution was adopted, or at the time the judicial act was passed.'" *Ante*, at 716 (quoting *Chisholm*, *supra*, at 434–435). But as the cases of Rhode Island and Connecticut demonstrate, Justice Iredell was simply wrong. As I have had occasion to say elsewhere, that an assertion of historical fact has been made by a Justice of the Court does not make it so. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 107, n. 5 (1996) (dissenting opinion).

[9] The Court seems to think I have overlooked this point, that the exceptions imply a rule, see *ante*, at 724 (provisions for chancery petitions "only confir[m]" immunity enjoyed by these States). The reason for canvassing the spectrum of state thought and practice is not to deny the undoubted place of sovereign immunity in most States' courts, but to examine what

was immune from suit, the contemporary practice allowed private litigants to seek legal remedies against the Crown through the petition of right or the *monstrans de droit* in the Chancery or Exchequer. See 3 Blackstone *256–*257. A Virginia statute provided:

> "'Where the auditors according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity.'" 9 W. Hening, Statutes at Large: Being a Collection of the Laws of Virginia 536, 540 (1821), quoted in Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 939–940, and n. 142 (1997).

This "petition" was clearly reminiscent of the English petition of right, as was the language "shall proceed to do right thereon," which paralleled the formula of royal approval, "*soit droit fait al partie*," technically required before a petition of right could be adjudicated. See 3 Blackstone *256; Pfander, *supra*, at 940, and nn. 143–144. A New York statute similarly authorized petition to the court of chancery by anyone who thought himself aggrieved by the state auditor general's resolution of his account with the State. See An Act Directing a Mode for the Recovery of Debts Due to, and the Settlement of Accounts with, this State, March 30, 1781,

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turns out to be the scanty evidence that the States understood sovereign immunity in the indefeasible, civilian, natural law sense, necessary to support the Court's position here.

in The First Laws of the State of New York 192 (1782 ed., reprinted 1984); see also Pfander, *supra*, at 941, and n. 145.

Pennsylvania not only adopted a law conferring the authority to settle accounts upon the Comptroller General, see Act of Apr. 13, 1782, ch. 959, 2 Laws of the Commonwealth of Pennsylvania 19 (1810), but in 1785 provided for appeal from such adjudications to the Pennsylvania Supreme Court, where a jury trial could be had, see *id.*, at 26–27; Pfander, *supra*, at 941, n. 147. Although in at least one recorded case before the Pennsylvania Supreme Court the Commonwealth, citing Blackstone, pleaded common law sovereign immunity, see *Respublica* v. *Sparhawk*, 1 Dall. 357, 363 (Pa. 1788), the Supreme Court of Pennsylvania did not reach this argument, concluding on other grounds that it lacked jurisdiction.[10] Two years after this decision, under the influence of James Wilson, see C. Jacobs, The Eleventh Amendment and Sovereign Immunity 25, and 169, n. 53 (1972), Pennsylvania adopted a new constitution, which provided that "[s]uits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct." Pa. Const., Art. IX, § 11 (1790), reprinted in 8 Sources and Documents of United States Constitutions, at 293; see also Pfander, *supra*, at 928, n. 101.[11]

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[10] In a suit against Virginia in the Court of Common Pleas for Philadelphia County, Virginia pleaded sovereign immunity in natural law terms, and the sheriff was excused from making return of the writ attaching Virginia's goods, see *Nathan* v. *Virginia*, 1 Dall. 77, n. (1781), but this was only after the Supreme Executive Council of the Commonwealth had already ordered the goods returned and, in any event, involved the immunity of one State in the courts of another, and not the distinct immunity of a State in her own courts, see *Nevada* v. *Hall*, 440 U. S., at 414.

[11] Whether this formulation was a constitutional waiver of sovereign immunity or an affirmative repudiation of its applicability is uncertain, but the broad language opening the courts to all suits, and the apparent desire to exceed the previously available statutory scheme, would appear to support the latter interpretation.

Around the time of the Constitutional Convention, then, there existed among the States some diversity of practice with respect to sovereign immunity; but despite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State, see, *e. g.*, Pennsylvania Constitution, Art. III (1776), 8 Sources and Documents of United States Constitutions, *supra*, at 278 ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same"), no State declared that sovereign immunity was one of those rights. To the extent that States were thought to possess immunity, it was perceived as a prerogative of the sovereign under common law. And where sovereign immunity was recognized as barring suit, provisions for recovery from the State were in order, just as they had been at common law in England.

C

At the Constitutional Convention, the notion of sovereign immunity, whether as natural law or as common law, was not an immediate subject of debate, and the sovereignty of a State in its own courts seems not to have been mentioned. This comes as no surprise, for although the Constitution required state courts to apply federal law, the Framers did not consider the possibility that federal law might bind States, say, in their relations with their employees.[12] In the subse-

[12] The Court says, "the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip States of the immunity." *Ante*, at 741. In fact, a stalwart supporter of the Constitution, James Wilson, laid the groundwork for just such a view at the Pennsylvania Convention, see *infra*, at 777–778. For the most part, it is true, the surviving records of the ratifying conventions do not suggest that much thought was given to the issue of suit against States in their own courts. But this silence does not tell us that the Framers' generation thought the prerogative so well settled as to be an inherent right of States, and not a common law creation. It says only that at the conventions, the issue was not on the participants'

quent ratification debates, however, the issue of jurisdiction over a State did emerge in the question whether States might be sued on their debts in federal court, and on this point, too, a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself.

The only arguable support for the Court's absolutist view that I have found among the leading participants in the debate surrounding ratification was the one already mentioned, that of Alexander Hamilton in The Federalist No. 81, where he described the sovereign immunity of the States in language suggesting principles associated with natural law:

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated [that States might be sued on their debts in federal court] must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, at 548–549.

Hamilton chose his words carefully, and he acknowledged the possibility that at the Convention the States might have surrendered sovereign immunity in some circumstances, but the thrust of his argument was that sovereign immunity was "inherent in the nature of sovereignty."[13] An echo of Pufen-

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minds because the nature of sovereignty was not always explicitly addressed.

[13] In *Seminole Tribe,* I explained that Hamilton had in mind state sovereign immunity only with respect to diversity cases applying state contract law. See 517 U. S., at 145–149 (dissenting opinion). Here I intend simply

dorf may be heard in his reference to "the conscience of the sovereign";[14] and the universality of the phenomenon of sovereign immunity, which Hamilton claimed ("the general sense and the general practice of mankind"), is a peculiar feature of the natural law conception. The apparent novelty and uniqueness of Hamilton's employment of natural law terminology to explain the sovereign immunity of the States is worth remarking, because it stands in contrast to formulations indicating no particular position on the natural-law-versus-common-law origin, to the more widespread view that sovereign immunity derived from common law, and to the more radical stance that the sovereignty of the people made sovereign immunity out of place in the United States. Hamilton's view is also worth noticing because, in marked contrast to its prominence in the Court's opinion today, as well as in *Seminole Tribe*, 517 U. S., at 54, and in *Hans* v. *Louisiana*, 134 U. S. 1, 13 (1890), cf. *Great Northern Life Ins. Co.*

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to point out that with respect to state law, in the main Hamilton spoke consistently with deriving sovereign immunity from a natural law model. That he did so is consistent with his focus on state law; Hamilton almost certainly knew that the natural law theory of sovereign immunity extended only to rights created by the sovereign, and so would not have applied to federal-question claims against a State in either state or federal court. Thus when the Court claims that subjecting States to suit in state court "would turn on its head the concern of the founding generation—that Article III might be used to circumvent state-court immunity," *ante*, at 743, it has failed to realize that even those Framers who, like Hamilton, aimed to preserve state sovereign immunity, had in mind only state immunity on state-law claims, not federal questions.

[14] Pufendorf's discussion of sovereign immunity, just before the passage quoted by Blackstone, begins (in a modern translation): "Now although promises and pacts are as binding upon the conscience of a king as upon that of any private citizen, there is, nevertheless, this difference between the obligation of a king and that of subjects, namely, that it is no trouble for the former to exact what is owed him from a subject, when he demurs, while a citizen, so long as he remains such, has no means within his power to recover his due from a king against his will." 2 Pufendorf 1344–1345.

v. *Read*, 322 U. S. 47, 51 (1944), it found no favor in the early Supreme Court, see *infra*, at 781.

In the Virginia ratifying convention, Madison was among those who debated sovereign immunity in terms of the result it produced, not its theoretical underpinnings. He maintained that "[i]t is not in the power of individuals to call any state into court," 3 Debates on the Federal Constitution 533 (J. Elliot 2d ed. 1863) (hereinafter Elliot's Debates), and thought that the phrase "in which a State shall be a Party" in Article III, § 2, must be interpreted in light of that general principle, so that "[t]he only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court." Elliot's Debates 533.[15] John Marshall argued along the same lines against the possibility of federal jurisdiction over private suits against States, and he invoked the immunity of a State in its own courts in support of his argument:

> "I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court." *Id.*, at 555.

There was no unanimity among the Virginians either on state- or federal-court immunity, however, for Edmund Randolph anticipated the position he would later espouse as plaintiff's counsel in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). He contented himself with agnosticism on the significance of what Hamilton had called "the general practice of mankind," and argued that notwithstanding any natural law view of the nonsuability of States, the Constitution permitted suit against a State in federal court: "I think, whatever the law

[15] Madison seems here to have overlooked the possibility of concurrent jurisdiction between the Supreme Court's original jurisdiction and that of state courts.

of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party.*" 3 Elliot's Debates 573. Randolph clearly believed that the Constitution both could, and in fact by its language did, trump any inherent immunity enjoyed by the States; his view on sovereign immunity in state court seems to have been that the issue was uncertain ("whatever the law of nations may say").

At the furthest extreme from Hamilton, James Wilson made several comments in the Pennsylvania Convention that suggested his hostility to any idea of state sovereign immunity. First, he responded to the argument that "the sovereignty of the states is destroyed" if they are sued by the United States, "because a suiter in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner." 2 *id.*, at 490. For Wilson, "[t]he answer [was] plain and easy: the government of each state ought to be subordinate to the government of the United States." *Ibid.*[16] Wil-

[16] The Court says this statement of Wilson's is "startling even today," *ante*, at 725, but it is hard to see what is so startling, then or now, about the proposition that, since federal law may bind state governments, the state governments are in this sense subordinate to the national. The Court seems to have forgotten that one of the main reasons a Constitutional Convention was necessary at all was that under the Articles of Confederation Congress lacked the effective capacity to bind the States. The Court speaks as if the Supremacy Clause did not exist or *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), had never been decided.

Nor is the Court correct to say that the views of Wilson, Randolph, and General Charles Cotesworth Pinckney, see n. 17, *infra*, "cannot bear the weight" I put upon them, *ante*, at 725. Indeed, the yoke is light, since I intend these Framers only to do their part in showing that a diversity of views with respect to sovereignty and sovereign immunity existed at the several state conventions, and that this diversity stands in the way of the Court's assumption that the founding generation understood sovereign

son was also pointed in commenting on federal jurisdiction over cases between a State and citizens of another State: "When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing." *Id.*, at 491. Finally, Wilson laid out his view that sovereignty was in fact not located in the States at all: "Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare." *Id.*, at 443.[17] While this

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immunity in the natural law sense as indefeasibly "fundamental" to statehood.

Finally, the Court calls Wilson's view "a radical nationalist vision of the constitutional design," *ibid.*, apparently in an attempt to discount it. But while Wilson's view of sovereignty was indeed radical in its deviation from older conceptions, this hardly distanced him from the American mainstream, and in October 1787, Washington himself called Wilson "as able, candid, & honest a member as any in Convention," 5 Papers of George Washington: Confederation Series 379 (W. Abbot & D. Twohig eds. 1997).

[17] Nor was Wilson alone in this theory. At the South Carolina Convention, General Charles Cotesworth Pinckney, who had attended the Philadelphia Convention, took the position that the States never enjoyed individual and unfettered sovereignty, because the Declaration of Independence was an act of the Union, not of the particular States. See 4 Elliot's Debates 301. In his view, the Declaration "sufficiently confutes the . . . doctrine of the individual sovereignty and independence of the several states. . . . The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration; the several states are not even mentioned by name in any part of it,—as if it was intended to impress this maxim on America, that our freedom and independence arose from our

statement did not specifically address sovereign immunity, it expressed the major premise of what would later become Justice Wilson's position in *Chisholm:* that because the people, and not the States, are sovereign, sovereign immunity has no applicability to the States.

From a canvass of this spectrum of opinion expressed at the ratifying conventions, one thing is certain. No one was espousing an indefeasible, natural law view of sovereign immunity. The controversy over the enforceability of state debts subject to state law produced emphatic support for sovereign immunity from eminences as great as Madison and Marshall, but neither of them indicated adherence to any immunity conception outside the common law.

D

At the close of the ratification debates, the issue of the sovereign immunity of the States under Article III had not been definitively resolved, and in some instances the indeterminacy led the ratification conventions to respond in ways that point to the range of thinking about the doctrine. Several state ratifying conventions proposed amendments and issued declarations that would have exempted States from subjection to suit in federal court.[18] The New York Conven-

union, and that without it we could neither be free nor independent." *Ibid.*

[18] "[T]he grand objection, that the states were made subject to the action of an individual, still remained for several years, notwithstanding the concurring dissent of several states at the time of accepting the constitution." 1 W. Blackstone, Commentaries, App. 352 (St. G. Tucker ed. 1803). In a footnote, Tucker specified that "[t]he several conventions of Massachusetts, New Hampshire, Rhode Island, New York, Virginia, and North Carolina, proposed amendments in this respect." *Ibid.* The proposed amendments of the latter four States, which may be found in Elliot's Debates, are discussed immediately *infra* this page and 779–781. The extant published versions of the proposed amendments of Massachusetts and New Hampshire do not include such a proposed amendment. See, *e. g.*, 1 Elliot's Debates 322–323 (nine proposed amendments of Massachusetts); 2 *id.*, at 177–178 (same); H. R. Doc. No. 398, 69th Cong., 1st Sess., 1018–1020 (1927)

tion's statement of ratification included a series of declarations framed as proposed amendments, among which was one stating "That the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." 1 Elliot's Debates 329.[19] Whether that amendment was meant to alter or to clarify Article III as ratified is uncertain, but regardless of its precise intent, New York's response to the draft proposed by the Convention of 1787 shows that there was no consensus at all on the question of state suability (let alone on the underlying theory of immunity doctrine). There was, rather, an unclear state of affairs which it seemed advisable to stabilize.

The Rhode Island Convention, when it finally ratified on June 16, 1790, called upon its representatives to urge the passage of a list of amendments. This list incorporated language, some of it identical to that proposed by New York, in the following form:

> "It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state; but, to remove all doubts or controversies respect-

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(same); 1 Elliot's Debates 325–326 (12 proposed amendments of New Hampshire); H. R. Doc. No. 398, *supra*, at 1025–1026 (same).

[19] It is conceivable that the New York Convention, which was after all the intended audience for The Federalist, thought that the States had some sort of an inherent right against being sued in federal court. But this is unlikely, because numerous other of the proposed amendments declared so-called "rights" in no uncertain terms, see, *e. g.*, 1 Elliot's Debates 328 ("[T]he people have an equal, natural, and unalienable right freely and peaceably to exercise their religion"; trial by jury is "one of the greatest securities to the rights of a free people"; "[T]he people have a right peaceably to assemble together"), whereas the proposed amendment regarding suits against States simply stated that the judicial power "does not extend . . . to authorize any suit by any person against a state," and said nothing about any rights, inherent or otherwise. *Id.*, at 329.

> ing the same, that it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states . . . in liquidating and discharging the public securities of any one state." *Id.*, at 336.

Even more clearly than New York's proposal, this amendment appears to have been intended to clarify Article III as reflecting some theory of sovereign immunity, though without indicating which one.

Unlike the Rhode Island proposal, which hinted at a clarification of Article III, the Virginia and North Carolina ratifying conventions proposed amendments that by their terms would have fundamentally altered the content of Article III. The Virginia Convention's proposal for a new Article III omitted entirely the language conferring federal jurisdiction over a controversy between a State and citizens of another State, see 3 *id.*, at 660–661, and the North Carolina Convention proposed an identical amendment, see 4 *id.*, at 246–247. These proposals for omission suggest that the conventions of Virginia and North Carolina thought they had subjected themselves to citizen suits under Article III as enacted, and that they wished not to have done so.[20] There is, thus, no suggestion in their resolutions that Article III as drafted was fundamentally at odds with an indefeasible natural law sovereignty, or with a conception that went to the essence of what it meant to be a State. At all events, the state ratifying conventions' felt need for clarification on the question of

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[20] The Court says "there is no evidence that [the proposed amendments] were directed toward the question of sovereign immunity or that they reflect an understanding that the States would be subject to private suits without consent under Article III as drafted." *Ante,* at 725. No evidence, that is, except the proposed amendments themselves, which would have omitted the Citizen-State Diversity Clause. If the proposed omission is not evidence going to sovereign immunity to private suits, one wonders what would satisfy the Court.

state suability demonstrates that uncertainty surrounded the matter even at the moment of ratification. This uncertainty set the stage for the divergent views expressed in *Chisholm*.

E

If the natural law conception of sovereign immunity as an inherent characteristic of sovereignty enjoyed by the States had been broadly accepted at the time of the founding, one would expect to find it reflected somewhere in the five opinions delivered by the Court in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). Yet that view did not appear in any of them. And since a bare two years before *Chisholm*, the Bill of Rights had been added to the original Constitution, if the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity so as to endue it with the equivalent of the natural law conception, one would be certain to find such a development mentioned somewhere in the *Chisholm* writings. In fact, however, not one of the opinions espoused the natural law view, and not one of them so much as mentioned the Tenth Amendment. Not even Justice Iredell, who alone among the Justices thought that a State could not be sued in federal court, echoed Hamilton or hinted at a constitutionally immutable immunity doctrine.

Chisholm presented the questions whether a State might be made a defendant in a suit brought by a citizen of another State, and if so, whether an action of assumpsit would lie against it. See *id.*, at 420 (questions presented).[21] In rep-

[21] The case had first been brought before the Federal Circuit Court for the District of Georgia, over which Justice Iredell and District Judge Nathaniel Pendleton had presided. Ultimately, Justice Iredell held that the Circuit Court had no jurisdiction in the case because Congress had not conferred such jurisdiction on it. See 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 128–129, 154 (M. Marcus ed. 1994). Georgia had maintained that it was "a free, sov[e]reign, and independent State, and . . . cannot be drawn or compelled, nor at any Time

resenting Chisholm, Edmund Randolph, the Framer[22] and then Attorney General, not only argued for the necessity of a federal forum to vindicate private rights against the States, see *id.*, at 422, but rejected any traditional conception of sovereignty. He said that the sovereignty of the States, which he acknowledged, *id.*, at 423, was no barrier to jurisdiction, because "the present Constitution produced a new order of things. It derives its origin immediately from the people . . . . The States are in fact assemblages of these individuals who are liable to process," *ibid.*

Justice Wilson took up the argument for the sovereignty of the people more vociferously. Building on a conception of sovereignty he had already expressed at the Pennsylvania

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past hath been accustomed to be, or could be drawn or compelled to answer against the will of the said State of Georgia, before any Justices of the federal Circuit Court for the District of Georgia or before any Justices of any Court of Law or Equity whatever." Plea to the Jurisdiction, Oct. 17, 1791, *id.*, at 143. Chisholm demurred to the plea on the apparent ground that while the plea alleged that Georgia could not be compelled to appear before any court, Article III expressly declared that the federal judicial power extended to all controversies between a State and citizens of another State. Demurrer, *id.*, at 144. In his unreported opinion, Justice Iredell dispensed with this demurrer. He first stated that the plea sufficiently alleged that the District Court lacked jurisdiction. *Id.*, at 150. He added that in any case, the existence of Congress's constitutional authority to create courts to hear controversies between a State and citizens of another State did not mean that Congress had in fact created such courts. *Id.*, at 151. Third, Justice Iredell pointed out that the right to create courts for cases in which a State was a party did not mean that Congress could confer jurisdiction in cases like the one at bar, because the word "controversies" in Article III might refer only to situations "where such controversies could formerly have been maintained" in state court. Since "under the jurisdiction of a particular State Sovereigns may be liable in some instances but not in others," just as "[i]n England the property in possession of the crown can be affected by an adverse Process, tho' certainly the King cannot be sued for the recovery of a sum of money," *ibid.*, it appeared to Justice Iredell that under some conditions Article III did not authorize suits against States.

[22] Framer but not signer.

ratifying convention, see *supra*, at 777–778, he began by noting what he took to be the pregnant silence of the Constitution regarding sovereignty:

> "To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves 'SOVEREIGN' people of the *United States:* But serenely conscious of the *fact*, they avoided the *ostentatious declaration.*" 2 Dall., at 454.

As if to contrast his own directness[23] with the Framers' delicacy, the Framer-turned-Justice explained in no uncertain terms that Georgia was not sovereign with respect to federal jurisdiction (even in a diversity case):

> "As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the 'People of the United States,' did *not* surrender the Supreme or sovereign Power to that State; but, *as to*

[23] Justice Wilson hinted that in his own private view, citizens of the States had not conferred sovereignty in the sense of absolute authority upon their state governments, because they had retained some rights to themselves: "[A]ccording to some writers, every State, which governs itself without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of *Georgia;* whether those citizens have done, as the individuals of *England* are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the *United States*, the citizens of *Georgia* have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State *dependent*, instead of being sovereign; these are questions, to which, as a Judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the *Union*, I know, and am interested to know, that the most satisfactory answers can be given." *Chisholm*, 2 Dall., at 457 (citation omitted).

> *the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT *a sovereign State*." *Id.*, at 457.

This was necessarily to reject any natural law conception of sovereign immunity as inherently attached to an American State, but this was not all. Justice Wilson went on to identify the origin of sovereign immunity in the feudal system that had, he said, been brought to England and to the common law by the Norman Conquest. After quoting Blackstone's formulation of the doctrine as it had developed in England, he discussed it in the most disapproving terms imaginable:

> "This last position [that the King is sovereign and no court can have jurisdiction over him] is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in *England*, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and *this* side of the Atlantic, been implicitly and generally received by those, who neither examined their *principles* nor their *consequences[.]* The principle is, that all human law must be prescribed by a *superior*. This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*." *Id.*, at 458.

With this rousing conclusion of revolutionary ideology and rhetoric, Justice Wilson left no doubt that he thought the

doctrine of sovereign immunity entirely anomalous in the American Republic. Although he did not speak specifically of a State's immunity in its own courts, his view necessarily requires that such immunity would not have been justifiable as a tenet of absolutist natural law.

Chief Justice Jay took a less vehement tone in his opinion, but he, too, denied the applicability of the doctrine of sovereign immunity to the States. He explained the doctrine as an incident of European feudalism, *id.*, at 471, and said that by contrast,

> "[n]o such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are *sovereigns without subjects* (unless the *African* slaves among us may be so called) and have none to govern but *themselves;* the citizens of *America* are equal as fellow citizens, and as joint tenants in the sovereignty." *Id.*, at 471–472.

From the difference between the sovereignty of princes and that of the people, Chief Justice Jay argued, it followed that a State might be sued. When a State sued another State, as all agreed it could do in federal court, all the people of one State sued all the people of the other. "But why it should be more incompatible, that all the people of a State should be sued by *one* citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike." *Id.*, at 473. Finally, Chief Justice Jay pointed out, Article III authorized suits between a State and citizens of another State. Although the Chief Justice reserved judgment on whether the United States might be sued by a citizen, given that the courts must rely on the Executive to implement their decisions, he made it clear that this reservation was practical, and not theoretical: "I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course

of law, be compelled to do justice, and be sued by individual citizens." *Id.*, at 478. Although Chief Justice Jay did not speak specifically to the question of state sovereign immunity in state court, his theory shows that he considered not the States, but the people collectively, to be sovereign; and there is thus no reason to think he would have denied that the people of the Nation could override any state claim to sovereign immunity in a matter committed to the Nation.

Justice Cushing's opinion relied on the express language of Article III to hold that Georgia might be sued in federal court. He dealt shortly with the objection that States' sovereignty would be thereby restricted so that States would be reduced to corporations: "As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers?" *Id.*, at 468. Observing that the Constitution limits the powers of the States in numerous ways, he concluded that "no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole." *Ibid.* From the opinion, it is not possible to tell with certainty what Justice Cushing thought about state sovereign immunity in state court, although his introductory remark is suggestive. The case, he wrote, "turns not upon the law or practice of *England*, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the *United States.*" *Id.*, at 466. It is clear that he had no sympathy for a view of sovereign immunity inherent in statehood and untouchable by national legislative authority.

Justice Blair, like Justice Cushing, relied on Article III, and his brief opinion shows that he acknowledged state sovereign immunity, but common law immunity in state court. First, Justice Blair asked hypothetically whether a verdict against the plaintiff would be preclusive if the plaintiff "should renew his suit against the State, in any mode in

which she may permit herself to be sued in her own Courts." *Id.*, at 452. Second, he commented that there was no need to require the plaintiff to proceed by way of petition:

> "When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty." *Ibid.*

It is worth noting that for Justice Blair, the petition brought in state court was properly called a suit. This reflects the contemporary practice of his native Virginia, where, as we have seen, *supra*, at 769, suits as of right against the State were authorized by statute. Justice Blair called sovereignty "an exemption from suit in any other than the sovereign's own Courts" because he assumed that, in its own courts, a sovereign will naturally permit itself to be sued as of right.

Justice Iredell was the only Member of the Court to hold that the suit could not lie; but if his discussion was far-reaching, his reasoning was cautious. Its core was that the Court could not assume a waiver of the State's common law sovereign immunity where Congress had not expressly passed such a waiver. See 2 Dall., at 449 (dissenting opinion). Although Justice Iredell added, in what he clearly identified as dictum, that he was "strongly against" any construction of the Constitution "which will admit, under any circumstances, a compulsive suit against a State for the recovery of money," *ibid.*,[24] he made it equally clear that he

[24] The basis for the dictum may be found earlier in the opinion, where Justice Iredell explained that it was uncertain whether Article III's extension of the federal judicial power to cases between a State and citizens of another State "is to be construed as intending merely a transfer of juris-

understood sovereign immunity as a common law doctrine passed to the States with independence:

> "No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union* in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as compleatly sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but such *as the States*

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diction from one tribunal to another, or as authorizing the Legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption." *Id.*, at 436. Justice Iredell seems to have believed that Article III authorized only the former; in other words, that the Framers intended to permit Article III jurisdiction in suits against a State only where some other existing court could also hear such a claim. Because in Justice Iredell's view, state courts could nowhere hear suits against a State at the time of ratification, see *id.*, at 434–435, it followed that Article III probably did not authorize such suits. Justice Iredell's reasoning, it must be said, differed markedly from the reasoning the Court adopts today. Justice Iredell believed simply that the Clause in Article III extending jurisdiction to controversies between a State and citizens of another State did not confer any extra lawmaking authority on Congress that was not found elsewhere in the Constitution. Because he could conceive of no other constitutional provision authorizing Congress to create a private right of action against a State, he concluded that none could exist. Today, of course, it is established that the commerce power authorizes Congress to create private rights as against the States. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). The Court today takes the altogether different tack of arguing that state immunity from suit in state court was an inherent right of States preserved by the Tenth Amendment. Whatever Justice Iredell might have thought of this argument, it gets no support from his opinion.

> *have surrendered to them:* Of course the part not surrenderred must remain as it did before." *Id.*, at 435.

This did not mean, of course, that the States had not delegated to Congress the power to subject them to suit, but merely that such a delegation would have been necessary on Justice Iredell's view.

In sum, then, in *Chisholm* two Justices (Jay and Wilson), one of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts; one (Cushing) was essentially silent on the issue of sovereign immunity in state court; one (Blair) took a cautious position affirming the pragmatic view that sovereign immunity was a continuing common law doctrine and that States would permit suit against themselves as of right; and one (Iredell) expressly thought that state sovereign immunity at common law rightly belonged to the sovereign States. Not a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood, and neither counsel for Georgia before the Circuit Court, see n. 21, *supra,* nor Justice Iredell seems even to have conceived the possibility that the new Tenth Amendment produced the equivalent of such a doctrine. This dearth of support makes it very implausible for today's Court to argue that a substantial (let alone a dominant) body of thought at the time of the framing understood sovereign immunity to be an inherent right of statehood, adopted or confirmed by the Tenth Amendment.[25]

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[25] It only makes matters worse for the Court that two States, New York and Maryland, voluntarily subjected themselves to suit in the Supreme Court around the time of *Chisholm.* See Marcus & Wexler, Suits Against States: Diversity of Opinion in the 1790s, 1993 J. Sup. Ct. Hist. 73, 74–78. At the Court's February Term, 1791, before *Chisholm,* Maryland entered a plea (probably as to the merits) in *Van Staphorst* v. *Maryland,* see 1993 J. Sup. Ct. Hist., at 74, a suit brought by a foreign citizen for debts owed by the State, but then settled the suit to avoid the establishment of

The Court's discomfort is evident in its obvious recognition that its natural law or Tenth Amendment conception of state sovereign immunity is insupportable if *Chisholm* stands. Hence the Court's attempt to discount the *Chisholm* opinions, an enterprise in which I believe it fails.

The Court, citing *Hans* v. *Louisiana*, 134 U. S. 1 (1890), says that the Eleventh Amendment "overruled" *Chisholm*, *ante*, at 723, but the animadversion is beside the point. The significance of *Chisholm* is its indication that in 1788 and 1791 it was not generally assumed (indeed, hardly assumed at all) that a State's sovereign immunity from suit in its own courts was an inherent, and not merely a common law, advantage. On the contrary, the testimony of five eminent legal minds of the day confirmed that virtually everyone who understood immunity to be legitimate saw it as a common law prerogative (from which it follows that it was subject to abrogation by Congress as to a matter within Congress's Article I authority).

The Court does no better with its trio of arguments to undercut *Chisholm*'s legitimacy: that the *Chisholm* majority "failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted," *ante*, at 721; that "the majority suspected the decision would be unpopular and surprising," *ibid.;* and that "two Members of the majority acknowledged that the United States might well remain immune from suit despite" Article III, *ante*, at 722. These three claims do not, of course, go to the question whether state sovereign immunity was understood to be "fundamental" or "inherent," but in any case, none of them is convincing.

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an adverse precedent on immunity, see *id.*, at 75. In *Oswald* v. *New York*, an action that commenced before *Chisholm* but that was continued after it, New York initially objected to jurisdiction, see 1993 J. Sup. Ct. Hist., at 77, but the suit was tried to a jury in the Supreme Court, and after New York lost, it paid the full jury verdict out of the State's treasury, *id.*, at 78.

With respect to the first, Justice Blair in fact did expressly refer to the practice of state sovereign immunity in state court, and acknowledged the petition of right as an appropriate and normal practice. This aside, the Court would have a legitimate point if it could show that the *Chisholm* majority took insufficient account of a body of practice that somehow indicated a widely held absolutist conception of state sovereign immunity untouchable and untouched by the Constitution. But of course it cannot.[26]

As for the second point, it is a remarkable doctrine that would hold anticipation of unpopularity the benchmark of constitutional error. In any event, the evidence proffered by the Court is merely this: that Justice Wilson thought the prerevolutionary conception of sovereignty misguided, 2 Dall., at 454–455; that Justice Cushing stated axiomatically that the Constitution could always be amended, *id.*, at 468; that Chief Justice Jay noted that the losing defendant might still come to understand that sovereign immunity is inconsistent with republicanism, *id.*, at 478–479; and that Attorney

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[26] The Court thinks that Justice Iredell's adversion to state practice gives reason to think so, see *ante*, at 721 ("[D]espite the opinion of Justice Iredell, the majority failed to address . . ."). Even if Justice Iredell had been right about state practice, failure to respond to a specific argument raised by another Justice (as opposed to counsel) has even less significance with respect to this early Supreme Court opinion than it would have today, because the Justices may not have afforded one another the opportunity to read their opinions before they were announced. See 1 J. Goebel, The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, p. 728 (1971) ("There are hints . . . that there may have been no conference and that each Justice arrived at his conclusion independently without knowing what each of his brethren had decided"). Indeed, since "opinions were given only orally in the Supreme Court in the 1790s," 5 Documentary History of the Supreme Court, *supra* n. 21, at 164, n., it is possible that the opinion as reported by Dallas followed a document prepared by Wilson after the oral announcement of the opinion, *ibid.;* see also *id.*, at xxiv–xxv, in which case it is possible that the other Justices never heard certain arguments until publication.

General Randolph admitted that the position he espoused was unpopular not only in Georgia, but also in another State, probably Virginia.[27] These items boil down to the proposition that the Justices knew (as who could not, with such a case before him) that at the ratifying conventions the significance of sovereign immunity had been, as it still was, a matter of dispute. This reality does not detract from, but confirms, the view that the Framers showed no intent to recognize sovereign immunity as an immutably inherent power of the States.

As to the third objection, that two Justices noted that the United States might possess sovereign immunity notwithstanding Article III, I explained, *supra*, at 785–786, that Chief Justice Jay thought this possibility was purely practical, not at all legal, and without any implication for state immunity vis-à-vis federal claims. Justice Cushing was so little troubled by the possibility he raised that he wrote, "If this be a necessary consequence, it must be so," *Chisholm*, *supra*, at 469, and simply suggested a textual reading that might have led to a different consequence.

Nor can the Court make good on its claim that the enactment of the Eleventh Amendment retrospectively reestablished the view that had already been established at the time of the framing (though eluding the perception of all but one Member of the Supreme Court), and hence "acted . . . to restore the original constitutional design," *ante*, at 722.[28]

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[27] The circumlocution "another State, whose will must be always dear to me," *Chisholm*, 2 Dall., at 419, hints at Randolph's home State. It seems odd to suggest that Randolph's acknowledgment of the unpopularity of his position in two States would somehow support the thought that the view was incorrect. Randolph himself had urged the same position at the Virginia ratifying convention, see *supra*, at 775–776, and so knew perfectly well that Virginia had ratified with full knowledge that his position might be the law.

[28] It is interesting to note a case argued in the Supreme Court of Pennsylvania in 1798, in which counsel for the Commonwealth urged a version of the point that the Court makes here, and said that "[t]he language of the amendment, indeed, does not import an alteration of the Constitution,

There was nothing "established" about the position espoused by Georgia in the effort to repudiate its debts, and the Court's implausible suggestion to the contrary merely echoes the brio of its remark in *Seminole Tribe* that *Chisholm* was "contrary to the well-understood meaning of the Constitution." 517 U. S., at 69 (citing *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934)). The fact that *Chisholm* was no conceptual aberration is apparent from the ratification debates and the several state requests to rewrite Article III. There was no received view either of the role this sovereign immunity would play in the circumstances of the case or of a conceptual foundation for immunity doctrine at odds with *Chisholm*'s reading of Article III. As an author on whom the Court relies, see *ante*, at 724, has it, "there was no unanimity among the Framers that immunity would exist," D. Currie, The Constitution in the Supreme Court: The First Hundred Years: 1789–1888, p. 19 (1985).[29]

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but an authoritative declaration of its true construction." *Respublica* v. *Cobbet*, 3 Dall. 467, 472 (1798). The court expressly repudiated the historical component of this claim in an opinion by its Chief Justice: "When the judicial law [*i. e.*, the Judiciary Act of 1789] was passed, the opinion prevailed that States might be sued, which by this amendment is settled otherwise." *Id.*, at 475 (M'Kean, C. J.).

[29] The Court might perhaps respond that if the role of state sovereign immunity was not the subject of universal consensus in 1792, the enactment of the Eleventh Amendment brought the doctrine into the constitutional realm. The strongest form of this view must maintain that, notwithstanding the Amendment's silence regarding state courts and its exclusive focus on the federal judicial power, the motivation of the framers of the Eleventh Amendment must have been affirmatively to embrace the position that the States enjoyed the immunity from suit previously enjoyed by the Crown. On this account, the framers of the Eleventh Amendment said nothing about sovereign immunity in state court because it never occurred to them that such immunity could be questioned; had they thought of this possibility, they would have considered it absurd that States immune in federal court could be subjected to suit in their own courts.

The first trouble with this view is that it assumes that the Eleventh Amendment was intended to reach all federal-law suits, and not only those arising under diversity jurisdiction. If the framers of the Eleventh

It should not be surprising, then, to realize that although much post-*Chisholm* discussion was disapproving (as the States saw their escape from debt cut off), the decision had champions "every bit as vigorous in defending their interpretation of the Constitution as were those partisans on the other side of the issue." Marcus & Wexler, Suits Against States: Diversity of Opinion In The 1790s, 1993 J. Sup. Ct. Hist. 73, 83; see, *e. g.*, 5 Documentary History of the Supreme Court, *supra* n. 21, at 251–252, 252–253, 262–264, 268–269 (newspaper articles supporting holding in *Chisholm*); 5 Documentary History of the Supreme Court, *supra*, at 616 (statement of a committee of Delaware Senate in support of holding in *Chisholm*). The federal citizen-state diversity jurisdiction was settled by the Eleventh Amendment; Article III was not "restored."

Amendment had in mind only diversity cases, as the Court was prepared to concede in *Seminole Tribe*, see 517 U. S., at 69–70 ("The text dealt in terms only with the problem presented by the decision in *Chisholm* . . . . [I]t seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States"), then it might plausibly follow that the framers of that Amendment assumed that States possessed sovereign immunity in their own courts with respect to state law. But it certainly does not follow that the Amendment's authors would have thought that States enjoyed immunity in state court on questions of federal law. To accept this would require one to believe that the framers of the Eleventh Amendment were blind to an extremely anomalous application of sovereign immunity, under which a State is immune even when it is not the font of the law under which it is sued, cf. *infra*, at 797–798, 800. The Court today may labor under the misapprehension that sovereign immunity can apply where the sovereign is not the font of law, but the Court adduces no evidence to suggest that the framers of the Eleventh Amendment held such a view. And the framers were much closer than the Court to the theory of sovereign immunity according to which the font of law may not be subject to suit under that law. This leaves the Court in the position of supporting its view of what the Eleventh Amendment means by the "historical" assertion that the framers must have intended it to mean the same.

F

It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as limiting authority elsewhere conferred by the Constitution or as imported into the Constitution by the Tenth Amendment. But what if the facts were otherwise and a natural law conception of state sovereign immunity in a State's own courts were implicit in the Constitution? On good authority, it would avail the State nothing, and the Court would be no less mistaken than it is already in sustaining the State's claim today.

The opinion of this Court that comes closer to embodying the present majority's inherent, natural law theory of sovereign immunity than any other I can find was written by Justice Holmes in *Kawananakoa* v. *Polyblank*, 205 U. S. 349 (1907).[30] I do not, of course, suggest that Justice Holmes

[30] The temptation to look to the natural law conception had shown up occasionally before Justice Holmes's appointment, and goes back at least to *Beers* v. *Arkansas*, 20 How. 527 (1858), in which Chief Justice Taney wrote for the Court that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission," *id.*, at 529. But nothing turned on this pronouncement, because the outcome in the case would have been the same had sovereign immunity been understood as a common law property of the States. In *Nichols* v. *United States*, 7 Wall. 122 (1869), Justice Davis wrote: "Every government has an inherent right to protect itself against suits . . . . The principle is fundamental, [and] applies to every sovereign power . . . ." *Id.*, at 126. This description came in dicta, and the origin of the immunity had no bearing on the decision. Justice Bradley quoted both Hamilton and Chief Justice Taney in *Hans* v. *Louisiana*, 134 U. S. 1, 13, 17 (1890), but nothing there depended on the natural law approach, and in the main the opinion, whatever its other demerits, see *Seminole Tribe*, *supra*, at 119 (SOUTER, J., dissenting), understood state sovereign immunity as a common law concept, see *Hans*, *supra*, at 16 ("The suability of a State without its consent was a thing unknown to the law"). And the Court in *Seminole Tribe* may possibly have intended to hint at the natural law background of sovereign immunity when it said approvingly that the decision in *Hans* "'found its

was a natural law jurist, see "Natural Law," in O. Holmes, Collected Legal Papers 312 (1920, reprinted 1952) ("The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted . . . as something that must be accepted"). But in *Kawananakoa* he gave not only a cogent restatement of the natural law view of sovereign immunity, but one that includes a feature (omitted from Hamilton's formulation) explaining why even the most absolutist version of sovereign immunity doctrine actually refutes the Court's position today: the Court fails to realize that under the natural law theory, sovereign immunity may be invoked only by the sovereign that is the source of the right upon which suit is brought. Justice Holmes said so expressly: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa*, *supra*, at 353.

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roots not solely in the common law of England, but in the much more fundamental "jurisprudence in all civilized nations."'" 517 U. S., at 69 (quoting *Hans*, *supra*, at 17, in turn quoting *Beers* v. *Arkansas*, *supra*, at 529). The Court's occasional seduction by the natural law view should not, however, obscure its basic adherence to the common law approach. In *United States* v. *Lee*, 106 U. S. 196 (1882), the Court explained that "the doctrine is derived from the laws and practices of our English ancestors," *id.*, at 205, and added approvingly that the petition of right "has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves," *ibid.* The Court went on to notice that at common law one reason given for sovereign immunity was the "absurdity" of the King's writ running against the King, *id.*, at 206, but, recognizing the distinct situation in the United States, the Court admitted candidly that "it is difficult to see on what solid foundation of principle the exemption from liability to suit rests," *ibid.* Even the dissent there discussed in great detail the common law heritage of the doctrine. See *id.*, at 227–234 (opinion of Gray, J.).

His cited authorities stand in the line that today's Court purports to follow: Hobbes, Bodin, Sir John Eliot, and Baldus de Ubaldis. Hobbes, in the cited work, said this:

> "The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before. For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound." Leviathan, ch. 26, § 2, p. 130.

Jean Bodin produced a similar explanation nearly three-quarters of a century before Hobbes, see J. Bodin, Les six livres de la république, Bk. 1, ch. 8 (1577); Six Books of the Commonwealth 28 (M. Tooley transl. 1967) ("[T]he sovereign . . . cannot in any way be subject to the commands of another, for it is he who makes law"). Eliot cited Baldus for the crux of the theory: majesty is "a fulness of power subject to noe necessitie, limitted within no rules of publicke Law," 1 J. Eliot, De Jure Maiestatis: or Political Treatise of Government 15 (A. Grosart ed. 1882), and Baldus himself made the point in observing that no one is bound by his own statute as of necessity, see Commentary of Baldus on the statute *Digna vox* in Justinian's Code 1.14.4, Lectura super Codice folio 51b (Chapter *De Legibus et constitutionibus*) (Venice ed. 1496) *("nemo suo statuto ligatur necessitative")*.

The "jurists who believe in natural law" might have reproved Justice Holmes for his general skepticism about the intrinsic value of their views, but they would not have faulted him for seeing the consequence of their position: if the sovereign is not the source of the law to be applied, sovereign immunity has no applicability. Justice Holmes indeed explained that in the case of multiple sovereignties, the sub-

ordinate sovereign will not be immune where the source of the right of action is the sovereign that is dominant. See *Kawananakoa,* 205 U. S., at 353, 354 (District of Columbia not immune to private suit, because private rights there are "created and controlled by Congress and not by a legislature of the District"). Since the law in this case proceeds from the national source, whose laws authorized by Article I are binding in state courts, sovereign immunity cannot be a defense. After *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985), Justice Holmes's logically impeccable theory yields the clear conclusion that even in a system of "fundamental" state sovereign immunity, a State would be subject to suit *eo nomine* in its own courts on a federal claim.

There is no escape from the trap of Holmes's logic save recourse to the argument that the doctrine of sovereign immunity is not the rationally necessary or inherent immunity of the civilians, but the historically contingent, and to a degree illogical, immunity of the common law. But if the Court admits that the source of sovereign immunity is the common law, it must also admit that the common law doctrine could be changed by Congress acting under the Commerce Clause. It is not for me to say which way the Court should turn; but in either case it is clear that Alden's suit should go forward.

II

The Court's rationale for today's holding based on a conception of sovereign immunity as somehow fundamental to sovereignty or inherent in statehood fails for the lack of any substantial support for such a conception in the thinking of the founding era. The Court cannot be counted out yet, however, for it has a second line of argument looking not to a clause-based reception of the natural law conception or even to its recognition as a "background principle," see *Seminole Tribe,* 517 U. S., at 72, but to a structural basis in the Constitution's creation of a federal system. Immunity, the

Court says, "inheres in the system of federalism established by the Constitution," *ante*, at 730, its "contours [being] determined by the Founders' understanding, not by the principles or limitations derived from natural law," *ante*, at 734. Again, "[w]e look both to the essential principles of federalism and to the special role of the state courts in the constitutional design." *Ante*, at 748. That is, the Court believes that the federal constitutional structure itself necessitates recognition of some degree of state autonomy broad enough to include sovereign immunity from suit in a State's own courts, regardless of the federal source of the claim asserted against the State. If one were to read the Court's federal structure rationale in isolation from the preceding portions of the opinion, it would appear that the Court's position on state sovereign immunity might have been rested entirely on federalism alone. If it had been, however, I would still be in dissent, for the Court's argument that state-court sovereign immunity on federal questions is inherent in the very concept of federal structure is demonstrably mistaken.

A

The National Constitution formally and finally repudiated the received political wisdom that a system of multiple sovereignties constituted the "great solecism of an *imperium in imperio*," cf. Bailyn, The Ideological Origins of the American Revolution, at 223.[31] Once "the atom of sovereignty" had been split, *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779,

[31] The authority of the view that Parliament's sovereignty must be indivisible had already been eroded in the decade before independence. Iredell himself, as early as 1774, rejected the applicability of the theory "to the case of several *distinct and independent legislatures* each engaged within a *separate* scale and employed about *different* objects," in the course of arguing for the possibility of a kind of proto-federalist relationship between the Colonies and the King. Iredell, Address to the Inhabitants of Great Britain, in 1 G. McRee, Life and Correspondence of James Iredell 205, 219 (1857, reprinted 1949); see Bailyn, The Ideological Origins of the American Revolution, at 224–225, and n. 64.

838 (1995) (KENNEDY, J., concurring), the general scheme of delegated sovereignty as between the two component governments of the federal system was clear, and was succinctly stated by Chief Justice Marshall: "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch* v. *Maryland*, 4 Wheat. 316, 410 (1819).[32]

Hence the flaw in the Court's appeal to federalism. The State of Maine is not sovereign with respect to the national objectives of the FLSA.[33] It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, *supra*, and is not contested here.

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[32] This is entirely consistent with, and indeed is a corollary of, the statement quoted by the Court that the States are "'no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Ante*, at 714 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). The point is that matters subject to federal law are within the federal sphere, and so the States are subject to the general authority where such matters are concerned.

[33] It is therefore sheer circularity for the Court to talk of the "anomaly," *ante*, at 752, that would arise if a State could be sued on federal law in its own courts, when it may not be sued under federal law in federal court, *Seminole Tribe of Florida* v. *Florida*, 517 U. S. 44 (1996). The short and sufficient answer is that the anomaly is the Court's own creation: the Eleventh Amendment was never intended to bar federal-question suits against the States in federal court. The anomaly is that *Seminole Tribe*, an opinion purportedly grounded in the Eleventh Amendment, should now be used as a lever to argue for state sovereign immunity in state courts, to which the Eleventh Amendment by its terms does not apply.

Nor can it be argued that because the State of Maine creates its own court system, it has authority to decide what sorts of claims may be entertained there, and thus in effect to control the right of action in this case. Maine has created state courts of general jurisdiction; once it has done so, the Supremacy Clause of the Constitution, Art. VI, cl. 2, which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. Maine has advanced no "'valid excuse,'" *Howlett* v. *Rose*, 496 U. S. 356, 369 (1990) (quoting *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–388 (1929)), for its courts' refusal to hear federal-law claims in which Maine is a defendant, and sovereign immunity cannot be that excuse, simply because the State is not sovereign with respect to the subject of the claim against it. The Court's insistence that the federal structure bars Congress from making States susceptible to suit in their own courts is, then, plain mistake.[34]

B

It is symptomatic of the weakness of the structural notion proffered by the Court that it seeks to buttress the argument by relying on "'the dignity and respect afforded a State,

[34] Perhaps as a corollary to its view of sovereign immunity as to some degree indefeasible because "fundamental," the Court frets that the "power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Ante*, at 749. But this is to forget that the doctrine of separation of powers prevails in our Republic. When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State's executive any more than we turn against the Federal Executive when we apply federal law to the United States: it is simply upholding the rule of law. There is no "commandeering" of the State's resources where the State is asked to do no more than enforce federal law.

which the immunity is designed to protect,'" *ante*, at 749 (quoting *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 268 (1997)), and by invoking the many demands on a State's fisc, *ante*, at 750–751. Apparently beguiled by Gilded Era language describing private suits against States as "'neither becoming nor convenient,'" *ante*, at 748 (quoting *In re Ayers*, 123 U. S. 443, 505 (1887)), the Court calls "immunity from private suits central to sovereign dignity," *ante*, at 715, and assumes that this "dignity" is a quality easily translated from the person of the King to the participatory abstraction of a republican State, see, *e. g.*, *ante*, at 749 ("[C]ongressional power to authorize private suits against nonconsenting States in their own courts would be . . . offensive to state sovereignty"). The thoroughly anomalous character of this appeal to dignity is obvious from a reading of Blackstone's description of royal dignity, which he sets out as a premise of his discussion of sovereignty:

> "First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects. . . . The law therefore ascribes to the king . . . certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine." 1 Blackstone *241.

It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American

government's immunity from private suit, it is not dignity.[35] See *United States* v. *Lee*, 106 U. S. 196, 208 (1882).

It is equally puzzling to hear the Court say that "federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Ante*, at 750–751. So long as the citizens' will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.

Least of all does the Court persuade by observing that "other important needs" than that of the "judgment creditor" compete for public money, *ante*, at 751. The "judgment creditor" in question is not a dunning bill collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.[36]

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[35] Furthermore, the very idea of dignity ought also to imply that the State should be subject to, and not outside of, the law. It is surely ironic that one of the loci classici of Roman law regarding the imperial prerogative begins with (and is known by) the assertion that it is appropriate to the Emperor's dignity that he acknowledge (or, on some readings, at least claim) that he is bound by the laws. See Digna Vox, Justinian's Code 1.4.14 *("Digna vox maiestate regnantis legis alligatum se principem profiteri")* ("It is a statement worthy of the majesty of the ruler for the Prince to profess himself bound by the laws"); see Pennington, The Prince and the Law, 1200–1600, at 78, and n. 6.

[36] The Court also claims that subjecting States to suit puts power in the hands of state courts that the State may wish to assign to its legislature, thus assigning the state judiciary a role "foreign to its experience but beyond its competence . . . ." *Ante*, at 752. This comes perilously close to legitimizing political defiance of valid federal law.

III

If neither theory nor structure can supply the basis for the Court's conceptions of sovereign immunity and federalism, then perhaps history might. The Court apparently believes that because state courts have not historically entertained Commerce Clause based federal-law claims against the States, such an innovation carries a presumption of unconstitutionality. See *ante*, at 744 (arguing that absence of statutes authorizing suits against States in state court suggests an assumed absence of such power). At the outset, it has to be noted that this approach assumes a more cohesive record than history affords. In *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197 (1991) (KENNEDY, J.), a case the Court labors mightily to distinguish, see *ante*, at 737,[37] we held that a state-owned railroad could be sued in state court under the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, notwithstanding the lack of an express congressional statement, because "'the Eleventh Amendment does not apply in state courts.'" *Hilton*, *supra*, at 205 (quoting *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63–64 (1989)).[38] But even if the record were less unkempt, the

[37] In its discussion of *Hilton*, the Court attempts to explain away the State's failure to raise a sovereign immunity defense by acknowledging candidly that when that case was decided, "it may have appeared to the State that Congress' power to abrogate its immunity from suit in any court was not limited by the Constitution at all." *Ante*, at 737. The reasoning of *Hilton* suggests that it appeared not only to the State, but also to the Court, that Congress could abrogate state sovereign immunity in state court. If Congress could not, then there would have been no jurisdiction in the case. The Court never even hinted that constitutional structure, much less the Tenth Amendment, might bar the suit, even though the dissent stressed that "the principle of federalism underlying the [Eleventh] Amendment pervades the constitutional structure," 502 U. S., at 209 (opinion of O'CONNOR, J.).

[38] Nor does *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885), one of the Virginia Coupon Cases, fit comfortably with the assumption that state courts have exercised no disputed jurisdiction over their own governments on federal questions. Under its Funding Act of 1871, Virginia had issued

problem with arguing from historical practice in this case is that past practice, even if unbroken, provides no basis for demanding preservation when the conditions on which the practice depended have changed in a constitutionally relevant way.

It was at one time, though perhaps not from the framing, believed that "Congress' authority to regulate the States under the Commerce Clause" was limited by "certain under-

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bonds that specified on their face that the attached coupons should be receivable at and after maturity for all taxes, debts, dues, and demands due the State. *Id.*, at 278. In 1882, however, Virginia passed a law requiring its tax collectors to accept nothing but gold, silver, or currency in payment of taxes. *Id.*, at 275. After the bonds reached maturity, Poindexter used them to pay state property taxes; Greenhow, the local tax collector, ignored the payment and took possession of an office desk in Poindexter's possession to sell it for unpaid taxes. Poindexter brought a common law action in detinue against the tax collector in state court for recovery of the desk, arguing that the later Virginia statute barring use of the coupons violated the Contracts Clause. Greenhow defended, *inter alia*, on the theory that the suit was "substantially an action against the State of Virginia, to which it has not assented." *Id.*, at 285. The Court rejected this claim by applying to the State of Virginia reasoning akin to, though broader than, that later adopted in *Ex parte Young*, 209 U. S. 123 (1908). We held that, where state legislative action is unconstitutional, it "is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name," 114 U. S., at 290. Because the original bonds were binding contracts, the obligation of which Virginia could not constitutionally impair, "[t]he true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it." *Id.*, at 293. It therefore could not be argued that the tax collector was acting on behalf of the State, because "[t]he State of Virginia has done none of these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands." *Ibid.* Although the tax collector had done nothing more than collect taxes under duly enacted state law, he was held to be liable to suit. Thus in the only case to have come before this Court specifically involving a claim of state sovereign immunity of constitutional magnitude in a State's own court, jurisdiction was upheld.

lying elements of political sovereignty . . . deemed essential to the States' 'separate and independent existence.'" *Garcia*, 469 U. S., at 547–548 (quoting *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869)). On this belief, the preordained balance between state and federal sovereignty was understood to trump the terms of Article I and preclude Congress from subjecting States to federal law on certain subjects. (From time to time, wage and hour regulation has been counted among those subjects, see *infra*, at 808.) As a consequence it was rare, if not unknown, for state courts to confront the situation in which federal law enacted under the Commerce Clause provided the authority for a private right of action against a State in state court. The question of state immunity from a Commerce Clause based federal-law suit in state court thus tended not to arise for the simple reason that Acts of Congress authorizing such suits did not exist.

Today, however, in light of *Garcia*, *supra* (overruling *National League of Cities* v. *Usery*, 426 U. S. 833 (1976)), the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty. "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." *Garcia*, *supra*, at 554. Because the commerce power is no longer thought to be circumscribed, the dearth of prior private federal claims entertained against the States in state courts does not tell us anything, and reflects nothing but an earlier and less expansive application of the commerce power.

Least of all is it to the point for the Court to suggest that because the Framers would be surprised to find States subjected to a federal-law suit in their own courts under the commerce power, the suit must be prohibited by the Constitution. See *ante*, at 741–743 (arguing on the basis of the "historical record" that the Constitution would not have been adopted if it had been understood to allow suit against States

in state court under federal law). The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure, but they do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.

If the Framers would be surprised to see States subjected to suit in their own courts under the commerce power, they would be astonished by the reach of Congress under the Commerce Clause generally. The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes. But the Framers' surprise at, say, the FLSA, or the Federal Communications Commission, or the Federal Reserve Board is no threat to the constitutionality of any one of them, for a very fundamental reason:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920) (Holmes, J.).
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> "'We must never forget,' said Mr. Chief Justice Marshall in *McCulloch*, [4 Wheat., at] 407, 'that it is a Constitution we are expounding.' Since then this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed."

Olmstead v. *United States*, 277 U. S. 438, 472 (1928) (Brandeis, J., dissenting).

IV

A

If today's decision occasions regret at its anomalous versions of history and federal theory, it is the more regrettable in being the second time the Court has suddenly changed the course of prior decision in order to limit the exercise of authority over a subject now concededly within the Article I jurisdiction of the Congress. The FLSA, which requires employers to pay a minimum wage, was first enacted in 1938, with an exemption for States acting as employers. See *Maryland* v. *Wirtz*, 392 U. S. 183, 185–186 (1968). In 1966, it was amended to remove the state employer exemption so far as it concerned workers in hospitals, institutions, and schools. See *id.*, at 186–187, and n. 6. In *Wirtz*, the Court upheld the amendment over the dissent's argument that extending the FLSA to these state employees was "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is . . . not consistent with our constitutional federalism." *Id.*, at 201 (opinion of Douglas, J.).

In 1974, Congress again amended the FLSA, this time "extend[ing] the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions." *National League of Cities*, 426 U. S., at 836. This time the Court went the other way: in *National League of Cities*, the Court held the extension of the Act to these employees an unconstitutional infringement of state sovereignty, *id.*, at 852; for good measure, the Court overturned *Wirtz*, dismissing its reasoning as no longer authoritative, see 426 U. S., at 854–855.

But *National League of Cities* was not the last word. In *Garcia*, decided some nine years later, the Court addressed the question whether a municipally owned mass-transit

system was exempt from the FLSA. 469 U. S., at 534, 536. In holding that it was not, the Court overruled *National League of Cities*, see 469 U. S., at 557, this time taking the position that Congress was not barred by the Constitution from binding the States as employers under the Commerce Clause, *id.*, at 554. As already mentioned, the Court held that whatever protection the Constitution afforded to the States' sovereignty lay in the constitutional structure, not in some substantive guarantee. *Ibid.*[39] *Garcia* remains good law, its reasoning has not been repudiated, and it has not been challenged here.

The FLSA has not, however, fared as well in practice as it has in theory. The Court in *Seminole Tribe* created a significant impediment to the statute's practical application by rendering its damages provisions unenforceable against the States by private suit in federal court. Today's decision blocking private actions in state courts makes the barrier to individual enforcement a total one.

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[39] *Garcia* demonstrates that, contra the Court's suggestion, the FLSA does not impermissibly act upon the States, see *ante*, at 714. Rather, the FLSA, enacted lawfully pursuant to the commerce power, treats the States like other employers. The Court seems to have misunderstood Hamilton's statement in The Federalist No. 15 that the citizens are "'"the only proper objects of government,"'" *ante*, at 714 (quoting *Printz* v. *United States*, 521 U. S. 898, 919–920 (1997)). Hamilton's point is not, as the Court seems to think, that the National Government should dictate nothing to the States in order to protect their residual sovereignty. To the contrary, Hamilton, who was arguing against the extreme respect for state sovereignty in the Articles of Confederation, meant precisely that the National Government should not act as the leader of a "league," The Federalist No. 15, p. 95 (J. Cooke ed. 1961), mediating among several sovereignties, but as a "national government," *ibid.*, with power to produce obedience through the "COER[C]ION of the magistracy," *ibid.* Hamilton is therefore the wrong person to quote for the proposition that the National Government may not act upon the States, since his point was that the National Government should not be limited to acting through the medium of the States.

B

The Court might respond to the charge that in practice it has vitiated *Garcia* by insisting, as counsel for Maine argued, Brief for Respondent 11–12, that the United States may bring suit in federal court against a State for damages under the FLSA, on the authority of *United States* v. *Texas*, 143 U. S. 621, 644–645 (1892). See also *Seminole Tribe*, 517 U. S., at 71, n. 14. It is true, of course, that the FLSA does authorize the Secretary of Labor to file suit seeking damages, see 29 U. S. C. § 216(c), but unless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. Facing reality, Congress specifically found, as long ago as 1974, "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily." S. Rep. No. 93–690, p. 27 (1974). One hopes that such voluntary compliance will prove more popular than it has in Maine, for there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States of the Union.[40]

The point is not that the difficulties of enforcement should drive the Court's decision, but simply that where Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy. No

[40] The most recent available data give 4,732,608 as the total number of employees of the 50 States of the Union, see State Government Employment Data: March 1997, http://www.census.gov/pub/govs/apes/97stus.txt.

one would think the remedy adequate if private tort claims against a State could only be brought by the National Government: the tradition of private enforcement, as old as the common law itself, is the benchmark. But wage claims have a lineage of private enforcement just as ancient, and a claim under the FLSA is a claim for wages due on work performed. Denying private enforcement of an FLSA claim is thus on par with closing the courthouse door to state tort victims unaccompanied by a lawyer from Washington.

So there is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy. Lord Chief Justice Holt could state this as an unquestioned proposition already in 1702, as he did in *Ashby* v. *White*, 6 Mod. 45, 53–54, 87 Eng. Rep. 808, 815 (Q. B.):

> "If an act of parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action; and the current of all the books is so" (citation omitted).[41]

[41] The principle is even older with respect to rights created by statute, like the FLSA rights here, than it is for common law damages. Lord Holt in fact argued that the well-established principle in the context of statutory rights applied to common law rights as well. See *Ashby* v. *White*, 6 Mod., at 54, 87 Eng. Rep., at 816 ("Now if this be so in case of an Act of Parliament, why shall not common law be so too? For sure the common law is as forcible as any Act of Parliament"). A still older formulation of the statutory right appears in a note in Coke's Reports: "[W]hen any thing is prohibited by an act, although that the act doth not give an action, yet action lieth upon it." 6 Co. Rep., pt. 12, p. *100. Coke's Institutes yield a similar statement: "When any act doth prohibit any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute." 1 E. Coke, The Second Part of the Institutes of the Laws of England 117 (1797) (reprinted in 5B 2d Historical Writings in Law and Jurisprudence (1986)). In our case, of course, the statute expressly gives an action.

Blackstone considered it "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 Blackstone *23. The generation of the Framers thought the principle so crucial that several States put it into their constitutions.[42] And when Chief Justice Marshall asked about Marbury: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?," *Marbury* v. *Madison*, 1 Cranch 137, 162 (1803), the question was rhetorical, and the answer clear:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.*, at 163.

Yet today the Court has no qualms about saying frankly that the federal right to damages afforded by Congress under the FLSA cannot create a concomitant private remedy. The right was "made for the benefit of" petitioners; they have been "hindered by another of that benefit"; but despite what has long been understood as the "necessary consequence of law," they have no action, cf. *Ashby*, *supra*, at 53, 87 Eng. Rep., at 815. It will not do for the Court to respond that a remedy was never available where the right in question was against the sovereign. A State is not the sovereign when a federal claim is pressed against it, and even the English sovereign opened itself to recovery and,

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[42] See, *e. g.*, A Declaration of Rights and Fundamental Rules of the Delaware State § 12 (1776), 2 Sources and Documents of United States Constitutions 197, 198 (W. Swindler ed. 1775); Md. Const., Art. XVII (1776), 4 *id.*, at 372, 373; Mass. Const., Art. XI (1780), 5 *id.*, at 92, 94; Ky. Const., Art. XII, cl. 13 (1792), 4 *id.*, at 142, 150; Tenn. Const., Art. XI, § 17 (1796), 9 *id.*, at 141, 148.

unlike Maine, provided the remedy to complement the right. To the Americans of the founding generation it would have been clear (as it was to Chief Justice Marshall) that if the King would do right, the democratically chosen Government of the United States could do no less.[43] The Chief Justice's

[43] Unfortunately, and despite the Court's professed "unwilling[ness] to assume the States will refuse to honor the Constitution and obey the binding laws of the United States," *ante*, at 755, that presumption of the sovereign's good-faith intention to follow the laws has managed somehow to disappear in the intervening two centuries, despite the general trend toward greater, not lesser, government accountability. Anyone inclined toward economic theories of history may look at the development of sovereign immunity doctrine in this country and see that it has been driven by the great and recurrent question of state debt, both in the aftermath of *Chisholm* and in the last quarter of the 19th century, see *Seminole Tribe*, 517 U. S., at 120–122 (SOUTER, J., dissenting). And no matter what one may think of the quality of the legal doctrine that the problem of state debt has helped to produce, one can at least argue that States' periodic attempts to repudiate their debts were not purely or egregiously lawless, because those who held state-issued bonds may well have valued and purchased them with the knowledge that default was a real possibility.

Maine's refusal to follow federal law in the case before us, however, is of a different order. Far from defaulting on debt to eyes-open creditors, Maine is simply withholding damages from private citizens to whom they appear to be due. Before *Seminole Tribe* was decided, petitioners here were the beneficiaries of a District Court ruling to the effect that they were entitled to some coverage, and hence to some amount of damages, under the FLSA. *Mills* v. *Maine*, 839 F. Supp. 3 (Me. 1993). Before us, Maine has not claimed that petitioners are not covered by the FLSA, but only that it is protected from suit. Indeed, Maine acknowledges that it may be sued by the United States in federal court for damages on the very same claim, Brief for Respondent 12–13, and we are told that Maine now pays employees like petitioners overtime as covered by the FLSA, *id.*, at 3. Why the State of Maine has not rendered this case unnecessary by paying damages to petitioners under the FLSA of its own free will remains unclear to me. The Court says that "it is conceded by all that the State has altered its conduct so that its compliance with federal law cannot now be questioned." *Ante*, at 759. But the ambiguous qualifier "now" allows the Court to avoid the fact that whatever its forward-looking compliance, the State still has not paid damages to petitioners; had it done so, the case before us would be moot.

contemporaries might well have reacted to the Court's decision today in the words spoken by Edmund Randolph when responding to the objection to jurisdiction in *Chisholm:* "[The Framers] must have viewed human rights in their essence, not in their mere form." 2 Dall., at 423.

V

The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of stability ahead. As it is, any such expectation would be naïve. The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.

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ORTIZ ET AL. *v.* FIBREBOARD CORP. ET AL.

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

No. 97–1704. Argued December 8, 1998—Decided June 23, 1999

Respondent Fibreboard Corporation, an asbestos manufacturer, was locked in litigation for decades. Plaintiffs filed a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of claims for compensatory damages each year. Fibreboard engaged in litigation with its insurers, respondent Continental Casualty Company and respondent Pacific Indemnity Company, over insurance coverage for the personal injury claims. In 1990, a California trial court ruled against Continental and Pacific, and the insurers appealed. At around the same time, Fibreboard approached a group of asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of Fibreboard's asbestos liability. Negotiations at one point led to the settlement of some 45,000 pending claims, and the parties eventually agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." Of this sum, $1.525 billion would come from Continental and Pacific, which had joined the negotiations, while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds. At plaintiffs' counsels' insistence, Fibreboard and its insurers then reached a backup settlement of the coverage dispute in the "Trilateral Settlement Agreement," under which the insurers agreed to provide Fibreboard with $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win court approval. Subsequently, a group of named plaintiffs filed the present action in Federal District Court, seeking certification for settlement purposes of a mandatory class comprising three groups—claimants who had not yet sued Fibreboard, those who had dismissed such claims and retained the right to sue in the future, and relatives of class members—but excluded claimants who had actions pending against Fibreboard or who had filed and, for negotiated value, dismissed such claims, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy. The District Court allowed petitioners and other objectors to intervene, held a fairness hearing under Federal Rule of Civil Procedure 23(e), ruled that the threshold Rule 23(a) numerosity, commonality, typicality, and adequacy of representation requirements were met, and certified the class under Rule 23(b)(1)(B). In response to intervenors' objections that the absence of a "limited fund"

precluded Rule 23(b)(1)(B) certification, the District Court ruled that both the disputed insurance asset liquidated by the $1.535 billion global settlement, and, alternatively, the sum of the value of Fibreboard plus the value of its insurance coverage, as measured by the insurance funds' settlement value, were relevant "limited funds." The Fifth Circuit affirmed both as to class certification and adequacy of settlement. Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found, *inter alia*, that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. As to Rule 23(b)(1)(B), the court approved the class certification on a "limited fund" rationale based on the threat to other class members' ability to receive full payment from Fibreboard's limited assets. This Court then decided *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of that decision. The Fifth Circuit again affirmed the District Court's judgment on remand.

Held:

1. This Court need not resolve two threshold matters before proceeding to the nub of the case. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the vast majority of the exposure-only class members being without injury in fact and hence without standing to sue. While an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, *Steel Co.* v. *Citizens For Better Environment*, 523 U. S. 83, 88–89, a Rule 23 question should be treated first because class certification issues are "logically antecedent" to Article III concerns, *Amchem*, *supra*, at 612, and pertain to statutory standing, which may properly be treated before Article III standing, see *Steel Co.*, *supra*, at 92. Second, although petitioners are correct that the Fifth Circuit on remand fell short in its attention to *Amchem* in passing on the Rule 23(a) issues, these points are dealt with in the Court's review of the certification on the Fifth Circuit's "limited fund" theory under Rule 23(b)(1)(B). Pp. 830–832.

2. Applicants for contested certification of a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B) must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing the conflicting interests of class members. Pp. 832–848.

(a) In drafting Rule 23(b), the Civil Rules Advisory Committee sought to catalogue in functional terms those recurrent life patterns which call for mass litigation through representative parties. Rule

23(b)(1)(B) (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions . . . would create a risk" of "adjudications with respect to individual [class] members . . . which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Among the traditional varieties of representative suits encompassed by Rule 23(b)(1)(B) is the limited fund class action. In such a case, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all. Pp. 832–837.

(b) The cases forming the limited fund class action's pedigree as understood by Rule 23's drafters have a number of common characteristics, despite the variety of circumstances from which they arose. These characteristics show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a Rule 23(b)(1)(B) class, from which no one has the right to secede. In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit that was inadequate to pay all claims against it, all of which was distributed to satisfy all those with claims based on a common theory of liability, by an equitable, pro rata distribution. Pp. 838–841.

(c) There are good reasons to treat the foregoing characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm. Although Rule 23(b)(1)(B)'s text is open to a more lenient limited fund concept, the greater the leniency in departing from the historical model, the greater the likelihood of abuse in ways that are apparent when the limited fund criteria are applied to this case. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. This limiting construction finds support in the Advisory Committee's expressions of understanding, which clearly did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. The construction also minimizes potential conflict with the Rules Enabling Act, which requires that rules of procedure "not abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072(b). See, *e. g.*, *Amchem*, *supra*, at 613. Finally, the Court's construction avoids serious constitutional concerns, including the Seventh

Amendment jury trial rights of absent class members, and the due process principle that, with limited exceptions, one is not bound by a judgment *in personam* in litigation in which he is not a party, *Hansberry* v. *Lee*, 311 U. S. 32, 40. Pp. 841–848.

3. The record on which the District Court rested its class certification did not support the essential premises of a mandatory limited fund class action. It did not demonstrate that the fund was limited except by the agreement of the parties, and it affirmatively allowed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the Rule 23(a) structural protections explained in *Amchem*. Pp. 848–861.

(a) The certification defect going to the most characteristic feature of a limited fund action was the uncritical adoption by both courts below of figures agreed upon by the parties in defining the fund's limits. In a settlement-only class action such as this, the settling parties must present not only their agreement, but evidence on which the district court may ascertain the fund's limits, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Here, there was no adequate demonstration of the fund's upper limit. The "fund" comprised both Fibreboard's general assets and the insurance provided by the two policies. As to the general assets, the lower courts concluded that Fibreboard had a then-current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative, at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance. Instead of independently evaluating potential insurance funds, the courts below simply accepted the $2 billion Trilateral Settlement Agreement figure, concluding that where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. Such value may be good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. No such assumption may be indulged in here, since at least some of the same lawyers representing the class also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute. Class counsel thus had great incentive to reach any global settlement that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. See *Amchem*, *supra*, at 626–627. Pp. 848–853.

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(b) The settlement certification also fell short with respect to the inclusiveness of the class and the fairness of distributions to those within it. The class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated at more than 53,000. A mandatory limited fund settlement class cannot qualify for certification when, in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent. The settlement certification is likewise deficient as to the fairness of the fund's distribution among class members. First, a class including holders of present and future claims (some of the latter involving no physical injury and claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See *Amchem*, 521 U. S., at 627. No such procedure was employed here. Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959, the year that saw the expiration of Fibreboard's Continental policy, which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within *Amchem*'s structural protection requirement. Pp. 854–859.

(c) A third contested feature that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Fifth Circuit to be available for payment of the mandatory class members' claims. Most notably, Fibreboard was allowed to retain virtually its entire net worth. Given this Court's treatment of the two preceding certification deficiencies, there is no need to decide whether this feature would alone be fatal to the global settlement. To ignore it entirely, however, would be so misleading that the Court simply identifies the issue it raises, without purporting to resolve it at this time. Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000 of that equity for itself. It hardly appears that such a regime is the best that can be provided for class members. Whether in a case where a settle-

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ment saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, a credit for some of the savings may be recognized as an incentive to settlement is at least a legitimate question, which the Court leaves for another day. Pp. 859–861.

134 F. 3d 668, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined, *post,* p. 865. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 865.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Brian Koukoutchos*, *Jonathan S. Massey*, *Frederick M. Baron*, *Brent M. Rosenthal*, and *Steve Baughman.*

Elihu Inselbuch argued the cause for respondents. With him on the brief for respondents Ahearn et al. were *Peter Van N. Lockwood*, *Joseph B. Cox*, *Jr.*, *Joseph F. Rice*, *Steven Kazan*, and *Harry F. Wartnick*. *Herbert M. Wachtell*, *Paul J. Bschorr*, *Richard B. Sypher*, *Kelly C. Wooster*, *Stephen M. Snyder*, *William R. Irwin*, *Rodney L. Eshelman*, *Donald T. Ramsey*, *Stuart Philip Ross*, *Sean M. Hanifan*, *Merril J. Hirsh*, and *Michael E. Jones* filed a brief for respondents Continental Casualty Co. et al.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Mark S. Mandell;* for Trial Lawyers for Public Justice, P. C., by *Arthur H. Bryant* and *Anne Bloom;* and for Legal Ethics, Civil Procedure, and Constitutional Law Scholars by *Roger C. Cramton*, *Kenneth J. Chesebro*, and *Barbara J. Olshansky.*

Briefs of *amici curiae* urging affirmance were filed for Asbestos Victims of America by *Daniel U. Smith;* for Exxon Corporation by *Charles W. Bender*, *John F. Daum*, and *Charles C. Lifland;* and for the National Association of Securities and Commercial Law Attorneys by *Kevin P. Roddy* and *Arthur R. Miller.*

JUSTICE SOUTER delivered the opinion of the Court.

This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B). We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.

I

Like *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.[1] In 1967, one of the first actions for personal asbestos injury was filed in the United States District Court for the Eastern District

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[1] "'[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

"'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.'" *Amchem Products, Inc.* v. *Windsor*, 521 U. S., at 598 (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991) (hereinafter Report)). We noted in *Amchem* that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for "federal legislation creating a national asbestos dispute-resolution scheme." 521 U. S., at 528 (citing Report 3, 27–35). To date Congress has not responded.

of Texas against a group of asbestos manufacturers. App. to Pet. for Cert. 252a. In the 1970's and 1980's, plaintiffs' lawyers throughout the country, particularly in East Texas, honed the litigation of asbestos claims to the point of almost mechanical regularity, improving the forensic identification of diseases caused by asbestos, refining theories of liability, and often settling large inventories of cases. See D. Hensler, W. Felstiner, M. Selvin, & P. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts vii (1985); McGovern, Resolving Mature Mass Tort Litigation, 69 B. U. L. Rev. 659, 660–661 (1989); see also App. to Pet. for Cert. 253a.

Respondent Fibreboard Corporation was a defendant in the 1967 action. Although it was primarily a timber company, from the 1920's through 1971 the company manufactured a variety of products containing asbestos, mainly for high-temperature industrial applications. As the tide of asbestos litigation rose, Fibreboard found itself litigating on two fronts. On one, plaintiffs were filing a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of new claims for compensatory damages each year. *Id.*, at 265a; App. 1040a. On the second front, Fibreboard was battling for funds to pay its tort claimants. From May 1957 through March 1959, respondent Continental Casualty Company had provided Fibreboard with a comprehensive general liability policy with limits of $1 million per occurrence, $500,000 per claim, and no aggregate limit. Fibreboard also claimed that respondent Pacific Indemnity Company had insured it from 1956 to 1957 under a similar policy. App. to Pet. for Cert. 267a–268a. Beginning in 1979, Fibreboard was locked in coverage litigation with Continental and Pacific in a California state trial court, which in 1990 held Continental and Pacific responsible for indemnification as to any claim by a claimant exposed to Fibreboard asbestos products prior to their policies' respective

expiration dates. *Id.*, at 268a–269a. The decree also required the insurers to pay the full cost of defense for each claim covered. *Ibid.* The insurance companies appealed.

With asbestos case filings continuing unabated, and its secure insurance assets almost depleted, Fibreboard in 1988 began a practice of "structured settlement," paying plaintiffs 40 percent of the settlement figure up front with the balance contingent upon a successful resolution of the coverage dispute.[2] By 1991, however, the pace of filings forced Fibreboard to start settling cases entirely with the assignments of its rights against Continental, with no initial payment. To reflect the risk that Continental might prevail in the coverage dispute, these assignment agreements generally carried a figure about twice the nominal amount of earlier settlements. Continental challenged Fibreboard's right to make unilateral assignments, but in 1992 a California state court ruled for Fibreboard in that dispute.[3]

Meanwhile, in the aftermath of a 1990 Federal Judicial Center conference on the asbestos litigation crisis, Fibreboard approached a group of leading asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of its asbestos

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[2] Because Fibreboard's insurance policy with Continental expired in 1959, before the global settlement the settlement value of claims by victims exposed to Fibreboard's asbestos prior to 1959 was much higher than for victims exposed after 1959, where the only right of recovery was against Fibreboard itself. See *In re Asbestos Litigation*, 90 F. 3d 963, 1012–1013 (CA5 1996) (Smith, J., dissenting).

[3] *Id.*, at 969, and n. 1 (citing *Andrus* v. *Fibreboard*, No. 614747–3 (Sup. Ct., Alameda Cty., June 1, 1992)). Continental appealed, and, after the Global Settlement Agreement was reached in this case, but before the fairness hearing, see *infra*, at 827, a California appellate court reversed. See 90 F. 3d, at 969, and n. 1 (citing *Fibreboard Corp.* v. *Continental Casualty Co.*, No. A059716 (Cal. App., Oct. 19, 1994)). Continental and Fibreboard had each brought actions seeking to establish (or challenge) the validity of Fibreboard's assignment-settlement program, but only *Andrus* produced a definitive ruling as opposed to a settlement. See App. to Pet. for Cert. 288a–290a.

personal-injury liability. Early negotiations bore relatively little fruit, save for the December 1992 settlement by assignment of a significant inventory of pending claims. This settlement brought Fibreboard's deferred settlement obligations to more than $1.2 billion, all contingent upon victory over Continental on the scope of coverage and the validity of the settlement assignments.

In February 1993, after Continental had lost on both issues at the trial level, and thus faced the possibility of practically unbounded liability, it too joined the global settlement negotiations. Because Continental conditioned its part in any settlement on a guarantee of "total peace," ensuring no unknown future liabilities, talks focused on the feasibility of a mandatory class action, one binding all potential plaintiffs and giving none of them any choice to opt out of the certified class. Negotiations continued throughout the spring and summer of 1993, but the difficulty of settling both actually pending and potential future claims simultaneously led to an agreement in early August to segregate and settle an inventory of some 45,000 pending claims, being substantially all those filed by one of the plaintiffs' firms negotiating the global settlement. The settlement amounts per claim were higher than average, with one-half due on closing and the remainder contingent upon either a global settlement or Fibreboard's success in the coverage litigation. This agreement provided the model for settling inventory claims of other firms.

With the insurance companies' appeal of the consolidated coverage case set to be heard on August 27, the negotiating parties faced a motivating deadline, and about midnight before the argument, in a coffee shop in Tyler, Texas, the negotiators finally agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." $1.525 billion of this sum would come from Continental and Pacific, in the proportion established by the California trial court in the coverage case,

while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds, App. 84a. The negotiators also agreed to identify unsettled present claims against Fibreboard and set aside an as-then unspecified fund to resolve them, anticipating that the bulk of any excess left in that fund would be transferred to class claimants. *Ahearn* v. *Fibreboard Corp.*, 162 F. R. D. 505, 517 (ED Tex. 1995). The next day, as a hedge against the possibility that the Global Settlement Agreement might fail, plaintiffs' counsel insisted as a condition of that agreement that Fibreboard and its two insurers settle the coverage dispute by what came to be known as the "Trilateral Settlement Agreement." The two insurers agreed to provide Fibreboard with funds eventually set at $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win approval. *Id.*, at 517, 521; see also App. to Pet. for Cert. 492a.[4]

On September 9, 1993, as agreed, a group of named plaintiffs filed an action in the United States District Court for the Eastern District of Texas, seeking certification for settlement purposes of a mandatory class comprising three groups: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims before the previous August 27; those who had dismissed such a claim but retained the right to bring a future action against Fibreboard; and "past, present and future spouses, parents, children, and other relatives" of class mem-

[4] Two related settlement agreements accompanied the Global and Trilateral Settlement Agreements. The first, negotiated with representatives of Fibreboard's major codefendants, preserved credit rights for codefendant third parties, *In re Asbestos Litigation*, 90 F. 3d 963, 973 (CA5 1996); the second provided that final approval of the Global Settlement Agreement would not constitute a "settlement" under the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. § 933(g), 162 F. R. D., at 521–522. Neither of these agreements is before the Court.

bers exposed to Fibreboard asbestos.[5] The class did not include claimants with actions presently pending against Fibreboard or claimants "who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy." *Id.*,

[5] The final judgment regarding class certification in the District Court defined the class as follows:

"(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

"(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

"(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability)." App. to Pet. for Cert. 534a–535a.

at 534a–535a. The complaint pleaded personal injury claims against Fibreboard, and, as justification for class certification, relied on the shared necessity of ensuring insurance funds sufficient for compensation. *Id.*, at 552a–569a. After Continental and Pacific had obtained leave to intervene as party-defendants, the District Court provisionally granted class certification, enjoined commencement of further separate litigation against Fibreboard by class members, and appointed a guardian ad litem to review the fairness of the settlement to the class members. See *In re Asbestos Litigation*, 90 F. 3d 963, 972 (CA5 1996).

As finally negotiated, the Global Settlement Agreement provided that in exchange for full releases from class members, Fibreboard, Continental, and Pacific would establish a trust to process and pay class members' asbestos personal injury and death claims. Claimants seeking compensation would be required to try to settle with the trust. If initial settlement attempts failed, claimants would have to proceed to mediation, arbitration, and a mandatory settlement conference. Only after exhausting that process could claimants go to court against the trust, subject to a limit of $500,000 per claim, with punitive damages and prejudgment interest barred. Claims resolved without litigation would be discharged over three years, while judgments would be paid out over a 5- to 10-year period. The Global Settlement Agreement also contained spendthrift provisions to conserve the trust, and provided for paying more serious claims first in the event of a shortfall in any given year. *Id.*, at 973.

After an extensive campaign to give notice of the pending settlement to potential class members, the District Court allowed groups of objectors, including petitioners here, to intervene. After an 8-day fairness hearing, the District Court certified the class and approved the settlement as "fair, adequate, and reasonable" under Rule 23(e). *Ahearn*, 162 F. R. D., at 527. Satisfied that the requirements of Rule

23(a) were met, *id.*, at 523–526,[6] the District Court certified the class under Rule 23(b)(1)(B),[7] citing the risk that Fibreboard might lose or fare poorly on appeal of the coverage case or lose the assignment-settlement dispute, leaving it without funds to pay all claims. *Id.*, at 526. The "allowance of individual adjudications by class members," the District Court concluded, "would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses." *Id.*, at 527. In response to intervenors' objections that the absence of a "limited fund" precluded certification under Rule 23(b)(1)(B), the District Court ruled that although the subdivision is not so restricted, if it were, this case would qualify. It found both the "disputed insurance asset liquidated by the $1.535 billion Global Settlement," and, alternatively, "the sum of the value of Fibreboard plus the value of its insurance coverage," as measured by the insurance funds' settlement value, to be relevant "limited funds." App. to Pet. for Cert. 491a–492a.

On appeal, the Fifth Circuit affirmed both as to class certification and adequacy of settlement. *In re Asbestos Litiga-*

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[6] "Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 613 (1997).

[7] Rule 23(b)(1)(B) provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

tion, *supra*.[8] Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found that there was commonality in class members' shared interest in securing and equitably distributing maximum possible settlement funds, and that the representative plaintiffs were sufficiently typical both in sharing that interest and in basing their claims on the same legal and remedial theories that absent class members might raise. *Id.*, at 975–976. The Fifth Circuit also thought that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. *Id.*, at 976–982.[9] As to Rule 23(b)(1)(B), the court approved the class certification on a "limited fund" rationale based on the threat to "the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets." *Id.*, at 982.[10] The Court of Appeals cited expert testimony that Fibreboard faced enormous potential liabilities and defense costs that would likely equal or exceed the amount of damages paid out, and concluded that even combining Fibreboard's value of some $235 million with the $2 billion provided in the Trilateral Settlement Agreement, the company would be unable to pay all valid claims against it within five to nine years. *Ibid.* Judge Smith dissented, arguing among other things that the

[8] Continental and Pacific also filed a class action against a defendant class essentially identical to the plaintiff class in the Global Settlement Agreement as well as a class of third parties with asbestos-related claims against Fibreboard, seeking a declaration that the Trilateral Settlement Agreement was fair and reasonable. The District Court certified the class and approved the Trilateral Settlement Agreement, which the Fifth Circuit consolidated with the review of the case below and affirmed. See *In re Asbestos Litigation*, 90 F. 3d, at 974, 991–993. That decision is now final and is not before this Court.

[9] As the objectors did not challenge the adequacy of representation of class representatives, the Fifth Circuit did not consider the issue. *Id.*, at 976, n. 10. Likewise, no party raised concerns with Rule 23(a)'s numerosity requirement.

[10] Abandoning the District Court's alternative rationale, the Court of Appeals rested entirely on a limited fund theory.

majority had skimped on serious due process concerns, had glossed over problems of commonality, typicality, and adequacy of representation, and had ignored a number of justiciability issues. See generally *id.*, at 993–1026.[11]

Shortly thereafter, this Court decided *Amchem* and proceeded to vacate the Fifth Circuit's judgment and remand for further consideration in light of that decision. 521 U. S. 1114 (1997). On remand, the Fifth Circuit again affirmed, in a brief *per curiam* opinion, distinguishing *Amchem* on the grounds that the instant action proceeded under Rule 23(b)(1)(B) rather than (b)(3), and did not allocate awards according to the nature of the claimant's injury. *In re Asbestos Litigation*, 134 F. 3d 668, 669–670 (1998). Again citing the findings on certification under Rule 23(b)(1)(B), the Fifth Circuit affirmed as "incontestable" the District Court's conclusion that the terms of the subdivision had been met. *Id.*, at 670. The Court of Appeals acknowledged *Amchem*'s admonition that settlement class actions may not proceed unless the requirements of Rule 23(a) are met, but noted that the District Court had made extensive findings supporting its Rule 23(a) determinations. *Ibid.* Judge Smith again dissented, reiterating his previous concerns, and argued specifically that the District Court erred in certifying the class under Rule 23(b)(1)(B) on a "limited fund" theory because the only limited fund in the case was a creature of the settlement itself. *Id.*, at 671–674.

We granted certiorari, 524 U. S. 936 (1998), and now reverse.

II

The nub of this case is the certification of the class under Rule 23(b)(1)(B) on a limited fund rationale, but before we reach that issue, there are two threshold matters. First,

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[11] The Fifth Circuit denied rehearing en banc, with Judge Smith, joined by five other Circuit Judges, dissenting. *In re Asbestos Litigation*, 101 F. 3d 368, 369 (1996).

petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the "vast majority" of the "exposure-only" class members being without injury in fact and hence without standing to sue. Brief for Petitioners 44–50. Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. *Steel Co.* v. *Citizens For Better Environment*, 523 U. S. 83, 88–89 (1998). But the class certification issues are, as they were in *Amchem*, "logically antecedent" to Article III concerns, 521 U. S., at 612, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see *Steel Co.*, *supra*, at 92. Thus the issue about Rule 23 certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints . . . ." *Amchem*, *supra*, at 612–613.

Petitioners also argue that the Fifth Circuit on remand disregarded *Amchem* in passing on the Rule 23(a) issues of commonality, typicality, and adequacy of representation. Brief for Petitioners 13–22. We agree that in reinstating its affirmance of the District Court's certification decision, the Fifth Circuit fell short in its attention to *Amchem*'s explanation of the governing legal standards. Two aspects in particular of the District Court's certification should have received more detailed treatment by the Court of Appeals. First, the District Court's enquiry into both commonality and typicality focused almost entirely on the terms of the settlement. See *Ahearn*, 162 F. R. D., at 524.[12] Second, and more significantly, the District Court took no steps at the outset to ensure that the potentially conflicting interests of

[12] In *Amchem*, the Court found that class members' shared exposure to asbestos was insufficient to meet the demanding predominance requirements of Rule 23(b)(3). 521 U. S., at 623–624. We left open the possibility, however, that such commonality might suffice for the purposes of Rule 23(a). *Ibid.*

easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its *post hoc* findings at the fairness hearing that these subclasses in fact had been adequately represented. As will be seen, however, these points will reappear when we review the certification on the Court of Appeals's "limited fund" theory under Rule 23(b)(1)(B). We accordingly turn directly to that.

III

A

Although representative suits have been recognized in various forms since the earliest days of English law, see generally S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); see also Marcin, Searching for the Origin of the Class Action, 23 Cath. U. L. Rev. 515, 517–524 (1973), class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, see Hazard, Gedid, & Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849, 1859–1860 (1998) (hereinafter Hazard, Gedid, & Sowle), as well as from the bill of peace, an equitable device for combining multiple suits, see Z. Chafee, Some Problems of Equity 161–167, 200–203 (1950). The necessary parties rule in equity mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." *West* v. *Randall*, 29 F. Cas. 718, 721 (No. 17,424) (CC RI) (1820) (Story, J.). But because that rule would at times unfairly deny recovery to the party before the court, equity developed exceptions, among them one to cover situations "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary associ-

ation for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole . . . ." *Id.*, at 722; see J. Story, Commentaries on Equity Pleadings § 97 (J. Gould 10th rev. ed. 1892); F. Calvert, A Treatise upon the Law Respecting Parties to Suits in Equity 17–29 (1837) (hereinafter Calvert, Parties to Suits in Equity). From these roots, modern class action practice emerged in the 1966 revision of Rule 23. In drafting Rule 23(b), the Advisory Committee sought to catalogue in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties." Kaplan, A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497 (1969).

Rule 23(b)(1)(B) speaks from "a vantage point within the class, [from which the Advisory Committee] spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 388 (1967) (hereinafter Kaplan, Continuing Work). Thus, the subdivision (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions . . . would create a risk" of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. Rule Civ. Proc. 23(b)(1)(B).[13] Classic examples

[13] In contrast to class actions brought under subdivision (b)(3), in cases brought under subdivision (b)(1), Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. See 1 H. Newberg & A. Conte, Class Actions § 4.01, p. 4–6 (3d ed. 1992) (hereinafter Newberg). It is for this reason that such cases are often referred to as "mandatory" class actions.

of such a risk of impairment may, for example, be found in suits brought to reorganize fraternal-benefit societies, see, *e. g.*, *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921); actions by shareholders to declare a dividend or otherwise to "fix [their] rights," Kaplan, Continuing Work 388; and actions charging "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class" of beneficiaries, requiring an accounting or similar procedure "to restore the subject of the trust," Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 696 (hereinafter Adv. Comm. Notes). In each of these categories, the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.

Among the traditional varieties of representative suit encompassed by Rule 23(b)(1)(B) were those involving "the presence of property which call[ed] for distribution or management," J. Moore & J. Friedman, 2 Federal Practice 2240 (1938) (hereinafter Moore & Friedman). One recurring type of such suits was the limited fund class action, aggregating "claims . . . made by numerous persons against a fund insufficient to satisfy all claims." Adv. Comm. Notes 697; cf. 1 Newberg § 4.09, at 4–33 ("Classic" limited fund class actions "include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others").[14] The Advisory Committee cited *Dickinson* v.

[14] Indeed, Professor Kaplan, reporter to the Advisory Committee's 1966 revision of Rule 23, commented in a letter to another member of the Advisory Committee that the phrase " 'impair or impede the ability of the other members to protect their interests' " is "redolent of claims against a fund." Letter from Benjamin Kaplan to John P. Frank, Feb. 7, 1963, Congressional Information Service Records of the U. S. Judicial Conference, Committee on Rules of Practice and Procedure 1935–1988, No. CI–6312–31, p. 2.

Some fund-related class actions involved claims for the creation or preservation of a specific fund subject to the interests of numerous claim-

Burnham, 197 F. 2d 973 (CA2), cert. denied, 344 U. S. 875 (1952), as illustrative of this tradition. In *Dickinson*, investors hoping to save a failing company had contributed some $600,000, which had been misused until nothing was left but a pool of secret profits on a fraction of the original investment. In a class action, the District Court took charge of this fund, subjecting it to a constructive trust for division among subscribers who demonstrated their claims, in amounts proportional to each class member's percentage of all substantiated claims. 197 F. 2d, at 978.[15] The Second Circuit approved the class action and the distribution of the entire pool to claimants, noting that "[a]lthough none of the contributors has been paid in full, no one . . . now asserts or suggests that they should have full recovery . . . as on an ordinary tort liability for conspiracy and defrauding. The court's power of disposition over the fund was therefore ab-

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ants. See, *e. g.*, *City & County of San Francisco* v. *Market Street R. Co.*, 95 Cal. App. 2d 648, 213 P. 2d 780 (1950). The rationale in such cases for representative plaintiffs suing on behalf of all similarly situated potential parties was that benefits arising from the action necessarily inured to the class as a whole. Another type of fund case involved the adjudication of the rights of all participants in a fund in which the participants had common rights. See, *e. g.*, *Hartford Life Ins. Co.* v. *IBS*, 237 U. S. 662 (1915); *Supreme Council of Royal Arcanum* v. *Green*, 237 U. S. 531 (1915); *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146 (1917); see also *Smith* v. *Swormstedt*, 16 How. 288 (1854). In such cases, regardless of the size of any individual claimant's stake, the adjudication would determine the operating rules governing the fund for all participants. This category is more analogous in modern practice to class actions seeking structural injunctions and is not at issue in this case.

[15] The District Court in *Dickinson*, as was the usual practice in such cases, distributed the limited fund only after notice had been given to all class members, allowing them to come into the suit, prove their claim, and share in the recovery. See 197 F. 2d, at 978; see also Adv. Comm. Notes 697 (describing limited fund class actions as involving an "action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund").

solute and final." *Id.*, at 980.[16] As the Advisory Committee recognized in describing *Dickinson*, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all.

Equity, of course, recognized the same necessity to bind absent claimants to a limited fund when no formal imposition of a constructive trust was entailed. In *Guffanti* v. *National Surety Co.*, 196 N. Y. 452, 458, 90 N. E. 174, 176 (1909), for example, the defendant received money to supply steamship tickets and had posted a $15,000 bond as required by state law. He converted to personal use funds collected from more than 150 ticket purchasers, was then adjudged bankrupt, and absconded. One of the defrauded ticket purchasers sued the surety in equity on behalf of himself and all others like him. Over the defendant's objection, the New York Court of Appeals sustained the equitable class suit, citing among other considerations the fact that all recovery had to come from a "limited fund out of which the aggregate recoveries must be sought" that was inadequate to pay all claims, and subject to pro rata distribution. *Id.*, at 458, 90 N. E., at 176. See Hazard, Gedid, & Sowle 1915 ("*[Guffanti]*

[16] As *Dickinson* demonstrates, the immediate precursor to the type of limited fund class action invoked in this case was a subset of "hybrid" class actions under the 1938 version of Rule 23. Cf. 1 Newberg § 1.09, at 1–25. The original Rule 23 categorized class actions by "the character of the right sought to be enforced for or against the class," dividing such actions into "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. Rule Civ. Proc. 23(a) (1938 ed., Supp. V). See Moore & Friedman 2240; see also Moore & Cohn, Federal Class Actions, 32 Ill. L. Rev. 307, 317–318 (1937); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L. J. 551, 574 (1937).

explained that when a debtor's assets were less than the total of the creditors' claims, a binding class action was not only permitted but was required; otherwise some creditors (the parties) would be paid and others (the absentees) would not"). See also *Morrison* v. *Warren* 174 Misc. 233, 234, 20 N. Y. S. 2d 26, 27 (Sup. Ct. N. Y. Cty. 1940) (suit on behalf of more than 400 beneficiaries of an insurance policy following a fire appropriate where "the amount of the claims . . . greatly exceeds the amount of the insurance"); *National Surety Co.* v. *Graves*, 211 Ala. 533, 534, 101 So. 190 (1924) (suit against a surety company by stockholders "for the benefit of themselves and all others similarly situate who will join the suit" where it was alleged that individual suits were being filed on surety bonds that "would result in the exhaustion of the penalties of the bonds, leaving many stockholders without remedy").

Ross v. *Crary*, 1 Paige Ch. 416, 417–418 (N. Y. Ch. 1829), presents the concept of the limited fund class action in another incarnation. "[D]ivers suits for general legacies," *id.*, at 417, were brought by various legatees against the executor of a decedent's estate. The *Ross* court stated that where "there is an allegation of a deficiency of the fund, so that an account of the estate is necessary," the court will "direc[t] an account in one cause only" and "stay the proceeding[s] in the others, leaving all the parties interested in the fund, to come in under the decree." *Id.*, at 417–418. Thus, in equity, legatee and creditor bills against the assets of a decedent's estate had to be brought on behalf of all similarly situated claimants where it was clear from the pleadings that the available portion of the estate could not satisfy the aggregate claims against it.[17]

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[17] In early creditors' bills, for example, equity would order a master to call for all creditors to prove their debts, to take account of the entire estate, and to apply the estate in payment of the debts. See 1 J. Story, Commentaries on Equity Jurisprudence §§ 547, 548 (I. Redfield 8th rev. ed. 1861). This decree, with its equitable benefit and incorporation of all

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The cases forming this pedigree of the limited fund class action as understood by the drafters of Rule 23 have a number of common characteristics, despite the variety of circumstances from which they arose. The points of resemblance are not necessarily the points of contention resolved in the particular cases, but they show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede.

The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine. See, *e. g.*, *Guffanti*, *supra*, at 457, 90 N. E., at 176 ("The total amount of the claims exceeds the penalty of the bond . . . . A just and equitable payment from the bond would be a distribution *pro rata* upon the amount of the several embezzlements. Unless in a case like this the amount

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creditors was not, however, available when the executor of the estate admitted assets sufficient to cover its debts, because where assets were not limited, no prejudice to the other creditors would result from the simple payment of the debt to the creditor who brought the bill. See *Woodgate* v. *Field*, 2 Hare 211, 213, 67 Eng. Rep. 88, 89 (Ch. 1842) ("The reason for . . . the usual form of decree . . . has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the Plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails"); see also *Hallett* v. *Hallett*, 2 Paige 15, 21 (N. Y. 1829) ("[I]f by the answer of the defendant [in a creditors' or legatees' suit] it appears there will be a deficiency of assets so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity").

of the bond is so distributed among the persons having claims which are secured thereby, it must necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements"); *Graves*, *supra*, at 534, 101 So., at 190 ("The primary equity of the bill is the adjustment of claims and the equitable apportionment of a fund provided by law, which is insufficient to pay claimants in full"). The equity of the limitation is its necessity.

Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. See, *e. g.*, *Dickinson*, 197 F. 2d, at 979–980 (rejecting a challenge by holder of funds to the court's disposition of the entire fund); see also *United States* v. *Butterworth-Judson Corp.*, 269 U. S. 504, 513 (1926) ("Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities"). It went without saying that the defendant or estate or constructive trustee with the inadequate assets had no opportunity to benefit himself or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than *seriatim* litigation would have produced.

Third, the claimants identified by a common theory of recovery were treated equitably among themselves. The cases assume that the class will comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery, to be satisfied from the limited fund as the source of payment. Each of the people represented in *Ross*, for example, had comparable entitlement as a legatee under the testator's will. Those subject to representation in *Dickinson* had a common source of claims in the solicitation of funds by parties whose subsequent defalcation left them without their investment, while in *Guffanti* the individuals represented had each entrusted

money for ticket purchases. In these cases the hope of recovery was limited, respectively, by estate assets, the residuum of profits, and the amount of the bond. Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery. See *Railroad Co.* v. *Orr*, 18 Wall. 471, 474 (1873) (reciting the "well settled" general rule "that when it appears on the face of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation"). The plaintiff appeared on behalf of all similarly situated parties, see Calvert, Parties to Suits in Equity 24 ("[I]t is not sufficient that the plaintiff appear on behalf of numerous parties: the rule seems to be, that he must appear on behalf of all who are interested"); thus, the creditors' bill was brought on behalf of all creditors, cf. *Leigh* v. *Thomas*, 2 Ves. Sen. 312, 313, 28 Eng. Rep. 201 (Ch. 1751) ("No doubt but a bill may be by a few creditors in behalf of themselves and the rest . . . but there is no instance of a bill by three or four to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors"), the constructive trust was asserted on behalf of all victims of the fraud, and the surety suit was brought on behalf of all entitled to a share of the bond.[18] Once all similar claims

[18] Professor Chafee explained, in discussing bills of peace, that where a case presents a limited fund, "it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due reference to the claims of the rest. The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts

were brought directly or by representation before the court, these antecedents of the mandatory class action presented straightforward models of equitable treatment, with the simple equity of a pro rata distribution providing the required fairness, see 1 J. Pomeroy, Equity Jurisprudence § 407, pp. 764–765 (4th ed. 1918) ("[I]f the fund is not sufficient to discharge all claims upon it in full . . . equity will incline to regard all the demands as standing upon an equal footing, and will decree a *pro rata* distribution or payment").[19]

In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.

C

The Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with these characteristics would satisfy the limited

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the number of persons at the table." Bills of Peace with Multiple Parties, 45 Harv. L. Rev. 1297, 1311 (1932).

[19] As noted above, traditional limited fund class actions typically provided notice to all claimants and the opportunity for those claimants to establish their claims before the actual distribution took place. See, *e. g.*, *Dickinson* v. *Burnham*, 197 F. 2d 973, 978 (CA2 1952); *Terry* v. *President and Directors of the Bank of Cape Fear*, 20 F. 777, 782 (CC WDNC 1884); cf. *Johnson* v. *Waters*, 111 U. S. 640, 674 (1884) (in a creditors' bill, "it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree"). Rule 23, however, specifies no notice requirement for subdivision (b)(1)(B) actions beyond that required by subdivision (e) for settlement purposes. Plaintiffs in this case made an attempt to notify all presently identifiable class members in connection with the fairness hearing, though the adequacy of the effort is disputed. Since satisfaction or not of a notice requirement would not affect the disposition of this case, we express no opinion on the need for notice or the sufficiency of the effort to give it in this case.

fund rationale cognizable under that subdivision. The question remains how far the same characteristics are necessary for limited fund treatment. While we cannot settle all the details of a subdivision (b)(1)(B) limited fund here (and so cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment), there are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm.

It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept, just as it covers more historical antecedents than the limited fund. But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse in ways that will be apparent when we apply the limited fund criteria to the case before us. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. As will be seen, this limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims, especially where a case seeks to resolve future liability in a settlement-only action.

To begin with, the Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B), at least in comparison with Rule 23(b)(3). Although the Committee crafted all three subdivisions of the Rule in general, practical terms, without the formalism that had bedeviled the original Rule 23, see Kaplan, Continuing Work 380–386, the Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward looking as it was in anticipating innovations under Rule 23(b)(3). Com-

pare Civil Rules Advisory Committee Meeting, Oct. 31–Nov. 2, 1963, Congressional Information Service Records of the U. S. Judicial Conference, Committee on Rules of Practice and Procedure 1935–1988, No. CI–7104–53, p. 11 (hereinafter Civil Rules Meeting) (comments of Reporter Kaplan) (Rule 23(b)(3) represents "the growing point of the law"); *id.*, at 16 (comments of Committee Member Prof. Albert M. Sacks) (Rule 23(b)(3) is "an evolving area"). Thus, the Committee intended subdivision (b)(1) to capture the "'standard'" class actions recognized in pre-Rule practice, Kaplan, Continuing Work 394.

Consistent with its backward look under subdivision (b)(1), as commentators have pointed out, it is clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. See Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1164 (1998) ("The 'framers' of Rule 23 did not envision the expansive interpretations of the rule that have emerged . . . . No draftsmen contemplated that, in mass torts, (b)(1)(B) 'limited fund' classes would emerge as the functional equivalent to bankruptcy by embracing 'funds' created by the litigation itself"); see also Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837, 840 (1995) ("The original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them"); Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L. Rev. 858, 877 (1995). None of the examples cited in the Advisory Committee Notes or by Professor Kaplan in explaining Rule 23(b)(1)(B) remotely approach what was then described as a "mass accident" case. While the Advisory Committee focused much attention on the amenability of Rule 23(b)(3) to such cases,

the Committee's debates are silent about resolving tort claims under a mandatory limited fund rationale under Rule 23(b)(1)(B).[20] It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3), with its provisions for notice and the right to opt out, see Rule 23(c)(2), would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B).[21] We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims, cf. *Ticor Title Ins. Co.* v. *Brown*, 511 U. S. 117, 121 (1994)

[20] To the extent that members of the Advisory Committee explicitly considered cases resembling the current mass tort limited fund class action, they did so in the context of the debate about bringing "mass accident" class actions under Rule 23(b)(3). There was much concern on the Advisory Committee about the degree to which subdivision (b)(3), which the Committee was drafting to replace the old spurious class action category, would be applied to "mass accident" cases. Compare, *e. g.*, Civil Rules Meeting 9, 14, with, *e. g., id.*, at 13, 44–45. See also *id.*, at 51. As a compromise, the Advisory Committee Notes state that a "'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Adv. Comm. Notes 697. See also Kaplan, Continuing Work 393.

[21] The Advisory Committee noted, moreover, that "[w]here the class-action character of the lawsuit is based solely on the existence of a 'limited fund,' the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of non-appearing members against the debtor." Adv. Comm. Notes 698. Cf. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B. U. L. Rev. 213, 282 (1990) (historically suits involving individual claims in the absence of a common fund did not automatically bind class members, instead providing a mechanism for notice and the opportunity to join the suit). This recognition underscores doubt that the Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of Rule 23(b)(1)(B) into a mechanism for resolving the claims of individuals not only against the fund, but also against an individual tortfeasor.

(per curiam). But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements.

The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that "rules of procedure 'shall not abridge, enlarge or modify any substantive right,' " *Amchem*, 521 U. S., at 613 (quoting 28 U. S. C. § 2072(b)); cf. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law"). Petitioners argue that the Act has been violated here, asserting that the Global Settlement Agreement's priorities of claims and compromise of full recovery abrogated the state law that must govern this diversity action under 28 U. S. C. § 1652. See Brief for Petitioners 31–36. Although we need not grapple with the difficult choice-of-law and substantive state-law questions raised by petitioners' assertion, we do need to recognize the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law. Even if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits by keeping limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption.

Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale. First, the certification of a mandatory class followed by settlement of its action for money

damages obviously implicates the Seventh Amendment jury trial rights of absent class members.[22] We noted in *Ross* v. *Bernhard*, 396 U. S. 531 (1970), that since the merger of law and equity in 1938, it has become settled among the lower courts that "class action plaintiffs may obtain a jury trial on any legal issues they present." *Id.*, at 541. By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.

Second, and no less important, mandatory class actions aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *Hansberry* v. *Lee*, 311 U. S. 32, 40 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court,'" *Martin* v. *Wilks*, 490 U. S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); see *Richards* v. *Jefferson County*, 517 U. S. 793, 798–799 (1996). Although "'[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party," or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," *Martin*, *supra*, at 762, n. 2 (citations omitted), the burden of justification rests on the exception.

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory

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[22] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.[23] And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting, see *Amchem*, *supra*, at 620.

In related circumstances, we raised the flag on this issue of due process more than a decade ago in *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985). *Shutts* was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. *Id.*, at 800. After certification of the class, the named plaintiffs notified each member by first-class mail of the right to opt out of the lawsuit. Out of a class of 33,000, some 3,400 exercised that right, and another 1,500 were excluded because their notices could not be delivered. *Id.*, at 801. After losing at trial, the defendant, Phillips Petroleum, argued that the state court had no jurisdiction over claims of out-of-state plaintiffs without their affirmative consent. We said no and held that out-of-state plaintiffs could not invoke the same due process limits on personal jurisdiction that out-of-state defendants had under *International Shoe Co.* v. *Washington*, 326 U. S.

[23] It is no answer in this case that the settlement agreement provided for a limited, back-end "opt out" in the form of a right on the part of class members eventually to take their case to court if dissatisfied with the amount provided by the trust. The "opt out" in this case requires claimants to exhaust a variety of alternative dispute mechanisms, to bring suit against the trust, and not against Fibreboard, and it limits damages to $500,000, to be paid out in installments over 5 to 10 years, see *supra*, at 827, despite multimillion-dollar jury verdicts sometimes reached in asbestos suits, *In re Asbestos Litigation*, 90 F. 3d, at 1006–1007, n. 30 (Smith, J., dissenting). Indeed, on approximately a dozen occasions, Fibreboard had settled for more than $500,000. See App. to Pet. for Cert. 373a.

310 (1945), and its progeny. 472 U. S., at 806–808. But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class." *Id.*, at 812.[24]

IV

The record on which the District Court rested its certification of the class for the purpose of the global settlement did not support the essential premises of mandatory limited fund actions. It failed to demonstrate that the fund was limited except by the agreement of the parties, and it showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in *Amchem.*

A

The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures[25] agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy.[26] When a dis-

[24] We also reiterated the constitutional requirement articulated in *Hansberry* v. *Lee*, 311 U. S. 32 (1940), that "the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U. S., at 812 (citing *Hansberry*, *supra*, at 42–43, 45). In *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were "wholly or predominately for money judgments," 472 U. S., at 811, n. 3.

[25] The plural reflects the fact that the insurers agreed to provide $1.525 billion under the Global Settlement Agreement and $2 billion under the Trilateral Settlement Agreement.

[26] The federal courts have differed somewhat in articulating the standard to evaluate whether, in fact, a fund is limited, in cases involving mass torts. Compare, *e. g.*, *In re Northern Dist. of California, Dalkon Shield*

trict court, as here, certifies for class action settlement only, the moment of certification requires "heightene[d] attention," *Amchem*, 521 U. S., at 620, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in *Amchem*, a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," *ibid.*, among them subdivision (b)(1)(B).[27] Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see *In re Bendectin Products Liability Litigation*, 749 F. 2d 300, 306 (CA6 1984) ("[T]he district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund

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IUD Products Liability Litigation, 693 F. 2d 847, 852 (CA9 1982), cert. denied *sub nom. A. H. Robins Co., Inc.* v. *Abed*, 459 U. S. 1171 (1983) (class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members), with, *e. g.*, *In re "Agent Orange" Product Liability Litigation*, 100 F. R. D. 718, 726 (EDNY 1983), aff'd 818 F. 2d 145 (CA2 1987), cert. denied *sub nom. Fraticelli et al.* v. *Dow Chemical Co. et al.*, 484 U. S. 1004 (1988) (requiring only a "substantial probability—that is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets"). Cf. *In re Bendectin Products Liability Litigation*, 749 F. 2d 300, 306 (CA6 1984). Because under either formulation, the class certification in this case cannot stand, it would be premature to decide the appropriate standard at this time.

[27] See Issacharoff, Class Action Conflicts, 30 U. C. D. L. Rev. 805, 822 (1997) ("[I]n the context of a mandatory *settlement* class, the individual class member is presented with what purports to be a binding *fait accompli*, with the only recourse a likely futile objection at the fairness hearing required by Rule 23(e)").

does not exist"); see also *In re Temple*, 851 F. 2d 1269, 1272 (CA11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); *In re Dennis Greenman Securities Litigation*, 829 F. 2d 1539, 1546 (CA11 1987) (discussing factual findings necessary for certification of a limited fund class action).

We have already alluded to the difficulties facing limited fund treatment of huge numbers of actions for unliquidated damages arising from mass torts, the first such hurdle being a computation of the total claims. It is simply not a matter of adding up the liquidated amounts, as in the models of limited fund actions. Although we might assume, *arguendo*, that prior judicial experience with asbestos claims would allow a court to make a sufficiently reliable determination of the probable total, the District Court here apparently thought otherwise, concluding that "there is no way to predict Fibreboard's future asbestos liability with any certainty." 162 F. R. D., at 528. Nothing turns on this conclusion, however, since there was no adequate demonstration of the second element required for limited fund treatment, the upper limit of the fund itself, without which no showing of insufficiency is possible.

The "fund" in this case comprised both the general assets of Fibreboard and the insurance assets provided by the two policies, see 90 F. 3d, at 982 (describing the fund as Fibreboard's entire equity and $2 billion in insurance assets under the Trilateral Settlement Agreement). As to Fibreboard's assets exclusive of the contested insurance, the District Court and the Fifth Circuit concluded that Fibreboard had a then-current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative,[28] at least the District Court heard evi-

[28] The District Court based the $235 million figure on evidence provided by an investment banker regarding what a "financially prudent buyer" would pay to acquire Fibreboard free of its personal injury asbestos liabili-

dence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance.

The insurance assets would obviously be "limited" in the traditional sense if the total of demonstrable claims would render the insurers insolvent, or if the policies provided aggregate limits falling short of that total; calculation might be difficult, but the way to demonstrate the limit would be clear. Neither possibility is presented in this case, however. Instead, any limit of the insurance asset here had to be a product of potentially unlimited policy coverage discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation. This sense of limit as a value discounted by risk is of course a step removed from the historical model, but even on the assumption that it would suffice for limited fund treatment, there was no adequate finding of fact to support its application here. Instead of undertaking an independent evaluation of potential insurance funds, the District Court (and, later, the Court of Appeals), simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay tort victims, concluding that "[w]here insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value." App. to Pet. for Cert. 492a.[29]

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ties, less transaction costs. App. to Pet. for Cert. 377a, 492a. In 1997, however, Fibreboard was acquired for about $515 million, plus $85 million of assumed debt. See *In re Asbestos Litigation,* 134 F. 3d 668, 674 (CA5 1998) (Smith, J., dissenting); see also Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1402 (1995) (noting the surge in Fibreboard's stock price following the settlement below).

[29] In describing possible limited funds in this case, the District Court discounted the $2 billion Trilateral Settlement Agreement figure by the amount necessary to resolve present claims included in neither the inventory settlements nor the global class claims and other items, yielding a figure equal to the $1.535 billion available under the Global Settlement Agreement. App. to Pet. for Cert. 492a. The Court of Appeals, by contrast, assumed that the full $2 billion represented by the Trilateral Settle-

Settlement value is not always acceptable, however. One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees.[30] In this case, certainly, any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, 90 F. 3d, at 969–970, 971, the full payment of which was contingent on a successful Global Settlement Agreement or the successful resolution of the insurance coverage dispute (either by litigation or by agreement, as eventually occurred in the Trilateral Settlement Agreement), *id.*, at 971, n. 3; App. 119a–120a. Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. Cf. Cramton, Individualized Justice, Mass

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ment Agreement would be available to class claims. *In re Asbestos Litigation*, 90 F. 3d, at 982. The Court of Appeals provided no explanation for using the higher figure in light of the District Court's conclusion that only $1.535 billion of the $2 billion Trilateral Settlement Agreement figure would actually be available to the class. Either way, the figure represented only the amount the insurance companies agreed to pay, and not an independent evaluation of the limits of their payment obligations.

[30] In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L. Rev. 811, 832 (1995) ("[S]ide settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class"). The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants. See 521 U. S., at 626–627 (discussing adequacy of named representatives under Rule 23(a)(4)).

We do not, of course, know exactly what an independent valuation of the limit of the insurance assets would have shown. It might have revealed that even on the assumption that Fibreboard's coverage claim was sound, there would be insufficient assets to pay claims, considered with reference to their probable timing; if Fibreboard's own assets would not have been enough to pay the insurance shortfall plus any claims in excess of policy limits, the projected insolvency of the insurers and Fibreboard would have indicated a truly limited fund. (Nothing in the record, however, suggests that this would have been a supportable finding.) Or an independent valuation might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases. Or the court's independent valuation might have shown, discount or no discount, the probability of enough assets to pay all projected claims, precluding certification of any mandatory class on a limited fund rationale. Throughout this litigation the courts have accepted the assumption that the third possibility was out of the question, and they may have been right. But objecting and unidentified class members alike are entitled to have the issue settled by specific evidentiary findings independent of the agreement of defendants and conflicted class counsel.

B

The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of distributions to those within it. On each, this certification for settlement fell short.

The definition of the class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. While the class includes those with present claims never filed, present claims withdrawn without prejudice, and future claimants, it fails to include those who had previously settled with Fibreboard while retaining the right to sue again "upon development of an asbestos related malignancy," plaintiffs with claims pending against Fibreboard at the time of the initial announcement of the Global Settlement Agreement, and the plaintiffs in the "inventory" claims settled as a supposedly necessary step in reaching the global settlement, see 90 F. 3d, at 971. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated by the Guardian Ad Litem at more than 53,000 as of August 27, 1993, see App. in No. 95–40635 (CA5), 6 Record, Tab 55, p. 72 (Report of the Guardian Ad Litem). It is a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class, but there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent, see App. to Pet. for Cert.

321a (noting that the parties negotiating the global settlement agreed to use a negotiating benchmark of 186,000 future claims against Fibreboard).

Might such class exclusions be forgiven if it were shown that the class members with present claims and the outsiders ended up with comparable benefits? The question is academic here. On the record before us, we cannot speculate on how the unsettled claims would fare if the global settlement were approved, or under the trilateral settlement. As for the settled inventory claims, their plaintiffs appeared to have obtained better terms than the class members. They received an immediate payment of 50 percent of a settlement higher than the historical average, and would get the remainder if the global settlement were sustained (or the coverage litigation resolved, as it turned out to be by the Trilateral Settlement Agreement); the class members, by contrast, would be assured of a 3-year payout for claims settled, whereas the unsettled faced a prospect of mediation followed by arbitration as prior conditions of instituting suit, which would even then be subject to a recovery limit, a slower payout, and the limitations of the trust's spendthrift protection. See *supra*, at 827. Finally, as discussed below, even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests.

On the second element of equity within the class, the fairness of the distribution of the fund among class members, the settlement certification is likewise deficient. Fair treatment in the older cases was characteristically assured by straightforward pro rata distribution of the limited fund. See *supra*, at 841. While equity in such a simple sense is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, at the least such a settlement must

seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves.

First, it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See *Amchem*, 521 U. S., at 627 (class settlements must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); cf. 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer, & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23–149 (3d ed. 1998) (an attorney who represents another class against the same defendant may not serve as class counsel).[31] As we said in *Amchem*, "for the currently injured, the critical goal is generous immediate payments," but "[t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." 521 U. S., at 626. No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund

[31] This adequacy of representation concern parallels the enquiry required at the threshold under Rule 23(a)(4), but as we indicated in *Amchem*, the same concerns that drive the threshold findings under Rule 23(a) may also influence the propriety of the certification decision under the subdivisions of Rule 23(b). See *Amchem*, 521 U. S., at 623, n. 18.

In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the "competency and conflicts of class counsel." *Id.*, at 626, n. 20 (citing *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 157–158, n. 13 (1982)); see also 5 Moore's Federal Practice § 23.25[3][a] (adequacy of representation concerns named plaintiff and class counsel). In this case, of course, the named representatives were not even "named [until] after the agreement in principle was reached," App. to Pet. for Cert. 483a; and they then relied on class counsel in subsequent settlement negotiations, *ibid.*

rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4).

Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one that provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, see 90 F. 3d, at 1012–1013 (Smith, J., dissenting), the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within the requirement of structural protection recognized in *Amchem*.

It is no answer to say, as the Fifth Circuit said on remand, that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes. See 134 F. 3d, at 669–670. The settlement decides that the claims of the immediately injured deserve no provisions more favorable than the more speculative claims of those projected to have future injuries, and that liability subject to indemnification is no different from liability with no indemnification. The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.

Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here. See Brief for Respondent Class Representatives Ahearn et al. 31 (discussing this issue in the context of the Rule 23(a)(4) adequacy of representation requirement); *id.*,

at 35–36 (citing, *e. g.*, *In re "Agent Orange" Product Liability Litigation*, 996 F. 2d 1425, 1435–1436 (CA2 1993); *In re "Agent Orange" Product Liability Litigation*, 800 F. 2d 14, 18–19 (CA2 1986)). This argument is simply a variation of the position put forward by the proponents of the settlement in *Amchem*, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests, see Brief for Petitioners in *Amchem Products, Inc.* v. *Windsor*, O. T. 1996, No. 96–270, p. 48 (arguing that "achieving a *global* settlement" was "an overriding concern that all plaintiffs [held] in common"); see also *id.*, at 42 (arguing that the requirement of Rule 23(b)(3) that there be predominance of common questions of law or fact had been met by shared interest in "the fairness of the settlement"). The current position is just as unavailing as its predecessor in *Amchem*. There we gave the argument no weight, see 521 U. S., at 625–628, observing that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but the determination whether "proposed classes are sufficiently cohesive to warrant adjudication" must focus on "questions that preexist any settlement," *id.*, at 622–623.[32] Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense. A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements

[32] We made this observation in the context of Rule 23(b)(3)'s predominance enquiry, see *Amchem*, 521 U. S., at 622–623, and noted that no " 'limited fund' capable of supporting class treatment under Rule 23(b)(1)(B)" was involved, *id.*, at 623, n. 19.

of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).[33]

C

A third contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth. Given our treatment of the two preceding deficiencies of the certification, there is of course no need to decide whether this feature of the agreement would alone be fatal to the Global Settlement Agreement. To ignore it entirely, however, would be so misleading that we have decided simply to identify the issue it raises, without purporting to resolve it at this time.

Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000

[33] As a variation of the argument that class members' common interest in securing the insurance settlement overrode any internal conflicts, respondents put forth an alternative rationale for sustaining the certification in this case under Rule 23(b)(1)(B). They assert that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis—allowing class members instead to prosecute their claims separately—would have put class members to the 'significant risk[s]' that Fibreboard would lose its claimed insurance as a result of the coverage disputes," and that "any separate action by any class member could have *itself* resulted in an adjudication that the insurers owed no coverage to Fibreboard . . . ." Brief for Respondents Continental et al. 25 (quoting Rule 23(b)(1)(B)). Whatever its merits, this rationale for certification is foreclosed by the class conflicts, rehearsed above, that tainted the negotiation of the global settlement, and that at this point cannot be undone. Thus, whether a mandatory class could now be certified without the excluded inventory plaintiffs (whose settlements would appear to be final), or with properly represented subclasses, is an issue we need not address.

of that equity for itself.[34] On the face of it, the arrangement seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed. With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members. Given the nature of a limited fund and the need to apply its criteria at the certification stage, it is not enough for a District Court to say that it "need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; [but only that] the amount recovered by the class [be] fair." *Ahearn*, 162 F. R. D., at 527.

The District Court in this case seems to have had a further point in mind, however. One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation, an advantage to which the settlement's proponents have referred in this case.[35] Although the District Court made no specific

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[34] We need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class certification. While there is no inherent conflict between a limited fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code, cf., *e. g., In re Drexel Burnham Lambert Group, Inc.*, 960 F. 2d 285, 292 (CA2 1992), it is worth noting that if limited fund certification is allowed in a situation where a company provides only a *de minimis* contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code. We note further that Congress in the Bankruptcy Reform Act of 1994, Pub. L. 103–394, § 111(a), amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability, see 11 U. S. C. §§ 524(g), (h).

[35] Some courts certifying limited fund class actions have focused on the advantages such suits have in reducing transaction costs when compared to piecemeal litigation. See, *e. g., In re Drexel Burnham Lambert Group, Inc.*, *supra*, at 292 (certifying mandatory class in part because "some mem-

finding about the transaction cost saving likely from this class settlement, estimating the amount in the "hundreds of millions," *id.*, at 529, it did conclude that the amount would exceed Fibreboard's net worth as the Court valued it, *ibid.* (Fibreboard's net worth of $235 million "is considerably less than the likely savings in defense costs under the Global Settlement"). If a settlement thus saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized in a mandatory class action as an incentive to settlement? It is at least a legitimate question, which we leave for another day.

V

Our decision rests on a different basis from the ground of JUSTICE BREYER's dissent, just as there was a difference in approach between majority and dissenters in *Amchem.* The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act. Although, as the dissent notes, *post,* at 882, the revised text adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also

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bers of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members," and thus warranting mandatory class certification "to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members"). Although the transaction costs Fibreboard faced prior to settlement were at times significant, see *Ahearn,* 162 F. R. D., at 509; see also App. to Pet. for Cert. 282a (Fibreboard's annual asbestos litigation defense costs ran, at times, as high as twice the total face value of settlements reached), given the exigencies of Fibreboard's contingent insurance asset, this case does not present an instance in which limited fund certification can be justified on the ground that such settlement necessarily provided funds equal to, or greater than, what might have been recovered through individual litigation factoring out transaction costs.

the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see *supra*, at 843–844. While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.

Apart from its effect on the requirements of subdivision (a) as explained and held binding in *Amchem*, the dissent would move the standards for mandatory actions in the direction of opt-out class requirements by according weight to this "unusual limited fund['s] . . . witching hour," *post*, at 877, in exercising discretion over class certification. It is on this belief (that we should sustain the allowances made by the District Court in consideration of the exigencies of this settlement proceeding) that the dissent addresses each of the criteria for limited fund treatment (demonstrably insufficient fund, intraclass equity, and dedication of the entire fund, see *post*, at 873–883).

As to the calculation of the fund, the dissent believes an independent valuation by the District Court may be dispensed with here in favor of the figure agreed upon by the settling parties. The dissent discounts the conflicts on the part of class counsel who negotiated the Global Settlement Agreement by arguing that the "*relevant*" settlement negotiation, and hence the relevant benchmark for judging the actual value of the insurance amount, was the negotiation between Fibreboard and the insurers that produced the Trilateral Settlement Agreement. See *post*, at 876. This argument, however, minimizes two facts: (1) that Fibreboard and the insurers made this separate, backup agreement only at the insistence of class counsel as a condition for reaching the Global Settlement Agreement; (2) even more important, that "[t]he Insurers were . . . adamant that they would not agree

to pay any more in the context of a backup agreement than in a global agreement," a principle "Fibreboard acceded to" on the day the Global Settlement Agreement was announced "as the price of permitting an agreement to be reached with respect to a global settlement," *Ahearn*, 162 F. R. D., at 516. Under these circumstances the reliability of the Trilateral Settlement Agreement's figure is inadequate as an independent benchmark that might excuse the want of any independent judicial determination that the Global Settlement Agreement's fund was the maximum possible. In any event, the dissent says, it is not crucial whether a $30 claim has to settle for $15 or $20. But it is crucial. Conflict-free counsel, as required by Rule 23(a) and *Amchem*, might have negotiated a $20 figure, and a limited fund rationale for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund, not a potentially significant fraction less.

With respect to the requirement of intraclass equity, the dissent argues that conflicts both within this certified class and between the class as certified and those excluded from it may be mitigated because separate counsel were simply not to be had in the short time that a settlement agreement was possible before the argument (or likely decision) in the coverage case. But this is to say that when the clock is about to strike midnight, a court considering class certification may lower the structural requirements of Rule 23(a) as declared in *Amchem*, and the parallel equity requirements necessary to justify mandatory class treatment on a limited fund theory.

Finally, the dissent would excuse Fibreboard's retention of virtually all its net worth, and the loss to members of the certified class of some 13 percent of the fund putatively available to them, on the ground that the settlement made more money available than any other effort would likely have done. But even if we could be certain that this evaluation were true, this is to reargue *Amchem:* the settlement's fair-

ness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b).

We believe that if an allowance for exigency can make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class actions will guarantee enough exigencies to take the law back before *Amchem* and unsettle the line between mandatory class actions under subdivision (b)(1)(B) and opt-out actions under subdivision (b)(3).

VI

In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper. The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm. Assuming, *arguendo,* that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rules 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. In this case, the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified by the representation of class members by counsel also representing excluded plaintiffs, whose settlements would be funded fully upon settlement of the class action on any terms that could survive final fairness review. Those separate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even

afforded to the conflicting elements within the class as certified.

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

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring.

JUSTICE BREYER's dissenting opinion highlights in graphic detail the massive impact of asbestos-related claims on the federal courts. *Post*, at 866–867. Were I devising a system for handling these claims on a clean slate, I would agree entirely with that dissent, which in turn approves the near-heroic efforts of the District Court in this case to make the best of a bad situation. Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.

But we are not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law, and I join it. But the "elephantine mass of asbestos cases," *ante*, at 821, cries out for a legislative solution.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

This case involves a settlement of an estimated 186,000 potential future asbestos claims against a single company, Fibreboard, for approximately $1.535 billion. The District Court, in approving the settlement, made 446 factual findings, on the basis of which it concluded that the settlement was equitable, that the potential claimants had been well represented, and that the distinctions drawn among different categories of claimants were reasonable. *Ahearn* v. *Fibreboard Corp.*, 162 F. R. D. 505 (ED Tex. 1995); App. to Pet. for

Cert. 248a–468a. The Court of Appeals, dividing 2 to 1, held that the settlement was lawful. *In re Asbestos Litigation*, 134 F. 3d 668 (CA5 1998). I would not set aside the Court of Appeals' judgment as the majority does. Accordingly, I dissent.

I

A

Four special background circumstances underlie this settlement and help to explain the reasonableness and consequent lawfulness of the relevant District Court determinations. First, as the majority points out, the settlement comprises part of an "elephantine mass of asbestos cases," which "defies customary judicial administration." *Ante,* at 821. An estimated 13-to-21 million workers have been exposed to asbestos. See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 6–7 (Mar. 1991) (hereinafter Report). Eight years ago the Judicial Conference spoke of the mass of related cases having "reached critical dimensions," threatening "a disaster of major proportions." *Id.*, at 2. In the Eastern District of Texas, for example, one out of every three civil cases filed in 1990 was an asbestos case. See *id.*, at 8. In the past decade nearly 80,000 new federal asbestos cases have been filed; more than 10,000 new federal asbestos cases were filed last year. See U. S. District Courts Civil Cases Commenced by Nature of Suit, Administrative Office of the Courts Statistics (Dec. 31, 1994–1998) (Table C2–A) (hereinafter AO Statistics).

The Judicial Conference found that asbestos cases on average take almost twice as long as other lawsuits to resolve. See Report 10–11. Judge Parker, the experienced trial judge who approved this settlement, noted in one 3,000-member asbestos class action over which he presided that 448 of the original class members had died while the litigation was pending. *Cimino* v. *Raymark Industries, Inc.*, 751 F. Supp. 649, 651 (ED Tex. 1990). And yet, Judge Parker

went on to state, if the District Court could close "thirty cases a month, it would [still] take six and one-half years to try these cases and [due to new filings] there would be pending over 5,000 untouched cases" at the end of that time. *Id.*, at 652. His subsequent efforts to accelerate final decision or settlement through the use of sample cases produced a highly complex trial (133 trial days, more than 500 witnesses, half a million pages of documents) that eventually closed only about 160 cases because efforts to extrapolate from the sample proved fruitless. See *Cimino* v. *Raymark Industries, Inc.*, 151 F. 3d 297, 335 (CA5 1998). The consequence is not only delay but also attorney's fees and other "transaction costs" that are unusually high, to the point where, of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims. See Report 13.

Second, an individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem. The judiciary cannot treat the problem as entirely one of legislative failure, as if it were caused, say, by a poorly drafted statute. Thus, when "calls for national legislation" go unanswered, *ante*, at 821, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Third, in that search the district courts may take advantage of experience that appellate courts do not have. Judge Parker, for example, has written of "a disparity of appreciation for the magnitude of the problem," growing out of the difference between the trial courts' "daily involvement with asbestos litigation" and the appellate courts' "limited" exposure to such litigation in infrequent appeals. *Cimino*, 751 F. Supp., at 651.

Fourth, the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her

own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment together mean that most potential plaintiffs may not have a realistic alternative. And Federal Rule of Civil Procedure 23 was designed to address situations in which the historical model of individual actions would not, for practical reasons, work. See generally Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 696 (discussing, in relation to Rule 23(b)(1)(B), instances in which individual judgments, "while not technically concluding the other members, might do so as a practical matter").

For these reasons, I cannot easily find a legal answer to the problems this case raises by referring, as does the majority, to "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ante,* at 846 (citation omitted). Instead, in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides. See generally *Califano* v. *Yamasaki,* 442 U. S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court"); *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 345 (1979) (district courts have "broad power and discretion . . . with respect to matters involving the certification" of class actions). And, in doing so, the Court should prove extremely reluctant to overturn a fact-specific or circumstance-specific exercise of that discretion, where a court of appeals has found it lawful. Cf. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 490–491 (1951) (Supreme Court will rarely overturn appellate court review of agency factfinding). This cautionary principle of review leads me to an ultimate conclusion different from that of the majority.

B

The case before us involves a class of individuals (and their families) exposed to asbestos manufactured by Fibreboard

who, for the most part, had not yet sued or settled with Fibreboard as of August 1993. The negotiating parties estimated that Fibreboard faced approximately 186,000 of these future claims. See App. to Pet. for Cert. 321a; cf. AO Statistics, Table C2–A (total number of *all* civil cases filed in federal district courts in 1998 was 252,994). Although the District Court was unable to give a precise figure, see App. to Pet. for Cert. 356a–357a, there is no doubt that a realistic assessment of the value of these claims far exceeds Fibreboard's total net worth.

But, as of 1993, one potentially short-lived additional asset promised potential claimants a greater recovery. That asset consisted of two insurance policies, one issued by Continental Casualty, the other by Pacific Indemnity. If the policies were valid (*i. e.*, if they covered most of the relevant claims), they were worth several billion dollars; but if they were invalid, this asset was worth nothing. At that time, a separate case brought by Fibreboard against the insurance companies in California state court seemed likely to resolve the value of the policies in the near future. That separate litigation had a settlement value for the insurance companies. At the time the parties were negotiating, prior to the California court's decision, the insurance policies were worth, as the majority puts it, the value of "unlimited policy coverage" (*i. e.*, perhaps the insurance companies' entire net worth) "discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation." *Ante*, at 851.

The insurance companies offered to settle with both Fibreboard and those persons with claims against Fibreboard (who might have tried to sue the insurance companies directly). The settlement negotiations came to a head in August 1993, just as a California state appeals court was poised to decide the validity of the insurance policies. This fact meant speed was important, for the California court could well decide that the policies were worth nothing. It also meant that it was important to certify a non-opt-out class of Fibreboard plain-

tiffs. If the class that entered into the settlement were an opt-out class, then members of that class could wait to see what the California court did. If the California court found the policies valid (hence worth many billions of dollars), they would opt out of the class and sue for everything they could get; if the California court found the policies invalid (and worth nothing), they would stick with the settlement. The insurance companies would gain little from that kind of settlement, and they would not agree to it. See *In re Asbestos Litigation*, 90 F. 3d 963, 970 (CA5 1996).

After eight days of hearings, the District Court found that the insurance policies plus Fibreboard's net worth amounted to a "limited fund," valued at $1.77 billion (the amount the insurance companies were willing to contribute to the settlement plus Fibreboard's value). See App. to Pet. for Cert. 492a. The court entered detailed factual findings. See generally 162 F. R. D., at 518–519. It certified a "non-opt-out" class. And the court approved the parties' Global Settlement Agreement. The Global Settlement Agreement allows those exposed to asbestos (and their families) to assert their Fibreboard claims against a fund that it creates. It does not limit recoveries for particular types of claims, but allows for individual determinations of damages based on all historically relevant individual factors and circumstances. See 90 F. 3d, at 976. It contains spendthrift provisions designed to limit the total payouts for any particular year, and a requirement that the claimants with the most serious injuries be paid first in any year in which there is a shortfall. It also permits an individual who wishes to retain his right to bring an ordinary action in court to opt out of the arrangement (albeit after mediation and nonbinding arbitration), but sets a ceiling of $500,000 upon the recovery obtained by any person who does so. See generally 162 F. R. D., at 518–519.

The question here is whether the court's certification of the class under Rule 23(b)(1)(B) violates the law. The majority seems to limit its holding (though not its discussion)

to that question, and so I limit the focus of my dissent to the Rule 23(b)(1)(B) issues as well.

II

The District Court certified a class consisting primarily of individuals (and their families) who had been exposed to Fibreboard's asbestos but who had not yet made claims. See *ante*, at 825–827, and n. 5. It did so under the authority of Federal Rule of Civil Procedure 23(b)(1)(B), which, by analogy to pre-Rules "limited fund" cases, permits certification of a non-opt-out class where

> "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

The majority thinks this class could not be certified under Rule 23(b)(1)(B). I, on the contrary, think it could.

The case falls within the Rule's language as long as there was a significant "risk" that the total assets available to satisfy the claims of the class members would fall well below the likely total value of those claims, for in such circumstances the money would go to those claimants who brought their actions first, thereby "'substantially impair[ing]'" the "'ability'" of later claimants "'to protect their interests.'" And the District Court found there was indeed such a "'risk.'" 162 F. R. D., at 526.

Conceptually speaking, that "risk" was no different from the risk inherent in a classic pre-Rules "limited fund" case. Suppose a broker agrees to invest the funds of 10 individuals who each give the broker $100. The broker misuses the money, and the customers sue. (1) Suppose their claims total $1,000, but the broker's total assets amount to $100.

(2) Suppose the same broker has no assets left, but he does have an insurance policy worth $100. (3) Suppose the broker has both $100 in assets and a $100 insurance policy.

The first two cases are classic limited fund cases. See *ante*, at 834–836 (citing, *e. g.*, *Dickinson* v. *Burnham*, 197 F. 2d 973 (CA2 1952), cert. denied, 344 U. S. 875 (1952), an investors' suit for the return of misused funds); *ante*, at 837 (citing, *e. g.*, *Morrison* v. *Warren*, 174 Misc. 233, 234, 20 N. Y. S. 2d 26, 27 (Sup. Ct. N. Y. Cty. 1940), a suit to distribute insurance proceeds to third party beneficiaries). The third case simply combines the first two, and that third case is the case before us.

Of course the value of the insurance policies in our case is not as precise as the $100 in my example, nor was it certain at the time of settlement. But that uncertainty makes no difference. It was certain that the insurance policies' value was limited. And that limitation was created by the likelihood of an independent judicial determination of the meaning of words in the policy, in respect to which the merits or value of the underlying tort claims against Fibreboard were beside the point.

Nor does it matter that the value of the insurance policies in our case might have fluctuated over time. Long before the Federal Rules of Civil Procedure, courts permitted actions by one group of insurance policyholders to bind all policyholders, even where the group proceeded against an insurance-company-administered fund that fluctuated over time. See *Hartford Life Ins. Co.* v. *IBS*, 237 U. S. 662, 672 (1915) (life insurance fund which, like the fund before us, was administered through court-ordered rules that bound all policyholders).

Neither does it matter that the insurance policies *might* be worth much more money *if* the California court decided the coverage dispute in Fibreboard's favor. A trust worth, say, $1 million (faced with $2 million in claims) is a limited fund, despite the possibility that a company whose stock it

holds *might* strike oil and send the value of the trust skyrocketing. Limitation is a matter of present value, which takes appropriate account of such future possibilities.

I need not pursue the conceptual matter further, however, for the majority apparently concedes the conceptual point that a fund's limit may equal its "value discounted by risk." *Ante*, at 851. But the majority sets forth three additional conditions that it says are "sufficient . . . to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede." *Ante*, at 838. The three are:

> *Condition One:* That "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims." *Ibid.;* Part IV–A, *ante.*
>
> *Condition Two:* That "the claimants identified by a common theory of recovery were treated equitably among themselves." *Ante*, at 839; Part IV–B, *ante.*
>
> *Condition Three:* That "the whole of the inadequate fund was to be devoted to the overwhelming claims." *Ante*, at 839; Part IV–C, *ante.*

I shall discuss each condition in turn.

A

In my view, the first condition is substantially satisfied. No one doubts that the "totals of the aggregated" claims well exceed the value of the assets in the "fund available for satisfying them," at least if the fund totaled about what the District Court said it did, namely, $1.77 billion at most. The District Court said that the limited fund equaled in value "the sum of the value of Fibreboard plus the value of its insurance coverage," or $235 million plus $1.535 billion. App. to Pet. for Cert. 492a. The Court of Appeals upheld

the finding. 90 F. 3d, at 982. And the finding is adequately supported.

The District Court found that the insurance policies were not worth substantially more than $1.535 billion in part because there was a "significant risk" that the insurance policies would soon turn out to be worth nothing at all. 162 F. R. D., at 526. The court wrote that "Fibreboard might lose" its coverage, *i. e.*, that it might lose "on one or more issues in the [California] Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program." *Ibid.*

Two California insurance law experts, a Yale professor and a former state court of appeals judge, testified that there was a good chance that Fibreboard would lose all or a significant part of its insurance coverage once the California appellate courts decided the matter. 90 F. 3d, at 974. And that conclusion is not surprising. The Continental policy (for which Fibreboard had paid $10,000 per year) carried limits of $500,000 "per-person" and $1 million "per-occurrence," had been in effect only between May 1957 and March 1959, and arguably denied Fibreboard the right to settle tort cases as it had been doing. See App. to Pet. for Cert. 267a. The Pacific policy was said (no one could find a copy) to carry a $500,000 per-claim limit, and had been in effect only for one year, from 1956 to 1957. See *ibid.* To win significantly in respect to either of the two policies, Fibreboard had to show that the policies fully covered a person exposed to asbestos long before the policy year (say, in 1948) even if the disease did not appear until much later (say, in 2002). It also had to explain away the $1 million per occurrence limit in the Continental policy, despite policy language defining "one occurrence" as "'[a]ll . . . exposure to substantially the same general conditions existing at or emanating from each premises location.'" Brief for Respondents Continental Casualty et al. 5. And Fibreboard had to show that its tort-suit settlement practice was consistent with the policy.

The settlement value of previous cases also indicated that the insurance policies were of limited value. Fibreboard's "no-cash" settlements (which required a settling plaintiff to obtain recovery from the insurance companies) were twice as high on average as were its comparable 40% cash settlements. App. to Pet. for Cert. 231a. That difference, suggesting a 50% discount for 40% cash, in turn suggests that settling parties estimated the odds of recovering on the insurance policies as worse than 2 to 1 against.

The District Court arrived at the present value of the policies ($1.535 billion) by looking to a different settlement, the settlement arrived at in the insurance coverage case itself as a result of bargaining between Fibreboard and the insurance companies. See *id.*, at 492a. That settlement, embodied in the Trilateral Agreement, created a backup fund by taking from the insurance companies $1.535 billion (plus other money used to satisfy claims not here at issue) and simply setting it aside to use for the payment of claims brought against Fibreboard in the ordinary course by members of this class (in the event that the federal courts ultimately failed to approve the Global Settlement Agreement).

The Fifth Circuit approved this method of determining the value of the insurance policies. See 90 F. 3d, at 982 (discussing value of Trilateral Agreement plus value of Fibreboard). And the majority itself sees nothing wrong with that method in principle. The majority concedes that one

> "may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Ante,* at 852.

The majority rejects the District Court's valuation for a different reason. It says that the settlement negotiation

that led to the valuation was not necessarily a fair one. The majority says it cannot make the necessary "arms-length bargaining" assumption because "*[c]lass counsel*" had a "great incentive to reach any agreement" in light of the fact that "some of the same lawyers . . . had also negotiated the separate settlement of 45,000" pending cases, which was partially contingent upon a global settlement or other favorable resolution of the insurance dispute. *Ibid.* (emphasis added).

The District Court and Court of Appeals, however, did accept the relevant "arms-length" assumption, with good reason. The *relevant* bargaining (*i. e.*, the bargaining that led to the Trilateral Agreement that set the policies' value) was not between the *plaintiffs' class counsel* and the insurance companies; it was between *Fibreboard* and the insurance companies. And there is no reason to believe that *that* bargaining, engaged in to settle the California coverage dispute, was not "arms length." That bargaining did not lead to a settlement that would release Fibreboard from potential tort liability. Rather, it led to a potential backup settlement that did not release Fibreboard from anything. It created a fund of insurance money, which, once exhausted, would have left Fibreboard totally exposed to tort claims. Consequently, Fibreboard had every incentive to squeeze as much money as possible out of the insurance companies, thereby creating as large a fund as possible in order to diminish the likelihood that it would eventually have to rely upon its own net worth to satisfy future asbestos plaintiffs.

Nor are petitioners correct when they argue that the insurance companies' participation in setting the value of the insurance policies created a fund that is limited "only in the sense that . . . every settlement is limited." Brief for Petitioners 28. As the District Court found, the fund was limited by the value of the insurance policies (along with Fibreboard's own limited net worth), and that limitation arose out of the independent likelihood that the California courts

would find the policies valueless. App. to Pet. for Cert. 492a. That is why the District Court said that certification in this case does not determine whether

> "mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute." 162 F. R. D., at 527.

The court added that, in the ordinary case: "If the settlement failed[,] . . . the defendant would retain the settlement funds (or the insurance coverage), and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification." *Ibid.* In this case, however, if settlement failed, coverage "[might] well disappear . . . with the result that Class members could not then secure their due through litigation." *Ibid.*

I recognize that one could reasonably argue about whether the total value of the insurance policies (plus the value of Fibreboard) is $1.535 billion, $1.77 billion, $2.2 billion, or some other roughly similar number. But that kind of argument, in this case, is like arguing about whether a trust fund, facing $30,000 in claims, is worth $15,000 or $20,000 (*e. g.*, do we count Aunt Agatha's share as part of the fund?), or whether a ship, subject to claims that, by any count, exceed its value, is worth a little more or a little less (*e. g.*, does the coal in the hold count as fuel, which is part of the ship's value, or as cargo, which is not?). A perfect valuation, requiring lengthy study by independent experts, is not feasible in the context of such an unusual limited fund, one that comes accompanied with its own witching hour. Within weeks after the parties' settlement agreement, the insurance policies might well have disappeared, leaving most potential plaintiffs with little more than empty claims. The ship was about to sink, the trust fund to evaporate; time was important. Under these circumstances, I would accept the valuation

findings made by the District Court and affirmed by the Court of Appeals as legally sufficient. See *supra*, at 868.

B

I similarly believe that the second condition is satisfied. The "claimants . . . were treated equitably among themselves." *Ante*, at 839. The District Court found equitable treatment, and the Court of Appeals affirmed. But a majority of this Court now finds significant inequities arising out of class counsel's "egregious" conflict of interest, the settlement's substantive terms, and the District Court's failure to create subclasses. See *ante*, at 854–859. But nothing I can find in the Court's opinion, nor in the objectors' briefs, convinces me that the District Court's findings on these matters were clearly erroneous, or that the Court of Appeals went seriously astray in affirming them.

The District Court made 76 separate findings of fact, for example, in respect to potential conflicts of interest. App. to Pet. for Cert. 392a–430a. Of course, class counsel consisted of individual attorneys who represented other asbestos claimants, including many other Fibreboard claimants outside the certified class. Since Fibreboard had been settling cases contingent upon resolution of the insurance dispute for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar "conflict." So whom should the District Court have appointed to negotiate a settlement that had to be reached soon, if ever? Should it have appointed attorneys unfamiliar with Fibreboard and the history of its asbestos litigation? Where was the District Court to find those competent, knowledgeable, conflict-free attorneys? The District Court said they did not exist. Finding of Fact ¶ 372 says there is "no credible evidence of the existence of other 'conflict-free' counsel who were qualified to negotiate" a settlement within the necessary time. *Id.*, at 428a. Finding of Fact ¶ 317 adds that the District Court viewed it as

"crucial . . . to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal." *Id.*, at 401a. Where is the clear error?

The majority emphasizes the fact that, by settling the claims of a class that consisted, for the most part, of persons who had not yet asserted claims against Fibreboard, counsel assured the availability of funds to pay other clients who had already asserted those claims. *Ante*, at 852–853. The decision to split the latter "inventory" claims from the former "class" claims, however, reflected the suggestion, not of class counsel, but of a judge, Circuit Judge Patrick Higginbotham, who had become involved in efforts to produce a timely settlement. Judge Higginbotham thought that negotiations had broken down because the combined class was "too complex." App. to Pet. for Cert. 316a–317a; see also *id.*, at 397a. He thought "inventory" claim settlements could be used as benchmarks to determine future class claim values, *id.*, at 316a–317a, and that is just what happened. Although the majority is concerned that "inventory" plaintiffs "appeared to have obtained better terms than the class members," *ante*, at 855, Finding of Fact ¶ 329 says that class counsel

> "used the higher-than-average [inventory plaintiff settlement values] . . . to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients." App. to Pet. for Cert. 407a.

In addition, more than 150 findings of fact, made after an 8-day hearing, support the District Court's finding that overall the settlement is "fair, adequate, and reasonable." See *id.*, at 500a–501a. And, of course, Finding of Fact ¶ 318 says that appointing other attorneys—*i. e.*, those who had no in-

ventory clients—would have "'jeopardiz[ed] any effort at serious negotiations'" and "resulted in a less favorable settlement" for the class, or perhaps no settlement followed by no insurance policy either. *Id.*, at 402a.

The Fifth Circuit found that "[t]he record amply supports" these District Court findings. 90 F. 3d, at 978. Does the majority mean to set them aside? If not, does it mean to set forth a rigid principle of law, such as the principle that asbestos lawyers with clients outside a class, who will potentially benefit from a class settlement, can *never* represent a class in settlement negotiations? And does that principle apply no matter how unusual the circumstances, or no matter how necessary that representation might be? Why should there be such a rule of law? If there is not an absolute rule, however, I do not see how this Court can hold that the case before us is *not* that unusual situation.

Consider next the claim that "equity" required more subclasses. *Ante*, at 855–857. To determine the "right" number of subclasses, a district court must weigh the advantages and disadvantages of bringing more lawyers into the case. The majority concedes as much when it says "at some point there must be an end to reclassification with separate counsel." *Ante*, at 857. The District Court said that if there had "been as many separate attorneys" as the objectors wanted, "there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal." App. to Pet. for Cert. 428a. Finding of Fact ¶ 346 lists the shared common interests among subclasses that argue for single representation, including "avoiding the potentially disastrous results of a loss . . . in the Coverage Case," "maximizing the total settlement contribution," "reducing transaction costs and delays," "minimizing . . . attorney's fees," and "adopting" equitable claims payment "procedures." *Id.*, at 415a. Surely the District Court was within its discretion to conclude that "the point" to which the majority alludes was reached in this case.

I need not go into further detail here. Findings of Fact ¶¶ 347–354 explain why the alleged conflict between pre- and post-1959 claimants is not significant. *Id.*, at 415a–418a (noting that "the decision as to how to divide the settlement among class members" did not take place until after the Trilateral Agreement was agreed to, at which point money was available equally to both pre- and post-1959 claimants). Findings of Fact ¶¶ 355–363 explain why the alleged conflict between claimants with, and those without, current illnesses is not significant. *Id.*, at 419a–422a (explaining why "the interest of the two subgroups at issue here coincide to a far greater extent than they diverge"). The Fifth Circuit found that the District Court "did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required." 90 F. 3d, at 982. This Court should not overturn these highly circumstance-specific judgments.

C

The majority's third condition raises a more difficult question. It says that the "*whole* of the inadequate fund" must be "devoted to the overwhelming claims." *Ante*, at 839 (emphasis added). Fibreboard's own assets, in theory, were available to pay tort claims, yet they were not included in the global settlement fund. Is that fact fatal?

I find the answer to this question in the majority's own explanation. It says that the third condition helps to guarantee that those who held the

> "inadequate assets had no opportunity to benefit [themselves] or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than *seriatim* litigation would have produced." *Ibid.*

That explanation suggests to me that Rule 23(b)(1)(B) permits a slight relaxation of this absolute requirement, where its basic purpose is met, *i. e.*, where there is no doubt that "the class as a whole was given the best deal," and where there is good reason for allowing the third condition's *substantial*, rather than its *literal*, satisfaction.

Rule 23 itself does not require modern courts to trace every contour of ancient case law with literal exactness. Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules that drafted the 1966 revisions, upon whom the majority properly relies for explanation, see, *e. g.*, *ante*, at 833, 834, 842–843, wrote of Rule 23:

> "The reform of Rule 23 was intended to shake the law of class actions free of abstract categories . . . and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. . . . And whereas the old Rule had paid virtually no attention to the practical administration of class actions, the revised Rule dwelt long on this matter—not, to be sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative." A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497 (1969).

The majority itself recognizes the possibility of providing incentives to enter into settlements that reduce costs by granting a "credit" for cost savings by relaxing the whole-of-the-assets requirement, at least where most of the savings would go to the claimants. *Ante*, at 861.

There is no doubt in this case that the settlement made far more money available to satisfy asbestos claims than was likely to occur in its absence. And the District Court found that administering the fund would involve transaction costs of only 15%. App. to Pet. for Cert. 362a. A comparison of that 15% figure with the 61% transaction costs figure applicable to asbestos cases in general suggests hundreds of mil-

lions of dollars in savings—an amount greater than Fibreboard's net worth. And, of course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses. I would consequently find substantial compliance with the majority's third condition.

Because I believe that all three of the majority's conditions are satisfied, and because I see no fatal conceptual difficulty, I would uphold the determination, made by the District Court and affirmed by the Court of Appeals, that the insurance policies (along with Fibreboard's net value) amount to a classic limited fund within the scope of Rule 23(b)(1)(B).

III

Petitioners raise additional issues, which the majority does not reach. I believe that respondents would likely prevail were the Court to reach those issues. That is why I dissent. But, as the Court does not reach those issues, I need not decide the questions definitively.

In some instances, my belief that respondents would likely prevail reflects my reluctance to second-guess a court of appeals that has affirmed a district court's fact- and circumstance-specific findings. See *supra*, at 868; cf. *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 629–630 (1997) (BREYER, J., concurring in part and dissenting in part). That reluctance applies to those of petitioners' further claims that, in effect, attack the District Court's conclusions related to: (1) the finding under Rule 23(a)(2) that there are "questions of law and fact common to the class," see App. to Pet. for Cert. 480a; see generally *Amchem*, *supra*, at 634–636 (BREYER, J., concurring in part and dissenting in part); (2) the finding under Rule 23(a)(3) that claims of the representative parties are "typical" of the claims of the class, see App.

to Pet. for Cert. 480a–481a; (3) the adequacy of "notice" to class members pursuant to Rule 23(e) and the Due Process Clause, see *id.*, at 511a; see generally *Amchem*, *supra*, at 640–641 (BREYER, J., concurring in part and dissenting in part); and (4) the standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact (even if only for fear of cancer or medical monitoring), see App. to Pet. for Cert. 252a; cf., *e. g.*, *Coover* v. *Painless Parker, Dentist*, 105 Cal. App. 110, 286 P. 1048 (1930).

In other instances, my belief reflects my conclusion that class certification here rests upon the presence of what is close to a *traditional* limited fund. And I doubt that petitioners' additional arguments that certification violates, for example, the Rules Enabling Act, the Bankruptcy Act, the Seventh Amendment, and the Due Process Clause are aimed at, or would prevail against, a traditional limited fund (*e. g.*, "trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit," *ante*, at 834 (internal quotation marks and citations omitted)). Cf. *In re Asbestos Litigation*, 90 F. 3d, at 986 (noting that *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), involved a class certified under the equivalent of Rule 23(b)(3), not a limited fund case under Rule 23(b)(1)(B)). Regardless, I need not decide these latter issues definitively now, and I leave them for another day. With that caveat, I respectfully dissent.

Per Curiam

WHITFIELD *v.* TEXAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–9085. Decided June 24, 1999*

Pro se petitioner seeks leave to proceed *in forma pauperis* on this certiorari petition. The instant petition brings his total number of frivolous filings to nine.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. He is barred from filing any further petitions for certiorari or extraordinary writs in noncriminal cases unless he first pays the docketing fee and submits his petition in compliance with this Court's Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1.

Motions denied.

PER CURIAM.

Pro se petitioner Whitfield seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request as frivolous pursuant to Rule 39.8. Whitfield is allowed until July 15, 1999, within which to pay the docketing fee required by Rule 38 and to submit his petition in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari or petitions for extraordinary writs from Whitfield in noncriminal matters unless he first pays the docketing fee required by Rule 38 and submits his petitions in compliance with Rule 33.1.

Whitfield has repeatedly abused this Court's certiorari and extraordinary writ processes. On March 30, 1998, we invoked Rule 39.8 to deny Whitfield *in forma pauperis* status with respect to a petition for certiorari. See *Whitfield* v. *Johnson*, 523 U. S. 1044. At that time, Whitfield had filed three petitions for certiorari and three petitions for extraor-

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*Together with *Whitfield* v. *Texas* (see this Court's Rule 12.4) and *Whitfield* v. *Texas* (see this Court's Rule 12.4), also on motions for leave to proceed *in forma pauperis.*

dinary writs, all of which were both patently frivolous and had been denied without recorded dissent. He thereafter filed another patently frivolous petition for certiorari, which we denied. The instant petition for certiorari thus brings Whitfield's total number of frivolous filings to nine.

We enter the order barring prospective filings for the reasons discussed in *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Whitfield's abuse of the writ of certiorari and of the extraordinary writs has been in noncriminal cases, and we limit our sanction accordingly. The order therefore will not prevent Whitfield from petitioning to challenge criminal sanctions which might be imposed on him. The order will, however, allow this Court to devote its limited resources to the claims of petitioners who have not abused our processes.

It is so ordered.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Cross* v. *Pelican Bay State Prison*, 526 U. S. 811, 812 (1999) (STEVENS, J., dissenting); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 886 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 14 THROUGH SEPTEMBER 28, 1999

JUNE 14, 1999

Certiorari Granted—Vacated and Remanded

No. 98–477. GODINEZ *v.* WHITE. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999). Reported below: 143 F. 3d 1049.

No. 98–1356. UNITED STATES *v.* LEVI STRAUSS & CO. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Haggar Apparel Co.*, 526 U. S. 380 (1999). Reported below: 156 F. 3d 1345.

No. 98–7353. SWOOPES *v.* SUBLETT, WARDEN, ET AL. C. A. 9th 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 *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999). Reported below: 163 F. 3d 607.

No. 98–8988. HALLUM *v.* IOWA. Sup. Ct. Iowa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lilly* v. *Virginia*, *ante*, p. 116. Reported below: 585 N. W. 2d 249.

Miscellaneous Orders

No. A–979. WEINSTEIN *v.* ARNOLD ET AL. Super. Ct. N. J., Law Div. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–2081. IN RE DISBARMENT OF BERFIELD. James Lee Berfield, of St. Petersburg, Fla., is suspended from the practice of law in this Court, and a rule will 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–2082. IN RE DISBARMENT OF LOPEZ. Andrew M. Lopez, of Denver, Colo., is suspended from the practice of law in this Court, and a rule will 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. M–74. REID *v.* TENNESSEE; and

No. M–75. MORGAN *v.* CMS/DATA CORP. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $29,096.50, to be paid equally by the parties. [For earlier decision herein, see, *e. g.*, 526 U. S. 589.]

No. 98–1299. NEW YORK *v.* HILL. Ct. App. N. Y. [Certiorari granted, 526 U. S. 1111.] Motion for appointment of counsel granted, and it is ordered that Edward J. Nowak, Esq., of Rochester, N. Y., be appointed to serve as counsel for respondent in this case.

No. 98–9473. IN RE HILL. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 6, 1999, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 98–9500. IN RE MAULDIN. Petition for writ of habeas corpus denied.

No. 98–1821. IN RE LUKACS. Petition for writ of mandamus denied.

Certiorari Granted

No. 98–1648. MITCHELL ET AL. *v.* HELMS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 151 F. 3d 347.

No. 98–7540. CARMELL *v.* TEXAS. Ct. App. Tex., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis*

granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 963 S. W. 2d 833.

Certiorari Denied

No. 98–1435. PEARSON ET AL. *v.* PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN) ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 159 F. 3d 86.

No. 98–1437. NATIVE VILLAGE OF EYAK ET AL. *v.* DALEY, SECRETARY OF COMMERCE. C. A. 9th Cir. Certiorari denied. Reported below: 154 F. 3d 1090.

No. 98–1449. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA ET AL. *v.* REIN, EXECUTRIX OF THE ESTATE OF REIN, DECEASED, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 748.

No. 98–1460. ARBITER SYSTEMS, INC. *v.* DANZIG, SECRETARY OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1311.

No. 98–1467. MALHEUR LUMBER CO. ET AL. *v.* BLUE MOUNTAINS BIODIVERSITY PROJECT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 1208.

No. 98–1493. HERRING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 730 So. 2d 1264.

No. 98–1551. ABIOYE *v.* SUNDSTRAND CORP. C. A. 7th Cir. Certiorari denied. Reported below: 164 F. 3d 364.

No. 98–1581. JONES *v.* TRUMP ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–1612. DIAMOND MULTIMEDIA SYSTEMS, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY (PASS ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 1036, 968 P. 2d 539.

No. 98–1636. BLUE CROSS OF CALIFORNIA ET AL. *v.* CALIFORNIA SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779.

No. 98–1638. C. W. SMITH ET AL. *v.* GWINNETT COUNTY. Sup. Ct. Ga. Certiorari denied. Reported below: 270 Ga. 424, 510 S. E. 2d 525.

No. 98–1639. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 932.

No. 98–1641. ASHCRAFT ET AL. *v.* HWA-SHAIN YEH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 489.

No. 98–1642. STABILE, TRUSTEE OF THE STABILE FAMILY TRUST AGREEMENT DATED MAY 1, 1990 *v.* CALIFORNIA FEDERAL BANK ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–1643. SOUTHMARK CORP. *v.* COOPERS & LYBRAND, L. L. P. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 925.

No. 98–1645. PAYNE, MOTHER FOR THE MINOR CHILD, HICKS, ET AL. *v.* CHURCHICH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 161 F. 3d 1030.

No. 98–1646. BRAWNER-AHLSTROM *v.* HUSSON ET AL. Ct. App. Colo. Certiorari denied. Reported below: 969 P. 2d 738.

No. 98–1650. FUESSENICH *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 50 Conn. App. 187, 717 A. 2d 801.

No. 98–1655. AUSTIN *v.* HANOVER INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 13.

No. 98–1656. CUTRIGHT *v.* METROPOLITAN LIFE INSURANCE CO., DBA METLIFE, ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–1657. ILLINOIS EX REL. RYAN, ATTORNEY GENERAL OF ILLINOIS *v.* TOWERS. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 952.

No. 98–1659. LIN *v.* LIN. Ct. App. N. C. Certiorari denied. Reported below: 128 N. C. App. 533, 496 S. E. 2d 849.

No. 98–1661. FLEET BANK, NATIONAL ASSN. *v.* BURKE, BANKING COMMISSIONER OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 160 F. 3d 883.

No. 98–1665. KILLINGER, WARDEN *v.* NEVERS. C. A. 6th Cir. Certiorari denied. Reported below: 169 F. 3d 352.

No. 98–1672. MEADE *v.* PEP BOYS MANNY MOE & JACK, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 122 Md. App. 796.

No. 98–1677. BYERLY *v.* OHIO. Ct. App. Ohio, Portage County. Certiorari denied.

No. 98–1679. BLAIR *v.* NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY. Sup. Ct. Nev. Certiorari denied.

No. 98–1681. IN RE DAY. Ct. App. D. C. Certiorari denied. Reported below: 717 A. 2d 883.

No. 98–1687. CROSS *v.* CROSS. Sup. Ct. Ga. Certiorari denied.

No. 98–1727. HEDRICK ET AL. *v.* HEDRICK ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–1733. JUNIOR *v.* GOODNIGHT ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–1755. BERK REALTY, INC. *v.* MERCER COUNTY TAX CLAIM BUREAU. Commw. Ct. Pa. Certiorari denied. Reported below: 715 A. 2d 1247.

No. 98–1757. UPSHAW *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–1769. SEA TOW SOUTH PALM BEACH, INC., ET AL. *v.* BOAT OWNERS ASSOCIATION OF THE UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 882.

No. 98–1777. BAIN, DIRECTOR OF PUBLIC SAFETY, SPARTANBURG POLICE DEPARTMENT, ET AL. *v.* NORWOOD, INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF CITIZENS. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 243.

No. 98–1793. KOLB *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 98–1809. MARIAH BOATS, INC. *v.* SLANE. C. A. 7th Cir. Certiorari denied. Reported below: 164 F. 3d 1065.

No. 98–1816. GOROD *v.* TABACHNICK. App. Ct. Mass. Certiorari denied. Reported below: 46 Mass. App. 1109, 707 N. E. 2d 406.

No. 98–1832. LYNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–1834. FULTZ *v.* DUNN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 165 F. 3d 215.

No. 98–1840. ANDREWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 883.

No. 98–1841. MEDJUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 916.

No. 98–1851. BERG *v.* COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 914.

No. 98–1865. DELUXE ELECTRONIC PAYMENT SYSTEMS, INC. *v.* MELLON BANK, N. A. C. A. 3d Cir. Certiorari denied. Reported below: 176 F. 3d 472.

No. 98–6437. RUNG *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 98–7930. CASON *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 910.

No. 98–8056. FREDYMA *v.* LAKE SUNAPEE BANK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 79.

No. 98–8172. OGUNYILEKA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 336.

No. 98–8264. HAYS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 155 Ore. App. 41, 964 P. 2d 1042.

No. 98–8462. MCNEILL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 457, 700 N. E. 2d 613.

No. 98–8525. NEVIUS *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 F. 3d 453.

No. 98–8870. GROVE *v.* NADEL, JUDGE, COURT OF COMMON PLEAS OF OHIO, HAMILTON COUNTY. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 252, 703 N. E. 2d 304.

No. 98–8872. DOWTIN-EL *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8873. HOLT *v.* LEMASTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 17.

No. 98–8874. DUCKWORTH *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8875. D'ALESSANDRO *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 98–8878. PACK *v.* UNION STATION TERMINAL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 920.

No. 98–8881. CHARPING *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 333 S. C. 124, 508 S. E. 2d 851.

No. 98–8882. FIELDS *v.* DALKON SHIELD CLAIMANTS TRUST. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 331.

No. 98–8883. KREHNBRINK *v.* MARYLAND STATE DEPARTMENT OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 720.

No. 98–8884. NOVEL *v.* SALZBERG. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 253 App. Div. 2d 684, 677 N. Y. S. 2d 471.

No. 98–8886. LEWIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–8890. LOVEDAY *v.* MICHIGAN. Cir. Ct. Oakland County, Mich. Certiorari denied.

No. 98–8893. COUCH *v.* GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 98–8899. JOHNSON *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 873.

No. 98–8903. BUDD *v.* QUICK ET AL. Ct. App. D. C. Certiorari denied.

No. 98–8904. BAILEY, AKA HILL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8906. OLSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8910. BISHOP *v.* COLORADO DEPARTMENT OF CORRECTIONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 62.

No. 98–8911. BURKS *v.* GREEN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 420.

No. 98–8916. LUCAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8923. OATS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1018.

No. 98–8927. SERRANO *v.* ESTRADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8932. VAZQUEZ *v.* CATOE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 336.

No. 98–8933. VISINTINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 857.

No. 98–8934. TAYLOR *v.* SUPREME COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8935. BRYANT *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8937. COX *v.* STIENEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 98–8938. COLEMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 741 So. 2d 490.

No. 98–8948. MORGAN *v.* CHAPIN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 1176.

No. 98–8957. SEREQUEBERHAN *v.* TESFAYE. Ct. App. D. C. Certiorari denied.

No. 98–8961. BARRETT *v.* POCATELLO HOUSING AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 914.

No. 98–8963. HICKMAN *v.* MOYA, WARDEN. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 976 S. W. 2d 360.

No. 98–9002. GILL *v.* NATIONAL RAILROAD PASSENGER CORPORATION, AKA AMTRAK, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 342.

No. 98–9021. REVERE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–9025. WARD *v.* HATCHER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 61.

No. 98–9036. RAULS *v.* LINAHAN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 98–9043. DOUGLAS *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 98–9045. HUNTER *v.* PATEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 482.

No. 98–9102. GODETTE, AKA ALI *v.* R & Y MANAGEMENT ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–9106. GRIER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 98–9110. PAGLINGAYEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied.

No. 98–9189. VINING *v.* HENDERSON, POSTMASTER GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 170 F. 3d 189.

No. 98–9191. THOMAS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9225. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–9236. EDWARDS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 298 Ill. App. 3d 1172, 738 N. E. 2d 238.

No. 98–9251. WALKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 1449, 703 N. E. 2d 327.

No. 98–9260. NOLL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 916.

No. 98–9267. BLACKBURN *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 62.

No. 98–9278. MARTINI *v.* ROSEWELL ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 298 Ill. App. 3d 1146, 738 N. E. 2d 229.

No. 98–9291. FUGAH *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–9293. FRANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 203.

No. 98–9294. STROTHERS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 922.

No. 98–9296. SKELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 16.

No. 98–9297. SNELL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 428 Mass. 766, 705 N. E. 2d 236.

No. 98–9299. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 172 F. 3d 39.

No. 98–9302. LOVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–9303. KLEIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 98–9304. JONES *v.* UNITED STATES; and JEFFERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 503 (first judgment); 172 F. 3d 60 (second judgment).

No. 98–9306. PADGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 98–9307. CLEMENTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 45.

No. 98–9309. AROWORADE ET AL. *v.* UNITED STATES; and ROA-MORA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 175 F. 3d 1021 (first judgment); 172 F. 3d 54 (second judgment).

No. 98–9313. STUYVESANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–9316. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 882.

No. 98–9317. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 164 F. 3d 243.

No. 98–9320. UPHAM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 168 F. 3d 532.

No. 98–9323. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–9324. KEEL *v.* FRENCH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 263.

No. 98–9340. SOAPE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 F. 3d 257.

No. 98–9341. PORRAS-AVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 F. 3d 486.

No. 98–9343. NAVARRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 160 F. 3d 1254.

No. 98–9348. TOEVS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 173 F. 3d 862.

No. 98–9351. OWENS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 352 Md. 663, 724 A. 2d 43.

No. 98–9356. MAXWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 426.

No. 98–9359. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–9361. AUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1296.

No. 98–9362. WITTGENSTEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 163 F. 3d 1164.

No. 98–9363. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 883.

No. 98–9364. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 729.

No. 98–9365. WIGHTMAN *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 98–9367. WELLS *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 254 App. Div. 2d 121, 678 N. Y. S. 2d 498.

No. 98–9368. SALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–9372. PORRAS-CANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 869.

No. 98–9373. O'NEAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 174 F. 3d 203.

No. 98–9374. ROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 181 F. 3d 105.

No. 98–9376. LAWRENCE *v.* MOATS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1209.

No. 98–9379. CAVAZOS-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 340.

No. 98–9380. ARMSTRONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9397. DYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–9399. CARRILLO GASCON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 502.

No. 98–9401. HOLLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 176 F. 3d 476.

No. 98–9405. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 867.

No. 98–9412. MARTINEZ-JARAMILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 870.

No. 98–1509. COLUMBIA UNION COLLEGE *v.* CLARKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 159 F. 3d 151.

JUSTICE THOMAS, dissenting.

Through the program at issue in this case—a program named, ironically, for Father Joseph Sellinger, a Roman Catholic priest—the State of Maryland provides financial aid, on a per student basis, to a wide range of private colleges. Although many of the colleges participating in the Sellinger Program are affiliated with religious institutions, Maryland deemed Columbia Union College, a private liberal arts college affiliated with the Seventh-day Adventist Church, "too religious" to participate. 159 F. 3d 151, 154–155 (CA4 1998). Throughout this litigation, Columbia Union College has maintained that Maryland violated its free speech, free exercise, and equal protection rights by excluding it from the Sellinger Program. The District Court and the Court of Appeals for the Fourth Circuit agreed that the State's action infringed one or more of these rights. But, relying on our decision in *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736 (1976) (plurality opinion), both courts nonetheless concluded that Columbia Union's exclusion could be justified by Maryland's compelling interest in enforcing the Establishment Clause by ensuring that a "pervasively sectarian" institution did not benefit from public funds.

We invented the "pervasively sectarian" test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities. In my view, the "pervasively sectarian"

test rests upon two assumptions that cannot be squared with our more recent jurisprudence. The first of these assumptions is that the Establishment Clause prohibits government funds from ever benefiting, either directly or indirectly, "religious" activities. See *id.*, at 755. The other is that any institution that takes religion seriously cannot be trusted to observe this prohibition.[1]

We no longer require institutions and organizations to renounce their religious missions as a condition of participating in public programs. Instead, we have held that they may benefit from public assistance that is made available based upon neutral, secular criteria. See *Agostini* v. *Felton*, 521 U. S. 203 (1997) (students attending religious schools eligible for federal remedial assistance); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (Christian student organization eligible for student activity funds); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993) (publicly funded sign language interpreter could assist student in a Catholic school); *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986) (blind student free to use public vocational assistance to attend bible college). Furthermore, the application of the "pervasively sectarian" test in this and similar cases directly collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. See *Rosenberger*, *supra* (invalidating university policy denying student activity funds to Christian student newspaper); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993) (invalidating "religious use" restriction on public access to school district property); *Widmar* v. *Vincent*, 454 U. S. 263 (1981) (invalidating policy prohibiting student religious organizations from using public university's facilities).

We should take this opportunity to scrap the "pervasively sectarian" test and reaffirm that the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion. See *Bowen* v. *Kendrick*, 487 U. S. 589, 624–625 (1988) (KENNEDY, J., joined by SCALIA, J., concurring). By so doing, we would vindicate Columbia Union's right to be free from invidious religious discrimina-

[1] Typical of this assumption is the plurality's statement in *Tilton* v. *Richardson*, 403 U. S. 672, 681 (1971), that "[t]here is no evidence that religion seeps into the use of any of these facilities[;] . . . the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."

tion.[2] Columbia Union's exclusion from the Sellinger Program "raise[s] the inevitable inference that the disadvantage imposed is born of animosity to the class of [institutions] affected," namely, those schools that insist upon integrating their religious and secular functions. *Romer* v. *Evans*, 517 U. S. 620, 634 (1996); see also *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993) ("[U]pon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures"). We also would provide the lower courts—which are struggling to reconcile our conflicting First Amendment pronouncements—with much needed guidance. Compare *Peter* v. *Wedl*, 155 F. 3d 992 (CA8 1998) (holding that the First Amendment prohibits school district from denying special education services to a child solely because he attends a religious school), and *Hartmann* v. *Stone*, 68 F. 3d 973 (CA6 1995) (invalidating policy excluding religious day care centers from Army program), with *Strout* v. *Albanese*, 178 F. 3d 57 (CA1 1999) (upholding state law excluding students who attend religious schools from education tuition program), and *Bagley* v. *Raymond School Dept.*, 1999 ME 60, 728 A. 2d 127 (1999) (same).

Although the Court declines to grant certiorari today—perhaps because this case comes to us in an interlocutory posture—the growing confusion among the lower courts illustrates that we cannot long avoid addressing the important issues that it presents.

No. 98–1533. HYNES, DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK, ET AL. *v.* TOMEI, JUSTICE, SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. Ct. App. N. Y. Motions of respondents Angel Mateo and Michael Hale for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 92 N. Y. 2d 613, 706 N. E. 2d 1201.

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[2] Indeed, Maryland is not the only State that practices religious discrimination in the distribution of financial aid. See, *e. g.*, Colo. Rev. Stat. § 23–3.5–101–106 (1998) (students attending pervasively sectarian colleges ineligible for Colorado Student Incentive Grant Program); Wash. Rev. Code § 28B.10.814 (1994) (students pursuing a theology degree ineligible for state financial aid programs); Wis. Stat. Ann. § 39.30(2)(d) (Supp. 1998–1999) (state tuition grants shall not be awarded to "members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education").

No. 98–1673. SMEDVIG TANKSHIPS, LTD., ET AL. *v.* ABUAN, GUARDIAN ON BEHALF OF VALDEZ. Ct. App. La., 4th Cir. Motion of Norwegian Shipowners' Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 717 So. 2d 1194.

No. 98–1790. PIETRANGELO *v.* UNITED STATES SENATE. C. A. 6th Cir. Certiorari before judgment denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 98–9674 (A–1047). THOMAS *v.* TAYLOR, 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 170 F. 3d 466.

Rehearing Denied

No. 98–1370. CARRERAS *v.* UNITED STATES, 526 U. S. 1021;
No. 98–1379. LENTINO ET AL. *v.* CAGE, 526 U. S. 1087;
No. 98–1380. LENTINO *v.* CAGE, 526 U. S. 1087;
No. 98–1398. WEISSER *v.* FLORIDA BAR, 526 U. S. 1087;
No. 98–7982. OWENS *v.* LIVERGOOD ET AL., 526 U. S. 1071;
No. 98–8178. BALEY *v.* FORD MOTOR CO., 526 U. S. 1089;
No. 98–8281. CUNNINGHAM *v.* WOODS, WARDEN, ET AL., 526 U. S. 1100;
No. 98–8291. SHAYESTEH *v.* UNITED STATES, 526 U. S. 1045;
No. 98–8319. CAVALIERI-CONWAY *v.* CALIFORNIA BOARD OF EQUALIZATION ET AL., 526 U. S. 1091;
No. 98–8375. WHATLEY *v.* GEORGIA, 526 U. S. 1101;
No. 98–8385. ROBINSON *v.* UNITED STATES, 526 U. S. 1058; and
No. 98–8391. WILLIAMS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL., 526 U. S. 1102. Petitions for rehearing denied.

No. 98–7668. TURNER *v.* UTAH DEPARTMENT OF WORKFORCE SERVICES ET AL., 526 U. S. 1024. Motion for leave to file petition for rehearing denied.

JUNE 15, 1999

Miscellaneous Order

No. 98–9805 (A–1061). IN RE KILGORE. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS,

and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

JUNE 16, 1999

Miscellaneous Orders

No. 98–9825 (A–1069). IN RE POLAND. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 98–9836 (A–1072). IN RE POLAND. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 98–9788 (A–1049). FAULDER *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. 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: 178 F. 3d 343.

No. 98–9819 (A–1066). POLAND *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

No. 98–9832 (A–1071). POLAND *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

JUNE 17, 1999

Miscellaneous Orders

No. A–1083. BALDWIN *v.* ALABAMA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. 98–9850 (A–1084). IN RE BALDWIN. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 98–9837. FAULDER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. 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: 178 F. 3d 741.

JUNE 21, 1999

Dismissal Under Rule 46

No. 98–1664. ARKANSAS ET AL. *v.* UNITED STATES EX REL. RODGERS ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 154 F. 3d 865.

Certiorari Granted—Vacated and Remanded

No. 97–1988. REOGAS ET AL. *v.* GRAY ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), and 11 U. S. C. § 362. JUSTICE SCALIA would grant the petition for writ of certiorari and vacate the judgment below. Costs under this Court's Rule 43.2 are not allowed. Reported below: 135 F. 3d 144.

No. 98–1332. BABBITT, SECRETARY OF THE INTERIOR *v.* CRAWFORD. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West* v. *Gibson*, *ante*, p. 212. Reported below: 148 F. 3d 1318.

No. 98–6678. LEMONS *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 *Lilly* v. *Virginia*, *ante*, p. 116. Reported below: 348 N. C. 335, 501 S. E. 2d 309.

No. 98–8363. SMITH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case

remanded for further consideration in light of *Lilly* v. *Virginia*, *ante*, p. 116.

Certiorari Granted—Reversed. (See No. 98–1062, *ante*, p. 465.)

Miscellaneous Orders. (See also No. 98–8952, *ante*, p. 469.)

No. A–1023 (98–1932). PATAKI, GOVERNOR OF NEW YORK, ET AL. *v.* GRUMET ET AL. Ct. App. N. Y. Application for stay, presented to JUSTICE GINSBURG, and by her referred to the Court, granted, and it is ordered that the judgment of the Court of Appeals of New York, case No. 38, dated May 11, 1999, is stayed pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall continue pending the issuance of the mandate of this Court.

No. D–2051. IN RE DISBARMENT OF BURGESS. Disbarment entered. [For earlier order herein, see 526 U. S. 1002.]

No. D–2057. IN RE DISBARMENT OF LUCAS. Disbarment entered. [For earlier order herein, see 526 U. S. 1036.]

No. D–2083. IN RE DISBARMENT OF GOBLE. Roger C. Goble, of Arlington Heights, Ill., is suspended from the practice of law in this Court, and a rule will 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–2084. IN RE DISBARMENT OF GIAMANCO. Paul D. Giamanco, of Mt. Vernon, Ill., is suspended from the practice of law in this Court, and a rule will 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–2085. IN RE DISBARMENT OF MAGLARAS. Chris Maglaras, Jr., of Las Vegas, Nev., is suspended from the practice of law in this Court, and a rule will 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–2086. IN RE DISBARMENT OF SMITH. Stephen L. Smith, of Gulfport, Miss., is suspended from the practice of law in this Court, and a rule will 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–2087. IN RE DISBARMENT OF PEEK. Mercer Randall Peek, of Conyers, Ga., is suspended from the practice of law in this Court, and a rule will 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–2088. IN RE DISBARMENT OF ROBINS. John Edwards Robins, Jr., of Hampton, Va., is suspended from the practice of law in this Court, and a rule will 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. M–76. AGARWAL ET UX. *v.* MORRIS ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion to strike Nebraska's counterclaim denied. Nebraska is granted leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, limited to the question whether the Republican River Compact restricts a State's consumption of groundwater. If such a motion is filed, the parties shall then brief the legal issue. Motion and opening brief of Nebraska shall be filed on or before 45 days from the date of this order. Kansas' brief shall be filed within 30 days thereafter, after which Nebraska may promptly file a reply brief. Further consideration of motion for appointment of Special Master deferred. [For earlier order herein, see, *e. g.*, 525 U. S. 1101.]

No. 98–8970. HOLSEY *v.* DIRECTOR OF CLASSIFICATION FOR DIVISION OF CORRECTIONS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 12, 1999, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 98–9514. In re Taylor. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 98–1682. United States et al. *v.* Playboy Entertainment Group, Inc. Appeal from D. C. Del. Probable jurisdiction noted. Reported below: 30 F. Supp. 2d 702.

Certiorari Granted

No. 98–1255. United States *v.* Martinez-Salazar. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 146 F. 3d 653.

Certiorari Denied

No. 97–1892. Bilzerian *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 127 F. 3d 237.

No. 98–495. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 139 F. 3d 1359.

No. 98–1041. Whitburn, Secretary, Wisconsin Department of Health and Family Services, et al. *v.* Addis et al. C. A. 7th Cir. Certiorari denied. Reported below: 153 F. 3d 836.

No. 98–1089. Hamilton Amusement Center, t/a Video Express, et al. *v.* Verniero, Attorney General of New Jersey, et al. Sup. Ct. N. J. Certiorari denied. Reported below: 156 N. J. 254, 716 A. 2d 1137.

No. 98–1273. Van Dyken *v.* Day, Director, Montana Department of Corrections. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 37.

No. 98–1324. Swartz *v.* Internal Revenue Service et al. C. A. 1st Cir. Certiorari denied. Reported below: 187 F. 3d 623.

No. 98–1330. Appalachian Power Co. et al. *v.* Environmental Protection Agency et al. C. A. D. C. Cir. Certiorari denied. Reported below: 150 F. 3d 1200.

No. 98–1481. Koster *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 163 F. 3d 1008.

No. 98–1495. CHIEJINA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 721 So. 2d 748.

No. 98–1505. FRIAS-MUNOZ *v.* ALBRIGHT, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 925.

No. 98–1511. CITY OF AUBURN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 154 F. 3d 1025.

No. 98–1666. CITY OF SANTA MARIA ET AL. *v.* RUIZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 160 F. 3d 543.

No. 98–1670. LOZANO, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, LANDEROS, ET AL. *v.* TOYOTA MOTOR CORP. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 98–1685. HARKER *v.* UNIVERSITY PROFESSIONALS OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 53.

No. 98–1690. FELLENCER *v.* PENOBSCOT NATION. C. A. 1st Cir. Certiorari denied. Reported below: 164 F. 3d 706.

No. 98–1691. DRYDEN ET AL. *v.* MADISON COUNTY. Sup. Ct. Fla. Certiorari denied. Reported below: 727 So. 2d 245.

No. 98–1699. HOULT *v.* HOULT. C. A. 1st Cir. Certiorari denied. Reported below: 157 F. 3d 29.

No. 98–1722. CABIRI ET UX. *v.* GOVERNMENT OF THE REPUBLIC OF GHANA. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 193.

No. 98–1764. PATIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 298 Ill. App. 3d 1159, 738 N. E. 2d 233.

No. 98–1766. COLWELL *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 699 N. E. 2d 797.

No. 98–1776. RIVERA *v.* SHERIFF, COOK COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 486.

No. 98–1798. JOHNSTON *v.* TWENTY GRAND OFFSHORE, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 731 So. 2d 548.

No. 98–1852. FINNEGAN *v.* KRUSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 630.

No. 98–1855. GIBSON *v.* SLATER, SECRETARY OF TRANSPORTATION. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 928.

No. 98–1858. BETTS *v.* CONTAINER CORPORATION OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 175 F. 3d 1019.

No. 98–1861. RUIZ MASSIEU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 238.

No. 98–1868. DAVISON ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–1870. UNITED STATIONERS, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 163 F. 3d 440.

No. 98–1871. FROST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 335.

No. 98–1874. VENDETTO *v.* SONAT OFFSHORE DRILLING, INC. Sup. Ct. La. Certiorari denied. Reported below: 725 So. 2d 474.

No. 98–6111. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–7805. THOMAS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 296.

No. 98–7987. GUNSBY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 725 So. 2d 1135.

No. 98–8193. KIMBRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–8201. PINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 24.

No. 98–8373. MCCOY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 333.

No. 98–8522. THOMAS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8715. STORY *v.* KINDT, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8724. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 280.

No. 98–8758. SINGLETON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 165 F. 3d 1297.

No. 98–8947. HUTCHERSON, AKA BONNER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 727 So. 2d 861.

No. 98–8964. HARTLINE *v.* HAMBRICK ET AL. C. A. 6th Cir. Certiorari denied.

No. 98–8966. GRAVES *v.* WILLIAMS. Sup. Ct. Va. Certiorari denied.

No. 98–8967. DAVIS *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8969. FOREMAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 297 Ill. App. 3d 1139, 737 N. E. 2d 717.

No. 98–8971. HOWARD *v.* LAND ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8975. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–8976. DUNN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 254 App. Div. 2d 511, 680 N. Y. S. 2d 125.

No. 98–8977. HAWKINS *v.* SCHOOLEY ET AL. Ct. App. Mich. Certiorari denied.

No. 98–8978. HAWKINS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 98–8979. GREEN *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8983. RIVES *v.* COUNTY OF MONMOUTH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–8985. EVANS *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 915.

No. 98–8990. GRAHAM *v.* QUICK. Ct. App. D. C. Certiorari denied.

No. 98–8995. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–9010. MELENDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–9015. MORALES *v.* HENRY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 500.

No. 98–9017. MALLARD *v.* FIELDS. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1173.

No. 98–9020. SIMS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 155 F. 3d 1297.

No. 98–9022. WALKER *v.* COOPER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 874.

No. 98–9029. LUMBEF *v.* ARDEN FAIR APARTMENTS ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–9032. LUMBEF *v.* STANFORD MEDICAL GROUP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 35.

No. 98–9033. MIDDLETON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 727 So. 2d 908.

No. 98–9034. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 98–9051. PADAVICH *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 162 F. 3d 521.

No. 98–9053. BARRETT *v.* DALKON SHIELD CLAIMANTS TRUST. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 98–9059. BURCKHALTER *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 98–9062. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 728 So. 2d 1088.

No. 98–9078. BOWLING *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 981 S. W. 2d 545.

No. 98–9082. TAYLOR *v.* SOCIETY OF ST. VINCENT DEPAUL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 856.

No. 98–9089. BROOKS *v.* MADDING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–9092. SCHLEEPER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 982 S. W. 2d 252.

No. 98–9094. SMITH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 98–9160. LOWERY *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 98–9197. SYVERTSON *v.* HUKEE. Dist. Ct. N. D., Richland County. Certiorari denied.

No. 98–9201. SHEPPARD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 230, 703 N. E. 2d 286.

No. 98–9233. ELROD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 98–9256. RICHARDSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9305. MANCUSO *v.* HERBERT, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 97.

No. 98–9318. WHITE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 535, 508 S. E. 2d 253.

No. 98–9331. CARDWELL *v.* WATKINS. C. A. 7th Cir. Certiorari denied.

No. 98–9344. NEAL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 731 So. 2d 621.

No. 98–9350. FAUSTINO VERGARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 502.

No. 98–9355. LYNCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 723.

No. 98–9357. TAYLOR *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 440.

No. 98–9358. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–9366. VALDEZ-MOSQUEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 867.

No. 98–9378. KEITH *v.* OHIO. Ct. App. Ohio, Crawford County. Certiorari denied.

No. 98–9386. BECKWITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–9394. ASAMOAH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 187 F. 3d 623.

No. 98–9398. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 503.

No. 98–9403. GRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 489.

No. 98–9414. KIRKPATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 50.

No. 98–9418. ABLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 167 F. 3d 1021.

No. 98–9419. ARAIZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 502.

No. 98–9427. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 3d 928.

No. 98–9429. BRITTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 142 F. 3d 836.

No. 98–9432. LITTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–9433. MCCULLOUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 142 F. 3d 446.

No. 98–9434. PILOTO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–9435. O'CAMPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 174 F. 3d 202.

No. 98–9436. PRATHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 60.

No. 98–9439. COLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 98–9445. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 426.

No. 98–9446. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 177 F. 3d 978.

No. 98–9449. FORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 169 F. 3d 104.

No. 98–9452. GORDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–9453. DEUTSCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–9454. HOLT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 149 F. 3d 1196.

No. 98–9455. PAYNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 880.

No. 98–9456. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1211.

No. 98–9458. PETREYKOV ET AL. *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1201.

No. 98–9460. SNYDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 3d 572.

No. 98–9461. HENRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 164 F. 3d 1304.

No. 98–9462. HALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 1095.

No. 98–9464. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 539.

No. 98–9472. HELMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–9474. ESCOBAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 98–9476. ERNEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 4.

No. 98–9481. HOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 335.

No. 98–9487. HOWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 98–9488. GOMEZ-SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 900.

No. 98–9493. CHEESE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 425.

No. 98–9494. BOSTIC *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 718.

No. 98–9496. CHAMBERS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 157 F. 3d 560.

No. 98–9497. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 169 F. 3d 418.

No. 98–9498. LAIHBEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 1364.

No. 98–9499. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 173 F. 3d 847.

No. 98–9501. MCCUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–9508. QUINTANILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 920.

No. 98–9512. CYPROWSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 426.

No. 98–9513. TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 98–9518. ROBERTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 175 F. 3d 1012.

No. 98–9519. WELLS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 98–9524. CLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–9529. GORDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 168 F. 3d 1222.

No. 98–9531. FRANCIS, AKA RAMSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 425.

No. 98–9533. GOODSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 165 F. 3d 610.

No. 98–9554. MARCUM *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 53.

Rehearing Denied

No. 98–8109. LOWERY *v.* FLORIDA, 526 U. S. 1073;
No. 98–8379. PAUL *v.* UNITED STATES, 526 U. S. 1058;
No. 98–8414. CHILDRESS *v.* APPALACHIAN POWER CO., 526 U. S. 1092; and
No. 98–8453. GARDNER *v.* KENTUCKY, 526 U. S. 1102. Petitions for rehearing denied.

JUNE 24, 1999

Dismissal Under Rule 46

No. 98–958. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ET AL. *v.* ANDERSON ET AL. C. A. 2d Cir. [Certiorari granted, 526 U. S. 1086.] Writ of certiorari dismissed under this Court's Rule 46.1.

Certiorari Granted—Remanded

No. 97–1695. FLANAGAN ET AL. *v.* AHEARN ET AL. C. A. 5th Cir. The Court reversed the judgment below in *Ortiz* v. *Fibreboard Corp.*, *ante*, p. 815. Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 134 F. 3d 668.

Certiorari Granted—Vacated and Remanded

No. 98–4. ARKANSAS DEPARTMENT OF EDUCATION, VOCATIONAL AND TECHNICAL EDUCATION DIVISION *v.* JACOBY ET AL. Sup. Ct. Ark. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alden* v. *Maine*, *ante*, p. 706. Reported below: 331 Ark. 508, 962 S. W. 2d 773.

No. 98–667. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NASA* v. *FLRA*, *ante*, p. 229. Reported below: 137 F. 3d 683.

No. 98–731. REGENTS OF UNIVERSITY OF CALIFORNIA *v.* GENENTECH, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, *ante*, p. 666. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 143 F. 3d 1446.

No. 98–972. LOWERY ET AL. *v.* CIRCUIT CITY STORES, INC. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kolstad* v. *American Dental Assn.*, *ante*, p. 526. Reported below: 158 F. 3d 742.

No. 98–1110. NEW MEXICO DEPARTMENT OF PUBLIC SAFETY ET AL. *v.* WHITTINGTON ET AL. Ct. App. N. M. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alden* v. *Maine*, *ante*, p. 706. Reported below: 126 N. M. 21, 966 P. 2d 188.

No. 98–1285. NEW YORK STATE BOARD OF LAW EXAMINERS ET AL. *v.* BARTLETT. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sutton* v. *United Air Lines, Inc.*, *ante*, p. 471, *Murphy* v.

United Parcel Service, Inc., *ante*, p. 516, and *Albertson's, Inc.* v. *Kirkingburg*, *ante*, p. 555. Reported below: 156 F. 3d 321.

No. 98–1365. HCA Health Services of Texas, Inc., dba Spring Branch Medical Center *v.* Washington. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sutton* v. *United Air Lines, Inc.*, *ante*, p. 471, and *Murphy* v. *United Parcel Service, Inc.*, *ante*, p. 516. Reported below: 152 F. 3d 464.

No. 98–1494. Jackson *v.* Dye et al. C. A. 6th Cir. Motions of respondents Jeffrey Dye and Gregory Turner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Martin* v. *Hadix*, *ante*, p. 343. Reported below: 172 F. 3d 48.

No. 98–1554. Board of Regents of New Mexico State University et al. *v.* Cockrell. Ct. App. N. M. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alden* v. *Maine*, *ante*, p. 706.

Miscellaneous Orders. (See also No. 98–9085, *ante*, p. 885.)

No. D–2061. In re Disbarment of Maguire. Disbarment entered. [For earlier order herein, see 526 U. S. 1084.]

No. D–2062. In re Disbarment of Langfus. Disbarment entered. [For earlier order herein, see 526 U. S. 1084.]

No. D–2063. In re Disbarment of Massey. Disbarment entered. [For earlier order herein, see 526 U. S. 1084.]

No. D–2066. In re Disbarment of Norvell. Disbarment entered. [For earlier order herein, see 526 U. S. 1085.]

No. D–2068. In re Disbarment of Reyes-Vidal. Disbarment entered. [For earlier order herein, see 526 U. S. 1085.]

No. D–2089. In re Disbarment of Raphael. Scott Douglas Raphael, of Newport Beach, Cal., is suspended from the practice of law in this Court, and a rule will 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–2090. In re Disbarment of Boncek. Edward Boncek, of Port St. Lucie, Fla., is suspended from the practice of

law in this Court, and a rule will 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. M–77. MATHEWS *v.* MIRCOSTA COLLEGE; and

No. M–78. CARLSON *v.* HYUNDAI MOTOR CO. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $189,366.40 for the period September 1, 1998, through May 31, 1999, to be paid as follows: 34% by Nebraska, 34% by Wyoming, 5% by Colorado, 24% by the United States, and 3% by Basin Electric Power Cooperative. [For earlier order herein, see, *e. g.*, 525 U. S. 927.]

No. 98–405. RENO, ATTORNEY GENERAL *v.* BOSSIER PARISH SCHOOL BOARD; and

No. 98–406. PRICE ET AL. *v.* BOSSIER PARISH SCHOOL BOARD. D. C. D. C. [Probable jurisdiction noted, 525 U. S. 1118.] Cases restored to calendar for reargument. The parties are directed to file supplemental briefs not to exceed 25 pages addressing the following questions: (1) Does the purpose prong of § 5 of the Voting Rights Act of 1965 extend to a discriminatory but nonretrogressive purpose? (2) Assuming, *arguendo*, that § 5 prohibits the implementation of a districting plan enacted with a discriminatory, nonretrogressive purpose, does the government or the covered jurisdiction bear the burden of proof in this issue?

No. 98–678. LOS ANGELES POLICE DEPARTMENT *v.* UNITED REPORTING PUBLISHING CORP. C. A. 9th Cir. [Certiorari granted, 525 U. S. 1121.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–963. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* SHRINK MISSOURI GOVERNMENT PAC ET AL. C. A. 8th Cir. [Certiorari granted, 525 U. S. 1121.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–822. FRIENDS OF THE EARTH, INC., ET AL. *v.* LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC. C. A. 4th Cir. [Certio-

rari granted, 525 U. S. 1176.] Further consideration of respondent's suggestion of mootness deferred to hearing of case on the merits.

No. 98–1161. CITY OF ERIE ET AL. *v.* PAP'S A. M., TDBA "KANDYLAND." Sup. Ct. Pa. [Certiorari granted, 526 U. S. 1111.] Motion of respondent to dismiss the writ of certiorari as moot denied.

No. 98–8093. PRUNTY *v.* HOLSCHUH, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, ET AL. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [526 U. S. 1063] denied.

No. 98–9084. TYLER *v.* HARTIGAN, JUDGE, DISTRICT COURT OF NEBRASKA, DOUGLAS COUNTY. Sup. Ct. Neb.; and

No. 98–9133. COHEA *v.* BRAY ET AL. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until July 15, 1999, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 98–9617. IN RE ZUBIATE. Petition for writ of habeas corpus denied.

No. 98–8563. IN RE HOLT. Petition for writ of mandamus denied.

Certiorari Granted

No. 98–1828. VERMONT AGENCY OF NATURAL RESOURCES *v.* UNITED STATES EX REL. STEVENS. C. A. 2d Cir. Certiorari granted. Reported below: 162 F. 3d 195.

Certiorari Denied

No. 98–303. BARNETT ET AL. *v.* GLENBOROUGH REALTY CORP. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 98–527. CASEY, DECEASED, BY CASEY, EXECUTRIX OF THE ESTATE, ET AL. *v.* BLISSETT. C. A. 2d Cir. Certiorari denied. Reported below: 147 F. 3d 218.

No. 98–917. INMATES OF D. C. JAIL *v.* EDWARDS, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 158 F. 3d 1357.

No. 98–1057. RIVER WEST, L. P. *v.* DEAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 152 F. 3d 471.

No. 98–1375. HARPER ET AL. *v.* GENERAL ELECTRIC CAPITAL AUTO LEASE, INC. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 266.

No. 98–1403. ROWLAND ET AL. *v.* RAND. C. A. 9th Cir. Certiorari denied. Reported below: 154 F. 3d 952.

No. 98–1452. AMATEL ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 156 F. 3d 192.

No. 98–1462. SWEENEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 704 N. E. 2d 86.

No. 98–1503. FIRST FEDERAL BANK OF CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–1528. GEORGE *v.* ABBOTT. C. A. 3d Cir. Certiorari denied. Reported below: 164 F. 3d 141.

No. 98–1556. PIASKOWSKI *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 222 Wis. 2d 217, 587 N. W. 2d 213.

No. 98–1564. MACKEY *v.* MILAM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 154 F. 3d 648.

No. 98–1568. TRAFALGAR CAPITAL ASSOCIATES, INC. *v.* CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 159 F. 3d 21.

No. 98–1570. SEFICK *v.* GARDNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 164 F. 3d 370.

No. 98–1595. FITZGERALD *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 910.

No. 98–1618. PATRIOT PORTFOLIO, LLC *v.* WEINSTEIN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 164 F. 3d 677.

No. 98–1620. IN RE MORRISSEY. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 134.

No. 98–1635. HAYDEN *v.* CONSOLIDATED RAIL CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 245.

No. 98–1653. TOUGH TRAVELER, LTD. *v.* OUTBOUND PRODUCTS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 15.

No. 98–1675. PANAYOTIDES *v.* PANAYOTIDES. Super. Ct. Pa. Certiorari denied. Reported below: 724 A. 2d 968.

No. 98–1680. SKURNICK *v.* RAAKE. C. A. 11th Cir. Certiorari denied.

No. 98–1703. BRAZELL *v.* SAVANNAH ELECTRIC & POWER CO. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 354.

No. 98–1704. AMERICAN AIRLINES, INC. *v.* TICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 966.

No. 98–1708. GASTINEAU *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Ventura County. Certiorari denied.

No. 98–1709. HEYWARD *v.* MONROE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT DIRECTOR OF HEALTH EDUCATION FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 332.

No. 98–1714. FULL GOSPEL TABERNACLE ET AL. *v.* COMMUNITY SCHOOL DISTRICT 27 ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 829.

No. 98–1719. THOMSON, S. A. *v.* QUIXOTE CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 166 F. 3d 1172.

No. 98–1721. COURTWAY ET AL. *v.* CARNAHAN, GOVERNOR OF MISSOURI, ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 985 S. W. 2d 350.

No. 98–1724. Zoski *v.* Kegler. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 429.

No. 98–1728. Wheeling College, Inc., et al. *v.* City of Wheeling; and

No. 98–1730. Schmitt *v.* City of Huntington. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 204 W. Va. 404, 513 S. E. 2d 177.

No. 98–1732. R. F. *v.* A. C. et al. App. Ct. Mass. Certiorari denied. Reported below: 46 Mass. App. 1101, 705 N. E. 2d 1177.

No. 98–1734. Bylinski et al. *v.* City of Allen Park et al. C. A. 6th Cir. Certiorari denied. Reported below: 169 F. 3d 1001.

No. 98–1736. Rowe *v.* Marietta Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 49.

No. 98–1737. In re Pappas. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–1741. Douglass *v.* General Motors Corp. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1172.

No. 98–1750. Kaley, Sheriff of Portage County, et al. *v.* Gallo et al. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 855.

No. 98–1752. Grandeotto, Inc., et al. *v.* City of Clarksburg. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 204 W. Va. 404, 513 S. E. 2d 177.

No. 98–1753. City of Fort Smith *v.* Krantz et al.; and

No. 98–1754. City of Alma et al. *v.* Krantz et al. C. A. 8th Cir. Certiorari denied. Reported below: 160 F. 3d 1214.

No. 98–1758. Parkwood Developmental Center, Inc., et al. *v.* National Labor Relations Board et al. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 41.

No. 98–1762. Steichen *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 588 N. W. 2d 870.

No. 98–1767. West *v.* West. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1219.

No. 98–1773. GRIFFIN ET AL. *v.* GRIFFIN. Ct. App. Miss. Certiorari denied. Reported below: 726 So. 2d 597.

No. 98–1775. SONIREGUN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 19.

No. 98–1781. ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA *v.* BARTGIS. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 1249, 969 P. 2d 949.

No. 98–1787. ESTATE OF OLIVER, DECEASED, BY RICHARDSON, PERSONAL REPRESENTATIVE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 168 F. 3d 506.

No. 98–1788. CONCORDE-NEW HORIZONS CORP. *v.* SHOPTALK, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 168 F. 3d 586.

No. 98–1792. WASHINGTON *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 160 F. 3d 750.

No. 98–1812. KASI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 256 Va. 407, 508 S. E. 2d 57.

No. 98–1814. CANNINGS *v.* LIBRARIAN OF CONGRESS ET AL.; CANNINGS *v.* LIBRARIAN OF CONGRESS ET AL.; and EVELYN *v.* LIBRARIAN OF CONGRESS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 173 (first judgment); 172 F. 3d 919 (second and third judgments).

No. 98–1815. DACHMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 332.

No. 98–1819. ROBBINS ET VIR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1310.

No. 98–1824. CHRYSLER *v.* CITY OF WEST COVINA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 915.

No. 98–1830. RICHARDSON *v.* ALBERTSON'S, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1221.

No. 98–1835. FULK ET AL. *v.* UNITED TRANSPORTATION UNION. C. A. 7th Cir. Certiorari denied. Reported below: 160 F. 3d 405.

No. 98–1847. WILLS ET AL. *v.* WALT DISNEY PICTURES & TELEVISION, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 173 F. 3d 862.

No. 98–1848. COEUR D'ALENE TRIBE *v.* MISSOURI EX REL. NIXON, ATTORNEY GENERAL OF MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 164 F. 3d 1102.

No. 98–1873. IN RE FONT. C. A. D. C. Cir. Certiorari denied.

No. 98–1893. LIVINGSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 174 F. 3d 201.

No. 98–1900. AZAMBER *v.* FRANCHISE TAX BOARD OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 914.

No. 98–1901. FUSCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 796.

No. 98–1907. WILLIAMS ET AL. *v.* MARSCH. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–1921. GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 92, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO *v.* WILSON. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1298.

No. 98–6220. METZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 144 F. 3d 50.

No. 98–6601. GOFF *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 82 Ohio St. 3d 123, 694 N. E. 2d 916.

No. 98–7732. JENKINS *v.* NELSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 157 F. 3d 485.

No. 98–8089. BURNS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 979 S. W. 2d 276.

No. 98–8120. SPEARMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–8316. ANTONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 918.

No. 98–8419. ROLE *v.* TEAMSTERS UNION LOCAL 11 ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8689. VIEFHAUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 168 F. 3d 392.

No. 98–8699. PELLEGRINO *v.* FANTER. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 607.

No. 98–9016. JENSEN *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 916.

No. 98–9069. SAFOUANE ET UX. *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash. Certiorari denied.

No. 98–9076. BEATTY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9077. CARTER *v.* FREESTONE COUNTY JAIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 584.

No. 98–9080. BOWMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 459, 509 S. E. 2d 428.

No. 98–9083. WARREN *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 358.

No. 98–9097. OLICK *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–9098. LOYA SALAS *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–9099. FISHER ET UX. *v.* SUNKIST GROWERS. C. A. 9th Cir. Certiorari denied.

No. 98–9103. HUDD *v.* SHIFFMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 32.

No. 98–9108. HERNANDEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 174 F. 3d 198.

No. 98–9111. RODRIGUEZ *v.* VIGLIOTTI ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–9113. MARTIN *v.* SCOTT, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 156 F. 3d 578.

No. 98–9114. METCALF *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 92 Wash. App. 165, 963 P. 2d 911.

No. 98–9116. LAMPKINS *v.* BEELER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–9118. LUDWIG *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9120. KIMBERLIN *v.* BIDWELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 333.

No. 98–9125. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 185 Ill. 2d 229, 705 N. E. 2d 809.

No. 98–9126. HENDRICKSON *v.* MCGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied.

No. 98–9127. HARRIS *v.* BALLARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 1164.

No. 98–9132. MACRI *v.* SWEEK ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 727 So. 2d 907.

No. 98–9136. RANKIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–9140. TRAVIS *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 98–9141. BERTONIERE *v.* KAYLO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–9142. BURNS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 729 So. 2d 203.

No. 98–9145. WALKER *v.* FITZGERALD, SHERIFF, STORY COUNTY, IOWA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–9152. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 718 So. 2d 144.

No. 98–9185. TUCKER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 334 S. C. 1, 512 S. E. 2d 99.

No. 98–9188. THOMPSON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 328 Ore. 248, 971 P. 2d 879.

No. 98–9194. RAMON VILLALOBOS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1359.

No. 98–9246. LOSS *v.* MICHIGAN ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied.

No. 98–9262. CROOM *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 47.

No. 98–9279. GETSY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 180, 702 N. E. 2d 866.

No. 98–9280. NEWLIN *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–9321. WRIGHT *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 504.

No. 98–9322. WALTERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–9353. BROWN *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 43.

No. 98–9360. TRAYLOR *v.* CYPERT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 879.

No. 98–9391. CHAVIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 336 Ark. xviii.

No. 98–9393. BARCLAY *v.* FLANDER. C. A. 3d Cir. Certiorari denied.

No. 98–9404. DENMARK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 730 So. 2d 674.

No. 98–9406. GUERRA *v.* ALAMEDA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 606.

No. 98–9409. POWERS *v.* ROBINSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 851.

No. 98–9442. RHODES *v.* CITY OF AURORA. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1221.

No. 98–9478. EVERETT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9480. NORRIS *v.* SLATER, SECRETARY OF TRANSPORTATION. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 928.

No. 98–9491. THOMPSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 729 So. 2d 923.

No. 98–9521. TRICE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 719 So. 2d 17.

No. 98–9538. PARKUS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 157 F. 3d 1136.

No. 98–9567. SMITH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 729 So. 2d 1191.

No. 98–9580. KRONE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 98–9589. WILLIAMS *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 484.

No. 98–906. GEORGIA DEPARTMENT OF REVENUE *v.* BURKE ET AL. C. A. 11th Cir. Motion of Business Bankruptcy Law Committee, New York County Lawyers' Association, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 146 F. 3d 1313.

No. 98–916. DEAS *v.* RIVER WEST ET AL. C. A. 5th Cir. Motion of Epilepsy Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 152 F. 3d 471.

No. 98–1478. RAINEY *v.* CHEVER. Sup. Ct. Ga. Certiorari denied. Reported below: 270 Ga. 519, 510 S. E. 2d 823.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The rising incidence of out-of-wedlock births and delinquent fathers has had dire social consequences, including, in one expert's view: "lower newborn health and increased risk of early infant death; retarded cognitive and verbal development; lowered educational achievement; lowered levels of job attainment; increased behavioral problems; lowered ability to control impulses; warped social development; increased dependence on welfare; increased exposure to crime; and increased risk of being physically or sexually abused." App. to Pet. for Cert. 11 (affidavit of Patrick F. Fagan, former Deputy Assistant Secretary for Family and Social Services Policy, U. S. Dept. of Health and Human Services). The State of Georgia sought to address a particularly disturbing manifestation of this alarming trend. The General Assembly had learned of situations "in which a father of a child, born out of wedlock had failed to form a substantial parental relationship with a child, failed to provide support for the child, or both, and then came forward seeking to profit from the death of the child." *Id.*, at 19–20 (affidavit of State Rep. William C. Randall). Georgia amended its inheritance laws to provide that, in cases where a father's paternity has been established, "neither the father nor any child of the father nor any other paternal kin shall inherit from or through a child born out of wedlock if it shall be established by a preponderance of evidence that the father failed or refused openly to treat the child as his own or failed or refused to provide support for the child." Ga. Code Ann. § 53–2–4(b)(2) (1997).

The facts of this case poignantly illustrate the problem that Georgia sought to address. In 1997, DeAndre Bernard Hamilton died tragically in an automobile crash allegedly caused by a manufacturing defect. Before DeAndre's death, respondent, his biological father, showed little interest in his son. He had no role

in his son's life and had taken no responsibility for his upbringing: According to the petition, respondent had no contact with his son even though he lived less than one mile away from him. Indeed, respondent only met his son at the age of 15 when DeAndre (along with other children whom respondent apparently had fathered) confronted him. Respondent never legitimated DeAndre and never initiated a visit with him. He had no idea when (or if) DeAndre graduated from high school, or, until his death, where DeAndre attended college. Nevertheless, immediately after DeAndre died, respondent was the first person—of all the parents whose children were injured or killed—to file a suit seeking monetary damages for his death.

Petitioner, DeAndre's mother, who reared him for 20 years under these adverse conditions, filed a petition to determine the rights of heirs. See § 53–2–20. She contended that because respondent completely neglected DeAndre he was not entitled to any inheritance under § 53–2–4(b)(2). Respondent argued that § 53–2–4(b)(2) violated, *inter alia*, the Equal Protection Clauses of the United States and Georgia Constitutions. A Georgia Superior Court judge agreed and granted summary judgment to respondent. The Supreme Court of Georgia affirmed, ruling that § 53–2–4(b)(2) on its face violated the Equal Protection Clauses of the United States and Georgia Constitutions. 270 Ga. 519, 510 S. E. 2d 823 (1999). The court reasoned that the statute created "a gender-based classification" because it imposed the support obligation only on fathers of children born out of wedlock; by contrast, mothers of these children bore no such support obligations as a condition of inheritance. Appearing to apply intermediate scrutiny, it stated that "[a] statute containing a gender-based classification violates equal protection unless the classification furthers important governmental objectives, and the discriminatory means employed are 'substantially related' to the achievement of those governmental objectives." *Id.*, at 520; 510 S. E. 2d, at 824 (citing *Reed* v. *Reed*, 404 U. S. 71, 76 (1971); *Franklin* v. *Hill*, 264 Ga. 302; 444 S. E. 2d 778 (1994)). Although the court recognized that encouraging fathers to take responsibility for out-of-wedlock children was an "important interest," it appeared to conclude that Georgia had an equal interest in encouraging such behavior in mothers and, thus, § 53–2–4(b)(2) did not adequately advance this important interest. 270 Ga., at 520, 510 S. E. 2d, at 824. The court found the State's

argument that mothers are less likely than fathers to abandon children born out of wedlock to be based on impermissible stereotypes and overbroad generalizations.

This decision arguably is inconsistent with this Court's prior decisions and, at a minimum, resolves an important question warranting this Court's review. Contrary to the Georgia Supreme Court's conclusion, § 53–2–4(b)(2) does not necessarily draw a gender-based classification but arguably distinguishes between two different categories of men: fathers who support their children born out of wedlock and fathers who do not. Although our prior decisions addressing Equal Protection Clause challenges to similar statutes are not entirely clear, they appear to indicate that heightened scrutiny does not apply. In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we considered a Georgia law requiring both parents' consent to the adoption of children born in wedlock but only the mother's consent for children born out of wedlock (unless the father legitimated the child). We held that the law did not violate the Equal Protection Clause, noting that the State *"[u]nder any standard of review"* could take into consideration that a delinquent father, unlike a married (or even divorced) one, had "never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.*, at 256 (emphasis added). Subsequently, in *Parham* v. *Hughes*, 441 U. S. 347 (1979), we rejected a challenge to a Georgia law that provided that fathers (but not mothers) of out-of-wedlock children could not inherit from their children unless they had legitimated them. Four Justices took the view that the statute did not invidiously discriminate on the basis of sex and, therefore, evaluated the statute under rational-basis review. Justifying its application of the rational-basis test, that four-Justice plurality concluded that "the statutory classification does not discriminate against fathers as a class *but instead distinguishes between fathers who have legitimated their children and those who have not.*" *Id.*, at 356 (emphasis added). Justice Powell, concurring in the judgment, believed that the statute should be reviewed under intermediate scrutiny and, applying that standard, agreed with the plurality that the statute passed constitutional muster. *Id.*, at 359–361. Finally, in *Lehr* v. *Robertson*, 463 U. S. 248 (1983), this Court upheld a New York law entitling all mothers of illegitimate children to prior notice of any adoption proceeding but entitling only

certain fathers to such notice. In holding that the statute did not invidiously discriminate between the father and mother in that case, we observed that the State could take account of the fact that the father had "never established any custodial, personal, or financial relationship with [his daughter]." *Id.*, at 267. Viewed against these decisions, the lower court's choice of heightened scrutiny, particularly in this case, appears to be in error.

Even if the Georgia Supreme Court correctly chose heightened scrutiny, its application of that standard is equally dubious. The only authority cited by the Georgia Supreme Court for its apparent conclusion that § 53–2–4(b)(2) was not substantially related to important governmental interests was a page from this Court's decision in *Miller* v. *Albright*, 523 U. S. 420, 442 (1998). This reliance on *Miller* is misplaced for several reasons. Most notably, the cited page does not even represent a holding of the Court but merely the views of two Justices. *Ibid.* (opinion of STEVENS, J., joined by REHNQUIST, C. J.). There was no opinion for the Court in *Miller;* rather six Justices, in three different opinions, affirmed a lower court judgment rejecting a constitutional challenge to a federal statute that imposed certain proof-of-paternity requirements on children born abroad to alien mothers and citizen fathers (but not alien fathers and citizen mothers). See *id.*, at 423–445; *id.*, at 445–452 (O'CONNOR, J., joined by KENNEDY, J., concurring in judgment); *id.*, at 452–459 (SCALIA, J., joined by THOMAS, J., concurring in judgment). Moreover, the principal opinion cited by the Georgia Supreme Court actually concluded that the statute at issue was *not* based on impermissible stereotypes, *id.*, at 442–445, reasoning that "[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands," *id.*, at 445. Thus, while the fractured decision in *Miller* may demonstrate the need for additional guidance as to the constitutionality of laws differentiating between fathers and mothers of out-of-wedlock children, it does not stand for the proposition that all generalizations based on gender are constitutionally infirm.

Further, I am at a loss to understand how the Georgia Supreme Court's decision can be squared with this Court's decisions recognizing women's unique role in childbirth. For example, this Court invalidated a requirement that a woman seek her husband's consent before obtaining an abortion, reasoning that "[i]nasmuch

as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 71 (1976); see also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 896 (1992) ("It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's"). The logic of the abortion cases, suggesting that the State *may not* ignore a mother's unique efforts in carrying a child to term, flatly contradicts the Georgia Supreme Court's reasoning that the State *must* ignore these efforts when deciding whether she, as opposed to the father, is entitled to inherit from the deceased child's estate.

Apart from the apparent inconsistency between the decision below and this Court's decisions, several prudential considerations counsel in favor of granting certiorari. This Court routinely reviews state courts' decisions invalidating state or local laws on federal constitutional grounds. See, *e. g.*, *Chicago* v. *Morales*, *ante*, p. 41; *Central State Univ.* v. *American Assn. of Univ. Professors, Central State Univ. Chapter*, 526 U. S. 124 (1999) *(per curiam)*. Moreover, the State of Georgia has filed an *amicus* brief urging the Court to uphold the constitutionality of § 53–2–4(b)(2), and its views should affect our decision whether to exercise jurisdiction. Finally, the importance of the issue cannot be gainsaid. A variety of States have adopted similar legislation requiring fathers (but not mothers) to support their children born out of wedlock as a condition of inheriting from their estates. See, *e. g.*, Ala. Code § 43–8–48(2) (1991); Del. Code Ann., Tit. 12, § 508(2) (1995); Idaho Code § 15–2–109(b) (1979); Ky. Rev. Stat. Ann. § 391.105(c)(2) (Michie Supp. 1998); Me. Rev. Stat. Ann., Tit. 18–A, § 2–109(2)(iii) (1998); Miss. Code Ann. § 91–1–15(3)(d)(i) (1994); Mo. Rev. Stat. § 474.060.2 (1994); Neb. Rev. Stat. § 30–2309(2) (1995); S. C. Code Ann. § 62–2–109(2) (Supp. 1998); Tenn. Code Ann. § 31–2–105(a)(2)(B) (Supp. 1998); Va. Code Ann. § 64.1–5.1.3 (Supp. 1998). The decision of the Supreme Court of Georgia, resting on federal constitutional grounds, calls the continued validity of these statutes into doubt. In light of the issue's importance and the substantial tension between the decision below and this Court's decisions, I would vote to grant certiorari.

No. 98–1739. WOODFORD, ACTING WARDEN *v.* CARO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition. Reported below: 165 F. 3d 1223.

No. 98–1742. EDWARDS, WARDEN *v.* HERRINGTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 178 F. 3d 1294.

No. 98–1783. FREEMAN ET VIR *v.* SIMON ET AL. App. Ct. Mass. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 46 Mass. App. 1106, 706 N. E. 2d 729.

Rehearing Denied

No. 97–9078. DOE *v.* A. M. E. ZION CHURCH ET AL., 525 U. S. 836;

No. 98–1054. MALLADI *v.* WEST, SECRETARY OF VETERANS AFFAIRS, 526 U. S. 1097;

No. 98–1431. RUPERT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER AND/OR CONSERVATOR FOR COLUMBIA SAVINGS AND LOAN ASSN., 526 U. S. 1099;

No. 98–1587. HAYNES *v.* UNITED STATES, 526 U. S. 1116;

No. 98–7729. RICCO *v.* UNITED STATES, 525 U. S. 1168;

No. 98–7751. HENDERSON *v.* HENNEBERRY, DIRECTOR, PATUXENT INSTITUTION, ET AL., 526 U. S. 1026;

No. 98–7938. DAVIS *v.* LENSING, WARDEN, ET AL., 526 U. S. 1053;

No. 98–8103. DUNLAP *v.* PECO ENERGY CO. ET AL., 526 U. S. 1073;

No. 98–8185. PRICE *v.* RYDER SYSTEM, INC., ET AL., 526 U. S. 1089;

No. 98–8294. SUMTER *v.* NEW JERSEY, 526 U. S. 1100;

No. 98–8402. UNDERWOOD *v.* MERIWETHER COUNTY, GEORGIA, ET AL., 526 U. S. 1119;

No. 98–8438. ABIDEKUN *v.* MARY IMOGENE BASSETT HOSPITAL, 526 U. S. 1120;

No. 98–8469. SMITH *v.* MISSISSIPPI, 526 U. S. 1092;

No. 98–8606. CLOUD *v.* WEBB, 526 U. S. 1134;

No. 98–8607. COTNER *v.* HARGETT, WARDEN, ET AL., 526 U. S. 1134;

No. 98–8651. HAUPT *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL., 526 U. S. 1135;

No. 98–8741. IN RE NOBLE, 526 U. S. 1097;

No. 98–8749. GONZALES *v.* ARIZONA, 526 U. S. 1136;

No. 98–8766. CARROLL *v.* UNITED STATES, 526 U. S. 1104; and

No. 98–8925. IN RE ROGERS, 526 U. S. 1097. Petitions for rehearing denied.

JUNE 25, 1999

Dismissal Under Rule 46

No. 98–9525. BUEHL *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 166 F. 3d 163.

JULY 6, 1999

Certiorari Denied

No. 99–5107 (A–28). PROVENZANO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 739 So. 2d 1150.

No. 99–5125 (A–32). WHITE, NEXT FRIEND TO HEIDNIK *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. 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. Reported below: 191 F. 3d 446.

JULY 7, 1999

Miscellaneous Order

No. 99–5029 (A–13). IN RE NEWSTED. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 99–5106 (A–27). DAVIS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 742 So. 2d 233.

No. 99–5161 (A–35). DAVIS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 737 So. 2d 550.

JULY 8, 1999

Miscellaneous Order

No. A–38 (O. T. 1999). HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* FORD. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on July 7, 1999, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JULY 12, 1999

Dismissal Under Rule 46

No. 98–2051. CANTU *v.* M. S. W. GROUP, L. L. C., ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 174 F. 3d 198.

JULY 21, 1999

Miscellaneous Orders

No. 98–7540. CARMELL *v.* TEXAS. Ct. App. Tex., 2d Dist. [Certiorari granted, *ante,* p. 1002.] Motion for appointment of counsel granted, and it is ordered that Richard D. Bernstein, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 99–5341 (A–80). IN RE STRICKLER. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion of peti-

tioner for leave to file a supplement in support of petition under seal denied. Petition for writ of habeas corpus denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice White (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit during the period September 15 through September 17, 1999, 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 2, 1999

Miscellaneous Orders

No. A–20 (O. T. 1999). ROBERTSON *v.* COMPTROLLER OF THE TREASURY. Ct. App. Md. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–2059. IN RE DISBARMENT OF BLUTRICH. Disbarment entered. [For earlier order herein, see 526 U. S. 1036.]

No. D–2060. IN RE DISBARMENT OF SCHAMBACH. Disbarment entered. [For earlier order herein, see 526 U. S. 1084.]

No. D–2064. IN RE DISBARMENT OF OLDS. Disbarment entered. [For earlier order herein, see 526 U. S. 1085.]

No. D–2065. IN RE DISBARMENT OF KULIE. Disbarment entered. [For earlier order herein, see 526 U. S. 1085.]

No. D–2067. IN RE DISBARMENT OF WEBB. Disbarment entered. [For earlier order herein, see 526 U. S. 1085.]

No. D–2069. IN RE DISBARMENT OF WALKER. Disbarment entered. [For earlier order herein, see 526 U. S. 1096.]

No. D–2071. IN RE DISBARMENT OF WOOLFORK. Disbarment entered. [For earlier order herein, see 526 U. S. 1108.]

No. D–2072. IN RE DISBARMENT OF WILSON. Disbarment entered. [For earlier order herein, see 526 U. S. 1109.]

No. D–2075. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order herein, see 526 U. S. 1129.]

No. D–2077. IN RE DISBARMENT OF ARNOPOLE. Disbarment entered. [For earlier order herein, see 526 U. S. 1156.]

No. D–2091. IN RE DISBARMENT OF TURTLETAUB. Sheldon J. Turtletaub, of Port Washington, N. Y., is suspended from the practice of law in this Court, and a rule will 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–2092. IN RE DISBARMENT OF LEWIS. David George Lewis, of White Plains, N. Y., is suspended from the practice of law in this Court, and a rule will 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–2093. IN RE DISBARMENT OF BYKOFSKY. Seth Darryl Bykofsky, of Garden City, N. Y., is suspended from the practice of law in this Court, and a rule will 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–2094. IN RE DISBARMENT OF ONDECK. Thomas P. Ondeck, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will 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–2095. IN RE DISBARMENT OF CONNORS. Charles Augustus Connors III, of San Mateo, Cal., is suspended from the practice of law in this Court, and a rule will 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–2096. IN RE DISBARMENT OF DURIE. Jack F. Durie, Jr., of Orlando, Fla., is suspended from the practice of law in this Court, and a rule will 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–2097. IN RE DISBARMENT OF WILKES. John Eric Wilkes, of Salem, Ore., is suspended from the practice of law in this Court, and a rule will 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. 98–1255. UNITED STATES *v.* MARTINEZ-SALAZAR. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1021.] Motion for appointment of counsel granted, and it is ordered that Michael D. Gordon, Esq., of Tempe, Ariz., be appointed to serve as counsel for respondent in this case.

Rehearing Denied

No. 98–1048. MEESTER *v.* HENDERSON, POSTMASTER GENERAL, 526 U. S. 1144;

No. 98–1310. ZISK ET UX. *v.* CITY OF ROSEVILLE ET AL., 526 U. S. 1067;

No. 98–1316. ENERCON GMBH *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION ET AL., 526 U. S. 1130;

No. 98–1461. CONSTRUCTIVIST FOUNDATION, INC. *v.* DEKALB COUNTY BOARD OF TAX ASSESSORS, 526 U. S. 1113;

No. 98–1578. AUSTIN INDEPENDENT SCHOOL DISTRICT ET AL. *v.* MEYER ET AL., 526 U. S. 1132;

No. 98–1624. KIRK ET UX. *v.* BERLIN PROBATE COURT ET AL., 526 U. S. 1132;

No. 98–7510. HALL *v.* UNITED STATES, 526 U. S. 1117;

No. 98–7571. CROSS *v.* UNITED STATES PAROLE COMMISSION, 526 U. S. 1071;

No. 98–8048. PYE *v.* GEORGIA, 526 U. S. 1118;

No. 98–8049. PERKINS *v.* GEORGIA, 526 U. S. 1118;

No. 98–8121. HENRY *v.* GEORGIA, 526 U. S. 1118;

No. 98–8328. FORD *v.* SAUNDERS, WARDEN, ET AL., 526 U. S. 1100;

No. 98–8399. WILLIAMS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 526 U. S. 1119;

No. 98–8450. GAUNCE *v.* DEVINCENTIS ET AL., 526 U. S. 1120;

No. 98–8501. DECKER *v.* TEXAS, 526 U. S. 1121;

No. 98–8507. HUTCHINSON *v.* FULCOMER ET AL., 526 U. S. 1102;

No. 98–8572. BELL *v.* MISSISSIPPI, 526 U. S. 1122;

No. 98–8577. BROOKS *v.* MARTIN MARIETTA UTILITY SERVICES, INC., ET AL., 526 U. S. 1122;

No. 98–8830. WASHINGTON *v.* WILLIAMS, MAYOR OF DISTRICT OF COLUMBIA, 526 U. S. 1162;

No. 98–8883. KREHNBRINK *v.* MARYLAND STATE DEPARTMENT OF EDUCATION ET AL., *ante*, p. 1007;

No. 98–8884. NOVEL *v.* SALZBERG, *ante*, p. 1007;
No. 98–8905. IN RE COOPER, 526 U. S. 1129;
No. 98–8957. SEREQUEBERHAN *v.* TESFAYE, *ante*, p. 1009;
No. 98–8962. BOYD *v.* BARKLEY, CHAPTER 13 TRUSTEE, 526 U. S. 1163;
No. 98–8974. GRAY *v.* DEPARTMENT OF THE ARMY, 526 U. S. 1138;
No. 98–8996. ALLEN *v.* HENDERSON, POSTMASTER GENERAL, 526 U. S. 1138;
No. 98–9128. FOWLER *v.* CITY OF RALEIGH PARKS AND RECREATION DEPARTMENT ET AL., 526 U. S. 1163;
No. 98–9139. THOMPSON *v.* UNITED STATES POSTAL SERVICE, 526 U. S. 1153; and
No. 98–9367. WELLS *v.* CITY OF NEW YORK ET AL., *ante*, p. 1012. Petitions for rehearing denied.

No. 98–1783. FREEMAN ET VIR *v.* SIMON ET AL., *ante*, p. 1049. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

AUGUST 5, 1999

Certiorari Denied

No. 98–9745 (A–111). BOYD *v.* JOHNSON, 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: 167 F. 3d 907.

AUGUST 10, 1999

Certiorari Denied

No. 99–5531 (A–116). EARHART *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.

AUGUST 11, 1999

Miscellaneous Orders

No. A–143 (O. T. 1999). IN RE EARHART. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 99–5663 (A–136). IN RE EARHART. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 17, 1999

Dismissal Under Rule 46

No. 98–1839. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* GRIFFIN. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 168 F. 3d 486.

Certiorari Denied

No. 98–9936 (A–83). TREVINO *v.* JOHNSON, 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: 168 F. 3d 173.

No. 99–5502 (A–148). WILLIAMS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 178 F. 3d 1288.

AUGUST 23, 1999

Miscellaneous Orders

No. A–95 (98–1924). WOJCIECHOWSKI *v.* MONTEVIDEO PARTNERSHIP ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. A–96 (98–1955). WOJCIECHOWSKI *v.* WALT DISNEY CONCERT HALL NO. 1 ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. A–993 (99–5103). KINNEY *v.* BANKERS TRUST CO. App. Ct. Conn. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. D–2074. IN RE DISBARMENT OF VEDATSKY. Disbarment entered. [For earlier order herein, see 526 U. S. 1129.]

No. D–2078. IN RE DISBARMENT OF PISANO. Disbarment entered. [For earlier order herein, see 526 U. S. 1156.]

No. D–2079. IN RE DISBARMENT OF QUAINTANCE. Disbarment entered. [For earlier order herein, see 526 U. S. 1156.]

No. D–2081. IN RE DISBARMENT OF BERFIELD. Disbarment entered. [For earlier order herein, see *ante*, p. 1001.]

No. D–2082. IN RE DISBARMENT OF LOPEZ. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D–2083. IN RE DISBARMENT OF GOBLE. Disbarment entered. [For earlier order herein, see *ante*, p. 1019.]

No. D–2084. IN RE DISBARMENT OF GIAMANCO. Disbarment entered. [For earlier order herein, see *ante*, p. 1019.]

No. D–2085. IN RE DISBARMENT OF MAGLARAS. Disbarment entered. [For earlier order herein, see *ante*, p. 1019.]

No. D–2086. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see *ante*, p. 1019.]

No. D–2090. IN RE DISBARMENT OF BONCEK. Disbarment entered. [For earlier order herein, see *ante*, p. 1032.]

No. D–2098. IN RE DISBARMENT OF HARRIS. Robert H. Harris, of Woodmere, N. Y., is suspended from the practice of law in this Court, and a rule will 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–2099. IN RE DISBARMENT OF HERNANDEZ. Rodolfo Hernandez, of El Paso, Tex., is suspended from the practice of law in this Court, and a rule will 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–2100. IN RE DISBARMENT OF MMAHAT. John A. Mmahat, of Metairie, La., is suspended from the practice of law in this Court, and a rule will 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. 96–8963. JARRETT *v.* TOXIC ACTION WASH ET AL., 522 U. S. 827;

No. 97–9361. JONES *v.* UNITED STATES, *ante*, p. 373;

No. 98–10. JEFFERSON COUNTY, ALABAMA *v.* ACKER, SENIOR JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA, ET AL., *ante*, p. 423;

No. 98–1481. KOSTER *v.* UNITED STATES, *ante*, p. 1021;

No. 98–1672. MEADE *v.* PEP BOYS MANNY MOE & JACK, INC., ET AL., *ante*, p. 1005;

No. 98–1680. SKURNICK *v.* RAAKE, *ante*, p. 1036;

No. 98–1703. BRAZELL *v.* SAVANNAH ELECTRIC & POWER CO., *ante*, p. 1036;

No. 98–1787. ESTATE OF OLIVER, DECEASED, BY RICHARDSON, PERSONAL REPRESENTATIVE *v.* FLORIDA ET AL., *ante*, p. 1038;

No. 98–1793. KOLB *v.* TEXAS, *ante*, p. 1005;

No. 98–1814. CANNINGS *v.* LIBRARIAN OF CONGRESS ET AL.; CANNINGS *v.* LIBRARIAN OF CONGRESS ET AL.; and EVELYN *v.* LIBRARIAN OF CONGRESS ET AL., *ante*, p. 1038;

No. 98–1815. DACHMAN *v.* UNITED STATES, *ante*, p. 1038;

No. 98–1830. RICHARDSON *v.* ALBERTSON'S, INC., ET AL., *ante*, p. 1038;

No. 98–1873. IN RE FONT, *ante*, p. 1039;

No. 98–7589. KING *v.* POPPELL ET AL., 526 U. S. 1117;

No. 98–7670. PETREYKOV ET AL. *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL., 525 U. S. 1167;

No. 98–8077. KING *v.* UPSHAW, WARDEN, ET AL., 526 U. S. 1072;

No. 98–8352. SHIVAEE *v.* VIRGINIA ET AL., 526 U. S. 1101;

No. 98–8426. LOFTIS *v.* CATOE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 526 U. S. 1119;

No. 98–8444. PATMON *v.* OKLAHOMA ET AL., 526 U. S. 1120;

No. 98–8468. IN RE ARTIS, 526 U. S. 1049;

No. 98–8677. MOORE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 526 U. S. 1103;

No. 98–8678. MINNIECHESKE *v.* SHAWANO COUNTY ET AL., 526 U. S. 1148;

No. 98–8736. In re Williams Lewis, 526 U. S. 1144;

No. 98–8843. Pearson *v.* Catoe, 526 U. S. 1162;

No. 98–8874. Duckworth *v.* Moore, Secretary, Florida Department of Corrections, et al., *ante*, p. 1007;

No. 98–8933. Visintine *v.* United States, *ante*, p. 1008;

No. 98–8983. Rives *v.* County of Monmouth et al., *ante*, p. 1024;

No. 98–9062. Jordan *v.* Mississippi, *ante*, p. 1026;

No. 98–9097. Olick *v.* John Hancock Mutual Life Insurance Co. et al., *ante*, p. 1040;

No. 98–9127. Harris *v.* Ballard et al., *ante*, p. 1041;

No. 98–9131. Mantilla *v.* United States, 526 U. S. 1152;

No. 98–9140. Travis *v.* Ohio, *ante*, p. 1041;

No. 98–9142. Burns *v.* Mississippi, *ante*, p. 1041;

No. 98–9195. Parise *v.* United States, 526 U. S. 1164;

No. 98–9278. Martini *v.* Rosewell et al., *ante*, p. 1010;

No. 98–9496. Chambers *v.* Bowersox, Superintendent, Potosi Correctional Center, *ante*, p. 1029; and

No. 98–9567. Smith *v.* Mississippi, *ante*, p. 1043. Petitions for rehearing denied.

No. 98–6022. Rosenthal *v.* Banks, Administrative Appeals Judge, Department of Health and Human Services, 525 U. S. 972. Motion for leave to file petition for rehearing denied.

August 30, 1999

Dismissal Under Rule 46

No. 99–105. Southern Union Co. *v.* Morse. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 174 F. 3d 917.

August 31, 1999

Miscellaneous Order

No. 99–6003 (A–177). In re Leisure. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 98–9808 (A–102). Jones *v.* Johnson, 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: 171 F. 3d 270.

No. 99–5975 (A–175). LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL.; and LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 99–6004 (A–178). LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 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.

SEPTEMBER 1, 1999

Certiorari Granted

No. 99–5746 (A–151). WEEKS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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, granted. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 176 F. 3d 249.

Certiorari Denied

No. 99–6016 (A–180). LEISURE *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Mo. 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 would grant the application for stay of execution and the petition for writ of certiorari.

No. 99–6017 (A–181). LEISURE *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, 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 would grant the application for stay of execution and the petition for writ of certiorari.

No. 99–6018 (A–182). LEISURE *v.* MISSOURI 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 would grant the application for stay of execution.

SEPTEMBER 8, 1999

Miscellaneous Order

No. A–210 (O. T. 1999). ARKANSAS ABOLITIONIST COMMITTEE *v.* ARKANSAS. Application for stay of execution of sentence of death of Alan Willett, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

SEPTEMBER 9, 1999

Miscellaneous Order

No. A–189 (99–6035). TAYLOR *v.* CAIN, WARDEN. 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 disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 10, 1999

Miscellaneous Orders

No. A–962. ROQUEMORE *v.* RICE, WARDEN, ET AL. Application for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 98–405. RENO, ATTORNEY GENERAL *v.* BOSSIER PARISH SCHOOL BOARD; and

No. 98–406. PRICE ET AL. *v.* BOSSIER PARISH SCHOOL BOARD. D. C. D. C. [Probable jurisdiction noted, 525 U. S. 1118.] Motion of the Solicitor General for divided argument granted.

No. 98–818. RICE *v.* CAYETANO, GOVERNOR OF HAWAII. C. A. 9th Cir. [Certiorari granted, 526 U. S. 1016.] Motion of the So-

licitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–822. FRIENDS OF THE EARTH, INC., ET AL. *v.* LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC. C. A. 4th Cir. [Certiorari granted, 525 U. S. 1176.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–1036. ILLINOIS *v.* WARDLOW. Sup. Ct. Ill. [Certiorari granted, 526 U. S. 1097.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–1170. PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY *v.* AGARD. C. A. 2d Cir. [Certiorari granted, 526 U. S. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–1299. NEW YORK *v.* HILL. Ct. App. N. Y. [Certiorari granted, 526 U. S. 1111.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–1682. UNITED STATES ET AL. *v.* PLAYBOY ENTERTAINMENT GROUP, INC. D. C. Del. [Probable jurisdiction noted, *ante*, p. 1021.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

Certiorari Granted

No. 98–1960. CORTEZ BYRD CHIPS, INC. *v.* BILL HARBERT CONSTRUCTION CO., A DIVISION OF BILL HARBERT INTERNATIONAL, INC. C. A. 11th Cir. Certiorari granted. Reported below: 169 F. 3d 693.

No. 98–1696. UNITED STATES *v.* JOHNSON. C. A. 6th Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,

Wednesday, December 1, 1999. This Court's Rule 29.2 does not apply. Reported below: 154 F. 3d 569.

No. 98–1701. UNITED STATES *v.* LOCKE, GOVERNOR OF WASHINGTON, ET AL.; and

No. 98–1706. INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) *v.* LOCKE, GOVERNOR OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 148 F. 3d 1053.

No. 98–1811. GEIER ET AL. *v.* AMERICAN HONDA MOTOR CO., INC., ET AL. C. A. D. C. Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 166 F. 3d 1236.

No. 98–1904. UNITED STATES ET AL. *v.* WEATHERHEAD. 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., Friday, October 22, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 1, 1999. This Court's Rule 29.2 does not apply. Reported below: 157 F. 3d 735.

No. 99–51. GUTIERREZ ET AL. *v.* ADA 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., Friday, October 22, 1999. Brief of respondents is to be filed with

the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 29, 1999. This Court's Rule 29.2 does not apply. Reported below: 179 F. 3d 672.

Rehearing Denied

No. 98–1539. GLAVEY *v.* HIGHLAND LAKES COUNTRY CLUB & COMMUNITY ASSN., 526 U. S. 1115;

No. 98–7947. EWING *v.* CALIFORNIA, 526 U. S. 1054;

No. 98–8120. SPEARMAN *v.* UNITED STATES, *ante*, p. 1039;

No. 98–8437. TRAFT *v.* AMERICAN THRESHOLD INDUSTRIES, INC., 526 U. S. 1120;

No. 98–8752. EDWARDS *v.* FRANCHINI ET AL., 526 U. S. 1124;

No. 98–8836. HAZLEY *v.* CITY OF AKRON ET AL., 526 U. S. 1162;

No. 98–8882. FIELDS *v.* DALKON SHIELD CLAIMANTS TRUST, *ante*, p. 1007;

No. 98–8980. SMITH *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 526 U. S. 1163;

No. 98–8987. EPLEY *v.* WEST ET AL., 526 U. S. 1150;

No. 98–9029. LUMBEF *v.* ARDEN FAIR APARTMENTS ET AL., *ante*, p. 1025;

No. 98–9032. LUMBEF *v.* STANFORD MEDICAL GROUP ET AL., *ante*, p. 1025;

No. 98–9288. IN RE HARRISON-BEY, 526 U. S. 1144;

No. 98–9331. CARDWELL *v.* WATKINS, *ante*, p. 1026;

No. 98–9376. LAWRENCE *v.* MOATS, WARDEN, ET AL., *ante*, p. 1012;

No. 98–9453. DEUTSCH *v.* UNITED STATES, *ante*, p. 1028;

No. 98–9458. PETREYKOV ET AL. *v.* CITY OF NEW YORK, *ante*, p. 1028;

No. 98–9478. EVERETT *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1043;

No. 98–9480. NORRIS *v.* SLATER, SECRETARY OF TRANSPORTATION, *ante*, p. 1043; and

No. 98–9500. IN RE MAULDIN, *ante*, p. 1002. Petitions for rehearing denied.

SEPTEMBER 14, 1999

Miscellaneous Order

No. 99–6147 (A–220). IN RE DAVIS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

SEPTEMBER 16, 1999

Certiorari Denied

No. 99–6143 (A–222). MUELLER *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. 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. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 181 F. 3d 557.

SEPTEMBER 21, 1999

Dismissals Under Rule 46

No. 99–425. WALLACE ET AL. *v.* STIEHL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari dismissed as to Linda Adams under this Court's Rule 46.

No. 99–210. HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH ET AL. *v.* SURGICAL CARE CENTER OF HAMMOND, L. C., ET AL.; CITY OF BOSSIER CITY ET AL. *v.* WILLIS-KNIGHTON MEDICAL CENTER; and RICHLAND PARISH HOSPITAL SERVICE DISTRICT 1–B, DBA RICHLAND PARISH MEDICAL CENTER, ET AL. *v.* ABRAHAM ET AL. C. A. 5th Cir. Certiorari dismissed as to *City of Bossier City et al.* v. *Willis-Knighton Medical Center* under this Court's Rule 46.1. Reported below: 178 F. 3d 1290 (second judgment).

SEPTEMBER 23, 1999

Certiorari Denied

No. 99–5630 (A–232). SULLIVAN *v.* SNYDER, WARDEN, ET AL. 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 JUS-

TICE GINSBURG would grant the application for stay of execution. Reported below: 187 F. 3d 626.

No. 99–6315 (A–254). SULLIVAN *v.* DELAWARE. Sup. Ct. Del. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. Reported below: 738 A. 2d 239.

SEPTEMBER 24, 1999

Dismissal Under Rule 46

No. 98–1961. INTERNATIONAL BUSINESS MACHINES CORP. ET AL. *v.* MCAULEY ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 165 F. 3d 1038.

Certiorari Denied

No. 99–6201 (A–235). GREEN *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 350 N. C. 400, 514 S. E. 2d 724.

No. 99–6278 (A–244). GREEN *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Pitt County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

No. 99–6313 (A–252). GREEN *v.* LEE, 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.

No. 99–6319 (A–256). GREEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 27, 1999

Miscellaneous Order

No. A–241 (99–451). LEWIS, WARDEN, ET AL. *v.* GARCIA DELGADO. C. A. 9th Cir. Application for stay of judgment of the

United States Court of Appeals for the Ninth Circuit in case No. 97–56162, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 28, 1999

Miscellaneous Order

No. 98–791. KIMEL ET AL. *v.* FLORIDA BOARD OF REGENTS ET AL.; and

No. 98–796. UNITED STATES *v.* FLORIDA BOARD OF REGENTS ET AL. C. A. 11th Cir. [Certiorari granted, 525 U. S. 1121.] Motion of the Solicitor General for divided argument granted.

Certiorari Granted

No. 98–1288. VILLAGE OF WILLOWBROOK ET AL. *v.* OLECH. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 160 F. 3d 386.

No. 98–1667. BARAL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted limited to the following question: "Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on tax refunds set forth in § 6511(b) of the Internal Revenue Code, 26 U. S. C. § 6511(b)?" Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 172 F. 3d 918.

No. 98–1856. HILL ET AL. *v.* COLORADO ET AL. Sup. Ct. Colo. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 973 P. 2d 1246.

No. 98–1949. PEGRAM ET AL. *v.* HERDRICH. C. A. 7th Cir. Motions of American Association of Health Plans et al. and Washington Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 154 F. 3d 362.

No. 98–2043. HUNT-WESSON, INC. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply.

No. 99–5. UNITED STATES *v.* MORRISON ET AL.; and

No. 99–29. BRZONKALA *v.* MORRISON ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 169 F. 3d 820.

No. 99–137. GARNER, FORMER CHAIRMAN OF THE STATE BOARD OF PARDONS AND PAROLES OF GEORGIA, ET AL. *v.* JONES. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel

on or before 3 p.m., Friday, November 12, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 164 F. 3d 589.

No. 99–138. TROXEL ET VIR *v.* GRANVILLE. Sup. Ct. Wash. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 137 Wash. 2d 1, 969 P. 2d 21.

No. 99–161. WEISGRAM ET AL. *v.* MARLEY CO. ET AL. C. A. 8th Cir. Certiorari granted limited to Question 2 presented by the petition. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. This Court's Rule 29.2 does not apply. Reported below: 169 F. 3d 514.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1996, 1997 AND 1998

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1996	**1997**	**1998**	**1996**	**1997**	**1998**	**1996**	**1997**	**1998**	**1996**	**1997**	**1998**
Number of cases on dockets	6	7	7	2,430	2,432	2,387	5,165	5,253	5,689	7,602	7,692	8,083
Number disposed of during term	2	1	2	2,083	2,106	2,066	4,606	4,611	4,947	6,691	6,718	7,015
Number remaining on dockets	5	6	5	347	326	321	559	642	742	907	974	1,058

	TERMS		
	1996	**1997**	**1998**
Cases argued during term	90	96	90
Number disposed of by full opinions	87	*93	84
Number disposed of by per curiam opinions	3	1	4
Number set for reargument	0	0	2
Cases granted review this term	88	90	81
Cases reviewed and decided without oral argument	83	51	59
Total cases to be available for argument at outset of following term	48	41	30

*96–1925 and 97–288 dismissed under Rule 46.1 after argument.

JUNE 24, 1999

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3. "*Malice or . . . reckless indifference.*" Civil Rights Act of 1991, 42 U. S. C. § 1981a(b)(1). Kolstad v. American Dental Assn., p. 526.

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