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In Memoriam

JUSTICE LEWIS F. POWELL, JR.

UNITED STATES REPORTS

VOLUME 526

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1998

MARCH 2 THROUGH JUNE 7, 1999

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

523 U. S. 1073, No. 97–1319: Petitioner should be "Madden Casselli".
523 U. S. 1098, No. 97–8102: "130 F. 3d 305" should be "141 F. 3d 1239".
523 U. S. 1111, No. 97–8442: "703 So. 2d 864" should be "709 So. 2d 369".

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.
HARRY A. BLACKMUN, 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.

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*Justice Blackmun, who retired effective August 3, 1994 (512 U. S. VII), died on March 4, 1999. See *post*, p. V.

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.)

DEATH OF JUSTICE BLACKMUN

Supreme Court of the United States

MONDAY, MARCH 8, 1999

Present: Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, and Justice Breyer.

The Chief Justice said:

As we open this morning, I announce with sadness that our friend and colleague Harry A. Blackmun, a former Justice of this Court, died on Thursday morning, March 4, 1999, at Arlington Hospital, in Arlington, Virginia.

Justice Blackmun was born in Nashville, Illinois, in 1908, and grew up in St. Paul, Minnesota. He received a scholarship to Harvard where he majored in mathematics and graduated *summa cum laude*. He received his law degree from Harvard Law School in 1932.

Justice Blackmun began his legal career serving as a law clerk to Judge John Sanborn on the United States Court of Appeals for the Eighth Circuit. After his clerkship, he spent 16 years in private practice, specializing in taxation, litigation, wills, and estate planning. He then became the first resident counsel at the Mayo Clinic in Rochester, Minnesota, where he combined his love for law and medicine. In 1959, President Eisenhower nominated him to serve on the United States Court of Appeals for the Eighth Circuit, filling the vacant seat of Judge Sanborn for whom he had clerked 26 years earlier. After serving nine years on the Eighth Circuit, he was appointed by President Nixon to a seat on the Supreme Court in June 1970.

Justice Blackmun was the 98th Justice to serve on the Court and served for nearly a quarter of a century. He spoke for the Court in more than 350 opinions. The publicity that the *Roe* v. *Wade* opinion received may have obscured many other important decisions he authored. Those include *Mistretta* v. *United States*, in which the Sentencing Guidelines were held to be constitutional; *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, concerning the admissibility of scientific evidence in federal courts; and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, which opened new horizons on First Amendment protection of commercial speech, to name just three. He was a worthy successor to the predecessors in the seat which he occupied—Joseph Story, Oliver Wendell Holmes, Benjamin Cardozo, and Felix Frankfurter. He will be missed by his friends throughout the judiciary and the country.

I speak for the members of this Court in expressing our profound sympathy to Mrs. Blackmun, and his daughters Nancy, Sally, and Susan, and to his grandchildren. The recess this Court takes today will be in his memory. At an appropriate time, the traditional memorial observance of the Court and the Bar of the Court will be held in this Courtroom.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE POWELL*

TUESDAY, MAY 18, 1999

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

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, Justice Lewis F. Powell, Jr.

The Court recognizes the Solicitor General.

The Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice Powell were unanimously adopted. With the Court's leave, I shall summarize the Resolutions and ask that they be set forth in their entirety in the records of the Court.

RESOLUTION

Lewis Franklin Powell, Jr., served on the Supreme Court from January 7, 1972, until June 26, 1987. Born on September 19, 1907, in Suffolk, Virginia, Powell lived most of his life

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*Justice Powell, who retired from the Court effective June 26, 1987 (483 U. S. VII), died in Richmond, Virginia, on August 25, 1998 (525 U. S. V).

in Richmond. His father was a successful businessman, with sufficient resources to send his son to a private boys' school in Richmond, then to six years at Washington and Lee University, where Lewis, Jr., earned both undergraduate and law degrees, and finally to one year at Harvard Law School. At Washington and Lee, he was the proverbial "big man on campus." He was elected president of the student body, tapped for a succession of exclusive clubs, and chosen to represent the school at the National Student Federation.

In 1931, Powell graduated first in his law school class at Washington and Lee, then went to Harvard. There the competition was entirely different. Powell took a seminar in Administrative Law taught by Felix Frankfurter, who would later succeed Benjamin Cardozo on the Supreme Court. Seated around the seminar table with the two future Justices were Harold Stephens, who would later serve on the D. C. Circuit Court of Appeals; Louis Jaffe, who had a brilliant career on the Harvard law faculty as a specialist in administrative law; and Paul Freund, who became a celebrated teacher of constitutional law and twice was seriously considered by President Kennedy for appointment to the Supreme Court. In this company, the graduate student from Virginia did not stand out. He sat at the far end of the table from the voluble professor, took copious notes, and said as little as possible.

Lewis Powell left Harvard at the depth of the Great Depression. He turned down an offer from John W. Davis to work at Davis, Polk, and Wardwell for the munificent salary of $150 per month and took a job in Richmond for one-third that rate. He was to practice law in Richmond for nearly 40 years, eventually becoming the city's leading lawyer and one of its foremost citizens. Much of that time Powell spent building a corporate practice at the great law firm that would one day bear his name (Hunton, Williams, Gay, Powell & Gibson), but to an astonishing degree he also devoted himself to public service. In the history of private practice, there is no better example of the lawyer as public citizen than Lewis Powell.

In the early years, Powell's public role was strictly local. He volunteered at the Legal Aid Society of Richmond, involved himself in a host of other civic activities, and became active in the local bar. For Powell, as for so many members of his generation, service on a broader scale began in the aftermath of Pearl Harbor. Too old to be drafted, Powell had good reasons not to volunteer. In 1936, he had married Josephine Pierce Rucker, a woman of striking beauty, vivacious temperament, and an immense capacity for supporting her husband. By 1941, they had two daughters. Powell's law partners urged him to stay home, saying that he might leave a wife and two small children with no means of livelihood, but, as Lewis told Jo, "I could never have looked my children in the face if I had ducked this responsibility."

It was not in Lewis Powell's nature to duck any responsibility. In 1942, he joined the intelligence branch of the Army Air Forces and in September of that year, found himself one of 16 officers crammed into a double berth on the *Queen Mary,* as the fast ship sped to Europe with a precious cargo of 17,000 American servicemen. Powell's unit spent six weeks in England, then shipped to North Africa. The air campaign was hard on the 319th Bombardment Group, and losses of men and airplanes mounted. When the unit was pulled from combat in February 1943 for rest and refitting, Powell transferred to the intelligence staff at the North African headquarters for Anglo-American air forces, where he helped plan the bombing campaign for the invasion of Sicily.

In August 1943, Powell was beginning to work on the planned invasion of the Italian mainland, when suddenly and mysteriously he was ordered back to the States. At first, it seemed that he had been brought home only to update Army manuals, but it soon became clear that he was in fact being interviewed for the most elite and unusual of all military intelligence services—the so-called Special Branch. The Special Branch was the organizational home of 28 American officers recruited to advise senior Allied commanders on the use of "Ultra" intelligence. That name referred to radio

intercepts encoded on the German enciphering machine "Enigma" and deciphered by the British through painstaking analysis at a secret installation outside London. Since the Germans used the Enigma machine for high-level radio traffic, the ability to decrypt Enigma intercepts gave the British access to the most secret of Germany's wartime communications. The challenge was to put this information to good use without revealing its source, for once the Germans suspected that the Enigma encoding mechanism had been broken, the intelligence would end.

Powell's job, and that of the other 27 Ultra representatives, was to receive Ultra decrypts, interpret them in light of other intelligence, present the findings to senior commanders, and make sure that no action taken on the basis of this information would reveal its source. For this purpose, Powell was assigned to the United States Strategic Air Force, where he eventually became head of the Operational Intelligence Division, comprising about 40 officers and as many enlisted personnel. In that capacity, Powell often represented his superiors at General Eisenhower's daily briefing, held originally in London and subsequently in the Petit Trianon at Versailles. Operational intelligence rewarded a lawyer's skills. Powell analyzed evidence, organized it coherently, and presented it to his superiors, all the while balancing loyalty to their aims and objectives with the independence of judgment necessary to a good counselor. From this experience, Powell gained a firm sense of his own competence and fitness to command.

At the end of the war, Powell returned home with the rank of full colonel, a chest full of decorations, and a set of long-stemmed champagne glasses that he had "liberated" from the basement of Hitler's retreat at Berchtesgaden. Powell also came home a patriot. Although his love of country was not of the sloganeering, flag-waving variety, Powell never doubted the broad alignment of national self-interest with world peace and freedom. For Powell, American mistakes were aberrational, not symptomatic. He had an ardent faith in his country's essential rightness, a faith powerfully rein-

forced by his service in World War II. In a long life of distinguished achievement, there was no part of his career of which Powell was more proud.

Back in Richmond, Powell renewed the process of building a law practice. Somehow, he also found time to do pro bono work for a variety of local organizations, including the Red Cross, the Virginia Home for Incurables, the Retreat for the Sick Hospital, the Family Service Society of Richmond, and even the Garden Club of Virginia. He became known as the leading "free" lawyer in Richmond, a reputation, he later said, that was "not given the highest rating by partners concerned with cash flow."

By far the most important—and the most controversial—of Powell's local activities was his stewardship of the Richmond public schools during the early years of desegregation. Powell was appointed to the Richmond School Board in 1950 and elected its chairman two years later. In 1954, the Supreme Court announced the beginning of the end of the Old South in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and one year later ordered desegregation to begin "with all deliberate speed." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955). Today, *Brown* is universally admired as both right and necessary. Indeed, no other decision in this century is so secure in moral standing or public esteem. It therefore requires an act of imagination to reconstruct the South's original response. In 1956, Senator Harry Flood Byrd, acknowledged leader of Virginia politics, called for "massive resistance" to the Supreme Court order. The Byrd organization's successful candidate for governor echoed that call: "Let there be no misunderstanding, no weasel words, on this point: We dedicate our every capacity to preserve segregation in the schools." To back up that bluster, the state prepared to shut down public schools altogether rather than allow black and white to sit together. This policy was shameful in origin, unlawful in operation, and disastrous in consequence. Public schools were closed in several Virginia cities and later in Prince Edward County, and for nearly a decade Virginia fought desegregation to a standstill.

It was Lewis Powell's fate to confront the hysteria of massive resistance in the capital of the old Confederacy. Publicly, he said nothing. Even when the Richmond City Council, which appointed School Board members, demanded to know Powell's position on desegregation, he refused to elaborate on a press release of deliberate vagueness. For the eight years in which Powell was chairman of the Richmond School Board, neither he nor that body took any public position on "massive resistance." Behind the scenes, however, Powell fought hard against it. He made a futile effort to dissuade Senator Byrd from this perilous course and staunchly supported Virginia moderates. In particular, Powell did battle with "interposition," the purported theoretical justification for massive resistance. Interposition advocates claimed for each state the right to defy and disregard Supreme Court decisions that they believed to have departed from the Constitution. In a letter to the governor, in a memorable debate before an influential group of the state's leading lawyers and businessmen, and in innumerable private conversations, Powell assailed this pernicious doctrine. It was, he argued, "no less than a proposal of insurrection" against the national government, reflecting an "attitude of lawlessness" which would not be tolerated in an individual and which would bring discredit on the state. Eventually, interposition and massive resistance ran their course. When Powell stepped down from the Richmond School Board, integration had begun, albeit just barely. Critics could and did complain about the pace of progress, but the schools had been kept open.

In 1964, Powell moved onto the national scene as President of the American Bar Association. In his inaugural speech in August of that year, Powell outlined three initiatives. First, he called for comprehensive reform of legal ethics. This project, which began under Powell's leadership, replaced the 1908 canons of ethics with a new Code of Professional Responsibility, adopted by the ABA in 1969. Second, Powell announced a massive project on standards for the administration of criminal justice. Chief Judge Edward J.

Lumbard of the Second Circuit chaired this effort. Participants included academics, lawyers, and judges, including four future Justices of the Supreme Court—Powell himself; Warren Burger, who eventually succeeded Lumbard as overall head of the project; Abe Fortas, who served on a committee on the conflict between free press and fair trial; and Harry Blackmun, who sat on a committee on the role of the trial judge. Third, Powell called for a dramatic expansion of legal services for the poor. This proposal led to Powell's most notable accomplishment as President of the ABA—the birth of the Legal Services Program.

The Family Service Society of Richmond, where Powell had worked, was representative of traditional legal aid societies. Led by establishment lawyers, staffed largely by volunteers, and allied with the local bar, their goal was not to attack poverty as such but to provide adequate legal representation for those who happened to be poor. Lyndon Johnson's "War on Poverty" spawned a radically different approach. In November 1964, Sargent Shriver, director of a newly created federal agency called the Office of Economic Opportunity, called for a federal program of legal aid for the poor. His proposal raised fears that lawyers' traditional freedom to represent their clients as they thought best would be subordinated to the dictates of bureaucrats and social workers. Moreover, Shriver spoke of training lay persons to act as "legal advocates for the poor," handling tasks that historically had required lawyers. Private practitioners foresaw publicly funded competition for the struggling neighborhood lawyer. Complaints poured into ABA headquarters, demanding that the organization mobilize against the federal proposal, but Powell refused. Instead, he placed his personal prestige on the line to forge an alliance between the federal anti-poverty activists and the establishment lawyers of the ABA. Through delicate negotiations and personal leadership, Powell worked out a compromise. The ABA agreed to support the federal program, and the OEO agreed to allow existing legal aid societies to participate in federal funding. The federal program

was redesigned to protect the traditional independence of lawyers and to make certain other concessions, and the energies committed to existing legal aid societies were now harnessed in the federal program. To everyone's astonishment, Powell secured *unanimous* ABA endorsement of this arrangement and staged a "symbolic handshake" in which Shriver announced a National Advisory Committee on which Powell and other ABA leaders agreed to serve.

Years later, when Powell's nomination to the Supreme Court came before the Senate Committee on the Judiciary, Jean Camper Cahn, who had originally proposed the Legal Services Program to Sargent Shriver, wrote an extraordinary 18-page letter recounting Powell's role in these tortuous negotiations. She recounted how he had worked closely with the all-black National Bar Association and how he had invited her to become the first African-American lawyer, male or female, to address a plenary session of the ABA, and predicted that Powell would "go down in history as one of the great statesmen of our profession."

In the late 1960's, Powell became increasingly prominent as a conservative voice on crime. He used the ABA presidency as a bully pulpit, insisting on the rule of law, criticizing civil disobedience on both the left and the right, and reminding everyone that the first duty of government is "to protect citizens in their persons and property from criminal conduct—whatever its source or cause." In 1965, Lyndon Johnson named Powell to the President's Commission on Law Enforcement and the Administration of Justice. When its final report, *The Challenge of Crime in a Free Society*, was published in 1967, Powell issued a "Supplemental Statement" (he was careful not to call it a dissent), asking whether *Miranda* v. *Arizona*, 384 U. S. 436 (1966), had gone too far and suggesting the possibility of a constitutional amendment. Powell's speeches and his participation on the crime commission established him as a critic of the Warren Court—a responsible and respectful, but unmistakably conservative, critic of the Warren Court's work in criminal procedure.

It was this reputation, coupled with Powell's long list of accomplishments and distinctions, that attracted the attention of President Richard Nixon. In 1969, when the Senate rejected the nomination of Clement Haynsworth of South Carolina, Powell made the "short list" for appointment to the Supreme Court but withdrew from consideration. At 62, he thought himself too old and, as he wrote the Attorney General, feared "that the nomination of another southern lawyer with a business-oriented background would invite—if not assure—organized and perhaps prolonged opposition." After the disastrous nomination of G. Harrold Carswell, the President turned to Harry A. Blackmun of Minnesota, who was confirmed without controversy in June 1970.

Barely a year later, the retirements of Justices Hugo Black and John Marshall Harlan created two new vacancies, and again attention turned to Powell. Twice the Attorney General urged Powell to take the job, and twice Powell declined. Finally, the President himself called, spoke of Powell's responsibility to the country, and insisted that it was Powell's *duty* to accept appointment to the Supreme Court. When this approach proved successful, President Nixon announced the nominations of Lewis F. Powell, Jr., of Virginia and William H. Rehnquist of Arizona to the Supreme Court. On January 7, 1972, they took their seats as the 99th and 100th Justices of the Supreme Court.

Justice Powell served from that date until he retired, a few months short of his 80th birthday, in 1987. In those years, neither liberals nor conservatives dominated the Supreme Court. With left and right in ideological balance, the Court embarked on a pragmatic search for justice, order, and decency in a changing world. Surprisingly, Justice Powell, whose pronouncements on criminal procedure had made him seem reliably conservative, found himself at the political center of a divided Court. Often, his was the decisive voice. The record he compiled is not that of a dependable champion of left or right but that of a thoughtful moderate, steadfast in firm convictions but respectful of compromise, a judge mindful of context and distrustful of sweeping generaliza-

tion, and committed above all to the institution and the country that he served.

Consideration of three areas will reveal Justice Powell's exceptional impact on the development of American constitutional law. Abortion, affirmative action, and capital punishment were—and are—intensely controversial. In each of these areas, Justice Powell confronted explosive constitutional questions which he had had little occasion to consider before coming to the Court. In each of these areas, he sought to bring his understanding of constitutional principles and precedents to bear on deeply difficult questions that continue to divide both the Court and the country. In each area, his decisions reveal both this constancy in support of strong convictions and his instinct for a middle course. In each area, his views had an uncommon impact on the course of constitutional law.

Justice Powell was in the majority in *Roe* v. *Wade*, 410 U. S. 113 (1973), and in every other abortion decision during his tenure. On the one hand, he steadfastly supported *Roe* against challenges and limitations, including attempts to require a parent or husband's consent. See *Bellotti* v. *Baird*, 443 U. S. 622 (1979) (parental consent); *Planned Parenthood* v. *Danforth*, 428 U. S. 52 (1976) (spousal consent). On the other hand, he upheld laws directing an unmarried minor to notify her parents before having an abortion (but not giving them the power to veto her decision), *H. L.* v. *Matheson*, 450 U. S. 398 (1981), and he consistently refused to require public funding for abortion. See, e. g., *Beal* v. *Doe*, 432 U. S. 438 (1977); *Harris* v. *McRae*, 448 U. S. 297 (1980). More than those of any other member of the Court, Justice Powell's votes determined the content and scope of the constitutional right to abortion.

So it was also with affirmative action. In the famous *Bakke* decision, Justice Powell made a "majority of one" to tolerate racial preferences in higher education, but only as a temporary and contested deviation from the ideal of color-blindness. *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978). Four Justices were prepared to

allow minority preferences more or less without limitation, and four others interpreted a federal statute to disallow minority preferences more or less without exception. Justice Powell cast the deciding vote in both directions. On the one hand, he thought it necessary that affirmative steps be permitted to overcome America's long history of racial oppression. On the other hand, he feared the entrenchment of a racial and ethnic spoils system that would prove permanently durable and socially divisive. Faced with these conflicting concerns, Justice Powell characteristically sought a middle course. He tried to permit racial preferences without conceding their future, to authorize such preferences while preserving the grounds of objection to them. In short, Justice Powell sought both to allow and to curtail racial preferences.

The middle ground that Justice Powell staked out in *Bakke* was filled in by thirteen additional affirmative action decisions during his tenure. In all of them, Justice Powell was in the majority. In all of them, he struck a delicate balance between the necessity, as he saw it, of allowing some racial preferences and the fear that racial quotas, once allowed, would become entrenched and permanent. Given the nearly even division of opinion elsewhere, Justice Powell's approach proved decisive. Perhaps in no other area of constitutional law have the individual views of a single Justice left such a large mark. His legacy lies not in a resolute commitment to either position but in the enduring ambivalence of the law's reaction to racial preferences. Under the regime of Justice Powell's views, affirmative action has been widespread, familiar, and significantly successful. It has also been contested, resented, and increasingly curtailed. Both sides owe something to the lonely wisdom of Lewis Powell.

One question on which Justice Powell did have a clear view on coming to the Court was the constitutionality of capital punishment. The question was argued only ten days after Justice Powell took his seat. He quickly concluded that the Constitution's repeated references to capital punishment, its long history of acceptance in this country, and the absence of

contrary precedent dictated that the death penalty be upheld. He said so, forcefully and at length, in his dissent from *Furman* v. *Georgia*, 408 U. S. 238, 414 (1972). That a majority of the Justices nevertheless determined to strike down all existing laws might have been expected to end capital punishment, but public opinion turned the other way. Thirty-five states promptly enacted new laws, and seventeen of them (in an effort to answer *Furman*'s concern with arbitrariness of administration) made death the mandatory penalty for certain broad classes of homicide. The Justices now faced a vast expansion of capital punishment for which they themselves were directly responsible.

In 1976, the Court heard five companion cases dealing with a representative sample of the new statutes. Four Justices voted to uphold all the statutes; two others voted to strike them all. The balance of power rested with Justices Stewart, Powell, and Stevens, who issued a joint opinion approving the statutes that attempted to structure and guide sentencing discretion in capital cases but invalidating those that made the death penalty mandatory. *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976): *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). These decisions inaugurated the constitutional regime that has continued until today. Under this approach, the Court respects the widespread legislative endorsement of capital punishment but insists on case-by-case scrutiny of the fairness of its administration. Here too Justice Powell's views proved durably influential.

Abortion, affirmative action, and capital punishment remain deeply divisive and controversial. Perhaps there will be few who unreservedly endorse Justice Powell's position on all three questions, yet we are united in our respect and admiration for the man who produced them. In these and other areas of constitutional adjudication, Lewis Powell showed himself a careful, caring, and supremely thoughtful jurist. In the words of his former clerk, J. Harvie Wilkinson, III, now Chief Judge of the United States Court of Ap-

peals for the Fourth Circuit, Justice Powell will have his critics: "Some of his votes are not easy to reconcile. Some of his theory is not seamlessly consistent. . . . For those who seek a comprehensive vision of constitutional law, Justice Powell will not have provided it." But, Wilkinson added, "For those who seek a perspective grounded in realism and leavened by decency, conscientious in detail and magnanimous in spirit, solicitous of personal dignity and protective of the public trust, there will never be a better Justice." Wilkinson, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 Harv. L. Rev. 417, 420 (1987).

Wherefore, it is accordingly

RESOLVED that we, as representative members of the Bar of the Supreme Court of the United States, express our admiration and respect for Justice Lewis F. Powell, Jr., our sadness at his death, and our condolences to his family; and it is further

RESOLVED that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

THE CHIEF JUSTICE said:

The Court recognizes the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

Although his courtly manners and quiet confidence would lead others to think of him as a patrician, Lewis Powell was not born to wealth. His father worked hard as a manager in a series of businesses when he was a child, and provided opportunities to Lewis, Jr., that he himself had not had. As

a schoolboy, Lewis Powell received an award for personal integrity, an honor that would repeatedly be re-won in respect others had for him throughout his life.

The Solicitor General has already described portions of the Bar Resolution that detail Lewis Powell's splendid reputation at the Bar and his tireless efforts in public service of all kinds—including his chairmanship of the Richmond School Board during a time of unparalled challenge; his lasting initiatives as President of the American Bar Association; and his exceptional service to this country in World War II. Each of these voluntary efforts would be reason enough for the country to extol the memory of Lewis Powell.

It is also fitting, I think, to mention that he also held the highest offices of the American Bar Association and the American College of Trial Lawyers. He served, as the Solicitor General has noted, as a member of President Johnson's Commission on Law Enforcement and the Administration of Justice, President Nixon's Blue Ribbon Defense Panel, the National Advisory Committee on Legal Services to the Poor, the Virginia Constitutional Revision Commission, the Board of Trustees of Washington and Lee University, and the Colonial Williamsburg Foundation.

It is fair to say that Lewis Powell, the Supreme Court Justice drew deeply from the experience of Lewis Powell, the attorney. He brought a cautious and highly sophisticated pragmatism to the Court, and a distrust of doctrinaire prescriptions for complex problems. He characteristically focused on the facts of the case before the Court, striving to do justice *in that case* as well as fashion rules of general applicability to govern other, similar circumstances. When occasionally the effort to achieve a just result on the given facts implied creation of a new rule of uncertain consequences, Justice Powell strove to do justice in the case while endeavoring to limit the breadth of the Court's decision. The informed 'balancing' of competing interests became his hallmark as a Justice. Particularly on the great issues that tended to divide the country, Justice Powell's capacity to find

important elements of truth and justice on each side of the controversy became a powerful source of reconciliation and healing.

From the time he joined the Court in January of 1972 until his retirement in June 1987, Justice Powell wrote more than 600 opinions, approximately half of them for the Court. Within a short time after his appointment, Justice Powell was writing some of the Court's most important opinions. In his very first Term, he wrote the Court's opinion in *Kastigar* v. *United States*, which established the ground rules for the modern application of the Fifth Amendment privilege against self-incrimination in the context of immunized testimony.

Also within months of his appointment, Justice Powell demonstrated his independence from the President who had appointed him by writing for the Court in *United States* v. *United States District Court*. In that case the Court rejected the government's assertion of an executive power to wiretap persons without judicial supervision in cases involving national security. But as his opinion for the Court in *Dalia* v. *United States* would later demonstrate, the use of a warrantless entry to install eavesdropping equipment would not in and of itself give rise to a Fourth Amendment violation so long as the officers had received the approval of a judge for the wiretapping itself.

Another decision from his early years on the Court, *Almeida-Sanchez* v. *United States* would later develop into a series of Fourth Amendment decisions prescribing carefully nuanced rules to govern searches and seizures at the Nation's borders. Those decisions included *United States* v. *Brignoni-Ponce*, *United States* v. *Ortiz*, and *United States* v. *Martinez-Fuerte*. A similarly balanced approach can be found in Justice Powell's opinions in a series of cases dealing with the scope of the exclusionary rule.

Justice Powell was an especially authoritative voice in cases involving public education. In his second Term, he wrote the Court's decision in *San Antonio Independent*

School District v. *Rodriguez*, holding that a publicly-funded education is not a fundamental right triggering strict scrutiny of the financial disparities that may exist between rich and poor school districts. Yet the deference in *Rodriguez* to local control of public education was counterbalanced a decade later by the Court's holding that a state law prohibiting the children of undocumented aliens from attending public school violated the Constitution. Justice Powell wrote in his concurring opinion in *Plyler* v. *Doe*, 'The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children, thus, have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.'

Similarly, in a series of opinions under the Equal Protection Clause involving gender discrimination, Justice Powell applied mid-level scrutiny with telling effect—resulting in the Court's invalidation of gender-based discrimination in the military, the ability of pregnant teachers to work, the dissemination of social security benefits, the sale of 3.2 beer, and the rules requiring consent for adoption by an unwed mother but not an unwed father.

Justice Powell will, of course, long be remembered for his eloquent opinion in the *Bakke* case, which struck down racial quotas but upheld the use of race as a factor in determining who will be admitted to a state professional school. His opinion, although not joined in its entirety by any other Justice, controlled the outcome of the case and serves to this day as a beacon for all who would seek to find constructive common ground on issues of profound divisiviness.

In many other areas of the law, Justice Powell's opinions for the Court have left an enduring legacy. He was a leading voice in the Court's modern antitrust jurisprudence. His opinion in *Batson* v. *Kentucky* struck down the use of

peremptory challenges to jurors on the basis of race. His opinion in *Mathews* v. *Eldridge* established the essential rules of procedural due process that continue to determine the constitutionality of governmental restrictions on a person's rights to liberty or property. His opinion in *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation* made clear that while discriminatory impact alone is insufficient to establish a constitutional violation, an intent to discriminate is susceptible of proof in practical ways. And in *Central Hudson Gas & Electric Company* v. *Public Service Commission*, Justice Powell's opinion articulated the essential criteria for evaluating the validity of governmental restrictions on commercial speech.

There are many other areas in which Justice Powell's views helped to shape this Court's jurisprudence. For example, in 44 cases involving the Religion Clauses of the First Amendment, Justice Powell was in the majority 93 percent of the time—by far the highest percentage of any Justice with whom he served. As the Solicitor General has noted, in the abortion cases decided during his tenure, he was in the majority 100 percent of the time, from *Roe* v. *Wade* through *Thornburgh* v. *American College of Obstetricians and Gynecologists*, even as the contentious issues of consent, public funding, and state restrictions commanded different majorities on the Court.

Lewis Powell recognized, in his many areas of endeavor, that individuals can make a significant difference in this world. The attributes that marked his life journey are ones everyone can admire: his determination in finding solutions to human problems, his unfailing courtesy to others, and his dedication to achieving results that helped diverse factions find common ground.

Mr. Chief Justice, on behalf of the lawyers of this Nation and particularly the Bar of this Court, I respectfully request that the Resolutions presented to you be accepted by this Court, and that they, together with the chronicle of

these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, thank you General Waxman for your presentation today in memory of our late friend and colleague, Lewis Powell.

We also extend to Chairman John Jeffries and the members of the Committee on Resolutions, Chairman William Kelly and the members of the Arrangements Committee, and Assistant Attorney General Joel Klein, Chairman of today's meeting of the Supreme Court Bar, our appreciation for the Resolutions you have provided today. Your motion that they be made part of the permanent record of the Court is hereby granted.

Lewis Powell was nominated to be an Associate Justice of this Court at age 64 in October 1971. It is fair to say he did not seek office—public office sought him. As the Bar Resolutions and the Attorney General have noted, Lewis Powell had a firmly established reputation as a leader of the Bar of his native Richmond, of his native State of Virginia, and of the United States.

Of 16 Justices, with whom I have served in more than 27 years on the Court, I think that only 2 would be long remembered in the annals of legal history had they not been appointed to the Supreme Court. Thurgood Marshall was one, and Lewis Powell was the other. Thurgood Marshall would have been remembered for the prominent up-front role he played in litigating landmark civil rights cases in the 1940's and 1950's. Lewis Powell would have been remembered for his building of Hunton & Williams into a national firm in a city the size of Richmond, Virginia, as president of the American Bar Association, president of the American College of Trial Lawyers, and a member of several blue-ribbon commissions. Byron White would have been remembered for his athletic accomplishments, but as for the rest of us; had we

not been appointed to the Supreme Court, we would have been perhaps more affluent, but certainly less well known.

Lewis Powell was a bear for work. During his 15 year tenure, he wrote over 600 opinions. The Bar Resolutions, the Solicitor General, and the Attorney General have pointed out the major contributions that Justice Powell made to the body of decisional law during his 15 year tenure on this Court. Virtually all of the opinions thus mentioned decide questions of constitutional law, and it is understandable that this should be so. I want to point out one opinion which Lewis Powell wrote that did not involve a constitutional question, but which is probably the most frequently cited opinion in briefs today of any opinion from the Court.

That case is *Harlow* v. *Fitzgerald,* which was decided in 1982. There we held in an opinion by Justice Powell that high ranking officials of the Executive Branch—and that holding has since been extended to most public officials exercising discretionary authority—are entitled to qualified immunity against suits for damages. More importantly, the qualified immunity is to be based on the objective reasonableness of the actions of the officials. Before *Harlow,* there was a subjective element involved which as a practical matter prevented summary judgment before discovery in just about every case.

As the Bar Resolutions have pointed out, but I none the less would like to emphasize, the Supreme Court appointment was not the first call to duty heeded by Lewis Powell. In 1941, at the time of the attack on Pearl Harbor, he was 34 years old, 7 years out of law school, and a partner at Hunton and Williams. He had two children at the time, and would have been excluded from the draft, but he nonetheless volunteered and was commissioned a First Lieutenant in the U. S. Army Air Force. He rose in rank to Colonel, he won the Legion of Merit and the Bronze Star, serving overseas with distinction as an Intelligence Officer in the Air Force for four years during World War II and its aftermath.

He served here at the Court with equal distinction. He brought a rare combination of ability, fair-mindedness, and

grace to the Court. He had the consummate judicial temperament. His capacity and willingness to see both sides of an issue, and his manner in persuading others to his own views resulted in his extraordinary influence during his tenure here.

Those of us who served with him during his 15 years on the Court cherished his intellect and gentlemanly charm. He managed to present his views in Conference forcefully without departing from his naturally gracious manner, particularly towards colleagues who expressed opposing views. Those of us who served with him continue to miss him. Our Nation is the better for his having served it in the many ways that he did.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1998

HOLLOWAY AKA ALI *v.* UNITED STATES

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

No. 97–7164. Argued November 9, 1998—Decided March 2, 1999

Petitioner was charged with federal offenses including carjacking, which 18 U. S. C. § 2119 defines as "tak[ing] a motor vehicle . . . from . . . another by force and violence or by intimidation" "with the intent to cause death or serious bodily harm." Petitioner's accomplice testified that their plan was to steal cars without harming the drivers, but that he would have used his gun if any of the victims had given him a "hard time." The District Judge instructed the jury, *inter alia,* that the intent requisite under § 2119 may be conditional, and that the Government satisfies this element of the offense when it proves that the defendant intended to cause death or serious bodily harm if the alleged victims refused to turn over their cars. The jury found petitioner guilty, and the Second Circuit affirmed, declaring, among other things, that the inclusion of a conditional intent to harm within § 2119 comported with a reasonable interpretation of the legislative purpose. Petitioner's alternative interpretation, which would cover only those carjackings in which defendant's sole and unconditional purpose at the time of the offense was to kill or maim the victim, was clearly at odds with Congress' intent, concluded the court.

Held: Section 2119's "with the intent to cause death or serious bodily harm" phrase does not require the Government to prove that the defendant had an unconditional intent to kill or harm in all events, but merely requires proof of an intent to kill or harm if necessary to effect a carjacking. This *mens rea* component of § 2119 directs the factfinder's

Syllabus

attention to the defendant's state of mind at the precise moment he demanded or took control over the car "by force and violence or by intimidation." If the defendant has the proscribed state of mind at that moment, the statute's scienter element is satisfied. Petitioner's reading—that the defendant must possess a specific and unconditional intent to kill or harm in order to complete the prescribed offense—would improperly transform the *mens rea* element from a modifier into an additional *actus reus* component of the carjacking statute; it would alter the statute into one that focuses on attempting to harm or kill a person in the course of the robbery of a motor vehicle. Given that § 2119 does not mention either conditional or unconditional intent separately—and thus does not expressly exclude either—its text is most naturally read to encompass the *mens rea* of both species of intent, and *not* to limit its reach to crimes involving the additional *actus reus* of an attempt to kill or harm. Two considerations strongly support the Court's conclusion. First, petitioner's interpretation would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit. Second, it is reasonable to presume that Congress was familiar with the leading cases and the scholarly writing recognizing that the specific intent to commit a wrongful act may be conditional. The Court's interpretation does not, as petitioner suggests, render superfluous the statute's "by force and violence or by intimidation" element. While an empty threat, or intimidating bluff, would be sufficient to satisfy that element, such conduct, standing on its own, is not enough to satisfy § 2119's specific intent element. Pp. 6–12.

126 F. 3d 82, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., *post,* p. 12, and THOMAS, J., *post,* p. 22, filed dissenting opinions.

Kevin J. Keating, by appointment of the Court, 525 U. S. 806, argued the cause for petitioner. With him on the briefs were *David G. Secular* and *Robert C. Nissen.*

Deputy Solicitor General Underwood argued the cause for the United States. With her on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson,*

Deputy Solicitor General Dreeben, *Edward C. DuMont*, and *Deborah Watson*.*

JUSTICE STEVENS delivered the opinion of the Court.

Carjacking "with the intent to cause death or serious bodily harm" is a federal crime.[1] The question presented in this case is whether that phrase requires the Government to prove that the defendant had an unconditional intent to kill or harm in all events, or whether it merely requires proof of an intent to kill or harm if necessary to effect a carjacking. Most of the judges who have considered the question have concluded, as do we, that Congress intended to criminalize the more typical carjacking carried out by means of a deliberate threat of violence, rather than just the rare case in which the defendant has an unconditional intent to use violence regardless of how the driver responds to his threat.

I

A jury found petitioner guilty on three counts of carjacking, as well as several other offenses related to stealing

Joshua L. Dratel filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

[1] As amended by the Violent Crime Control and Law Enforcement Act of 1994, § 60003(a)(14), 108 Stat. 1970, and by the Carjacking Correction Act of 1996, § 2, 110 Stat. 3020, the statute provides:

"Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

"(1) be fined under this title or imprisoned not more than 15 years, or both,

"(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

"(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death." 18 U. S. C. § 2119 (1994 ed. and Supp. III) (emphasis added).

cars.[2] In each of the carjackings, petitioner and an armed accomplice identified a car that they wanted and followed it until it was parked. The accomplice then approached the driver, produced a gun, and threatened to shoot unless the driver handed over the car keys.[3] The accomplice testified that the plan was to steal the cars without harming the victims, but that he would have used his gun if any of the drivers had given him a "hard time." App. 52. When one victim hesitated, petitioner punched him in the face, but there was no other actual violence.

The District Judge instructed the jury that the Government was required to prove beyond a reasonable doubt that the taking of a motor vehicle was committed with the intent "to cause death or serious bodily harm to the person from whom the car was taken." *Id.*, at 29. After explaining that merely using a gun to frighten a victim was not sufficient to prove such intent, he added the following statement over petitioner's objection:

> "In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> "In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense. . . ." *Id.*, at 30.

In his postverdict motion for a new trial, petitioner contended that this instruction was inconsistent with the text

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[2] He was also charged with conspiring to operate a "chop shop" in violation of 18 U. S. C. § 371, operating a chop shop in violation of § 2322, and using and carrying a firearm in violation of § 924(c).

[3] One victim testified that the accomplice produced his gun and threatened, "'Get out of the car or I'll shoot.'" App. 51. Another testified that he said, "'Give me your keys or I will shoot you right now.'" *Id.*, at 52.

of the statute. The District Judge denied the motion, stating that there "is no question that the conduct at issue in this case is precisely what Congress and the general public would describe as carjacking, and that Congress intended to prohibit it in § 2119." 921 F. Supp. 155, 156 (EDNY 1996). He noted that the statute as originally enacted in 1992 contained no intent element but covered all carjackings committed by a person "possessing a firearm." A 1994 amendment had omitted the firearm limitation, thus broadening the coverage of the statute to encompass the use of other weapons, and also had inserted the intent requirement at issue in this case. The judge thought that an "odd result" would flow from a construction of the amendment that "would no longer prohibit the very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime—murder or a serious assault." *Id.*, at 159. Moreover, the judge determined that even though the issue of conditional intent has not been discussed very often, at least in the federal courts, it was a concept that scholars and state courts had long recognized.

Over a dissent that accused the majority of "a clear judicial usurpation of congressional authority," *United States* v. *Arnold*, 126 F. 3d 82, 92 (CA2 1997) (opinion of Miner, J.), the Court of Appeals affirmed. The majority was satisfied that "the inclusion of a conditional intent to harm within the definition of specific intent to harm" was not only "a well-established principle of criminal common law," but also, and "most importantly," comported "with a reasonable interpretation of the legislative purpose of the statute." *Id.*, at 88. The alternative interpretation, which would cover "only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim," the court concluded, was clearly at odds with the intent of the statute's drafters. *Ibid.*

To resolve an apparent conflict with a decision of the Ninth Circuit, *United States* v. *Randolph*, 93 F. 3d 656 (1996),[4] we granted certiorari. 523 U. S. 1093 (1998).

II

Writing for the Court in *United States* v. *Turkette*, 452 U. S. 576, 593 (1981), Justice White reminded us that the language of the statutes that Congress enacts provides "the most reliable evidence of its intent." For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, "[w]e consider not only the bare meaning" of the critical word or phrase "but also its placement and purpose in the statutory scheme." *Bailey* v. *United States*, 516 U. S. 137, 145 (1995).

The specific issue in this case is what sort of evil motive Congress intended to describe when it used the words "with the intent to cause death or serious bodily harm" in the 1994 amendment to the carjacking statute. More precisely, the question is whether a person who points a gun at a driver, having decided to pull the trigger if the driver does not comply with a demand for the car keys, possesses the intent, at that moment, to seriously harm the driver. In our view, the

[4] The Ninth Circuit held that neither a person's mere threat to the driver that "'she would be okay if she [did] what was told of her'" nor "the brandishing of a weapon, without more" constituted an intent to cause death or serious bodily harm under the amended version of § 2119. 93 F. 3d, at 664–665. The court therefore reversed the defendant's carjacking conviction on the ground of insufficient evidence. In the course of its opinion, the Ninth Circuit also stated more broadly that "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement." *Id.*, at 665. It is this proposition with which other courts have disagreed. See *United States* v. *Williams*, 136 F. 3d 547, 550–551 (CA8 1998), cert. pending, No. 97–9553; *United States* v. *Arnold*, 126 F. 3d 82, 89, n. 4 (CA2 1997); *United States* v. *Romero*, 122 F. 3d 1334, 1338 (CA10 1997), cert. denied, 523 U. S. 1025 (1998); *United States* v. *Anderson*, 108 F. 3d 478, 481–483 (CA3), cert. denied, 522 U. S. 843 (1997).

answer to that question does not depend on whether the driver immediately hands over the keys or what the offender decides to do after he gains control over the car. At the relevant moment, the offender plainly does have the forbidden intent.

The opinions that have addressed this issue accurately point out that a carjacker's intent to harm his victim may be either "conditional" or "unconditional."[5] The statutory phrase at issue theoretically might describe (1) the former, (2) the latter, or (3) both species of intent. Petitioner argues that the "plain text" of the statute "unequivocally" describes only the latter: that the defendant must possess a specific and unconditional intent to kill or harm in order to complete the proscribed offense. To that end, he insists that Congress would have had to insert the words "if necessary" into the disputed text in order to include the conditional species of intent within the scope of the statute. See Reply Brief for Petitioner 2. Because Congress did not include those words, petitioner contends that we must assume that Congress meant to provide a federal penalty for only those carjackings in which the offender actually attempted to harm or kill the driver (or at least intended to do so whether or not the driver resisted).

We believe, however, that a commonsense reading of the carjacking statute counsels that Congress intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies. As we have repeatedly stated, "'the meaning of statutory language, plain or not, depends on context.'" *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (quoting *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991)). When petitioner's argument is considered in the context of the statute, it becomes apparent that his proffered construction of the intent element overlooks the significance of the placement of that element in

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[5] See, *e. g., Williams,* 136 F. 3d, at 550–551; *Anderson,* 108 F. 3d, at 481.

the statute. The carjacking statute essentially is aimed at providing a federal penalty for a particular type of robbery. The statute's *mens rea* component thus modifies the act of "tak[ing]" the motor vehicle. It directs the factfinder's attention to the defendant's state of mind at the precise moment he demanded or took control over the car "by force and violence or by intimidation." If the defendant has the proscribed state of mind at that moment, the statute's scienter element is satisfied.

Petitioner's reading of the intent element, in contrast, would improperly transform the *mens rea* element from a modifier into an additional *actus reus* component of the carjacking statute; it would alter the statute into one that focuses on attempting to harm or kill a person in the course of the robbery of a motor vehicle.[6] Indeed, if we accepted petitioner's view of the statute's intent element, even Congress' insertion of the qualifying words "if necessary," by themselves, would not have solved the deficiency that he believes exists in the statute. The inclusion of those words after the intent phrase would have excluded the unconditional species of intent—the intent to harm or kill even if not necessary to complete a carjacking. Accordingly, if Congress had used words such as "if necessary" to describe the conditional species of intent, it would also have needed to add something like "or even if not necessary" in order to cover both species of intent to harm. Given the fact that the actual text does not mention either species separately—and thus does not expressly exclude either—that text is most naturally read to encompass the *mens rea* of both conditional and unconditional intent, and *not* to limit the statute's reach to crimes involving the additional *actus reus* of an attempt to kill or harm.

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[6] Although subsections (2) and (3) of the carjacking statute envision harm or death resulting from the crime, subsection (1), under petitioner's reading, would have to cover attempts to harm or kill when no serious bodily harm resulted.

Two considerations strongly support the conclusion that a natural reading of the text is fully consistent with a congressional decision to cover both species of intent. First, the statute as a whole reflects an intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern.[7] Because that purpose is better served by construing the statute to cover both the conditional and the unconditional species of wrongful intent, the entire statute is consistent with a normal interpretation of the specific language that Congress chose. See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 94–95 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law, and . . . its object and policy" (internal quotation marks omitted)). Indeed, petitioner's interpretation would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit.

Second, it is reasonable to presume that Congress was familiar with the cases and the scholarly writing that have recognized that the "specific intent" to commit a wrongful act may be conditional. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–698 (1979). The facts of the leading case on the point are strikingly similar to the facts of this case. In *People* v. *Connors*, 253 Ill. 266, 97 N. E. 643 (1912),

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[7] Although the legislative history relating to the carjacking amendment is sparse, those members of Congress who recorded comments made statements reflecting the statute's broad deterrent purpose. See 139 Cong. Rec. 27867 (1993) (statement of Sen. Lieberman) ("Th[e 1994] amendment will broaden and strengthen th[e] [carjacking] law so our U. S. attorneys will have every possible tool available to them to attack the problem"); 140 Cong. Rec. E858 (May 5, 1994) (extension of remarks by Rep. Franks) ("We must send a message to [carjackers] that committing a violent crime will carry a severe penalty"). There is nothing in the 1994 amendment's legislative history to suggest that Congress meant to create a federal crime for only the unique and unusual subset of carjackings in which the offender intends to harm or kill the driver regardless of whether the driver accedes to the offender's threat of violence.

the Illinois Supreme Court affirmed the conviction of a union organizer who had pointed a gun at a worker and threatened to kill him forthwith if he did not take off his overalls and quit work. The court held that the jury had been properly instructed that the "specific intent to kill" could be found even though that intent was "coupled with a condition" that the defendant would not fire if the victim complied with his demand.[8] That holding has been repeatedly cited with approval by other courts[9] and by scholars.[10] Moreover, it reflects the views endorsed by the authors of the Model

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[8] The trial judge had given this instruction to the jury:

"'The court instructs you as to the intent to kill alleged in the indictment that though you must find that there was a specific intent to kill the prosecuting witness, Morgan H. Bell, still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative—that is, if the defendants, or any of them, acting for and with the others, then and there pointed a revolver at the said Bell with the intention of compelling him to take off his overalls and quit work, or to kill him if he did not—and if that specific intent was formed in the minds of the defendants and the shooting of the said Bell with intent to kill was only prevented by the happening of the alternative—that is, the compliance of the said Bell with the demand that he take off his overalls and quit work—then the requirement of the law as to the specific intent is met.'" 253 Ill., at 272–273, 97 N. E., at 645.

[9] See *People* v. *Vandelinder*, 192 Mich. App. 447, 451, 481 N. W. 2d 787, 789 (1992) (endorsing holding of *Connors*); *Eby* v. *State*, 154 Ind. App. 509, 517, 290 N. E. 2d 89, 95 (1972) (same); *Beall* v. *State*, 203 Md. 380, 386, 101 A. 2d 233, 236 (1953) (same); *Price* v. *State*, 168 Tenn. 378, 381, 79 S. W. 2d 283, 284 (1935) (same). But see *State* v. *Irwin*, 55 N. C. App. 305, 285 S. E. 2d 345 (1982) (reaching opposite conclusion); *State* v. *Kinnemore*, 34 Ohio App. 2d 39, 295 N. E. 2d 680 (1972) (same).

[10] See 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.5(d), p. 312 (1986); R. Perkins & R. Boyce, Criminal Law 646–647, 835 (3d ed. 1982); 1 J. Bishop, Bishop on Criminal Law § 287*a* (9th ed. 1923); 1 H. Brill, Cyclopedia of Criminal Law § 409, p. 692 (1922); Alexander & Kessler, Mens Rea and Inchoate Crimes, 87 J. Crim. L. & C. 1138, 1140–1147 (1997). See also 2 C. Torcia, Wharton's Criminal Law § 182 (15th ed. 1994) (supporting principle of conditional intent but not citing *Connors*).

Criminal Code.[11] The core principle that emerges from these sources is that a defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose; "[a]n intent to kill, in the alternative, is nevertheless an intent to kill."[12]

This interpretation of the statute's specific intent element does not, as petitioner suggests, render superfluous the statute's "by force and violence or by intimidation" element. While an empty threat, or intimidating bluff, would be sufficient to satisfy the latter element, such conduct, standing on its own, is not enough to satisfy § 2119's specific intent element.[13] In a carjacking case in which the driver surrendered or otherwise lost control over his car without the defendant attempting to inflict, or actually inflicting, serious bodily harm, Congress' inclusion of the intent element re-

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[11] Section 2.02(6) of the Model Penal Code provides:

"Requirement of Purpose Satisfied if Purpose is Conditional.

"When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense." American Law Institute, Model Penal Code (1985).

Of course, in this case the condition that the driver surrender the car was the precise evil that Congress wanted to prevent.

[12] Perkins & Boyce, Criminal Law, at 647.

[13] In somewhat different contexts, courts have held that a threat to harm does not in itself constitute intent to harm or kill. In *Hairston* v. *State*, 54 Miss. 689 (1877), for example, the defendant in an angry and profane manner threatened to shoot a person if that person stopped the defendant's mules. The court affirmed the defendant's conviction for assault, but reversed a conviction of assault with intent to commit murder, explaining that "we have found no case of a conviction of assault with intent to kill or murder, upon proof only of the levelling of a gun or pistol." *Id.*, at 694. See also *Myers* v. *Clearman*, 125 Iowa 461, 464, 101 N. W. 193, 194 (1904) (in determining whether defendant acted with intent to commit great bodily harm the issue for the jury was "whether the accused, in aiming his revolver at [the victim], intended to inflict great bodily harm, or some more serious offense, or did this merely with the purpose of frightening her").

quires the Government to prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car.

In short, we disagree with petitioner's reading of the text of the Act and think it unreasonable to assume that Congress intended to enact such a truncated version of an important criminal statute.[14] The intent requirement of § 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car). Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SCALIA, dissenting.

The issue in this case is the meaning of the phrase, in 18 U. S. C. § 2119, "with the intent to cause death or serious bodily harm." (For convenience' sake, I shall refer to it in this opinion as simply intent to kill.) As recounted by the Court, petitioner's accomplice, Vernon Lennon, "testified that the plan was to steal the cars without harming the victims, but that he would have used his gun if any of the drivers had given him a 'hard time.'" *Ante,* at 4. The District Court instructed the jury that the intent element would be satisfied if petitioner possessed this "conditional"

[14] We also reject petitioner's argument that the rule of lenity should apply in this case. We have repeatedly stated that "'[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.'" *Muscarello* v. *United States,* 524 U. S. 125, 138 (1998) (quoting *United States* v. *Wells,* 519 U. S. 482, 499 (1997)) (additional quotations and citations omitted). Accord, *Ladner* v. *United States,* 358 U. S. 169, 178 (1958). The result of our preceding analysis requires us to make no such guess in this case.

intent. Today's judgment holds that instruction to have been correct.

I dissent from that holding because I disagree with the following, utterly central, passage of the opinion:

> "[A] carjacker's intent to harm his victim may be either 'conditional' or 'unconditional.' The statutory phrase at issue theoretically might describe (1) the former, (2) the latter, or (3) both species of intent." *Ante*, at 7 (footnote omitted).

I think, to the contrary, that in customary English usage the unqualified word "intent" does not usually connote a purpose that is subject to any conditions precedent except those so remote in the speaker's estimation as to be effectively nonexistent—and it *never* connotes a purpose that is subject to a condition which the speaker hopes will not occur. (It is this last sort of "conditional intent" that is at issue in this case, and that I refer to in my subsequent use of the term.) "Intent" is "[a] state of mind in which a person seeks to accomplish a given result through a course of action." Black's Law Dictionary 810 (6th ed. 1990). One can hardly "seek to accomplish" a result he hopes will not ensue.

The Court's division of intent into two categories, conditional and unconditional, makes the unreasonable seem logical. But Aristotelian classification says nothing about linguistic usage. Instead of identifying *two* categories, the Court might just as readily have identified *three:* unconditional intent, conditional intent, and feigned intent. But the second category, like the third, is simply not conveyed by the word "intent" alone. There is intent, conditional intent, and feigned intent, just as there is agreement, conditional agreement, and feigned agreement—but to say that in either case the noun alone, without qualification, "theoretically might describe" all three phenomena is simply false. Conditional intent is no more embraced by the unmodified word "intent" than a sea lion is embraced by the unmodified word "lion."

If I have made a categorical determination to go to Louisiana for the Christmas holidays, it is accurate for me to say that I "intend" to go to Louisiana. And that is so even though I realize that there are some remote and unlikely contingencies—"acts of God," for example—that might prevent me. (The fact that these remote contingencies are always implicit in the expression of intent accounts for the humorousness of spelling them out in such expressions as "if I should live so long," or "the Good Lord willing and the creek don't rise.") It is less precise, though tolerable usage, to say that I "intend" to go if my purpose is conditional upon an event which, though not virtually certain to happen (such as my continuing to live), is reasonably likely to happen, and which I hope will happen. I might, for example, say that I "intend" to go even if my plans depend upon receipt of my usual and hoped-for end-of-year bonus.

But it is *not* common usage—indeed, it is an unheard-of usage—to speak of my having an "intent" to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur. When a friend is seriously ill, for example, I would not say that "I intend to go to his funeral next week." I would have to make it clear that the intent is a conditional one: "I intend to go to his funeral next week if he dies." The carjacker who intends to kill if he is met with resistance is in the same position: He has an "intent to kill if resisted"; he does not have an "intent to kill." No amount of rationalization can change the reality of this normal (and as far as I know exclusive) English usage. The word in the statute simply will not bear the meaning that the Court assigns.

The Government makes two contextual arguments to which I should respond. First, it points out that the statute criminalizes not only carjackings accomplished by "force and violence" but also those accomplished by mere "intimidation." Requiring an unconditional intent, it asserts, would make the number of covered carjackings accomplished by in-

timidation "implausibly small." Brief for United States 22. That seems to me not so. It is surely not an unusual carjacking in which the criminal jumps into the passenger seat and forces the person behind the wheel to drive off at gunpoint. A carjacker who intends to kill may well use this *modus operandi*, planning to kill the driver in a more secluded location. Second, the Government asserts that it would be hard to imagine an unconditional-intent-to-kill case in which the first penalty provision of § 2119 would apply, *i. e.*, the provision governing cases in which no death or bodily harm has occurred. *Id.*, at 23. That is rather like saying that the crime of attempted murder should not exist, because someone who intends to kill always succeeds.

Notwithstanding the clear ordinary meaning of the word "intent," it would be possible, though of course quite unusual, for the word to have acquired a different meaning in the criminal law. The Court does not claim—and falls far short of establishing—such "term-of-art" status. It cites five state cases (representing the majority view among the minority of jurisdictions that have addressed the question) saying that conditional intent satisfies an intent requirement; but it acknowledges that there are cases in other jurisdictions to the contrary. See *ante*, at 10, n. 9 (citing *State* v. *Irwin*, 55 N. C. App. 305, 285 S. E. 2d 345 (1982); *State* v. *Kinnemore*, 34 Ohio App. 2d 39, 295 N. E. 2d 680 (1972)); see also *Craddock* v. *State*, 204 Miss. 606, 37 So. 2d 778 (1948); *McArdle* v. *State*, 372 So. 2d 897 (Ala. Crim. App.), writ denied, 372 So. 2d 902 (Ala. 1979). As I understand the Court's position, it is not that the former cases are right and the latter wrong, so that "intent" in criminal statutes, a term of art in that context, includes conditional intent; but rather that "intent" in criminal statutes *may* include conditional intent, depending upon the statute in question. That seems to me not an available option. It is so utterly clear in normal usage that "intent" does *not* include conditional intent, that only an accepted convention in the criminal law could

give the word a different meaning. And an accepted convention is not established by the fact that some courts have thought so some times. One must decide, I think, which line of cases is correct, and in my judgment it is that which rejects the conditional-intent rule.

There are of course innumerable federal criminal statutes containing an intent requirement, ranging from intent to steal, see 18 U. S. C. §2113, to intent to defeat the provisions of the Bankruptcy Code, see §152(5), to intent that a vessel be used in hostilities against a friendly nation, see §962, to intent to obstruct the lawful exercise of parental rights, see §1204. Consider, for example, 21 U. S. C. §841, which makes it a crime to possess certain drugs with intent to distribute them. Possession alone is also a crime, but a lesser one, see §844. Suppose that a person acquires and possesses a small quantity of cocaine for his own use, and that he in fact consumes it entirely himself. But assume further that, at the time he acquired the drug, he told his wife not to worry about the expense because, if they had an emergency need for money, he could always resell it. If conditional intent suffices, this person, who has never sold drugs and has never "intended" to sell drugs in any normal sense, has been guilty of possession with intent to distribute. Or consider 18 U. S. C. §2390, which makes it a crime to enlist within the United States "with intent to serve in armed hostility against the United States." Suppose a Canadian enlists in the Canadian army in the United States, intending, of course, to fight all of Canada's wars, including (though he neither expects nor hopes for it) a war against the United States. He would be criminally liable. These examples make it clear, I think, that the doctrine of conditional intent cannot reasonably be applied across-the-board to the criminal code. I am unaware that any equivalent absurdities result from reading "intent" to mean what it says—a conclusion strongly supported by the fact that the Government has cited only a single case involving another federal

statute, from over two centuries of federal criminal jurisprudence, applying the conditional-intent doctrine (and that in circumstances where it would not at all have been absurd to require real intent).[1] The course selected by the Court, of course—"intent" is sometimes conditional and sometimes not—would require us to sift through these many statutes

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[1] The one case the Government has come up with is *Shaffer* v. *United States*, 308 F. 2d 654 (CA5 1962), cert. denied, 373 U. S. 939 (1963), which upheld a conviction of assault "with intent to do bodily harm" where the defendant had said that if any persons tried to leave the building within five minutes after his departure "he would shoot their heads off," 308 F. 2d, at 655. In my view, and in normal parlance, the defendant did not "intend" to do bodily harm, and there would have been nothing absurd about holding to that effect.

The Government cites six other federal cases, Brief for United States 14–15, n. 5, but they are so inapposite that they succeed only in demonstrating the weakness of its assertion that conditional intent is the federal rule. Two of them, *United States* v. *Richardson*, 27 F. Cas. 798 (No. 16,155) (CCDC 1837), and *United States* v. *Myers*, 27 F. Cas. 43 (No. 15,845) (CCDC 1806), involve convictions for simple assault *with no specific intent*, and do not even contain any dictum bearing upon the present question. A third, *United States* v. *Arrellano*, 812 F. 2d 1209, 1212, n. 2 (CA9 1987), contains nothing *but* dictum, since the jury found no intent of any sort. A fourth, *United States* v. *Marks*, 29 M. J. 1 (Ct. Mil. App. 1989), involved a defendant who tried to set fire to material that he assertedly believed was flame resistant. The crime he was convicted of, aggravated arson, was, as the court specifically stated, "a general intent crime," *id.*, at 3. And the last two cases, *United States* v. *Dworken*, 855 F. 2d 12 (CA1 1988), and *United States* v. *Anello*, 765 F. 2d 253 (CA1), cert. denied *sub nom. Wendolkowski* v. *United States*, 474 U. S. 996 (1985), both involved conspiracy to possess drugs with intent to distribute. Defendants contended that they could not be convicted because they did not intend to complete the conspired-for transaction unless the quality of the drugs (and, in the case of *Dworken*, the price as well) was satisfactory. Of course the intent necessary to conspire for a specific-intent crime is not the same as the intent necessary for the crime itself, *particularly* insofar as antecedent conditions are concerned. And in any event, since it can hardly be thought that the conspirators *wanted* the quality and price of the drugs to be inadequate, neither case involved the conditional intent that is the subject of the present case.

one-by-one, making our decision on the basis of such ephemeral indications of "congressional purpose" as the Court has used in this case, to which I now turn.

Ultimately, the Court rests its decision upon the fact that the purpose of the statute—which it says is deterring carjacking—"is better served by construing the statute to cover both the conditional and the unconditional species of wrongful intent." *Ante,* at 9. It supports this statement, both premise and conclusion, by two unusually uninformative statements from the legislative history (to stand out in that respect in that realm is quite an accomplishment) that speak generally about strengthening and broadening the carjacking statute and punishing carjackers severely. *Ante,* at 9, n. 7. But every statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a "purpose" of the statute than the policy goal itself. See *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 135–136 (1995). Under the Court's analysis, any interpretation of the statute that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical.

The Court confidently asserts that "petitioner's interpretation would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit." *Ante,* at 9. It seems to me that one can best judge what Congress "obviously intended" not by intuition, but by the words that Congress enacted, which in this case require intent (not conditional intent) to kill. Is it implausible that Congress intended to define such a narrow federal crime? Not at all. The era when this statute was passed contained well publicized instances of not only carjackings, and not only carjackings involving violence or the threat of violence (as, of course, most of them do); but also of carjackings in which the perpetrators senselessly harmed the car owners

when that was entirely unnecessary to the crime. I have a friend whose father was killed, and whose mother was nearly killed, in just such an incident—after the car had already been handed over. It is not at all implausible that Congress should direct its attention to this particularly savage sort of carjacking—where killing the driver is part of the intended crime.[2]

Indeed, it seems to me much more implausible that Congress would have focused upon the ineffable "conditional intent" that the Court reads into the statute, sending courts and juries off to wander through "would-a, could-a, should-a" land. It is difficult enough to determine a defendant's actual intent; it is infinitely more difficult to determine what the defendant planned to do upon the happening of an event that the defendant hoped would not happen, and that he himself may not have come to focus upon. There will not often be the accomplice's convenient confirmation of conditional intent that exists in the present case. Presumably it will be up to each jury whether to take the carjacker ("Your car or

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[2] Note that I am discussing what was a *plausible* congressional purpose in enacting this language—not what I necessarily think was the real one. I search for a plausible purpose because a text without one may represent a "scrivener's error" that we may properly correct. See *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 528–529 (1989) (SCALIA, J., concurring in judgment); see also *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 82 (1994) (SCALIA, J., dissenting). There is no need for such correction here; the text as it reads, unamended by a meaning of "intent" that contradicts normal usage, makes total sense. If I *were* to speculate as to the *real* reason the "intent" requirement was added by those who drafted it, I think I would select neither the Court's attribution of purpose nor the one I have hypothesized. Like the District Court, see 921 F. Supp. 155, 158 (EDNY 1996), and the Court of Appeals for the Third Circuit, see *United States* v. *Anderson*, 108 F. 3d 478, 482–483 (1997), I suspect the "intent" requirement was inadvertently expanded beyond the new subsection 2119(3), which imposed the death penalty—where it was thought necessary to ensure the constitutionality of that provision. Of course the actual intent of the draftsmen is irrelevant; we are governed by what Congress enacted.

your life") at his word. Such a system of justice seems to me so arbitrary that it is difficult to believe Congress intended it. Had Congress meant to cast its carjacking net so broadly, it could have achieved that result—and eliminated the arbitrariness—by defining the crime as "carjacking under threat of death or serious bodily injury." Given the language here, I find it much more plausible that Congress meant to reach—as it said—the carjacker who intended to kill.

In sum, I find the statute entirely unambiguous as to whether the carjacker who hopes to obtain the car without inflicting harm is covered. Even if ambiguity existed, however, the rule of lenity would require it to be resolved in the defendant's favor. See generally *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820). The Government's statement that the rule of lenity "has its *primary* application in cases in which there is some doubt whether the legislature intended to criminalize conduct that might otherwise appear to be innocent," Brief for United States 31 (emphasis added), is carefully crafted to conceal the fact that we have repeatedly applied the rule to situations just like this. For example, in *Ladner* v. *United States*, 358 U. S. 169 (1958), the statute at issue made it a crime to assault a federal officer with a deadly weapon. The defendant, who fired one shotgun blast that wounded two federal officers, contended that under this statute he was guilty of only one, and not two, assaults. The Court said, in an opinion joined by all eight Justices who reached the merits of the case:

> "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shot-

> gun alleged by the petitioner in this case would constitute only a single violation of § 254." *Id.*, at 178.

In *Bell* v. *United States*, 349 U. S. 81 (1955), the issue was similar: whether transporting two women, for the purpose of prostitution, in the same vehicle and on the same trip, constituted one or two violations of the Mann Act. In an opinion authored by Justice Frankfurter, the Court said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Id.*, at 83.

If that is no longer the presupposition of our law, the Court should say so, and reduce the rule of lenity to a historical curiosity. But if it remains the presupposition, the rule has undeniable application in the present case. If the statute is not, as I think, clear in the defendant's favor, it is at the very least ambiguous and the defendant must be given the benefit of the doubt.

* * *

This seems to me not a difficult case. The issue before us is not whether the "intent" element of some common-law crime developed by the courts themselves—or even the "intent" element of a statute that replicates the common-law definition—includes, or should include, conditional intent. Rather, it is whether the English term "intent" used in a statute defining a brand new crime bears a meaning that contradicts normal usage. Since it is quite impossible to say that longstanding, agreed-upon legal usage has converted this word into a term of art, the answer has to be no. And it would be no even if the question were doubt-

ful. I think it particularly inadvisable to introduce the new possibility of "conditional-intent" prosecutions into a modern federal criminal-law system characterized by plea bargaining, where they will predictably be used for *in terrorem* effect. I respectfully dissent.

JUSTICE THOMAS, dissenting.

I cannot accept the majority's interpretation of the term "intent" in 18 U. S. C. § 2119 (1994 ed. and Supp. III) to include the concept of conditional intent. The central difficulty in this case is that the text is silent as to the meaning of "intent"—the carjacking statute does not define that word, and Title 18 of the United States Code, unlike some state codes, lacks a general section defining intent to include conditional intent. See, *e. g.*, Del. Code Ann., Tit. 11, § 254 (1995); Haw. Rev. Stat. § 702–209 (1993); 18 Pa. Cons. Stat. § 302(f) (1998). As the majority notes, *ante*, at 9–11, there is some authority to support its view that the specific intent to commit an act may be conditional. In my view, that authority does not demonstrate that such a usage was part of a well-established historical tradition. Absent a more settled tradition, it cannot be presumed that Congress was familiar with this usage when it enacted the statute. For these reasons, I agree with JUSTICE SCALIA the statute cannot be read to include the concept of conditional intent and, therefore, respectfully dissent.

Syllabus

PEGUERO *v.* UNITED STATES

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

No. 97–9217. Argued January 11, 1999—Decided March 2, 1999

After petitioner pleaded guilty to federal drug charges, the District Court sentenced him to prison, but failed to inform him at the sentencing hearing of his right to appeal the sentence. In a later motion for habeas relief, petitioner alleged that that failure violated the express terms of Federal Rule of Criminal Procedure 32(a)(2). The District Court rejected petitioner's claim that any Rule 32 violation, without regard to prejudice, is enough to vacate a sentence, and held that petitioner was not entitled to relief because he actually knew of his right to appeal when he was sentenced. The Third Circuit affirmed, holding that the Rule 32(a)(2) violation was subject to harmless-error review and that, because petitioner was aware of his right to appeal, the Rule's purpose had been served.

Held: A district court's failure to advise a defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission. Because Rule 32(a)(2) requires a district court to advise a defendant of any right to appeal his sentence, it is undisputed that the court's failure to give the required advice was error in this case. However, as a general rule, a court's failure to give a defendant advice required by the Federal Rules is a sufficient basis for collateral relief only when the defendant is prejudiced by the error. See, *e. g.*, *United States* v. *Timmreck*, 441 U. S. 780. Because petitioner had full knowledge of his right to appeal, the fact that the court violated the Rule, standing alone, does not entitle him to collateral relief. The narrow holding in *Rodriquez* v. *United States*, 395 U. S. 327—that when counsel fails to file a requested appeal, a defendant is entitled to resentencing and an appeal without showing that his appeal would likely have merit—is not implicated here because the District Court found that petitioner did not request an appeal. Pp. 26–30.

142 F. 3d 430, affirmed.

KENNEDY, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 30.

Daniel Isaiah Siegel argued the cause for petitioner. With him on the briefs was *James Vincent Wade.*

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

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to resolve a Circuit conflict over whether a district court's failure to advise a defendant of his right to appeal as required by the Federal Rules of Criminal Procedure provides a basis for collateral relief even when the defendant was aware of his right to appeal when the trial court omitted to give the advice. Compare, *e. g.*, *Thompson* v. *United States*, 111 F. 3d 109 (CA11 1997) (defendant entitled to relief even if he knew of his right to appeal through other sources); *United States* v. *Sanchez*, 88 F. 3d 1243 (CADC 1996) (same); *Reid* v. *United States*, 69 F. 3d 688 (CA2 1995) *(per curiam)* (same), with *Tress* v. *United States*, 87 F. 3d 188 (CA7 1996) (defendant not entitled to relief if he knew of his right to appeal); *United States* v. *Drummond*, 903 F. 2d 1171 (CA8 1990) (same). We hold that a district court's failure to advise the defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission.

Petitioner Manuel Peguero pleaded guilty to conspiracy to distribute cocaine, in violation of 21 U. S. C. § 846. At a sentencing hearing held on April 22, 1992, the District Court sentenced petitioner to 274 months' imprisonment. The court did not inform petitioner of his right to appeal his sentence.

In December 1996, more than four years after he was sentenced, petitioner filed a *pro se* motion to set aside his

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**John J. Gibbons*, *Lawrence S. Lustberg*, *Kevin McNulty*, and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

conviction and sentence. See 28 U. S. C. § 2255 (1994 ed., Supp. II). He alleged his counsel was ineffective for various reasons, including the failure to file a notice of appeal pursuant to petitioner's request. App. 63, 65. The District Court appointed new counsel, who filed an amended motion adding a claim that at the sentencing proceeding the trial court violated Federal Rule of Criminal Procedure 32(a)(2) by failing to advise petitioner of his right to appeal his sentence. This last claim gives rise to the question before us.

The District Court held an evidentiary hearing. Petitioner testified that, upon being sentenced, he at once asked his lawyer to file an appeal. App. 139. Consistent with petitioner's testimony, the District Court found that, although the sentencing court had failed to advise petitioner of his right to appeal the sentence, petitioner knew of his right to appeal when the sentencing hearing occurred. No. 1:CR–90–97–01 (MD Pa., July 1, 1997), App. 168, 184. The court also credited the testimony of petitioner's trial counsel that petitioner told counsel he did not want to take an appeal because he hoped to cooperate with the Government and earn a sentence reduction. *Id.*, at 180–181; cf. Fed. Rule Crim. Proc. 35(b) ("The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense").

Relying on our holding in *United States* v. *Timmreck*, 441 U. S. 780 (1979), the District Court rejected petitioner's claim that any violation of Rule 32, without regard to prejudice, is enough to vacate a sentence under § 2255. The court held that petitioner was not entitled to relief because he was actually aware of his right to appeal at the time of sentencing. No. 1:CR–90–97–01, App. 184. The court also rejected petitioner's ineffective assistance of counsel claim based on its finding that petitioner did not request an appeal. *Id.*, at 180.

The Court of Appeals for the Third Circuit affirmed the ruling. It held that the Rule 32(a)(2) violation was subject to harmless-error review and that, because petitioner was aware of his right to appeal, the purpose of the Rule had been served and petitioner was not entitled to relief. Judgt. order reported at 142 F. 3d 430 (1998), App. 192, 194–195. We granted certiorari. 524 U. S. 982 (1998).

In 1992, when petitioner was sentenced, Federal Rule of Criminal Procedure 32(a)(2) provided:

> "*Notification of Right To Appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

Current Rule 32(c)(5) likewise imposes on the district court the duty to advise the defendant at sentencing of any right to appeal.

The requirement that the district court inform a defendant of his right to appeal serves important functions. It will often be the case that, as soon as sentence is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney. The relationship between the defendant and the attorney may also be strained after sentencing, in any event, because of the defendant's disappointment over the outcome of the case or the terms of the sentence. The attorney, moreover, concentrating on

other matters, may fail to tell the defendant of the right to appeal, though months later the attorney may think that he in fact gave the advice because it was standard practice to do so. In addition, if the defendant is advised of the right by the judge who imposes sentence, the defendant will realize that the appeal may be taken as of right and without affront to the trial judge, who may later rule upon a motion to modify or reduce the sentence. See Fed. Rule Crim. Proc. 35. Advising the defendant of his right at sentencing also gives him a clear opportunity to announce his intention to appeal and request the court clerk to file the notice of appeal, well before the 10-day filing period runs. See Rule 32(c)(5) ("If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant"); Fed. Rule App. Proc. 4(b) (establishing 10-day period for filing appeal, which may be extended for 30 days by district court for "excusable neglect").

These considerations underscore the importance of the advice which comes from the court itself. Trial judges must be meticulous and precise in following each of the requirements of Rule 32 in every case. It is undisputed, then, that the court's failure to give the required advice was error.

A violation of Rule 32(a)(2), however, does not entitle a defendant to collateral relief in all circumstances. Our precedents establish, as a general rule, that a court's failure to give a defendant advice required by the Federal Rules is a sufficient basis for collateral relief only when the defendant is prejudiced by the court's error. In *Hill* v. *United States*, 368 U. S. 424 (1962), for example, the District Court violated the then-applicable version of Rule 32(a) by failing to make explicit that the defendant had an opportunity to speak in his own behalf. The defendant did not allege that he had been "affirmatively denied an opportunity to speak," that the District Judge had been deprived of any relevant information, or that the defendant "would have had anything at all to say if he had been formally invited to speak." *Id.*, at 429.

The defendant established only "a failure to comply with the formal requirements of the Rule," *ibid.*, and alleged no prejudice; on these premises, the Court held the defendant was not entitled to collateral relief, *id.*, at 428–429.

So, also, in *United States* v. *Timmreck*, collateral relief was unavailable to a defendant who alleged only that the District Court "'fail[ed] to comply with the formal requirements'" of Rule 11 of the Federal Rules of Criminal Procedure by not advising him of a mandatory special parole term to which he was subject. 441 U. S., at 785. The defendant did not argue "that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." *Id.*, at 784. Having alleged no prejudice, defendant's "only claim [was] of a technical violation of the Rule" insufficient to justify habeas relief. *Ibid.*

In this case, petitioner had full knowledge of his right to appeal, hence the District Court's violation of Rule 32(a)(2) by failing to inform him of that right did not prejudice him. The fact of the violation, standing alone, *Hill* and *Timmreck* instruct, does not entitle petitioner to collateral relief.

Our decision in *Rodriquez* v. *United States*, 395 U. S. 327 (1969), does not hold otherwise. In *Rodriquez*, the Court held that when counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit. *Id.*, at 329–330. Without questioning the rule in *Rodriquez*, we conclude its holding is not implicated here because of the District Court's factual finding that petitioner did not request an appeal. While *Rodriquez* did note the sentencing court's failure to advise the defendant of his right to appeal, it did so only in the course of rejecting the Government's belated argument that the case should be remanded for fact-finding to determine the reason counsel had not filed the appeal. The court's failure to advise the defendant of his right

was simply one factor—in combination with the untimeliness of the Government's request and the lengthy proceedings and delay the defendant had already endured—that led the Court to conclude that it was "just under the circumstances" to accord the petitioner final relief at that time without further proceedings. *Id.*, at 331–332. This limited and fact-specific conclusion does not support a general rule that a court's failure to advise a defendant of the right to appeal automatically requires resentencing to allow an appeal.

Petitioner and his *amicus* would distinguish *Timmreck* (and, presumably, *Hill*) on the ground that the defendant in *Timmreck* had the opportunity to raise his claim on direct appeal but failed to do so, whereas the absence of the "judicial warning [required by Rule 32(a)(2)] may effectively undermine the defendant's ability to take a direct appeal." Brief for Petitioner 20. This argument, however, provides no basis for holding that a Rule 32(a)(2) oversight, though nonprejudicial, automatically entitles the defendant to habeas relief. Even errors raised on direct appeal are subject to harmless-error review. Rule 52(a) of the Federal Rules of Criminal Procedure prohibits federal courts from granting relief based on errors that "d[o] not affect substantial rights." See Rule 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); see also *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254–255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). . . . Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions").

Accordingly, we hold that petitioner is not entitled to habeas relief based on a Rule 32(a)(2) violation when he had independent knowledge of the right to appeal and so

was not prejudiced by the trial court's omission. The judgment of the Court of Appeals for the Third Circuit is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring.

I join the opinion of the Court, and I write separately to express my views about the meaning of prejudice in this context. When, as here, a district court fails to advise a defendant of his right to appeal, there are two ways in which this error could be said not to have prejudiced the defendant. First, a defendant might not be prejudiced by the error because he already knew about his right to appeal. That is the case here, and the Court properly concludes that under these circumstances, the defendant has not shown that he is entitled to collateral relief.

Second, a defendant might not be prejudiced by the district court's failure to advise him of his right to appeal because he had no meritorious grounds for appeal in any event. In my opinion, there is no reason why a defendant should have to demonstrate that he had meritorious grounds for an appeal when he is attempting to show that he was harmed by the district court's error. To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial 28 U. S. C. § 2255 motion. If the district judge had fulfilled his obligation to advise the defendant of his right to appeal, and the defendant had wanted to appeal, he would have had a lawyer to identify and develop his arguments on appeal. The defendant should not be penalized for failing to appeal in the first instance when his failure to appeal is attributable to the errors of a district court judge. This result is consistent with our resolution of *Rodriquez* v. *United States*, 395 U. S. 327 (1969). In *Rodriquez*, we held that when a defendant's failure to

appeal a conviction is attributable to an error by his lawyer, the defendant is entitled to collateral relief without requiring him to show that his appeal would have had merit. In my view, there is no reason to adopt a different rule when the failure to appeal results from a district judge's error.

Syllabus

ARIZONA DEPARTMENT OF REVENUE *v.* BLAZE CONSTRUCTION CO., INC.

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 97–1536. Argued December 8, 1998—Decided March 2, 1999

Over several years, the Bureau of Indian Affairs contracted with respondent Blaze Construction Company to build, repair, and improve roads on several Indian reservations located in Arizona. At the end of the contracting period, petitioner Arizona Department of Revenue (Department) issued a tax deficiency assessment against Blaze for its failure to pay Arizona's transaction privilege tax on the proceeds from its contracts with the Bureau; that tax is levied on the gross receipts of companies doing business in the State. Blaze protested the assessment and prevailed in administrative proceedings, but the Arizona Tax Court granted the Department summary judgment. The Arizona Court of Appeals reversed, rejecting the Department's argument that *United States* v. *New Mexico*, 455 U. S. 720, controlled, and holding that federal law pre-empted the tax's application to Blaze.

Held: A State generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Federal Government, regardless of whether the federal contractor renders its services on an Indian reservation. In *New Mexico*, *supra*, the Court announced a clear rule that tax immunity is appropriate only when the levy falls on the United States itself, or on its agency or closely connected instrumentality. *Id.*, at 733. To expand that immunity beyond these narrow constitutional limits, Congress must *expressly* so provide. *Id.*, at 737. Thus, absent a constitutional immunity or congressional exemption, federal law does not shield Blaze from Arizona's transaction privilege tax. The incidence of the tax falls on Blaze, not the Government; nor has Congress exempted these contracts from taxation. Nevertheless, the Arizona Court of Appeals employed a balancing test weighing state, federal, and tribal interests, and held that a congressional intent to preempt the tax could be inferred from federal laws regulating Indian welfare. In cases involving taxation of on-reservation activity, this Court has undertaken such a particularized examination where the tax's legal incidence fell on a nontribal entity engaged in a transaction with tribes or tribal members. See, *e. g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163. But the Court has never employed this balancing test where a State seeks to tax a transaction between the Government and a non-Indian private contractor, and declines to do so now. The need

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to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxing federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations. Moreover, the political process is uniquely adapted to accommodating the interests implicated by state taxation of federal contractors. *New Mexico*, *supra*, at 738. The decision whether to exempt Blaze from the tax rests with Arizona and Congress, not this Court. Pp. 35–39.

190 Ariz. 262, 947 P. 2d 836, reversed and remanded.

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

Patrick Irvine, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Grant Woods*, Attorney General, *C. Tim Delaney*, Solicitor General, and *Carter G. Phillips*.

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Roy W. McLeese III*, and *Elizabeth Ann Peterson*.

Bruce C. Smith argued the cause for respondent. With him on the brief was *Lat J. Celmins*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, and *Thomas F. Gede*, Special Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Heidi Heitkamp* of North Dakota, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, and *James E. Doyle* of Wisconsin; 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 Gila River Indian Community by *Rodney B. Lewis;* for the Navajo Nation by *Marcelino R. Gomez;* for the San Carlos Apache Indian Tribe by *Richard T. Treon;* and for Frank Adson et al. by *Tracy A. Labin* and *Melody L. McCoy*.

JUSTICE THOMAS delivered the opinion of the Court.

In *United States* v. *New Mexico*, 455 U. S. 720 (1982), we held that a State generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Federal Government. This case asks us to determine whether that same rule applies when the federal contractor renders its services on an Indian reservation. We hold that it does.

I

Under the Federal Lands Highways Program, 23 U. S. C. § 204, the Federal Government finances road construction and improvement projects on federal public roads, including Indian reservation roads. Various federal agencies oversee the planning of particular projects and the allocation of funding to them. §§ 202(d), 204. The Commissioner of Indian Affairs has the responsibility to "plan, survey, design and construct" Indian reservation roads. 25 CFR § 170.3 (1998).

Over a several-year period, the Bureau of Indian Affairs contracted with Blaze Construction Company to build, repair, and improve roads on the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham, and San Carlos Apache Indian Reservations in Arizona. Blaze is incorporated under the laws of the Blackfeet Tribe of Montana and is owned by a member of that Tribe. But, as the company concedes, Blaze is the equivalent of a non-Indian for purposes of this case because none of its work occurred on the Blackfeet Reservation. Brief in Opposition 2, n. 1; see *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 160–161 (1980).

At the end of the contracting period, the Arizona Department of Revenue (Department) issued a tax deficiency assessment against Blaze for its failure to pay Arizona's transaction privilege tax on the proceeds from its contracts with the Bureau; that tax is levied on the gross receipts of compa-

nies doing business in the State.[1] See Ariz. Rev. Stat. Ann. §§ 42–1306, 42–1310.16 (1991). Blaze protested the assessment and prevailed at the end of administrative proceedings, but, on review, the Arizona Tax Court granted summary judgment in the Department's favor. The Arizona Court of Appeals reversed. 190 Ariz. 262, 947 P. 2d 836 (1997). It rejected the Department's argument that our decision in *New Mexico*, *supra*, controlled the case and held that federal law pre-empted the application of Arizona's transaction privilege tax to Blaze. The Arizona Supreme Court denied the Department's petition for review, with one justice voting to grant the petition. We granted certiorari, 523 U. S. 1117 (1998), and now reverse.

II

In *New Mexico*, we considered whether a State could impose gross receipts and use taxes on the property, income, and purchases of private federal contractors. To remedy "the confusing nature of our precedents" in this area, 455 U. S., at 733, we announced a clear rule:

> "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.*, at 735.

We reasoned that this "narrow approach" to the scope of governmental tax immunity "accord[ed] with competing constitutional imperatives, by giving full range to each sovereign's taxing authority." *Id.*, at 735–736 (citing *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 483 (1939)). For that immunity to be expanded beyond these "narrow constitu-

[1] The Department initially also sought to tax Blaze's proceeds from contracts with tribal housing authorities but eventually dropped its claim. We therefore have no occasion to consider Blaze's tax liability with respect to those contracts.

tional limits," we explained that Congress must "take responsibility for the decision, by so *expressly* providing as respects contracts in a particular form, or contracts under particular programs." 455 U. S., at 737 (emphasis added); see also *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234 (1952). Applying those principles, we upheld each of the taxes at issue in that case because the legal incidence of the taxes fell on the contractors, not the Federal Government; the contractors could not be considered agencies or instrumentalities of the Federal Government; and Congress had not expressly exempted the contractors' activities from taxation but, rather, had expressly repealed a pre-existing statutory exemption. See *New Mexico*, 455 U. S., at 743–744.

These principles control the resolution of this case. Absent a constitutional immunity or congressional exemption, federal law does not shield Blaze from Arizona's transaction privilege tax. See *id.*, at 737; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161 (1937). The incidence of Arizona's transaction privilege tax falls on Blaze, not the Federal Government. Blaze does not argue that it is an agency or instrumentality of the Federal Government, and *New Mexico*'s clear rule would have foreclosed any such argument under these circumstances. Nor has Congress exempted these contracts from taxation. Cf. *Carson*, *supra*, at 234.

Nevertheless, the Arizona Court of Appeals held (and Blaze urges here) that the tax cannot be applied to activities taking place on Indian reservations.[2] After it employed a

[2] Blaze also appears to argue that Arizona's tax infringes on the Tribes' right to make their own decisions and be governed by them and that this is sufficient, by itself, to preclude application of Arizona's tax. See *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). Our decisions upholding state taxes in a variety of on-reservation settings squarely foreclose that argument. See, *e. g.*, *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 156 (1980); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 483 (1976).

balancing test "weighing the respective state, federal, and tribal interests," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 177 (1989), the court below held that a congressional intent to pre-empt Arizona's tax could be inferred from federal laws regulating the welfare of Indians. In cases involving taxation of on-reservation activity, we have undertaken this "particularized examination," *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of N. M.*, 458 U. S. 832, 838 (1982), where the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members. See, *e. g.*, *Cotton Petroleum Corp.*, *supra*, at 176–187 (state severance tax imposed on non-Indian lessee's production of oil and gas); *Ramah*, *supra*, at 836–846 (state gross receipts tax imposed on private contractor's proceeds from contract with tribe for school construction); *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160, 165–166 (1980) (tax imposed on sale of farm machinery to tribe); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 144–153 (1980) (motor carrier license and use fuel taxes imposed on logging and hauling operations pursuant to contract with tribal enterprise). But we have never employed this balancing test in a case such as this one where a State seeks to tax a transaction between the Federal Government and its non-Indian private contractor.

We decline to do so now. Interest balancing in this setting would only cloud the clear rule established by our decision in *New Mexico*. The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations. Cf. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 458–459 (1995); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502

U. S. 251, 267–268 (1992).[3] Moreover, as we recognized in *New Mexico*, the "political process is 'uniquely adapted to accommodating' " the interests implicated by state taxation of federal contractors. 455 U. S., at 738 (quoting *Massachusetts* v. *United States*, 435 U. S. 444, 456 (1978) (plurality opinion)). Accord, *Washington* v. *United States*, 460 U. S. 536, 546 (1983). Whether to exempt Blaze from Arizona's transaction privilege tax is not our decision to make; that decision rests, instead, with the State of Arizona and with Congress.

Our conclusion in no way limits the Tribes' ample opportunity to advance their interests when they choose to do so. Under the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.* (1994 ed. and Supp. III), a tribe may request the Secretary of Interior to enter into a self-determination contract "to plan, conduct, and administer programs or portions thereof, including construction programs." § 450f(a)(1). Where a tribe enters into such a contract, it assumes greater responsibility over the management of the federal funds and the operation of certain federal programs. See, *e. g.*, 25 CFR § 900.3(b)(4) (1998). Here, the Tribes on whose reservations Blaze's work was performed have not exercised this option, and the Federal Government has retained contracting responsibility. Because the Tribes in this case have not assumed this responsibility, we have no occasion to consider whether the Indian pre-emption doctrine would apply when Tribes choose to take a more direct and active role in administering the

[3] Indeed, a recent decision by the New Mexico Supreme Court illustrates the perils of a more fact-intensive inquiry. See *Blaze Constr. Co., Inc.* v. *Taxation and Revenue Dept. of New Mexico*, 118 N. M. 647, 884 P. 2d 803 (1994), cert. denied, 514 U. S. 1016 (1995). In that case, also involving the imposition of a tax on the gross receipts of Blaze's federal contracts, the New Mexico Supreme Court applied the balancing test in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163 (1989), and reached the exact opposite conclusion from the Arizona Court of Appeals. 118 N. M., at 652–653, 884 P. 2d, at 808–809.

federal funds. Therefore, we see no need to depart from the clear rule announced in *New Mexico*.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. ET AL. *v.* SULLIVAN ET AL.

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

No. 97–2000. Argued January 19, 1999—Decided March 3, 1999

Under Pennsylvania's Workers' Compensation Act, once an employer becomes liable for an employee's work-related injury—because liability either is not contested or is no longer at issue—the employer or its insurer must pay for all "reasonable" and "necessary" medical treatment. To assure that only medical expenses meeting these criteria are paid, and in an attempt to control costs, Pennsylvania has amended its workers' compensation system to provide that a self-insured employer or private insurer (collectively insurer) may withhold payment for disputed treatment pending an independent "utilization review," as to which, among other things, the insurer files a one-page request for review with the State Workers' Compensation Bureau (Bureau), the Bureau forwards the request to a "utilization review organization" (URO) of private health care providers, and the URO determines whether the treatment is reasonable or necessary. Respondents, employees and employee representatives, filed this suit under 42 U. S. C. § 1983 against various Pennsylvania officials, a self-insured public school district, and a number of private workers' compensation insurers, alleging, *inter alia*, that in withholding benefits without predeprivation notice and an opportunity to be heard, the state and private defendants, acting "under color of state law," deprived respondents of property in violation of due process. The District Court dismissed the private insurers from the suit on the ground that they are not "state actors," and later dismissed the state officials and school district on the ground that the Act does not violate due process. The Third Circuit disagreed on both issues, holding, among other rulings, that a private insurer's decision to suspend payment under the Act constitutes state action. The court also noted the parties' assumption that employees have a protected property interest in workers' compensation medical benefits, and held that due process requires that payment of medical bills not be withheld until employees have had an opportunity to submit their view in writing to the URO as to the reasonableness and necessity of the disputed treatment.

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Held:

1. A private insurer's decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatments is not fairly attributable to the State so as to subject the insurer to the Fourteenth Amendment's constraints. State action requires *both* an alleged constitutional deprivation caused by acts taken pursuant to state law *and* that the allegedly unconstitutional conduct be fairly attributable to the State. *E. g., Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937. Here, while it may fairly be said that the first requirement is satisfied, respondents have failed to satisfy the second. The mere fact that a private business is subject to extensive state regulation does not by itself convert its action into that of the State. See, *e. g., Blum* v. *Yaretsky*, 457 U. S. 991, 1004. The private insurers cannot be held to constitutional standards unless there is a sufficiently close nexus between the State and the challenged action so that the latter may be fairly treated as that of the State itself. *Ibid.* Whether such a nexus exists depends on, among other things, whether the State has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *E. g., ibid.* That the statutory scheme previously prohibited insurers from withholding payment for disputed medical services and no longer does so merely shows that the State, in administering a many-faceted remedial system, has shifted one facet from favoring the employees to favoring the employer. This sort of decision occurs regularly in the legislative process and cannot be said to "encourage" or "authorize" the insurer's actions. Also rejected is respondents' assertion that the challenged decisions are state action because insurers must obtain "authorization" or "permission" from the Bureau before withholding payment. The Bureau's participation is limited to requiring submission of a form and related functions, which cannot render it responsible for the insurers' actions. See *id.*, at 1007. Respondents' twofold argument that state action is present because the State has delegated to insurers powers traditionally reserved to itself also lacks merit. First, the contention as to delegation of the provision of state-mandated "public benefits" fails because nothing in Pennsylvania's Constitution or statutory scheme obligates the State to provide either medical treatment or workers' compensation benefits to injured workers. See, *e. g., Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 352; *West* v. *Atkins*, 487 U. S. 42, 54–56, distinguished. Second, their argument as to delegation of the governmental decision to suspend payment for disputed medical treatment is supported by neither historical practice nor the state statutory scheme. That Pennsylvania originally recognized an insurer's traditionally pri-

vate prerogative to withhold payment, then restricted it, and now (in one limited respect) has restored it, cannot constitute the delegation of an exclusive public function. See *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 162, n. 12. Finally, respondents misplace their reliance on a "joint participation" theory of state action. Privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of that theory. *E. g., Blum, supra*, at 1011; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, and *Lugar, supra*, distinguished. Pp. 49–58.

2. The Pennsylvania regime does not deprive disabled employees of "property" within the meaning of the Due Process Clause of the Fourteenth Amendment. Only after finding deprivation of a protected property interest does this Court look to see if the State's procedures comport with due process. *Mathews* v. *Eldridge*, 424 U. S. 319, 332. Here, respondents contend that state law confers upon them such a protected interest in workers' compensation medical benefits. However, under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer's initial liability is established, as respondents' argument assumes. Instead, the law expressly limits an employee's entitlement to "reasonable" and "necessary" medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise. Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: He must prove (1) that an employer is liable for a work-related injury, and (2) that the particular medical treatment at issue is reasonable and necessary. While respondents have cleared the first hurdle, they have yet to satisfy the second. Consequently, they do not have the property interest they claim. *Goldberg* v. *Kelly*, 397 U. S. 254, 261–263, and *Mathews, supra*, at 332, distinguished. Pp. 58–61.

139 F. 3d 158, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, Parts I and II of which were joined by O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., and Part III of which was joined by O'CONNOR, KENNEDY, THOMAS, and GINSBURG, JJ. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 61. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 62. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 63.

Michael W. McConnell argued the cause for petitioners. With him on the briefs were *Alan E. Untereiner*, *Robert McL. Boote*, *Burt M. Rublin*, and *Robert E. Kelly, Jr.*

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Jeffrey A. Lamken*, *Barbara C. Biddle*, and *Jacob M. Lewis.*

Loralyn McKinley argued the cause for respondents. With her on the brief for respondents Sullivan et al. were *Alan B. Epstein* and *Thomas J. O'Brien.* *Jan M. Ritchie*, *Patricia Farrell Kerelo*, *Joseph W. Cunningham*, and *Mark Pfeiffer* filed a brief for respondent School District of Philadelphia.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.†

Pennsylvania provides in its workers' compensation regime that an employer or insurer may withhold payment for disputed medical treatment pending an independent review to determine whether the treatment is reasonable and necessary. We hold that the insurers are not "state actors" under the Fourteenth Amendment, and that the Pennsylvania re-

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*Briefs of *amici curiae* urging reversal were filed for the American Insurance Association et al. by *Mark F. Horning;* for the National Association of Waterfront Employers et al. by *F. Edwin Froelich* and *Charles T. Carroll;* and for the Washington Legal Foundation by *Ronald D. Maines*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons et al. by *Gil Deford*, *Sarah Lenz Lock*, *Michael Schuster*, *Jeanne Finberg*, *Vicki Gottlich*, and *Judith L. Lichtman;* for the Pennsylvania Federation of Injured Workers by *Roderick M. Hills, Jr.*, and *Richard W. McHugh;* for the Pennsylvania Trial Lawyers Association et al. by *Michael J. Foley*, *Mark S. Mandell*, *Jeffrey White*, and *Richard A. Kimnach;* and for Carl Kreschollek by *David M. Linker.*

†JUSTICE SCALIA joins Parts I and II of this opinion.

gime does not deprive disabled employees of property within the meaning of that Amendment.

I

Before the enactment of workers' compensation laws, employees who suffered a work-related injury or occupational disease could recover compensation from their employers only by resort to traditional tort remedies available at common law. In the early 20th century, States began to replace the common-law system, which often saddled employees with the difficulty and expense of establishing negligence or proving damages, with a compulsory insurance system requiring employers to compensate employees for work-related injuries without regard to fault. See generally 1 A. Larson & L. Larson, Larson's Workers' Compensation Law §§ 5.20–5.30, pp. 2–15 to 2–25 (1996).

Following this model, Pennsylvania's Workers' Compensation Act, Pa. Stat. Ann., Tit. 77, § 1 *et seq.* (Purdon 1992 and Supp. 1998) (Act or 77 Pa. Stat. Ann.), first enacted in 1915, creates a system of no-fault liability for work-related injuries and makes employers' liability under this system "exclusive . . . of any and all other liability." § 481(a). All employers subject to the Act must (1) obtain workers' compensation insurance from a private insurer, (2) obtain such insurance through the State Workmen's Insurance Fund (SWIF), or (3) seek permission from the State to self-insure. § 501(a). Once an employer becomes liable for an employee's work-related injury—because liability either is not contested or is no longer at issue—the employer or its insurer[1] must pay for all "reasonable" and "necessary" medical treatment, and must do so within 30 days of receiving a bill. §§ 531(1)(i), (5).

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[1] Self-insured employers and private insurers face identical obligations under Pennsylvania's workers' compensation system, and we therefore refer to them collectively as "insurers" or "private insurers."

To assure that insurers pay only for medical care that meets these criteria, and in an attempt to control costs, Pennsylvania amended its workers' compensation system in 1993. 1993 Pa. Laws, No. 44, p. 190. Most important for our purposes, the 1993 amendments created a "utilization review" procedure under which the reasonableness and necessity of an employee's past, ongoing, or prospective medical treatment could be reviewed before a medical bill must be paid. 77 Pa. Stat. Ann. § 531(6) (Purdon Supp. 1998).[2] Under this system, if an insurer "disputes the reasonableness or necessity of the treatment provided," § 531(5), it may request utilization review (within the same 30-day period) by filing a one-page form with the Workers' Compensation Bureau of the Pennsylvania Department of Labor and Industry (Bureau). § 531(6)(i); 34 Pa. Code §§ 127.404(b), 127.452(a) (1998). The form identifies (among other things) the employee, the medical provider, the date of the employee's injury, and the medical treatment to be reviewed. *Ibid.;* App. 5. The Bureau makes no attempt, as the Court of Appeals stated, to "address the legitimacy or lack thereof of the request," but merely determines whether the form is "properly completed—i.e., that all information required by the form is provided." *Sullivan* v. *Barnett*, 139 F. 3d 158, 163 (CA3 1998); see 34 Pa. Code § 127.452(a). Upon the proper filing

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[2] Before Pennsylvania enacted the "utilization review" procedure, an insurer had no effective means of recouping payments for medical treatment that was later determined to be unreasonable or unnecessary. State law bars insurers from seeking reimbursement of excessive payments from health care providers, see *Moats* v. *Workmen's Compensation Appeal Bd.* (Emerald Mines Corp.), 588 A. 2d 116, 118 (Pa. Commw. 1991), and, although insurers are entitled to reimbursement from the Workmen's Compensation Supersedeas Fund for treatment later deemed to be unreasonable or unnecessary, 34 Pa. Code § 127.208(g) (1998), the fund is financed entirely from assessments levied on insurers and self-insured employers themselves. 77 Pa. Stat. Ann. § 999(b) (Purdon 1992). See generally D. Ballantyne, Workers Compensation Research Institute, Revisiting Workers' Compensation in Pennsylvania 36–37 (1997).

of a request, an insurer may withhold payment to health care providers for the particular services being challenged. 77 Pa. Stat. Ann. § 531(5) (Purdon Supp. 1998); 34 Pa. Code § 208(f).

The Bureau then notifies the parties that utilization review has been requested and forwards the request to a randomly selected "utilization review organization" (URO). § 127.453. URO's are private organizations consisting of health care providers who are "licensed in the same profession and hav[e] the same or similar specialty as that of the provider of the treatment under review," 77 Pa. Stat. Ann. § 531(6)(i) (Purdon Supp. 1998); 34 Pa. Code § 127.466. The purpose of utilization review, and the sole authority conferred upon a URO, is to determine "whether the treatment under review is reasonable or necessary for the medical condition of the employee" in light of "generally accepted treatment protocols." §§ 127.470(a), 127.467. Reviewers must examine the treating provider's medical records, §§ 127.459, 127.460, and must give the provider an opportunity to discuss the treatment under review, § 127.469.[3] Any doubt as to the reasonableness and necessity of a given procedure must be resolved in favor of the employee. § 127.471(b).

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[3] Although URO's may not request, and the parties may not submit, any "reports of independent medical examinations," 34 Pa. Code § 127.461, employees are allowed to submit a "written personal statement" to the URO regarding their view of the "reasonableness and/or necessity" of the disputed treatment, App. 50. This latter aspect of the process differs from the system in place at the time of the Court of Appeals' decision. Under the law at that time, employees received notice that utilization review had been requested, but were not informed that their medical benefits could be suspended and were not permitted to submit materials to the URO. The Bureau modified its procedures in response to the Court of Appeals' decision, and now provides for more extensive notice and an opportunity for employees to provide at least some input into the URO's decision. Petitioners have not challenged the Court of Appeals' holding with respect to these additional procedures.

URO's are instructed to complete their review and render a determination within 30 days of a completed request. 77 Pa. Stat. Ann. § 531(6)(ii) (Purdon Supp. 1998); 34 Pa. Code § 127.465. If the URO finds in favor of the insurer, the employee may appeal the determination to a workers' compensation judge for a *de novo* review, but the insurer need not pay for the disputed services unless the URO's determination is overturned by the judge, or later by the courts. 77 Pa. Stat. Ann. § 531(6)(iv) (Purdon Supp. 1998); 34 Pa. Code § 127.556. If the URO finds in favor of the employee, the insurer must pay the disputed bill immediately, with 10 percent annual interest, as well as the cost of the utilization review.[4] 34 Pa. Code § 127.208(e); 77 Pa. Stat. Ann. § 531(6)(iii) (Purdon Supp. 1998).

Respondents are 10 individual employees and 2 organizations representing employees who received medical benefits under the Act.[5] They claimed to have had payment of particular benefits withheld pursuant to the utilization review procedure set forth in the Act. They sued under Rev. Stat. § 1979, 42 U. S. C. § 1983, acting individually and on behalf of a class of similarly situated employees.[6] Named as defendants were various Pennsylvania officials who administer the Act, the director of the SWIF, the School District of Philadel-

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[4] If the URO's determination is overturned on appeal, the insurer may recover excess payments from the Workmen's Compensation Supersedeas Fund. See n. 2, *supra.*

[5] In addition to the 10 named employees, the 2 named organizations are the Philadelphia Area Project on Occupational Safety and Health, a nonprofit group composed of over 2,000 unions and their members, Amended Complaint ¶ 15, App. 12, and the Philadelphia Federation of Teachers, a labor organization representing approximately 20,000 employees of the School District of Philadelphia, *id.*, ¶ 16, App. 12.

[6] The class was defined to include "all persons who have been, or will be in the future, receiving medical benefits pursuant to the Pennsylvania Workers' Compensation [Act], and who have had or will have their medical benefits" suspended without prior notice and an opportunity to be heard. *Id.*, ¶ 17, App. 12–13.

phia (which self-insures), and a number of private insurance companies who provide workers' compensation coverage in Pennsylvania. Respondents alleged that in withholding workers' compensation benefits without predeprivation notice and an opportunity to be heard, the state and private defendants, acting "under color of state law," deprived them of property in violation of due process. Amended Complaint ¶¶ 265–271, App. 43–44. They sought declaratory and injunctive relief, as well as damages.

The District Court dismissed the private insurers from the lawsuit on the ground that they are not "state actors," *Sullivan* v. *Barnett*, 913 F. Supp. 895, 905 (ED Pa. 1996), and later dismissed the state officials who remained as defendants, as well as the school district, on the ground that the Act does not violate due process, App. to Pet. for Cert. 71a.

The Court of Appeals for the Third Circuit disagreed on both issues. 139 F. 3d 158 (1998). It held that a private insurer's decision to suspend payment under the Act—what the court called a "supersedeas"—constitutes state action. The court reasoned:

> "In creating and executing this system of entitlements, the [State] has enacted a complex and interwoven regulatory web enlisting the Bureau, the employers, and the insurance companies. The [State] extensively regulates and controls the Workers' Compensation system. Although the insurance companies are private entities, when they act under the construct of the Workers' Compensation system, they are providing public benefits which honor [s]tate entitlements. In effect, they become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system. . . .
>
> "The right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the State. When insurance companies invoke the supersedeas (i. e., suspension) of an employee's medi-

> cal benefits, they compromise an employee's [s]tate-created entitlements. The insurers have no power to deprive or terminate such benefits without the permission and participation of the [State]. More importantly, however, the [State] is intimately involved in any decision by an insurer to terminate an employee's constitutionally protected benefits because an insurer cannot suspend medical payments without first obtaining authorization from the Bureau. However this authorization may be characterized, any deprivation that occurs is predicated upon the State's involvement." *Id.*, at 168.

On the due process issue, the Court of Appeals did not address whether respondents have a protected property interest in workers' compensation medical benefits, stating that "[n]either party disputes" this point. *Id.*, at 171, n. 23. Thus focusing on what process is "due," the court held that payment of bills may not be withheld until employees have had an opportunity to submit their view in writing as to the reasonableness and necessity of the disputed treatment to the URO. The court then determined that the relevant statutory language permitting the suspension of payment during utilization review was severable and struck it from the statute. *Id.*, at 173–174.

We granted certiorari, 524 U. S. 981 (1998), to resolve a conflict on the status of private insurers providing workers' compensation coverage under state laws,[7] and to review the Court of Appeals' holding that due process prohibits insurers from withholding payment for disputed medical treatment pending review.

II

To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed

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[7] Cf. *Barnes* v. *Lehman,* 861 F. 2d 1383 (CA5 1988).

under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful,'" *Blum* v. *Yaretsky*, 457 U. S. 991, 1002 (1982) (quoting *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948)).[8]

Perhaps hoping to avoid the traditional application of our state-action cases, respondents attempt to characterize their claim as a "facial" or "direct" challenge to the utilization review procedures contained in the Act, in which case, the argument goes, we need not concern ourselves with the "identity of the defendant" or the "act or decision by a private actor or entity who is relying on the challenged law." Brief for Respondents 16. This argument, however, ignores our repeated insistence that state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982); see *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 156 (1978). In this case, while it may fairly be said that private insurers act "'with the knowledge of and pursuant to'" the state statute, *ibid.* (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 162, n. 23 (1970)), thus satisfying the first requirement, respondents still must satisfy the second, whether the allegedly unconstitutional conduct is fairly attributable to the State.[9]

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[8] Where, as here, deprivations of rights under the Fourteenth Amendment are alleged, these two requirements converge. See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 935, n. 18 (1982).

[9] Respondents' reliance on *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478 (1988), as support for their position is misplaced. Nowhere in *Tulsa* did we characterize petitioner's claim as a "facial" or "direct" challenge to the Oklahoma "nonclaim" statute at issue there. Instead, we analyzed petitioner's challenge under our traditional two-step approach, requiring both action taken pursuant to state law and significant

Our approach to this latter question begins by identifying "the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U. S., at 1004; see *id.*, at 1003 ("Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint"). Here, respondents named as defendants both public officials and a class of private insurers and self-insured employers. Also named is the director of the SWIF and the School District of Philadelphia, a municipal corporation. The complaint alleged that the state and private defendants, acting under color of state law and pursuant to the Act, deprived them of property in violation of due process by withholding payment for medical treatment without prior notice and an opportunity to be heard. All agree that the *public officials* responsible for administering the workers' compensation system and the director of SWIF are state actors. See 139 F. 3d, at 167.[10] Thus, the issue we address, in accordance with our cases, is whether a *private insurer's* decision to withhold payment for disputed medical treatment may be fairly attributable to the State so as to subject insurers to the constraints of the Fourteenth Amendment. Our answer to that question is "no."

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state involvement. See *id.*, at 486–487. While it may be true, as respondents argue, that the utilization review procedure here, like the nonclaim statute in *Tulsa*, is not "self-executing," that fact does not relieve respondents of establishing both requisites of state action. *Tulsa* does not suggest otherwise.

[10] At the same time the District Court dismissed the private insurers, it refused to grant the school district's motion to dismiss for lack of state action (the school district argued that because it contracted out its responsibilities as a self-insurer to a private company, it was not a state actor), leaving the question of the school district's status unresolved pending further discovery. *Sullivan* v. *Barnett*, 913 F. Supp. 895, 905 (ED Pa. 1996). The District Court's later ruling on the due process question obviated any need to decide whether the school district acted under color of state law, nor did the Court of Appeals rule on that question. See 139 F. 3d, at 167, and n. 16.

In cases involving extensive state regulation of private activity, we have consistently held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 350 (1974); see *Blum*, 457 U. S., at 1004. Faithful application of the state-action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts. Thus, the private insurers in this case will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Ibid.* (internal quotation marks omitted). Whether such a "close nexus" exists, our cases state, depends on whether the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Ibid.;* see *Flagg Bros.*, *supra*, at 166; *Jackson*, *supra*, at 357; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 173 (1972); *Adickes* v. *S. H. Kress & Co.*, *supra*, at 170. Action taken by private entities with the mere approval or acquiescence of the State is not state action. *Blum*, *supra*, at 1004–1005; *Flagg Bros.*, *supra*, at 154–165; *Jackson*, *supra*, at 357.

Here, respondents do not assert that the decision to invoke utilization review should be attributed to the State because the State compels or is directly involved in that decision. Obviously the State is not so involved. It authorizes, but does not require, insurers to withhold payments for disputed medical treatment. The decision to withhold payment, like the decision to transfer Medicaid patients to a lower level of care in *Blum*, is made by concededly private parties, and "turns on . . . judgments made by private parties" without "standards . . . established by the State." *Blum*, *supra*, at 1008.

Respondents do assert, however, that the decision to withhold payment to providers may be fairly attributable to the State because the State has "authorized" and "encouraged" it. Respondents' primary argument in this regard is that, in amending the Act to provide for utilization review and to grant insurers an option they previously did not have, the State purposely "encouraged" insurers to withhold payments for disputed medical treatment. This argument reads too much into the State's reform, and in any event cannot be squared with our cases.

We do not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be seen as encouraging them to do just that. But, as petitioners note, this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it. See *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 485 (1988) ("Private use of state-sanctioned private remedies or procedures does not rise to the level of state action"); see also *Lugar*, 457 U. S., at 937; *Flagg Bros.*, 436 U. S., at 165–166. It bears repeating that a finding of state action on this basis would be contrary to the "essential dichotomy," *Jackson*, *supra*, at 349, between public and private acts that our cases have consistently recognized.

The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary. See *Flagg Bros.*, 436 U. S., at 164–165. Before the 1993 amendments, Pennsylvania restricted the ability of an

insurer (after liability had been established, of course) to defer workers' compensation medical benefits, including payment for unreasonable and unnecessary treatment, beyond 30 days of receipt of the bill. The 1993 amendments, in effect, restored to insurers the narrow option, historically exercised by employers and insurers before the adoption of Pennsylvania's workers' compensation law, to defer payment of a bill until it is substantiated. The most that can be said of the statutory scheme, therefore, is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so. Such permission of a private choice cannot support a finding of state action. As we have said before, our cases will not tolerate "the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'" *Ibid.*

Nor does the State's role in creating, supervising, and setting standards for the URO process differ in any meaningful sense from the creation and administration of any forum for resolving disputes. While the decision of a URO, like that of any judicial official, may properly be considered state action, a private party's mere use of the State's dispute resolution machinery, without the "overt, significant assistance of state officials," *Tulsa*, *supra*, at 486, cannot.

The State, in the course of administering a many-faceted remedial system, has shifted one facet from favoring the employees to favoring the employer. This sort of decision occurs regularly in legislative review of such systems. But it cannot be said that such a change "encourages" or "authorizes" the insurer's actions as those terms are used in our state-action jurisprudence.

We also reject the notion, relied upon by the Court of Appeals, that the challenged decisions are state action because insurers must first obtain "authorization" or "permission" from the Bureau before withholding payment. See 139 F. 3d, at 168. As described in our earlier summary of the

statute and regulations, the Bureau's participation is limited to requiring insurers to file "a form prescribed by the Bureau," 34 Pa. Code § 127.452, processing the request for technical compliance, and then forwarding the matter to a URO and informing the parties that utilization review has been requested. In *Blum*, we rejected the notion that the State, "by requiring completion of a form," 457 U. S., at 1007, is responsible for the private party's decision. The additional "paper shuffling" performed by the Bureau here in response to an insurers' request does not alter that conclusion.

Respondents next contend that state action is present because the State has delegated to insurers "powers traditionally exclusively reserved to the State." *Jackson*, 419 U. S., at 352. Their argument here is twofold. Relying on *West* v. *Atkins*, 487 U. S. 42 (1988), respondents first argue that workers' compensation benefits are state-mandated "public benefits," and that the State has delegated the provision of these "public benefits" to private insurers. They also contend that the State has delegated to insurers the traditionally exclusive government function of determining whether and under what circumstances an injured worker's medical benefits may be suspended. The Court of Appeals apparently agreed on both points, stating that insurers "providing public benefits which honor State entitlements . . . become an arm of the State, fulfilling a uniquely governmental obligation," 139 F. 3d, at 168, and that "[t]he right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the State," *ibid.*

We think neither argument has merit. *West* is readily distinguishable: There the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action. See 487 U. S., at 54–56. Here, on the other hand, nothing in Pennsylvania's Constitution or statutory scheme obligates the State to provide either medical treatment or work-

ers' compensation benefits to injured workers. See *Blum*, *supra*, at 1011. Instead, the State's workers' compensation law imposes that obligation on employers. This case is therefore not unlike *Jackson*, *supra*, where we noted that "while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State." *Id.*, at 353; see also *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 544 (1987) ("The fact '[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action'") (quoting *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 842 (1982)).[11]

Nor is there any merit in respondents' argument that the State has delegated to insurers the traditionally exclusive governmental function of deciding whether to suspend payment for disputed medical treatment. Historical practice, as well as the state statutory scheme, does not support respondents' characterization. It is no doubt true that before the 1993 amendments an insurer who sought to withhold payment for disputed medical treatment was required to petition the Bureau, and could withhold payment only upon a favorable ruling by a workers' compensation judge, and then only for prospective treatment.

But before Pennsylvania ever adopted its workers' compensation law, an insurer under contract with an employer to pay for its workers' reasonable and necessary medical expenses could withhold payment, for any reason or no reason, without any authorization or involvement of the State. The

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[11] The fact that the State has established a Workers' Compensation Security Fund to guarantee the payment of medical benefits in the event an insurer becomes insolvent, see 77 Pa. Stat. Ann. § 1053 (Purdon 1992), does not mean, as respondents suggest, that the State has created a self-imposed obligation to provide benefits. The security fund is financed entirely through assessments on insurers and receives no financial assistance from the State. § 1055; see D. Ballantyne & C. Telles, Workers Compensation Research Institute, Workers' Compensation in Pennsylvania 15 (1991).

insurer, of course, might become liable to the employer (or its workers) if the refusal to pay breached the contract or constituted "bad faith," but the obligation to pay would only arise after the employer had initiated a claim and reduced it to a judgment. That Pennsylvania first recognized an insurer's traditionally private prerogative to withhold payment, then restricted it, and now (in one limited respect) has restored it, cannot constitute the delegation of a traditionally exclusive public function. Like New York in *Flagg Bros.*, Pennsylvania "has done nothing more than authorize (and indeed limit)—without participation by any public official—what [private insurers] would tend to do, even in the absence of such authorization," *i. e.*, withhold payment for disputed medical treatment pending a determination that the treatment is, in fact, reasonable and necessary. 436 U. S., at 162, n. 12.

The Court of Appeals, in response to the various arguments advanced by respondents, seems to have figuratively thrown up its hands and fallen back on language in our decision in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). The Pennsylvania system, that court said, "inextricably entangles the insurance companies in a partnership with the Commonwealth such that they become an integral part of the state in administering the statutory scheme." 139 F. 3d, at 170. Relying on *Burton*, respondents urge us to affirm the Court of Appeals' holding under a "joint participation" theory of state action.

Burton was one of our early cases dealing with "state action" under the Fourteenth Amendment, and later cases have refined the vague "joint participation" test embodied in that case. *Blum* and *Jackson*, in particular, have established that "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Blum*, 457 U. S., at 1011; see *Jackson*, *supra*, at 357–358. Here, workers' compensation insurers are at least

as extensively regulated as the private nursing facilities in *Blum* and the private utility in *Jackson*. Like those cases, though, the state statutory and regulatory scheme leaves the challenged decisions to the judgment of insurers.

Respondents also rely on *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), which contains general language about "joint participation" as a test for state action. But, as the *Lugar* opinion itself makes clear, its language must not be torn from the context out of which it arose:

> "The Court of Appeals erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. . . . Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Id.*, at 942.

In the present case, of course, there is no effort by petitioners to seize the property of respondents by an *ex parte* application to a state official.

We conclude that an insurer's decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State. Respondents have therefore failed to satisfy an essential element of their § 1983 claim.

III

Though our resolution of the state-action issue would be sufficient by itself to reverse the judgment of the Court of Appeals, we believe the court fundamentally misapprehended the nature of respondents' property interest at stake in this case, with ramifications not only for the state officials who are concededly state actors, but also for the private insurers who (under our holding in Part II) are not. If the Court of Appeals' ruling is left undisturbed, SWIF, which

insures both public and private employers, will be required to pay for all medical treatment (reasonable and necessary or not) within 30 days, while private insurers will be able to defer payment for disputed treatment pending utilization review.[12] Although we denied the petitions for certiorari filed by the school district, 525 U. S. 824 (1998), and the various state officials, 525 U. S. 824 (1998), we granted both questions presented in the petition filed by the private insurance companies. The second question therein states:

> "Whether the Due Process Clause requires workers' compensation insurers to pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary." Pet. for Cert. (i).

This question has been briefed and argued, it is an important one, and it is squarely presented for review. We thus proceed to address it.

The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." See U. S. Const., Amdt. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Mathews* v. *Eldridge*, 424 U. S. 319, 332 (1976). Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process. *Ibid.*

Here, respondents contend that Pennsylvania's workers' compensation law confers upon them a protected property interest in workers' compensation medical benefits. Under state law, respondents assert, once an employer's liability is established for a particular work-related injury, the em-

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[12] SWIF, like all insurers and self-insured employers, is entitled to reimbursement from the state supersedeas fund for treatment later determined to be unreasonable or unnecessary. See n. 2, *supra*. Because this fund is maintained through assessments on all insurers, the Court of Appeals' ruling, if left undisturbed, would likely cause distinct injury to private insurers.

ployer is obligated to pay for certain benefits, including partial wage replacement, compensation for permanent injury or disability, and medical care. See 77 Pa. Stat. Ann. §§ 431, 531 (Purdon Supp. 1998). It follows from this, the argument goes, that medical benefits are a state-created entitlement, and thus an insurer cannot withhold payment of medical benefits without affording an injured worker due process.

In *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), we held that an individual receiving federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in *Mathews*, *supra*, we recognized that the same was true for an individual receiving Social Security disability benefits. In both cases, an individual's entitlement to benefits had been established, and the question presented was whether predeprivation notice and a hearing were required before the individual's interest in *continued* payment of benefits could be terminated. See *Goldberg*, *supra*, at 261–263; *Mathews*, *supra*, at 332.

Respondents' property interest in this case, however, is fundamentally different. Under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer's initial liability is established, as respondents' argument assumes. Instead, the law expressly limits an employee's entitlement to "reasonable" and "necessary" medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise. See 77 Pa. Stat. Ann. § 531(1)(i) (Purdon Supp. 1998) ("The employer shall provide payment . . . for *reasonable* surgical and medical services" (emphasis added)); § 531(5) ("All payments to providers for treatment . . . shall be made within thirty (30) days of receipt of such bills and records *unless the employer or insurer disputes the reasonableness or necessity of the treatment*" (emphasis added)). Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two

hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in *Goldberg* and the recipient of disability benefits in *Mathews*.

Respondents obviously have not cleared both of these hurdles. While they indeed have established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary. Consequently, they do not have a property interest—under the logic of their own argument—in having their providers paid for treatment that has yet to be found reasonable and necessary. To state the argument is to refute it, for what respondents ask in this case is that insurers be required to pay for patently unreasonable, unnecessary, and even fraudulent medical care without any right, under state law, to seek reimbursement from providers. Unsurprisingly, the Due Process Clause does not require such a result.

Having concluded that respondents' due process claim falters for lack of a property interest in the payment of benefits, we need go no further.[13] The judgment of the Court of Appeals is

Reversed.

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

I join Part III of the Court's opinion on the understanding that the Court rejects specifically, and only, respondents' de-

[13] Respondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the argument goes, could not finally reject their claims without affording them appropriate procedural protections. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 430–431 (1982). We therefore need not address this issue. See *Lyng* v. *Payne*, 476 U. S. 926, 942 (1986) (reserving question); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320, n. 8 (1985) (same).

mands for constant payment of each medical bill, within 30 days of receipt, pending determination of the necessity or reasonableness of the medical treatment. See *ante*, at 61, n. 13. I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care. See *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 428–431 (1982); *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 485 (1988); Brief for United States as *Amicus Curiae* 21–22.*

Part III disposes of the instant controversy with respect to all insurers, the State Workmen's Insurance Fund as well as the private insurers. I therefore do not join the Court's extended endeavor, in Part II, to clean up and rein in our "state action" precedent. "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984); see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). While this rule is ordinarily invoked to avoid deciding a constitutional question in lieu of a less tall ground for decision, its counsel of restraint is soundly applied to the instant situation: When a case presents two constitutional questions, one of which disposes of the entire case and the other of which does not, resolution of the case-dispositive question should suffice.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion and its judgment. I agree with Part III insofar as it rejects respond-

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*I agree with JUSTICE STEVENS that, although Pennsylvania's original procedure was deficient, the dispute resolution process now in place meets the constitutional requirement. See *post*, at 64 (opinion concurring in part and dissenting in part).

ents' facial attack on the statute and also points out that respondents "do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves." *Ante*, at 61, n. 13. I would add, however, that there may be individual circumstances in which the receipt of earlier payments leads an injured person reasonably to expect their continuation, in which case that person may well possess a constitutionally protected "property" interest. See, *e. g.*, *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"); *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 262, and n. 8 (1970); *Mathews* v. *Eldridge*, 424 U. S. 319, 332 (1976).

JUSTICE STEVENS, concurring in part and dissenting in part.

Because the individual respondents suffered work-related injuries, they are entitled to have their employers, or the employers' insurers, pay for whatever "reasonable" and "necessary" treatment they may need. Pa. Stat. Ann., Tit. 77, §§ 531(1)(i), (5) (Purdon Supp. 1998). That right—whether described as a "claim" for payment or a "cause of action"—is unquestionably a species of property protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 485 (1988). Disputes over the reasonableness or necessity of particular treatments are resolved by decisionmakers who are state actors and who must follow procedures established by Pennsylvania law. Because the resolution of such disputes determines the scope of the claimants' property interests, the Constitution requires that the procedure be fair. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422

(1982).* That is true whether the claim is asserted against a private insurance carrier or against a public entity that self-insures. It is equally clear that the State's duty to establish and administer a fair procedure for resolving the dispute obtains whether the dispute is initiated by the filing of a claim or by an insurer's decision to withhold payment until the reasonableness issue is resolved.

In my judgment, the significant questions raised by this case are: (1) as in any case alleging that state statutory processes violate the Fourteenth Amendment, whether Pennsylvania's procedure was fair when the case was commenced, and (2), if not, whether it was fair after the State modified its rules in response to the Court of Appeals' decision. See *ante*, at 46, n. 3. In my opinion, the Court of Appeals correctly concluded that the original procedure was deficient because it did not give employees either notice that a request for utilization review would automatically suspend their benefits or an opportunity to provide relevant evidence and argument to the state actor vested with initial decisional authority. I would therefore affirm the judgment of the Court of Appeals insofar as it mandated the change described in the Court's n. 3, *ante*, at 46. I do not, however, find any constitutional defect in the procedures that are now in place, and therefore agree that the judgment should be reversed to the extent that it requires any additional modifications. It is not unfair, in and of itself, for a State to allow either a private or a publicly owned party to withhold payment of a state-created entitlement pending resolution of a dispute over its amount.

Thus, although I agree with much of what the Court has written, I do not join its opinion for two reasons. First, I think it incorrectly assumes that the question whether the

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*As the Court correctly notes, "the State's role in creating, supervising, and setting standards for the URO process [do not] differ in any meaningful sense from the creation and administration of any forum for resolving disputes." *Ante*, at 54.

insurance company is a state actor is relevant to the controlling question whether the state procedures are fair. The relevant state actors, rather than the particular parties to the payment disputes, are the state-appointed decisionmakers who implement the exclusive procedure that the State has created to protect respondents' rights. These state actors are defendants in this suit. See *ante*, at 51. Second, the Court fails to answer either the question whether the State's procedures were fair when the case was filed or the question whether they are fair now.

Syllabus

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT *v.* GARRET F., A MINOR, BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.

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

No. 96–1793. Argued November 4, 1998—Decided March 3, 1999

To help "assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs," 20 U. S. C. § 1400(c), the Individuals with Disabilities Education Act (IDEA) authorizes federal financial assistance to States that agree to provide such children with special education and "related services," as defined in § 1401(a)(17). Respondent Garret F., a student in petitioner school district (District), is wheelchair-bound and ventilator dependent; he therefore requires, in part, a responsible individual nearby to attend to certain physical needs during the schoolday. The District declined to accept financial responsibility for the services Garret needs, believing that it was not legally obligated to provide continuous one-on-one nursing care. At an Iowa Department of Education hearing, an Administrative Law Judge concluded that the IDEA required the District to bear financial responsibility for all of the disputed services, finding that most of them are already provided for some other students; that the District did not contend that only a licensed physician could provide the services; and that applicable federal regulations require the District to furnish "school health services," which are provided by a "qualified school nurse or other qualified person," but not "medical services," which are limited to services provided by a physician. The Federal District Court agreed and the Court of Appeals affirmed, concluding that *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883, provided a two-step analysis of § 1401(a)(17)'s "related services" definition that was satisfied here. First, the requested services were "supportive services" because Garret cannot attend school unless they are provided; and second, the services were not excluded as "medical services" under *Tatro*'s bright-line test: Services provided by a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided by a nurse or qualified layperson are not.

Held: The IDEA requires the District to provide Garret with the nursing services he requires during school hours. The IDEA's "related services" definition, *Tatro*, and the overall statutory scheme support the

Syllabus

Court of Appeals' decision. The "related services" definition broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education," § 1401(a)(17), and the District does not challenge the Court of Appeals' conclusion that the services at issue are "supportive services." Furthermore, § 1401(a)(17)'s general "related services" definition is illuminated by a parenthetical phrase listing examples of services that are included within the statute's coverage, including "medical services" if they are "for diagnostic and evaluation purposes." Although the IDEA itself does not define "medical services" more specifically, this Court in *Tatro* concluded that the Secretary of Education had reasonably determined that "medical services" referred to services that must be performed by a physician, and not to school health services. 468 U. S., at 892–894. The cost-based, multifactor test proposed by the District is supported by neither the statute's text nor the regulations upheld in *Tatro*. Moreover, the District offers no explanation why characteristics such as cost make one service any more "medical" than another. Absent an elaboration of the statutory terms plainly more convincing than that reviewed in *Tatro*, there is no reason to depart from settled law. Although the District may have legitimate concerns about the financial burden of providing the services Garret needs, accepting its cost-based standard as the sole test for determining § 1401(a)(17)'s scope would require the Court to engage in judicial lawmaking without any guidance from Congress. It would also create tension with the IDEA's purposes, since Congress intended to open the doors of public education to all qualified children and required participating States to educate disabled children with nondisabled children whenever possible, *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 192, 202. Pp. 73–79.

106 F. 3d 822, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 79.

Sue Luettjohann Seitz argued the cause for petitioners. With her on the briefs was *Edward M. Mansfield*.

Douglas R. Oelschlaeger argued the cause for respondents. With him on the brief was *Diane Kutzko*.

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging affirmance. With her on the

brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Deputy Solicitor General Underwood*, *David K. Flynn*, and *Seth M. Galanter*.*

JUSTICE STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, was enacted, in part, "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U. S. C. § 1400(c). Consistent with this purpose, the IDEA authorizes federal financial assistance to States that agree to provide disabled children with special education and "related services." See §§ 1401(a)(18), 1412(1). The question presented in this case is whether the definition of "related services" in § 1401(a)(17)[1] requires a public school

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**Gwendolyn H. Gregory* and *Julie Underwood* filed a brief for the National School Boards Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by *Paul M. Smith* and *Nory Miller;* and for the National Association of Protection and Advocacy Systems et al. by *Leslie Seid Margolis.*

[1] "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U. S. C. § 1401(a)(17).

Originally, the statute was enacted without a definition of "related services." See Education of the Handicapped Act, 84 Stat. 175. In 1975, Congress added the definition at issue in this case. Education for All Handicapped Children Act of 1975, § 4(a)(4), 89 Stat. 775. Aside from nonsubstantive changes and added examples of included services, see, *e. g.*, Individuals with Disabilities Education Act Amendments of 1997, § 101, 111 Stat. 45; Individuals with Disabilities Education Act Amendments of 1991, § 25(a)(1)(B), 105 Stat. 605; Education of the Handicapped Act

district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours.

I

Respondent Garret F. is a friendly, creative, and intelligent young man. When Garret was four years old, his spinal column was severed in a motorcycle accident. Though paralyzed from the neck down, his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements. Garret is currently a student in the Cedar Rapids Community School District (District), he attends regular classes in a typical school program, and his academic performance has been a success. Garret is, however, ventilator dependent,[2] and therefore requires a responsible individual nearby to attend to certain physical needs while he is in school.[3]

Amendments of 1990, § 101(c), 104 Stat. 1103, the relevant language in § 1401(a)(17) has not been amended since 1975. All references to the IDEA herein are to the 1994 version as codified in Title 20 of the United States Code—the version of the statute in effect when this dispute arose.

[2] In his report in this case, the Administrative Law Judge explained: "Being ventilator dependent means that [Garret] breathes only with external aids, usually an electric ventilator, and occasionally by someone else's manual pumping of an air bag attached to his tracheotomy tube when the ventilator is being maintained. This later procedure is called ambu bagging." App. to Pet. for Cert. 19a.

[3] "He needs assistance with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. He also needs assistance from someone familiar with his ventilator in the event there is a malfunction or electrical problem, and someone who can perform emergency procedures in the event he experiences autonomic hyperreflexia. Autonomic hyperreflexia is an uncontrolled visceral reaction to anxiety or a full bladder. Blood pressure increases, heart rate increases,

During Garret's early years at school his family provided for his physical care during the schoolday. When he was in kindergarten, his 18-year-old aunt attended him; in the next four years, his family used settlement proceeds they received after the accident, their insurance, and other resources to employ a licensed practical nurse. In 1993, Garret's mother requested the District to accept financial responsibility for the health care services that Garret requires during the schoolday. The District denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services.

Relying on both the IDEA and Iowa law, Garret's mother requested a hearing before the Iowa Department of Education. An Administrative Law Judge (ALJ) received extensive evidence concerning Garret's special needs, the District's treatment of other disabled students, and the assistance provided to other ventilator-dependent children in other parts of the country. In his 47-page report, the ALJ found that the District has about 17,500 students, of whom approximately 2,200 need some form of special education or special services. Although Garret is the only ventilator-dependent student in the District, most of the health care services that he needs are already provided for some other students.[4] "The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support." App. to Pet. for Cert. 28a. The ALJ noted that the parties disagreed over the training or

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and flushing and sweating may occur. Garret has not experienced autonomic hyperreflexia frequently in recent years, and it has usually been alleviated by catheterization. He has not ever experienced autonomic hyperreflexia at school. Garret is capable of communicating his needs orally or in another fashion so long as he has not been rendered unable to do so by an extended lack of oxygen." *Id.*, at 20a.

[4] "Included are such services as care for students who need urinary catheterization, food and drink, oxygen supplement positioning, and suctioning." *Id.*, at 28a; see also *id.*, at 53a.

licensure required for the care and supervision of such students, and that those providing such care in other parts of the country ranged from nonlicensed personnel to registered nurses. However, the District did not contend that only a licensed physician could provide the services in question.

The ALJ explained that federal law requires that children with a variety of health impairments be provided with "special education and related services" when their disabilities adversely affect their academic performance, and that such children should be educated to the maximum extent appropriate with children who are not disabled. In addition, the ALJ explained that applicable federal regulations distinguish between "school health services," which are provided by a "qualified school nurse or other qualified person," and "medical services," which are provided by a licensed physician. See 34 CFR §§ 300.16(a), (b)(4), (b)(11) (1998). The District must provide the former, but need not provide the latter (except, of course, those "medical services" that are for diagnostic or evaluation purposes, 20 U. S. C. § 1401(a)(17)). According to the ALJ, the distinction in the regulations does not just depend on "the title of the person providing the service"; instead, the "medical services" exclusion is limited to services that are "in the special training, knowledge, and judgment of a physician to carry out." App. to Pet. for Cert. 51a. The ALJ thus concluded that the IDEA required the District to bear financial responsibility for all of the services in dispute, including continuous nursing services.[5]

[5] In addition, the ALJ's opinion contains a thorough discussion of "other tests and criteria" pressed by the District, *id.*, at 52a, including the burden on the District and the cost of providing assistance to Garret. Although the ALJ found no legal authority for establishing a cost-based test for determining what related services are required by the statute, he went on to reject the District's arguments on the merits. See *id.*, at 42a–53a. We do not reach the issue here, but the ALJ also found that Garret's in-school needs must be met by the District under an Iowa statute as well as the IDEA. *Id.*, at 54a–55a.

The District challenged the ALJ's decision in Federal District Court, but that court approved the ALJ's IDEA ruling and granted summary judgment against the District. *Id.*, at 9a, 15a. The Court of Appeals affirmed. 106 F. 3d 822 (CA8 1997). It noted that, as a recipient of federal funds under the IDEA, Iowa has a statutory duty to provide all disabled children a "free appropriate public education," which includes "related services." See *id.*, at 824. The Court of Appeals read our opinion in *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883 (1984), to provide a two-step analysis of the "related services" definition in § 1401(a)(17)—asking first, whether the requested services are included within the phrase "supportive services"; and second, whether the services are excluded as "medical services." 106 F. 3d, at 824–825. The Court of Appeals succinctly answered both questions in Garret's favor. The court found the first step plainly satisfied, since Garret cannot attend school unless the requested services are available during the schoolday. *Id.*, at 825. As to the second step, the court reasoned that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." 106 F. 3d, at 825.

In its petition for certiorari, the District challenged only the second step of the Court of Appeals' analysis. The District pointed out that some federal courts have not asked whether the requested health services must be delivered by a physician, but instead have applied a multifactor test that considers, generally speaking, the nature and extent of the services at issue. See, *e. g.*, *Neely* v. *Rutherford County School*, 68 F. 3d 965, 972–973 (CA6 1995), cert. denied, 517 U. S. 1134 (1996); *Detsel* v. *Board of Ed. of Auburn Enlarged City School Dist.*, 820 F. 2d 587, 588 (CA2) *(per curiam)*, cert. denied, 484 U. S. 981 (1987). We granted the District's petition to resolve this conflict. 523 U. S. 1117 (1998).

II

The District contends that § 1401(a)(17) does not require it to provide Garret with "continuous one-on-one nursing services" during the schoolday, even though Garret cannot remain in school without such care. Brief for Petitioner 10. However, the IDEA's definition of "related services," our decision in *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883 (1984), and the overall statutory scheme all support the decision of the Court of Appeals.

The text of the "related services" definition, see n. 1, *supra*, broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." As we have already noted, the District does not challenge the Court of Appeals' conclusion that the in-school services at issue are within the covered category of "supportive services." As a general matter, services that enable a disabled child to remain in school during the day provide the student with "the meaningful access to education that Congress envisioned." *Tatro*, 468 U. S., at 891 ("'Congress sought primarily to make public education available to handicapped children' and 'to make such access meaningful'" (quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 192 (1982))).

This general definition of "related services" is illuminated by a parenthetical phrase listing examples of particular services that are included within the statute's coverage. § 1401(a)(17). "[M]edical services" are enumerated in this list, but such services are limited to those that are "for diagnostic and evaluation purposes." *Ibid.* The statute does not contain a more specific definition of the "medical services" that are excepted from the coverage of § 1401(a)(17).

The scope of the "medical services" exclusion is not a matter of first impression in this Court. In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services

that must be performed by a physician, and not to school health services. 468 U. S., at 892–894. Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, though not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and other services, *ibid.*, but our endorsement of that line was unmistakable.[6] It is thus settled that the phrase

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[6] "The regulations define 'related services' for handicapped children to include 'school health services,' 34 CFR § 300.13(a) (1983), which are defined in turn as 'services provided by a qualified school nurse or other qualified person,' § 300.13(b)(10). 'Medical services' are defined as 'services provided by a licensed physician.' § 300.13(b)(4). Thus, the Secretary has [reasonably] determined that the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such.

. . . . . .

". . . *By limiting the 'medical services' exclusion to the services of a physician or hospital*, both far more expensive, the Secretary has given a permissible construction to the provision." 468 U. S., at 892–893 (emphasis added) (footnote omitted); see also *id.*, at 894 ("[T]he regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician").

Based on certain policy letters issued by the Department of Education, it seems that the Secretary's post-*Tatro* view of the statute has not been entirely clear. *E. g.*, App. to Pet. for Cert. 64a. We may assume that the Secretary has authority under the IDEA to adopt regulations that define the "medical services" exclusion by more explicitly taking into account the nature and extent of the requested services; and the Secretary surely has the authority to enumerate the services that are, and are not, fairly included within the scope of § 1407(a)(17). But the Secretary has done neither; and, in this Court, he advocates affirming the judgment of the Court of Appeals. Brief for United States as *Amicus Curiae* 7–8, 30; see also *Auer* v. *Robbins*, 519 U. S. 452, 462 (1997) (an agency's views as *amicus curiae* may be entitled to deference). We obviously have no authority to rewrite the regulations, and we see no sufficient reason to revise *Tatro*, either.

"medical services" in § 1401(a)(17) does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction. See 26 U. S. C. § 213(d)(1) (1994 ed. and Supp. II) (defining "medical care").

The District does not ask us to define the term so broadly. Indeed, the District does not argue that any of the items of care that Garret needs, considered individually, could be excluded from the scope of 20 U. S. C. § 1401(a)(17).[7] It could not make such an argument, considering that one of the services Garret needs (catheterization) was at issue in *Tatro*, and the others may be provided competently by a school nurse or other trained personnel. See App. to Pet. for Cert. 15a, 52a. As the ALJ concluded, most of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret's ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. *Id.*, at 51a–52a. While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in *Tatro*.

Instead, the District points to the combined and continuous character of the required care, and proposes a test under which the outcome in any particular case would "depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed." Brief for Petitioner 11; see also *id.*, at 34–35.

The District's multifactor test is not supported by any recognized source of legal authority. The proposed factors can be found in neither the text of the statute nor the regulations that we upheld in *Tatro*. Moreover, the District offers no explanation why these characteristics make one service

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[7] See Tr. of Oral Arg. 4–5, 12.

any more "medical" than another. The continuous character of certain services associated with Garret's ventilator dependency has no apparent relationship to "medical" services, much less a relationship of equivalence. Continuous services may be more costly and may require additional school personnel, but they are not thereby more "medical." Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro*, there is no good reason to depart from settled law.[8]

Finally, the District raises broader concerns about the financial burden that it must bear to provide the services that Garret needs to stay in school. The problem for the District in providing these services is not that its staff cannot be trained to deliver them; the problem, the District contends, is that the existing school health staff cannot meet all of their

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[8] At oral argument, the District suggested that we first consider the nature of the requested service (either "medical" or not); then, if the service is "medical," apply the multifactor test to determine whether the service is an excluded physician service or an included school nursing service under the Secretary of Education's regulations. See Tr. of Oral Arg. 7, 13–14. Not only does this approach provide no additional guidance for identifying "medical" services, it is also disconnected from both the statutory text and the regulations we upheld in *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883 (1984). "Medical" services are generally *excluded* from the statute, and the regulations elaborate on that statutory term. No authority cited by the District requires an additional inquiry if the requested service is both "related" and non-"medical." Even if § 1401(a)(17) demanded an additional step, the factors proposed by the District are hardly more useful in identifying "nursing" services than they are in identifying "medical" services; and the District cannot limit educational access simply by pointing to the limitations of existing staff. As we noted in *Tatro*, the IDEA requires schools to hire specially trained personnel to meet disabled student needs. *Id.*, at 893.

responsibilities and provide for Garret at the same time.[9] Through its multifactor test, the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested services. The first two factors can be seen as examples of cost-based distinctions: Intermittent care is often less expensive than continuous care, and the use of existing personnel is cheaper than hiring additional employees. The third factor—the cost of the service—would then encompass the first two. The relevance of the fourth factor is likewise related to cost because extra care may be necessary if potential consequences are especially serious.

The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that *accommodates* the cost concerns Congress may have had, cf. *Tatro*, 468 U. S., at 892, is altogether different from using cost *itself* as the definition. Given that § 1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students com-

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[9] See Tr. of Oral Arg. 4–5, 13; Brief for Petitioner 6–7, 9. The District, however, will not necessarily need to hire an additional employee to meet Garret's needs. The District already employs a one-on-one teacher associate (TA) who assists Garret during the schoolday. See App. to Pet. for Cert. 26a–27a. At one time, Garret's TA was a licensed practical nurse (LPN). In light of the state Board of Nursing's recent ruling that the District's registered nurses may decide to delegate Garret's care to an LPN, see Brief for United States as *Amicus Curiae* 9–10 (filed Apr. 22, 1998), the dissent's future-cost estimate is speculative. See App. to Pet. for Cert. 28a, 58a–60a (if the District could assign Garret's care to a TA who is also an LPN, there would be "a minimum of additional expense").

mensurate with the opportunities provided to other children, see *Rowley*, 458 U. S., at 200; and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA, see *Tatro*, 468 U. S., at 892. But Congress intended "to open the door of public education" to all qualified children and "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible." *Rowley*, 458 U. S., at 192, 202; see *id.*, at 179–181; see also *Honig* v. *Doe*, 484 U. S. 305, 310–311, 324 (1988); §§ 1412(1), (2)(C), (5)(B).[10]

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[10] The dissent's approach, which seems to be even broader than the District's, is unconvincing. The dissent's rejection of our unanimous decision in *Tatro* comes 15 years too late, see *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) (*stare decisis* has "special force" in statutory interpretation), and it offers nothing constructive in its place. Aside from rejecting a "provider-specific approach," the dissent cites unrelated statutes and offers a circular definition of "medical services." *Post*, at 81 (opinion of THOMAS, J.) ("'services' that are 'medical' in 'nature'"). Moreover, the dissent's approach apparently would exclude most ordinary school nursing services of the kind routinely provided to nondisabled children; that anomalous result is not easily attributable to congressional intent. See *Tatro*, 468 U. S., at 893.

In a later discussion the dissent does offer a specific proposal: that we now interpret (or rewrite) the Secretary's regulations so that school districts need only provide disabled children with "health-related services that school nurses can perform as part of their normal duties." *Post*, at 85. The District does not dispute that its nurses "can perform" the requested services, so the dissent's objection is that District nurses would not be performing their "normal duties" if they met Garret's needs. That is, the District would need an "additional employee." *Ibid.* This proposal is functionally similar to a proposed regulation—ultimately withdrawn—that would have replaced the "school health services" provision. See 47 Fed. Reg. 33838, 33854 (1982) (the statute and regulations may not be read to affect legal obligations to make available to handicapped children services, including school health services, made available to nonhandicapped children). The dissent's suggestion is unacceptable for several reasons. Most important, such revisions of the regulations are better left to the Secretary, and an additional staffing need is generally not a sufficient objection to the requirements of § 1401(a)(17). See n. 8, *supra*.

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, dissenting.

The majority, relying heavily on our decision in *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883 (1984), concludes that the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.*, requires a public school district to fund continuous, one-on-one nursing care for disabled children. Because *Tatro* cannot be squared with the text of IDEA, the Court should not adhere to it in this case. Even assuming that *Tatro* was correct in the first instance, the majority's extension of it is unwarranted and ignores the constitutionally mandated rules of construction applicable to legislation enacted pursuant to Congress' spending power.

I

As the majority recounts, *ante*, at 68, IDEA authorizes the provision of federal financial assistance to States that agree to provide, *inter alia*, "special education and related services" for disabled children. § 1401(a)(18). In *Tatro*, *supra*, we held that this provision of IDEA required a school district to provide clean intermittent catheterization to a disabled child several times a day. In so holding, we relied on Department of Education regulations, which we concluded had reasonably interpreted IDEA's definition of "related

services"[1] to require school districts in participating States to provide "school nursing services" (of which we assumed catheterization was a subcategory) but not "services of a physician." *Id.*, at 892–893. This holding is contrary to the plain text of IDEA, and its reliance on the Department of Education's regulations was misplaced.

A

Before we consider whether deference to an agency regulation is appropriate, "we first ask whether Congress has 'directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *National Credit Union Admin.* v. *First Nat. Bank & Trust Co.*, 522 U. S. 479, 499–500 (1998) (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984)).

Unfortunately, the Court in *Tatro* failed to consider this necessary antecedent question before turning to the Department of Education's regulations implementing IDEA's related services provision. The Court instead began "with the regulations of the Department of Education, which," it said, "are entitled to deference." 468 U. S., at 891–892. The Court need not have looked beyond the text of IDEA, which expressly indicates that school districts are not required to provide medical services, except for diagnostic and evaluation purposes. 20 U. S. C. § 1401(a)(17). The majority asserts that *Tatro* precludes reading the term "medical serv-

[1] IDEA currently defines "related services" as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education . . . ." 20 U. S. C. § 1401(a)(17) (emphasis added).

ices" to include "all forms of care that might loosely be described as 'medical.'" *Ante*, at 75. The majority does not explain, however, why "services" that are "medical" in nature are not "medical services." Not only is the definition that the majority rejects consistent with other uses of the term in federal law,[2] it also avoids the anomalous result of holding that the services at issue in *Tatro* (as well as in this case), while not "medical services," would nonetheless qualify as medical care for federal income tax purposes. *Ante*, at 74–75.

The primary problem with *Tatro*, and the majority's reliance on it today, is that the Court focused on the provider of the services rather than the services themselves. We do not typically think that automotive services are limited to those provided by a mechanic, for example. Rather, anything done to repair or service a car, no matter who does the work, is thought to fall into that category. Similarly, the term "food service" is not generally thought to be limited to work performed by a chef. The term "medical" similarly does not support *Tatro*'s provider-specific approach, but encompasses services that are "of, *relating to, or concerned with* physicians *or* with the practice of medicine." See Webster's Third New International Dictionary 1402 (1986) (emphasis added); see also *id.*, at 1551 (defining "nurse" as "a person skilled in caring for and waiting on the infirm, the injured, or the sick; *specif:* one esp. trained to carry out such duties under the supervision of a physician").

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[2] See, *e. g.*, 38 U. S. C. § 1701(6) ("The term 'medical services' includes, in addition to medical examination, treatment, and rehabilitative services— . . . surgical services, dental services . . . , optometric and podiatric services, . . . preventive health services, . . . [and] such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment"); § 101(28) ("The term 'nursing home care' means the accommodation of convalescents . . . who require nursing care and related medical services"); 26 U. S. C. § 213(d)(1) ("The term 'medical care' means amounts paid—. . . for the diagnosis, cure, mitigation, treatment, or prevention of disease").

IDEA's structure and purpose reinforce this textual interpretation. Congress enacted IDEA to increase the *educational* opportunities available to disabled children, not to provide medical care for them. See 20 U. S. C. § 1400(c) ("It is the purpose of this chapter to assure that all children with disabilities have . . . a free appropriate public education"); see also § 1412 ("In order to qualify for assistance . . . a State shall demonstrate . . . [that it] has in effect a policy that assures all children with disabilities the right to a free appropriate public education"); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children"). As such, where Congress decided to require a supportive service—including speech pathology, occupational therapy, and audiology—that appears "medical" in nature, it took care to do so explicitly. See § 1401(a)(17). Congress specified these services precisely because it recognized that they would otherwise fall under the broad "medical services" exclusion. Indeed, when it crafted the definition of related services, Congress could have, but chose not to, include "nursing services" in this list.

B

Tatro was wrongly decided even if the phrase "medical services" was subject to multiple constructions, and therefore, deference to any reasonable Department of Education regulation was appropriate. The Department of Education has never promulgated regulations defining the scope of IDEA's "medical services" exclusion. One year before *Tatro* was decided, the Secretary of Education issued proposed regulations that defined excluded medical services as "services relating to the practice of medicine." 47 Fed. Reg. 33838 (1982). These regulations, which represent the Department's only attempt to define the disputed term, were never adopted. Instead, "[t]he regulations actually define only those 'medical services' that *are* owed to handicapped

children," *Tatro*, 468 U. S., at 892, n. 10 (emphasis in original), not those that *are not*. Now, as when *Tatro* was decided, the regulations require districts to provide services performed "'by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.'" *Ibid.* (quoting 34 CFR §300.13(b)(4) (1983), recodified and amended as 34 CFR §300.16(b)(4) (1998).

Extrapolating from this regulation, the *Tatro* Court presumed that this meant that "'medical services' not owed under the statute are those 'services by a licensed physician' that serve other purposes." *Tatro*, *supra*, at 892, n. 10 (emphasis deleted). The Court, therefore, did not defer to the regulation itself, but rather relied on an inference drawn from it to speculate about how a regulation might read if the Department of Education promulgated one. Deference in those circumstances is impermissible. We cannot defer to a regulation that does not exist.[3]

II

Assuming that *Tatro* was correctly decided in the first instance, it does not control the outcome of this case. Because IDEA was enacted pursuant to Congress' spending power, *Rowley*, *supra*, at 190, n. 11, our analysis of the statute in this case is governed by special rules of construction. We have repeatedly emphasized that, when Congress places conditions on the receipt of federal funds, "it must do so unambiguously." *Pennhurst State School and Hospital* v. *Hal-*

[3] Nor do I think that it is appropriate to defer to the Department of Education's litigating position in this case. The agency has had ample opportunity to address this problem but has failed to do so in a formal regulation. Instead, it has maintained conflicting positions about whether the services at issue in this case are required by IDEA. See *ante*, at 74, n. 6. Under these circumstances, we should not assume that the litigating position reflects the "agency's fair and considered judgment." *Auer* v. *Robbins*, 519 U. S. 452, 462 (1997).

derman, 451 U. S. 1, 17 (1981). See also *Rowley*, *supra*, at 190, n. 11; *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987); *New York* v. *United States*, 505 U. S. 144, 158 (1992). This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 286 (1998). As such, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, *supra*, at 17 (citations omitted). It follows that we must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.

The majority's approach in this case turns this Spending Clause presumption on its head. We have held that, in enacting IDEA, Congress wished to require "States to educate handicapped children with nonhandicapped children whenever possible," *Rowley*, *supra*, at 202. Congress, however, also took steps to limit the fiscal burdens that States must bear in attempting to achieve this laudable goal. These steps include requiring States to provide an education that is only "appropriate" rather than requiring them to maximize the potential of disabled students, see 20 U. S. C. § 1400(c); *Rowley*, *supra*, at 200, recognizing that integration into the public school environment is not always possible, see § 1412(5), and clarifying that, with a few exceptions, public schools need not provide "medical services" for disabled students, §§ 1401(a)(17) and (18).

For this reason, we have previously recognized that Congress did not intend to "impos[e] upon the States a burden of unspecified proportions and weight" in enacting IDEA. *Rowley*, *supra*, at 190, n. 11. These federalism concerns require us to interpret IDEA's related services provision, con-

sistent with *Tatro*, as follows: Department of Education regulations require districts to provide disabled children with health-related services that school nurses can perform as part of their normal duties. This reading of *Tatro*, although less broad than the majority's, is equally plausible and certainly more consistent with our obligation to interpret Spending Clause legislation narrowly. Before concluding that the district was required to provide clean intermittent catheterization for Amber Tatro, we observed that school nurses in the district were authorized to perform services that were "difficult to distinguish from the provision of [clean intermittent catheterization] to the handicapped." *Tatro*, 468 U. S., at 893. We concluded that "[i]t would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Id.*, at 893–894.

Unlike clean intermittent catheterization, however, a school nurse cannot provide the services that respondent requires, see *ante*, at 69–70, n. 3, and continue to perform her normal duties. To the contrary, because respondent requires continuous, one-on-one care throughout the entire schoolday, all agree that the district must hire an additional employee to attend solely to respondent. This will cost a minimum of $18,000 per year. Although the majority recognizes this fact, it nonetheless concludes that the "more extensive" nature of the services that respondent needs is irrelevant to the question whether those services fall under the medical services exclusion. *Ante*, at 75. This approach disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they could not have anticipated.

* * *

For the foregoing reasons, I respectfully dissent.

Syllabus

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309 *v.* DEPARTMENT OF THE INTERIOR ET AL.

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

No. 97–1184. Argued November 9, 1998—Decided March 3, 1999*

As relevant here, the Federal Service Labor-Management Relations Statute (Statute) requires federal agencies and their employees' unions to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement," 5 U. S. C. § 7114(a)(4); and creates the Federal Labor Relations Authority, giving it broad adjudicatory, policymaking, and rulemaking powers to implement the Statute, §§ 7104, 7105. The Authority initially held that § 7114(a)(4)'s good-faith-bargaining requirement does not extend to union-initiated proposals during the term of the basic contract. The D. C. Circuit disagreed, and in response, the Authority reversed its position. In this suit, a federal employees' union proposed including in its basic contract with a subagency of the Department of the Interior (Agency) a provision obligating the Agency to negotiate, at the union's request, about midterm matters not in the original contract. Relying on the Fourth Circuit's view that union-initiated midterm bargaining is inconsistent with the Statute, the Agency refused to accept, or bargain about, the proposed clause. However, the Authority ordered the Agency to bargain. The Fourth Circuit set aside that order, holding that the Statute prohibits such a provision.

Held: The Statute delegates to the Authority the legal power to determine whether parties must engage in midterm bargaining or bargaining about midterm bargaining. Pp. 91–101.

(a) The Statute itself does not resolve the midterm bargaining question. Section 7114(a)(4)'s language is sufficiently ambiguous or open on the point as to require judicial deference to reasonable interpretation or elaboration by the agency charged with the Statute's execution. Such ambiguity is inconsistent both with the Fourth Circuit's absolute reading that the Statute prohibits midterm bargaining and with the D. C. Circuit's similarly absolute, but opposite, reading. It is perfectly consistent, however, with the conclusion that Congress delegated to the

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*Together with No. 97–1243, *Federal Labor Relations Authority* v. *Department of the Interior et al.*, also on certiorari to the same court.

Syllabus

Authority the power to determine whether, when, where, and what sort of midterm bargaining is required. This conclusion is supported by the Statute's delegation of rulemaking, adjudicatory, and policymaking powers to the Authority and by precedent recognizing the similarity of the Authority's public-sector and the National Labor Relations Board's private-sector roles, see *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 97. Pp. 91–99.

(b) For similar reasons, the Statute also grants the Authority leeway in answering the question whether an agency must bargain endterm about including in the basic labor contract a midterm bargaining clause. The Authority's judgment that the parties must bargain over such a provision was occasioned by the D. C. Circuit's holding that the Statute imposes a duty to bargain midterm. Since the Statute does not resolve the question of midterm bargaining, nor the related question of bargaining about midterm bargaining, the Authority should have the opportunity to consider these questions aware that the Statute permits, but does not compel, the conclusions it reached. Pp. 99–101.

132 F. 3d 157, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, and in which SCALIA and THOMAS, JJ., joined as to Part I, *post*, p. 101.

Gregory O'Duden argued the cause for petitioner in No. 97–1184. With him on the briefs was *Barbara A. Atkin*. *David M. Smith* argued the cause for petitioner in No. 97–1243. With him on the brief was *James F. Blandford*.

Irving L. Gornstein argued the cause for the Department of the Interior in both cases. On the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Underwood*, *Jonathan E. Nuechterlein*, *William Kanter*, *Robert M. Loeb*, and *Sushma Soni*.†

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†*Jonathan P. Hiatt*, *James B. Coppess*, *Marsha S. Berzon*, *Laurence Gold*, *Mark D. Roth*, and *Kevin M. Grile* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging reversal.

JUSTICE BREYER delivered the opinion of the Court.

The Federal Service Labor-Management Relations Statute requires federal agencies and the unions that represent their employees to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U. S. C. § 7114(a)(4). We here consider whether that duty to bargain extends to a clause proposed by a union that would bind the parties to bargain midterm—that is, while the basic comprehensive labor contract is in effect—about subjects not included in that basic contract. We vacate a lower court holding that the statutory duty to bargain does not encompass midterm bargaining (or bargaining about midterm bargaining). We conclude that the Statute delegates to the Federal Labor Relations Authority the legal power to determine whether the parties must engage in midterm bargaining (or bargaining about that matter). We remand these cases so that the Authority may exercise that power.

I

Congress enacted the Federal Service Labor-Management Relations Statute (Statute or FSLMRS) in 1978. See 5 U. S. C. § 7101 *et seq.* Declaring that "labor organizations and collective bargaining in the civil service are in the public interest," § 7101(a), the Statute grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices. See §§ 7114(a)(1), 7116. It creates the Federal Labor Relations Authority, which it makes responsible for implementing the Statute through the exercise of broad adjudicatory, policymaking, and rulemaking powers. §§ 7104, 7105. And it establishes within the Authority a Federal Service Impasses Panel, to which it grants the power to resolve negotiation impasses through compulsory arbitration, § 7119, hence without the strikes that the law forbids to federal employees, § 7116(b)(7).

Of particular relevance here, the Statute requires a federal agency employer to "meet" with the employees' collective-bargaining representative and to "negotiate in good faith for the purposes of arriving at a collective bargaining agreement." § 7114(a)(4). The Courts of Appeals disagree about whether, or the extent to which, this good-faith-bargaining requirement extends to midterm bargaining. Suppose, for example, that the federal agency and the union negotiate a basic 5-year contract. In the third year a matter arises that the contract does not address. If the union seeks negotiations about the matter, does the Statute require the agency to bargain then and there, or can the agency wait for basic contract renewal negotiations? Does it matter whether the basic contract itself contains a "zipper clause" expressly forbidding such bargaining? Does it matter whether the basic contract itself contains a clause expressly permitting midterm bargaining? Can the parties insist upon bargaining endterm (that is, during the negotiations over adopting or renewing a basic labor contract) about whether to include one or the other such clauses in the basic contract itself?

In 1985 the Authority began to answer some of these questions. It considered a union's effort to force midterm negotiations about a matter the basic labor contract did not address, and it held that the Statute *did not* require the agency to bargain. *Internal Revenue Service*, 17 F. L. R. A. 731 (1985) *(IRS I)*.

The Court of Appeals for the District of Columbia Circuit, however, set aside the Authority's ruling. The court held that in light of the intent and purpose of the Statute, it must be read to require midterm bargaining, inasmuch as it did not create any distinction between bargaining at the end of a labor contract's term and bargaining during that term. *National Treasury Employees Union* v. *FLRA*, 810 F. 2d 295 (1987) *(NTEU)*. On remand the Authority reversed its earlier position. *Internal Revenue Service*, 29 F. L. R. A.

162, 166 (1987) *(IRS II)*. Accepting the D. C. Circuit's analysis, the Authority held:

> "[T]he duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters which are not addressed in the [basic] agreement and were not clearly and unmistakably waived by the union during negotiation of the agreement." *Id.*, at 167.

The Fourth Circuit has taken a different view of the matter. It has held that "union-initiated midterm bargaining is not required by the statute and would undermine the congressional policies underlying the statute." *Social Security Administration* v. *FLRA*, 956 F. 2d 1280, 1281 (1992) (*SSA*). Nor, in its view, may the basic labor contract itself impose a midterm bargaining duty upon the parties. *Department of Energy* v. *FLRA*, 106 F. 3d 1158, 1163 (1997) (holding unlawful a midterm bargaining clause that the Federal Service Impasses Panel had imposed upon the parties' basic labor contract).

In the present suit, the National Federation of Federal Employees, Local 1309 (Union), representing employees of the United States Geological Survey, a subagency of the Department of the Interior (Agency), proposed including in the basic labor contract a midterm bargaining provision that said:

> "The Union may request and the Employer will be obliged to negotiate [midterm] on any negotiable matters not covered by the provisions of this [basic] agreement." *Department of Interior*, 52 F. L. R. A. 475, 476 (1996).

The Agency, relying on the Fourth Circuit's view that the Statute prohibits such a provision, refused to accept, or to bargain about, the proposed clause. The Authority, reiterating its own (and the D. C. Circuit's) contrary view, held that the Agency's refusal to bargain amounted to an unfair labor practice. *Id.*, at 479–481. The Statute itself, said the Au-

thority, imposes an obligation to engage in midterm bargaining—an obligation that the proposed clause only reiterates. *Id.*, at 479–480. And even if such an obligation did not exist under the Statute, the Authority added, a proposal to create a *contractual* obligation to bargain midterm is a fit subject for endterm negotiation. *Id.*, at 480–481. Consequently, the Authority ordered the Agency to bargain over the proposed clause.

The Fourth Circuit set aside the Authority's order. 132 F. 3d 157 (1997). The court reiterated its own view that the Statute itself does not impose any midterm bargaining duty. *Id.*, at 161–162. That being so, it concluded, the parties should not be required to bargain endterm about including a clause that would require bargaining midterm. The court reasoned that once bargaining over such a clause began, the employer would have no choice but to accept the clause. Were the employer not to do so (by bargaining to impasse over the proposed clause), the Federal Service Impasses Panel would then inevitably insert the clause over the employer's objection, as the Impasses Panel (like the D. C. Circuit) believes that a midterm bargaining clause would merely reiterate the duty to bargain midterm that the Statute itself imposes. *Ibid.*

We granted certiorari to consider the conflicting views of the Circuits.

II

We shall focus primarily upon the basic question that divided the Circuits: Does the Statute itself impose a duty to bargain during the term of an existing labor contract? The Fourth Circuit thought that the Statute did not impose a duty to bargain midterm and that the matter was sufficiently clear to warrant judicial rejection of the contrary view of the agency charged with the Statute's administration. *SSA*, *supra*, at 1284 (stating that "'Congress has directly spoken to the precise question at issue,'" and quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U. S. 837, 842 (1984)). We do not agree with the Fourth Circuit, for we find the Statute's language sufficiently ambiguous or open on the point as to require judicial deference to reasonable interpretation or elaboration by the agency charged with its execution. See *id.*, at 842–845; *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 644–645 (1990).

The D. C. Circuit, the Fourth Circuit, and the Authority all agree that the Statute itself does not expressly address union-initiated midterm bargaining. See *NTEU*, *supra*, at 298; *SSA*, *supra*, at 1284; Brief for Petitioner FLRA in No. 97–1243, p. 18. The Statute's relevant language simply says that federal agency employer and union representative "shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U. S. C. § 7114(a)(4). It defines the key term "collective bargaining agreement" as an "agreement entered into as a result of collective bargaining." § 7103(a)(8). And it goes on to define "collective bargaining" as involving the meeting of employer and employee representatives "at reasonable times" to "consult" and to "bargain in a good-faith effort to reach agreement with respect to the conditions of employment," incorporating "any collective bargaining agreement reached" as a result of these negotiations in "a written document." § 7103(a)(12). This language, taken literally, may or may not include a duty to bargain collectively midterm.

The Agency, here represented by the Solicitor General, argues that in context, this language *must* exclude midterm bargaining. We shall explain why we do not agree with each of the Agency's basic arguments.

First, the Agency makes a variety of linguistic arguments. As an initial matter, it emphasizes the words "arriving at" in the Statute's general statement that the parties must bargain "for the purposes of *arriving at* a collective bargaining agreement." This statement tends to exclude midterm bargaining, the Agency contends, because parties engage in midterm bargaining, not for the purpose of *arriving at*, but

for the purpose of *supplementing,* their basic, comprehensive labor contract. In other words, the basic collective-bargaining agreement is the only appropriate destination at which negotiations might "arriv[e]." The Agency adds that "collective bargaining agreement" is a term of art, which only and always refers to basic labor contracts, not to midterm agreements.

Further, while the Agency acknowledges that there is a duty to bargain midterm in the private sector, see *NLRB* v. *Jacobs Manufacturing Co.*, 196 F. 2d 680 (CA2 1952), it argues that this private-sector duty is based upon language in the National Labor Relations Act (NLRA) that is different in significant respects from the language in the Statute here. The Agency explains that the NLRA defines private-sector collective bargaining to include (1) negotiation "with respect to wages, hours, and other terms and conditions of employment, *or* [(2)] the negotiation of an agreement, or any question arising thereunder." 29 U. S. C. § 158(d) (emphasis added). The "or," under this view, indicates that private-sector employers have a comprehensive duty to "bargain collectively" whether or not such bargaining is part of "the negotiation of an agreement" leading to "written contract."

In our view, these linguistic arguments, while logical, make too much of too little. One can easily read "arriving at *a collective bargaining agreement*" as including an agreement reached at the conclusion of midterm bargaining, particularly because the Statute itself does no more than define the relevant term "collective bargaining agreement" in a circular way—as "an agreement entered into as a result of collective bargaining." 5 U. S. C. § 7103(a)(8). Nor have we found any statute, judicial opinion, agency document, or treatise that says whether the words "collective bargaining agreement" are words of art that must necessarily exclude midterm agreements. Finally, the linguistic differences between the NLRA and the FSLMRS tell us little, particularly given the fact that the two labor statutes, like collective bar-

gaining itself, are not otherwise identical in the two sectors. For all these reasons, we find in the relevant statutory language ambiguity, not certainty.

Second, the Agency—like the Fourth Circuit—contends that the Statute's policies demand a reading of the statutory language that would exclude midterm bargaining from its definition of "collective bargaining." The availability of midterm bargaining, the Agency argues, might lead unions to withhold certain subjects from ordinary endterm negotiations and then to raise them during the term, under more favorable bargaining conditions. A union might conclude, for example, that it is more likely to get what it wants by presenting a proposal during the term (when no other issues are on the table and a compromise is less likely) and then negotiating to impasse, thus leaving the matter for the Federal Service Impasses Panel to resolve. The Agency also points out that public-sector and private-sector bargaining differ in this respect. Private-sector unions enforce their views through strikes, and because they hesitate to strike midterm, they also have no particular incentive to bargain midterm. But public-sector unions enforce their views through compulsory arbitration, not strikes. Hence, the argument goes, public-sector unions have a unique incentive to bargain midterm on a piecemeal basis, thereby threatening to undermine the basic collective-bargaining process. See, *e. g.*, *SSA*, 956 F. 2d, at 1288–1289.

Other policy concerns, however, argue for a different reading of the Statute. Without midterm bargaining, for example, will it prove possible to find a collective solution to a workplace problem, say, a health or safety hazard, that first appeared midterm? The Statute's emphasis upon collective bargaining as "contribut[ing] to the effective conduct of public business," 5 U. S. C. § 7101(a)(1)(B), suggests that it would favor joint, not unilateral, solutions to such midterm problems.

The Authority would seem better suited than a court to make the workplace-related empirical judgments that would help properly balance these, and other, policy-related considerations. The Statute does not indicate that Congress itself decided to make these specific policy judgments. Hence the Agency's policy arguments illustrate the need for the Authority's elaboration or refinement of the basic statutory collective-bargaining obligation; they illustrate the appropriateness of judicial deference to considered Authority views on the matter; and, most importantly, they do not narrow the scope of a statutory provision the language of which is consistent with a variety of interpretations.

Third, the Agency argues that the Statute's history and prior administrative practice support its view that federal agencies have no duty to bargain midterm. The Statute grew out of an Executive Order that previously had governed federal-sector labor relations. See Exec. Order No. 11491, 3 CFR 861 (1966–1970 Comp.), as amended by Exec. Order Nos. 11616, 11636, and 11838, 3 CFR 605, 634, 957 (1971–1975 Comp.). In support, the Agency cites a case in which an Assistant Secretary of Labor, applying that Executive Order, dismissed an unfair labor practice complaint on the ground, among others, that a federal agency need not bargain over midterm union proposals. *Army and Air Force Exchange Serv., Capital Exchange Region Headquarters*, Case No. 22–6657(CA), 2 Rulings on Requests for Review of Assistant Secretary of Labor for Labor-Management Relations 561–562 (1976) (not reviewed by the Federal Labor Relations Council, predecessor to the Authority); see *IRS I*, 17 F. L. R. A., at 736–737, n. 7 (finding, based upon this decision, that there was no obligation to bargain over midterm union proposals under the Executive Order). A single alternative ground, however—in a single, unreviewed decision from before the Statute was enacted—does not demonstrate the kind of historical practice that one might assume would

be reflected in the Statute, particularly when at least one treatise suggested at the time that federal labor relations practice was to the contrary. See H. Robinson, Negotiability in the Federal Sector 10–11, and n. 9 (1981) (stating that under the Executive Order both unions and agencies had a continuing duty to bargain through the term of a basic labor contract).

The Agency also points to a Senate Report in support of its interpretation of the Statute. That Report speaks of the parties' "mutual duty to bargain" with respect to (1) "changes in established personnel policies proposed by management," and (2) "negotiable proposals initiated by either the agency or [the union] . . . in the context of negotiations *leading to a basic collective bargaining agreement.*" S. Rep. No. 95–969, p. 104 (1978) (emphasis added). This Report, however, concerns a bill that contains language similar to the language before us but was not enacted into law. According to the D. C. Circuit, at least, any distinction between basic and midterm bargaining that is indicated by this passage "did not survive the rejection by Congress of the Senate's restrictive view of the rights of labor and the importance of collective bargaining." *NTEU,* 810 F. 2d, at 298. In any event, the Report's list of possible occasions for collective bargaining does not purport to be an exclusive list; it does not say that the Statute was understood to exclude midterm bargaining; and any such implication is simply too distant to control our reading of the Statute.

Fourth, the Agency and the Fourth Circuit contend that the "management rights" provision of the Statute, 5 U. S. C. § 7106, *does* authorize limited midterm bargaining in respect to certain matters (not here at issue), and that by negative implication it denies permission to bargain midterm in respect to any others. See, *e. g.*, *SSA*, *supra,* at 1284 ("The inclusion of a specific duty of midterm effects bargaining . . . suggests the inadvisability of reading a more general duty into the statute"). Our examination of that provision,

however, finds little support for such a strong negative implication.

Subsection (a) of the management rights provision withdraws from collective bargaining certain subjects that it reserves exclusively for decision by management. It specifies, for example, that federal agency "management official[s]" will retain their authority to hire, fire, promote, and assign work, and also to determine the agency's "mission, budget, organization, number of employees, and internal security practices." § 7106(a).

Subsection (b), however, permits a certain amount of collective bargaining in respect to the very subjects that subsection (a) withdrew. Subsection (b) states:

> "*Nothing in this section shall preclude* any agency and any labor organization from negotiating—
>
> "(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> "(2) procedures which management officials . . . will observe in exercising any authority under this section; or
>
> "(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." § 7106(b) (emphasis added).

The two subsections of the management rights provision, taken together, do not help the Agency. While the provision contemplates that bargaining over the impact and implementation of management changes may take place during the term of the basic labor contract, subsection (b) need not be read to actually impose a duty to bargain midterm. The italicized clause, "[n]othing in this section shall preclude," indicates only that the delegation of certain rights to man-

agement (*e. g.*, promotions) shall not *preclude* negotiations about certain related matters (*e. g.*, promotion procedures). By its terms, then, subsection (b) does nothing more than create an exception to subsection (a), preserving the duty to bargain with respect to certain matters otherwise committed to the discretion of management. Because § 7106(b) chiefly addresses the subject matter of bargaining and not the timing, one could reasonably conclude that while that subsection contemplates midterm bargaining in the circumstances there specified, the duty to bargain midterm finds its source elsewhere in the Statute. Hence, the management rights provision seems to hurt, as much as to help, the Agency's basic argument.

The upshot of this analysis is that where the Agency and the Fourth Circuit find a clear statutory denial of any midterm bargaining obligation, we find ambiguity created by the Statute's use of general language that might, or might not, encompass various forms of midterm bargaining. That kind of statutory ambiguity is inconsistent both with the Fourth Circuit's absolute reading of the Statute and also with the D. C. Circuit's similarly absolute, but opposite, reading. Compare *SSA*, 956 F. 2d, at 1284, with *NTEU*, 810 F. 2d, at 301 (rejecting the Authority's position that there is no duty to bargain midterm on the ground that it is "contrary to the intent of the legislature and the guiding purpose of the statute"). Indeed, the D. C. Circuit's analysis implicitly concedes the need to make at least *some* midterm bargaining distinctions, when it assumes that the midterm bargaining obligation does not extend to matters that are covered by the basic contract. See *id.*, at 296.

The statutory ambiguity is perfectly consistent, however, with the conclusion that Congress delegated to the Authority the power to determine—within appropriate legal bounds, see, *e. g.*, 5 U. S. C. § 706 (Administrative Procedure Act); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*,

Inc., 467 U. S. 837 (1984)—whether, when, where, and what sort of midterm bargaining is required. The Statute's delegation of rulemaking, adjudicatory, and policymaking powers to the Authority supports this conclusion. See 5 U. S. C. § 7105(a)(1) ("Authority shall provide leadership in establishing policies and guidance"); § 7105(a)(2)(E) (Authority "resolves issues relating to the duty to bargain in good faith"); § 7117(c) (Authority resolves disputes about whether the duty to bargain in good faith extends to a particular matter); accord, *American Federation of Govt. Employees, Local 2986, AFL–CIO* v. *FLRA*, 775 F. 2d 1022, 1027 (CA9 1985); *American Federation of Govt. Employees, AFL–CIO, Council of Soc. Sec. Dist. Office Locals, San Francisco Region* v. *FLRA*, 716 F. 2d 47, 50 (CADC 1983). This conclusion is also supported by precedent recognizing the similarity of the Authority's public-sector and the National Labor Relations Board's private-sector roles. As we have recognized, the Authority's function is "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act," and it "is entitled to considerable deference when it exercises its 'special function of applying the general provisions of the Act to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 97 (1983) (quoting *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963)).

We conclude that Congress "left" the matters of whether, when, and where midterm bargaining is required "to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron*, *supra*, at 865–866.

III

The specific question before us is whether an agency must bargain endterm about including in the basic labor contract a clause that would require certain forms of midterm bar-

gaining. As is true of midterm bargaining itself, and for similar reasons, the Statute grants the Authority leeway (within ordinary legal limits) in answering that question as well.

The Authority says that it has determined, as a matter of its own judgment, that the parties must bargain over such a provision. Our reading of its relevant administrative determinations, however, leads us to conclude that its judgment on the matter was occasioned by the D. C. Circuit's holding that the Statute must be read to impose on agencies a duty to bargain midterm. See, *e. g.*, *Merit Systems Protection Bd. Professional Assn.*, 30 F. L. R. A. 852, 859–860 (1988) (midterm bargaining clause is negotiable because it "reiterates a right the Union has under the Statute"); 52 F. L. R. A., at 479 (in the instant suit, restating that same conclusion). The Authority did indicate below that even if it agreed with the Fourth Circuit's position that the Statute does not impose a duty to bargain midterm, the outcome in this litigation would be no different, as the Authority " 'has previously upheld the negotiability of proposals despite the absence of a statutory right concerning the matter in question.' " *Id.*, at 480 (quoting *Department of Energy*, 51 F. L. R. A. 124, 127 (1995), enf. denied, *Department of Energy* v. *FLRA*, 106 F. 3d 1158 (CA4 1997)). This explanation, however, seems more an effort to respond to, and to distinguish, a contrary judicial authority, rather than an independently reasoned effort to develop complex labor policies. Regardless, the Authority's conclusion would seem linked to the D. C. Circuit's basic understanding about the statutory requirements.

In light of our determination that the Statute does not resolve the question of midterm bargaining, nor the related question of bargaining about midterm bargaining, we believe the Authority should have the opportunity to consider these questions aware that the Statute permits, but does not compel, the conclusions it reached.

The judgment of the Fourth Circuit is vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'Connor, with whom The Chief Justice joins, and with whom Justice Scalia and Justice Thomas join as to Part I, dissenting.

The Court today ignores the plain meaning of the Federal Service Labor-Management Relations Statute (Federal Labor Statute or Statute) and erroneously concludes that when an agency responds to a judicial decision by abandoning its own interpretation of a statute and adopting that of the judicial forum this Court should defer to the agency's revised position, rather than evaluate whether the revised interpretation renders, in fact, the most plausible reading of the statute. I respectfully dissent.

I

The Federal Labor Statute plainly does not impose a general duty on agencies to bargain midterm. See *Social Security Administration* v. *FLRA*, 956 F. 2d 1280, 1281 (CA4 1992). Whether the language of a statute is plain or ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997).

Here, the language of the Federal Labor Statute, as well as the specific and broader contexts in which that language is used, demonstrates that the Statute is unambiguous. The Federal Labor Statute specifies a few instances where midterm bargaining is required, see 5 U. S. C. § 7106(b), but it contains no provision that expressly or implicitly imposes a *general* duty on agencies to bargain during the term of a collective bargaining agreement. Rather, Congress defined

the general duty to bargain to include only a duty to "meet and negotiate in good faith for the purposes of *arriving at a collective bargaining agreement*," § 7114(a)(4) (emphasis added), and obligated agencies to negotiate "with a sincere resolve to reach *a collective bargaining agreement*," § 7114(b)(1) (emphasis added); see also § 7114(b)(5) (requiring parties "to take such steps as are necessary to implement such agreement"). The term "arrive" is commonly understood to mean "to reach a destination" or "to gain or achieve an end." See Webster's Third New International Dictionary 121 (1976). Thus, by its terms, the Federal Labor Statute requires an agency to "meet and negotiate in good faith" with unions only "for the purposes of" achieving an end: a comprehensive collective bargaining agreement. See also § 7103(a)(8) (defining "collective bargaining agreement" as "an agreement" reached through collective bargaining); § 7103(a)(12) (defining "collective bargaining," in part, as "to reach [an] agreement with respect to the conditions of employment").

The Court suggests that, because a midterm bargaining agreement is an end agreement of negotiation, the duty to bargain may encompass midterm agreements as well. See *ante*, at 93. As the word "midterm" suggests, however, such agreements are only a "midpoint" in the term of the underlying collective bargaining agreement. Because such agreements do not stand alone but relate back to the primary collective bargaining agreement, a midterm agreement is most appropriately regarded as a modification of, or a supplement to, the primary agreement reached pursuant to the Federal Labor Statute. See, *e. g.*, 29 U. S. C. § 158(d) (describing midterm bargaining agreements in private sector as "modification[s]" to the primary agreement). The Federal Labor Statute expresses no *general* duty on the part of agencies to negotiate modifications or supplements to an existing collective bargaining agreement. With respect to modifications and supplements, the Statute requires only that agen-

cies bargain over a few specified topics. See 5 U. S. C. § 7106(b).

Section 7106(b) *obligates* an agency to bargain midterm over specified agency initiatives, such as the creation of "procedures which management officials of the agency will observe in exercising any authority" under the Federal Labor Statute. § 7106(b)(2); see also § 7106(b)(3) (providing for bargaining over "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials"); *American Federation of Government Employees, AFL–CIO, Local 2782* v. *FLRA*, 702 F. 2d 1183, 1186–1187 (CADC 1983). Because the Statute specifies a few, limited topics that are subject to midterm bargaining, it cannot be construed to require midterm bargaining generally. Such a construction, indeed, renders the specific and general obligations redundant. See, *e. g., United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 36 (1992).

The Court reasons that § 7106(b) does not define a limited duty to bargain midterm because it merely defines exceptions to § 7106(a), which, in turn, defines managerial rights that are themselves exceptions to the duties outlined in the Statute. Moreover, because the section's introductory language "indicates only that the delegation of certain rights to management . . . shall not *preclude* negotiations about certain related matters," see *ante*, at 97–98, the Court suggests that § 7106(b) defines a permissive exception to an exception rather than an obligation. It thus follows from the structure and text of § 7106(b) that "the duty to bargain midterm finds its source elsewhere in the Statute." *Ante*, at 98.

The Court's reliance on § 7106(b)'s introductory language is misplaced because the subparts of § 7106(b) indicate that this section defines an obligation, not a permissive exception. Specifically, although § 7106(b)(1) provides that an agency at its election can initiate bargaining on working conditions, §§ 7106(b)(2) and (b)(3) are mandatory, *requiring* that agen-

cies bargain midterm over the matters specified. At the very least, §§ 7106(b)(2) and (b)(3) demonstrate that Congress intended to impose only a limited duty on agencies to bargain midterm. Even assuming § 7106(b) is permissive, there is no basis for the Court's conclusion that this section demonstrates that a generalized duty to bargain midterm emanates from another statutory source; indeed, there is no other provision of the Statute from which such a duty could emanate. See *ante,* at 98. Accordingly, it is plain from its language and structure that a general duty to engage in midterm bargaining is not prescribed by the Federal Labor Statute.

That the Federal Labor Statute contemplates a single end agreement, and not supplementary agreements or modifications, is also demonstrated by a comparison of it to the National Labor Relations Act (NLRA), the Statute's private-sector counterpart. The duty to bargain, as defined in the NLRA, includes "the negotiation of an agreement, *or any question arising thereunder.*" 29 U. S. C. § 158(d) (emphasis added). This broad definition of the duty, which clearly contemplates negotiation of midterm agreements, stands in stark contrast to the duty defined in the Federal Labor Statute, to "arriv[e] at a collective bargaining agreement." 5 U. S. C. § 7114(a)(4). The NLRA also contains a proviso limiting this broad duty to negotiate when there is "in effect a collective-bargaining contract covering employees in an industry" and a party desires to "modify" that contract. 29 U. S. C. § 158(d). For example, there is no duty to engage in midterm bargaining over matters already "contained in" the existing collective bargaining agreement. *Ibid.* As noted above, the Federal Labor Statute lacks any comparable language. Because, at the time it drafted the Statute, Congress knew that the NLRA defined a duty to bargain midterm, see *NLRB* v. *Jacobs Mfg. Co.,* 196 F. 2d 680, 684 (CA2 1952), this omission indicates that Congress did not intend to include a similar duty in the Federal Labor Statute.

The Court concludes, nevertheless, that this omission is irrelevant because the Federal Labor Statute and the NLRA, as well as collective bargaining in the public and private sectors, are different. See *ante*, at 93; see also *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 648 (1990) (observing that the Federal Labor Statute and the NLRA should not be read *in pari materia*). To be sure, there are differences between the Acts, but that fact does not render a comparison of them irrelevant. It is well established that "the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." 2B N. Singer, Sutherland on Statutory Construction § 53.03, p. 233 (rev. 5th ed. 1992). Employing this principle, the Court has previously compared nonanalogous statutes to aid its interpretation of them. See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131–132 (1943) (using Federal Employers' Liability Act to aid interpretation of Fair Labor Standards Act of 1938 even though the two Acts were *not* strictly analogous). In light of these principles of construction, the NLRA may be used to aid our interpretation of the Federal Labor Statute. See also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 92–93, 96–97 (1983) (analogizing the Federal Labor Relations Authority (FLRA) to the National Labor Relations Board).

A comparison of the two statutes explains why a duty to bargain midterm was included in the NLRA but omitted from the Federal Labor Statute. Under the Statute, but not the NLRA, the Government must subsidize union negotiators. See 5 U. S. C. § 7131(a). Consequently, there is little incentive for union negotiators to streamline their bargaining positions or to avoid extended midterm bargaining. Given this incentive structure, it is difficult to imagine that Congress would obligate Government agencies to bargain midterm, for such an obligation would likely cause perpetual collective bargaining. Continuous bargaining, however, is

contrary to the goal of the FLRA: to promote "effective and efficient" Government, not Government stymied by perpetual bargaining. § 7101(b). Indeed, it was this realization that initially motivated the FLRA to reject the contention that the Federal Labor Statute contained a duty to bargain midterm. See *Internal Revenue Service*, 17 F. L. R. A. 731, 736–737 (1985) (observing that midterm bargaining would cause continuous bargaining on an issue-by-issue basis).

A duty to bargain midterm was also excluded from the Statute because, in the context of the no-strike regime of federal labor relations, it would leave the agency-employer at an unfair disadvantage. In the NLRA context, the union that wants to obtain a midterm modification or supplement from an employer who is dead set against it must pay the price of a strike that is costly to it and its members. In the context of the Federal Labor Statute, the union that wants to obtain a midterm modification or supplement need only bargain to an impasse and then hope that the Federal Service Impasses Panel will give it all (or at least some) of what it has requested. Demanding unreciprocated additional benefits is cost free. Thus, a midterm bargaining requirement might motivate a union to "hold [a] matter off until the term agreement is done[,]. . . initiate the proposal as part of a single-issue negotiation," and, if an impasse results, force the agency to arbitrate. Ferris, Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns, 5 Negotiation J. 407, 411–412 (Oct. 1989). Again, it is obvious that this incentive structure does not promote "effective and efficient" Government. § 7101(b). Given the language and structure of the Federal Labor Statute, the context in which this language is used and the differences between the Statute and the NLRA, I would hold that the Federal Labor Statute plainly, and justifiably, does not impose a general duty to bargain midterm.

The FLRA argues, in the alternative, that even if the Federal Labor Statute does not impose a general obligation to

bargain midterm, agencies nevertheless must bargain over union-initiated proposals to include in term agreements midterm bargaining provisions. In other words, unions may propose that agency-employers agree to obligate themselves contractually to bargain midterm. In the private sector, the duty to bargain means only that the employer and the exclusive representative bargain over something in good faith. In the public sector, however, the duty to bargain over a proposal can have very different consequences: Unions may force an agency into binding arbitration by bargaining to impasse. § 7119(c)(5)(B)(iii). Therefore, by imposing a duty to bargain over midterm bargaining clauses, the FLRA is, at the very least, taking the choice of whether to bargain midterm out of a reluctant federal employer's hands, and placing it into the hands of the Federal Service Impasses Panel, a result that seems inconsistent with the Federal Labor Statute's goals of promoting "effective and efficient Government." § 7101(b).

There is, moreover, no statutory source for a duty to bargain over contractual requirements to bargain midterm. Section 7117(a)(1) directs an agency to bargain over "matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation" but only "to the extent not inconsistent with any Federal law." The FLRA has interpreted this section to impose a duty on agencies to bargain over only proposals relating to conditions of employment. See Brief for Petitioner FLRA in No. 97–1243, p. 37. It is not apparent, however, how bargaining over a contractual requirement to bargain midterm is a "matte[r] . . . affecting working conditions." See 5 U. S. C. § 7103(a)(14) (defining "conditions of employment"). More important, because Congress, through the Federal Labor Statute, chose not to require agencies to bargain midterm, it is "inconsistent with . . . Federal law" for the FLRA to require bargaining over a contractual requirement to bar-

gain midterm. As I read the Statute, Congress has clearly rejected such a requirement.

II

Even if I agreed with the Court that the Federal Labor Statute is ambiguous with respect to the duty to bargain midterm, I would not defer in this suit to the FLRA's interpretation of the Statute pursuant to *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).

We observed in *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402 (1993), that when an agency alters its interpretation of a statute, its revised interpretation may be entitled to less deference than a position consistently held. We explained:

> "The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. Indeed, an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes. On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.' *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987). How much weight should be given to the agency's views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings, will depend on the facts of individual cases." *Id.*, at 417 (some citations and internal quotation marks omitted).

See also *INS* v. *Cardoza-Fonseca,* 480 U. S. 421, 446–447, and n. 30 (1987) (rejecting agency interpretation of statute on ground that interpretation was not consistent with congressional intent, and agency's interpretation was not entitled to heightened deference because it had been inconsistent over time); *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 37 (1981) (observing that the "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling," but ultimately deferring to inconsistent agency position); see also *Watt* v. *Alaska,* 451 U. S. 259, 272–273 (1981) (holding that agency's interpretation of amendment that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation).

Here, the FLRA changed its position on the precise matter that we have been asked to consider—whether agencies have a duty to bargain midterm under the Federal Labor Statute—and did so in response to a judicial decision. Initially, the FLRA determined that the Statute did not impose a duty to bargain midterm, see *Internal Revenue Service*, 17 F. L. R. A. 731 (1985), but it came to the opposite conclusion after the D. C. Circuit rejected this reading of the Statute, see *National Treasury Employees Union* v. *FLRA,* 810 F. 2d 295 (1987) (holding the Statute required midterm bargaining); *Internal Revenue Service*, 29 F. L. R. A. 162, 166 (1987) (adopting D. C. Circuit's reading of the Statute). At the time it reversed course, the FLRA offered only a scant explanation for its sudden interpretive shift. It merely stated that it agreed with the D. C. Circuit's holdings and concluded, "based on the court's decision and in agreement with the Administrative Law Judge," that the IRS had impermissibly refused to bargain over a midterm proposal. *Id.*, at 165–166, 168. The only apparent reason for the agency's shift in interpretation was the D. C. Circuit's decision. In this circumstance, the agency's interpretation of

the Statute is entitled to less deference. See *Good Samaritan Hospital* v. *Shalala*, *supra*, at 417. This lesser standard of deference seems particularly appropriate here because we have recognized some limits on the FLRA's interpretive powers. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S., at 108. Accordingly, we should endeavor to find the most plausible construction of the Federal Labor Statute and examine the Secretary's current interpretation in light of this construction.

The FLRA currently interprets the Federal Labor Statute to impose a duty on federal agencies to negotiate midterm those union-initiated proposals that are not covered in the term agreement unless the union has clearly waived its right to bargain midterm. See Brief for Petitioner FLRA in No. 97–1243, at 18–20; see *Department of Navy, Marine Corps Logistics Base* v. *FLRA*, 962 F. 2d 48, 56 (CADC 1992) (outlining FLRA position). This is not, however, the most plausible construction of the Statute. For the reasons previously discussed, there is no language in the Statute expressing a general duty to bargain midterm. Moreover, to the extent that the FLRA has codified exceptions to a generalized duty to bargain midterm, those exceptions are defined out of whole cloth; there is nothing in the text of the Federal Labor Statute that suggests limits on a duty to bargain midterm. For these reasons, even if there were some ambiguity in the Federal Labor Statute, I would hold that the agency's interpretation of the Federal Labor Statute is inferior to the natural, and most plausible, reading of that Statute—that there is no general duty to bargain midterm. See *Good Samaritan Hospital* v. *Shalala*, *supra*, at 417; *INS* v. *Cardoza-Fonseca*, *supra*, at 446–447, and n. 30. I respectfully dissent and would affirm the decision of the Fourth Circuit.

Per Curiam

FEDERAL REPUBLIC OF GERMANY ET AL. *v.* UNITED STATES ET AL.

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

No. 127, Orig. (A–736). Decided March 3, 1999

Plaintiffs moved for leave to file a bill of complaint and for a preliminary injunction against the United States and the Governor of Arizona, both raised under this Court's original jurisdiction, seeking, *inter alia*, enforcement of an *ex parte* order by the International Court of Justice, which directed the United States to prevent Arizona's execution of a German citizen. The action was filed within two hours of an execution ordered in January, based upon a sentence imposed in 1984, about which Germany learned in 1992.

Held: Given the tardiness of the pleas and the threshold barriers they implicate, this Court declines to exercise its original jurisdiction. It appears that the United States has not waived its sovereign immunity, and it is doubtful that Art. III, § 2, cl. 2, provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. Also, a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles. See *Breard* v. *Greene*, 523 U. S. 371, 377.

Motions denied.

PER CURIAM.

The motion of the Federal Republic of Germany et al. (plaintiffs) for leave to file a bill of complaint and the motion for preliminary injunction against the United States of America and Jane Dee Hull, Governor of the State of Arizona, both raised under this Court's original jurisdiction, are denied. Plaintiffs' motion to dispense with printing requirements is granted. Plaintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice, on its own motion and with no opportunity for the United States to respond, directing the

United States to prevent Arizona's scheduled execution of Walter LaGrand. Plaintiffs assert that LaGrand holds German citizenship. With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity. Second, it is doubtful that Art. III, § 2, cl. 2, provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard* v. *Greene*, 523 U. S. 371, 377 (1998) *(per curiam)*, a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join in the foregoing order, subject to the qualification that I do not rest my decision to deny leave to file the bill of complaint on any Eleventh Amendment principle. In exercising my discretion, I have taken into consideration the position of the Solicitor General on behalf of the United States.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The Federal Republic of Germany et al. (Germany) has filed a motion for leave to file a complaint, seeking as relief an injunction prohibiting the execution of Walter LaGrand pending final resolution of Germany's case against the United

States in the International Court of Justice (ICJ)—a case in which Germany claims that Arizona's execution of LaGrand violates the Vienna Convention. Germany also seeks a stay of that execution "pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion." Motion for Leave to File a Bill of Complaint and for a Temporary Restraining Order or Preliminary Injunction 2 (Motion). The ICJ has issued an order "indicat[ing]" that the "United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings." ¶ 9, *id.*, at 6–7.

The Solicitor General has filed a letter in which he opposes any stay. In his view, the "Vienna Convention does not furnish a basis for this Court to grant a stay of execution," and "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief." The Solicitor General adds, however, that he has "not had time to read the materials thoroughly or to digest the contents." Letter from Solicitor General Waxman filed Mar. 3, 1999, with Clerk of this Court.

Germany's filings come at what is literally the eleventh hour. Nonetheless, Germany explains that it did not file its case in the ICJ until it learned that the State of Arizona had admitted that it was aware, when LaGrand was arrested, that he was a German national. That admission came only eight days ago, and the ICJ issued its preliminary ruling only today. Regardless, in light of the fact that both the ICJ and a sovereign nation have asked that we stay this case, or "indicate[d]" that we should do so, Motion 6, I would grant the preliminary stay that Germany requests. That stay would give us time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved, including further views of the Solicitor General, after time for study and appropriate consultation.

The Court has made Germany's motion for a preliminary stay moot by denying its motion to file its complaint and "declin[ing] to exercise" its original jurisdiction in light of the "tardiness of the pleas and the jurisdictional barriers they implicate." *Ante*, at 112. It is at least arguable that Germany's reasons for filing so late are valid, and the jurisdictional matters are arguable. Indeed, the Court says that it is merely "*doubtful* that Art. III, § 2, cl. 2, provides an anchor" for the suit and that a foreign government's ability to assert a claim against a State is "without *evident* support in the Vienna Convention and in *probable* contravention of Eleventh Amendment principles." *Ante*, at 112 (emphasis added). The words "doubtful" and "probable," in my view, suggest a need for fuller briefing.

For these reasons I would grant a preliminary stay.

STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* LaGRAND

ON APPLICATION TO LIFT RESTRAINING ORDER AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. A–735 (98–1412). Decided March 3, 1999

After Walter LaGrand's conviction and sentence were affirmed by the Arizona Supreme Court and his first federal habeas petition was denied, he filed this petition, challenging, *inter alia*, lethal gas as a cruel and unusual form of execution. The District Court denied the petition and a certificate of appealability. The Ninth Circuit granted the certificate and denied the stay of execution, but enjoined the State from executing LaGrand by lethal gas.

Held: The Ninth Circuit's judgment is reversed and its injunctive order vacated. LaGrand waived his claim that execution by lethal gas is unconstitutional by choosing lethal gas over lethal injection, an alternative method of execution available in Arizona. To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of *Teague* v. *Lane*, 489 U. S. 288. In addition, LaGrand's claims are procedurally defaulted, and he has failed to show cause for his failure to overcome this bar. At the time of his direct appeal, there was sufficient debate about the constitutionality of lethal gas executions that he cannot show cause for his failure to raise this claim. He also specifically waived an alternative claim that his trial counsel was ineffective by representing to the District Court prior to filing his first federal habeas petition that there was no basis for such a claim. That claim is also procedurally defaulted. The Arizona court held that his ineffective-assistance arguments were barred pursuant to a state procedural rule, and he has not demonstrated cause or prejudice for his failure to raise the claims on direct review.

Certiorari granted; judgment reversed and injunction vacated.

PER CURIAM.

Walter LaGrand and Karl LaGrand were each convicted of first-degree murder, attempted murder in the first degree, attempted armed robbery, and two counts of kidnaping. The Arizona Supreme Court gave a detailed account of the

crime in Walter LaGrand's appeal. See *State* v. *LaGrand*, 153 Ariz. 21, 23–24, 734 P. 2d 563, 565–566 (1987). Following a jury trial, both Karl LaGrand and Walter LaGrand were convicted on all charges and sentenced to death. The Arizona Supreme Court affirmed the convictions and sentences. *State* v. *LaGrand*, 152 Ariz. 483, 733 P. 2d 1066 (1987) (Karl LaGrand); *State* v. *LaGrand*, *supra* (Walter LaGrand). Subsequently, we denied the LaGrands' petitions for certiorari. See 484 U. S. 872 (1987).

The LaGrands then filed petitions for writs of habeas corpus pursuant to 28 U. S. C. § 2254. Until then, Walter LaGrand had been represented by Bruce Burke, a Tucson lawyer. Before appointing Burke as counsel in the habeas proceeding, however, the District Court required Burke to discuss all possible claims of ineffective assistance of counsel with Walter LaGrand and to file a status report with the court. See 133 F. 3d 1253, 1269 (CA9 1998). Walter LaGrand informed Burke that he did not desire a new attorney and requested that Burke continue to represent him. *Ibid.* Nevertheless, after Burke learned that Karl LaGrand was pursuing ineffective-assistance-of-counsel claims, Burke moved to withdraw as counsel. The District Court denied this motion on the ground that "Walter LaGrand entered a waiver of any potential claims of ineffective assistance of counsel and Mr. Burke indicated to the Court that he believes no such grounds existed." *LaGrand* v. *Lewis*, 883 F. Supp. 451, 456, n. 3 (1995). The Ninth Circuit affirmed, holding that "[w]hen Walter waived the offer of new counsel, he was waiving the benefits of new representation, among which would potentially have been the presentation of this sort of [ineffective-assistance claim]." 133 F. 3d, at 1269.

Among the claims raised in Walter LaGrand's petition for a writ of habeas corpus was the claim that execution by lethal gas constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The

District Court found the claim to be procedurally defaulted because Walter LaGrand had failed to raise it either on direct appeal or in his petition for state postconviction relief, when the sole method of execution was by way of lethal gas. On appeal, the Ninth Circuit did not reach the issue of procedural default because it found the claim was not ripe until and unless LaGrand chose gas as his method of execution. *Id.*, at 1264. The petition for writ of habeas corpus was denied. *Id.*, at 1269.

In February 1999, Karl LaGrand filed a successive state petition for postconviction relief raising the claim that execution by lethal gas constituted cruel and unusual punishment. The trial court found the claim moot and precluded due to Karl LaGrand's failure to raise the claim in prior state court proceedings, and the Arizona Supreme Court denied review. Karl LaGrand again raised the claim in a second federal habeas corpus petition. The District Court again found the claim procedurally defaulted and concluded that Karl LaGrand had failed to establish cause and prejudice or a fundamental miscarriage of justice to excuse the default. The District Court denied that petition, but the Court of Appeals reversed.

The Ninth Circuit held that Karl LaGrand's lethal gas claim was procedurally barred but found cause and prejudice to excuse the default. The court concluded that Karl LaGrand's failure to raise the lethal gas claim was excused because there was no legal or factual basis for the claim when he pursued his direct appeal in state court. Prejudice was shown because he was now faced with execution by a method the Ninth Circuit had previously found to be unconstitutional.

The Ninth Circuit also addressed the State's argument that Karl LaGrand's choice of execution method constituted a waiver of his current claim. According to the Ninth Circuit, its precedent dictated that "Eighth Amendment protec-

tions may not be waived, at least in the area of capital punishment." See *LaGrand* v. *Stewart*, 173 F. 3d 1144, 1148 (1999). As part of its ultimate order, the Court of Appeals stayed Karl LaGrand's execution and enjoined Arizona "from executing Karl Hinze LaGrand, or anyone similarly situated, by means of lethal gas." *Id.*, at 1149. The State filed an application to vacate the stay, which we granted. Subsequently, Karl LaGrand's lawyers moved to clarify our order to determine whether the Ninth Circuit's injunction was still in place. We denied this motion. 525 U. S. 1174 (1999). At the last moment, Karl LaGrand requested the use of lethal injection, which the State allowed, and the validity of the Ninth Circuit's injunction was not tested.

This case followed. Like Karl LaGrand, Walter LaGrand filed a petition for writ of habeas corpus challenging lethal gas as a cruel and unusual form of execution. The District Court declined to follow the Ninth Circuit's previous opinion in *LaGrand* v. *Stewart*, No. 99–99004 (Feb. 23, 1999), concluding that our lifting of the stay of execution necessarily vacated the merits of the Ninth Circuit's decision. The District Court also denied a certificate of appealability, concluding that "the issue of procedural default of Petitioner's lethal gas challenge is not debatable among jurists of reason." Pet. for Cert. 5.

The Ninth Circuit panel granted a certificate of appealability and proceeded to the merits of the case. It concluded that our order lifting the stay of execution in *LaGrand* v. *Stewart*, No. 99–99004 (Feb. 23, 1999), did not pass upon the merits of the panel's opinion and concluded that its reasoning remained sound. It then denied the stay of execution but restrained and enjoined the State of Arizona from executing Walter LaGrand by means of lethal gas.

The State has filed a petition for writ of certiorari and an application to lift the Court of Appeals' injunction. We now grant the petition for certiorari, summarily reverse the judgment, and vacate the Court of Appeals' injunctive order.

I

Walter LaGrand, by his actions, has waived his claim that execution by lethal gas is unconstitutional. At the time Walter LaGrand was sentenced to death, lethal gas was the only method of execution available in Arizona, but the State now provides inmates a choice of execution by lethal gas or lethal injection, see Ariz. Rev. Stat. Ann. § 13–704(B) (Supp. 1998) (creating a default rule of execution by lethal injection). Walter LaGrand was afforded this choice and decided to be executed by lethal gas. On March 1, 1999, Governor Hull of Arizona offered Walter LaGrand an opportunity to rescind this decision and select lethal injection as his method of execution. Walter LaGrand, again, insisted that he desired to be executed by lethal gas. By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it. See, *e. g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of *Teague* v. *Lane*, 489 U. S. 288 (1989).

II

In addition, Walter LaGrand's claims are procedurally defaulted, and he has failed to show cause to overcome this bar. See *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). At the time of Walter LaGrand's direct appeal, there was sufficient debate about the constitutionality of lethal gas executions that Walter LaGrand cannot show cause for his failure to raise this claim. Arguments concerning the constitutionality of lethal gas have existed since its introduction as a method of execution in Nevada in 1921. See H. Bedau, The Death Penalty in America 16 (3d ed. 1982). In the period immediately prior to Walter LaGrand's direct appeal, a number of States were reconsidering the use of execution by lethal gas, see *Gray* v. *Lucas*, 710 F. 2d 1048, 1059–1061 (CA5

1983) (discussing evidence presented by the defendant and changes in Nevada's and North Carolina's methods of execution), and two United States Supreme Court Justices had expressed their views that this method of execution was unconstitutional, see *Gray* v. *Lucas*, 463 U. S. 1237, 1240–1244 (1983) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). In addition, lethal gas executions have been documented since 1937, when San Quentin introduced it as an execution method, and studies of the effect of execution by lethal gas date back to the 1950's. See Bedau, *supra*, at 16.

III

Walter LaGrand's alternative argument, that his ineffective-assistance-of-counsel claim suffices as cause, also fails. Walter LaGrand specifically waived the claim that his trial counsel was ineffective, representing to the District Court prior to filing his first federal habeas petition that there was no basis for such claims. See *LaGrand* v. *Lewis*, 883 F. Supp., at 456, n. 3; 133 F. 3d, at 1269. In addition, the ineffective-assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective-assistance arguments were barred pursuant to a state procedural rule, see *State* v. *LaGrand*, No. CR–07426, Minute Entry (Pima County Super. Ct., Mar. 2, 1999), and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review.

Accordingly, the judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and its injunctive order is vacated.

It is so ordered.

Justice Souter, with whom Justice Ginsburg and Justice Breyer join, concurring in part and concurring in the judgment.

I join Part I of the *per curiam* opinion, on the understanding that petitioner makes no claim that death by lethal

injection would be cruel and unusual under the Eighth Amendment. I do not reach any issue of the applicability of *Teague* v. *Lane*, 489 U. S. 288 (1989).

JUSTICE STEVENS, dissenting.

In my opinion the answer to the question whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear. I would not decide such an important question without full briefing and argument.

I, therefore, respectfully dissent.

SCHWARZ *v.* NATIONAL SECURITY AGENCY ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–7771. Decided March 8, 1999*

Pro se petitioner seeks leave to proceed *in forma pauperis* on her petitions for certiorari. These constitute her 34th and 35th frivolous filings with this Court.

Held: Petitioner's motions to proceed *in forma pauperis* are 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.

Motions denied.

PER CURIAM.

Pro se petitioner Schwarz seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request as frivolous pursuant to Rule 39.8. Schwarz is allowed until March 29, 1999, within which to pay the docketing fee required by Rule 38 and to submit her petitions in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari from Schwarz in noncriminal matters unless she pays the docketing fee required by Rule 38 and submits her petition in compliance with Rule 33.1.

Schwarz has repeatedly abused this Court's certiorari process. On December 14, 1998, we invoked Rule 39.8 to deny Schwarz *in forma pauperis* status with respect to four petitions for certiorari. See *Schwarz* v. *Federal Bureau of Investigation*, 525 U. S. 1053; *Schwarz* v. *National Institute of Corrections*, 525 U. S. 1053; *Schwarz* v. *United States Parole Comm'n*, 525 U. S. 1053; *Schwarz* v. *National Archives and Records Administration*, 525 U. S. 1053. Before that

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*Together with No. 98–7782, *Schwarz* v. *Executive Office of the President et al.*, also on motion for leave to proceed *in forma pauperis.*

time, Schwarz had filed 29 petitions for certiorari, all of which were both patently frivolous and had been denied without recorded dissent. The instant petitions for certiorari thus constitute Schwarz's 34th and 35th frivolous filings with this Court.

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)*. Schwarz's abuse of the writ of certiorari has been in noncriminal cases, and we limit our sanction accordingly. The order therefore will not prevent Schwarz from petitioning to challenge criminal sanctions which might be imposed on her. Similarly, because Schwarz has not abused this Court's extraordinary writs procedures, the order will not prevent her from filing nonfrivolous petitions for extraordinary writs. The order will, however, allow this Court to devote its limited resources to the claims of petitioners who have not abused our certiorari process.

It is so ordered.

JUSTICE STEVENS, dissenting.

For reasons previously stated, see *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

CENTRAL STATE UNIVERSITY *v.* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, CENTRAL STATE UNIVERSITY CHAPTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 98–1071. Decided March 22, 1999

Pursuant to Ohio Rev. Code Ann. § 3345.45, petitioner university adopted standards for its professors' instructional workloads and notified respondent, the certified collective-bargaining agent for the professors, that it would not bargain over the workload issue. Respondent then filed a complaint in state court for declaratory and injunctive relief, alleging that § 3345.45 created a class of public employees not entitled to bargain regarding their workload in violation of the Equal Protection Clauses of the Ohio and United States Constitutions. The Ohio Supreme Court held that the collective-bargaining exemption bore no rational relationship to the State's interest in correcting the imbalance between research and teaching at its public universities, and concluded that the State had not shown any rational basis for singling out university professors as the only public employees precluded from bargaining over their workload.

Held: The Ohio Supreme Court's holding cannot be reconciled with the requirements of the Equal Protection Clause. This Court has repeatedly held that where a classification involves neither fundamental rights nor suspect proceedings it cannot run afoul of the Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose. *E. g.*, *Heller* v. *Doe*, 509 U. S. 312, 319–321. The legislative classification here passes that test. Imposing a workload policy not subject to collective bargaining was an entirely rational step to accomplish the statute's objective of increasing the time faculty spent in the classroom. The fact that the record before the Ohio courts did not show that collective bargaining had lead to the decline in faculty classroom time does not detract from the legislative decision's rationality.

Certiorari granted; 83 Ohio St. 3d 229, 699 N. E. 2d 463, reversed and remanded.

PER CURIAM.

Petitioner Central State University challenges a ruling of the Ohio Supreme Court striking down on equal protection grounds a state law requiring public universities to develop standards for professors' instructional workloads and exempting those standards from collective bargaining. We grant the petition and reverse the judgment of the Ohio Supreme Court.

In an effort to address the decline in the amount of time that public university professors devoted to teaching as opposed to researching, the State of Ohio enacted Ohio Rev. Code Ann. §3345.45 (1997). This provision provides in relevant part:

> "On or before January 1, 1994, the Ohio board of regents jointly with all state universities . . . shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. . . .
>
> "On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding [other provisions making faculty workload at public universities a proper subject for collective bargaining], the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding [these collective-bargaining provisions], any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees."*

*As part of the same bill codified at §3345, the Ohio General Assembly also enacted uncodified legislation providing that the Board of Regents

In 1994, petitioner Central State University adopted a workload policy pursuant to § 3345.45 and notified respondent, the certified collective-bargaining agent for Central State's professors, that it would not bargain over the issue of faculty workload. Respondent subsequently filed a complaint in Ohio state court for declaratory and injunctive relief, alleging that § 3345.45 created a class of public employees not entitled to bargain regarding their workload and that this classification violated the Equal Protection Clauses of the Ohio and United States Constitutions.

By a divided vote, the Ohio Supreme Court agreed with respondent that § 3345.45 deprived public university professors the equal protection of the laws. See 83 Ohio St. 3d 229, 699 N. E. 2d 463 (1998). The court acknowledged that Ohio's purpose in enacting the statute was legitimate and that all legislative enactments enjoy a strong presumption of constitutionality. *Id.*, at 234–235, 699 N. E. 2d, at 468–469. Nonetheless, the court held that § 3345's collective-bargaining exemption bore no rational relationship to the State's interest in correcting the imbalance between research and teaching at its public universities. See *id.*, at 236–239, 699 N. E. 2d, at 469–470. The State had argued that achieving uniformity, consistency, and equity in faculty workload was necessary to recapture the decline in teaching, and that collective bargaining produced variation in workloads across universities in departments having the same academic mission. *Id.*, at 236, 699 N. E. 2d, at 469. Reviewing evidence that the State had submitted in support of this

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shall work with state universities "to ensure that no later than [the] fall term 1994, a minimum ten percent increase in statewide undergraduate teaching activity be achieved to restore the reductions experienced over the past decade. Notwithstanding section 3345.45 of the Revised Code, any collective bargaining agreement in effect on the effective date of this act shall continue in effect until its expiration date." Amended Substitute House Bill No. 152, § 84.14, 145 Ohio Laws 4539 (effective July 1, 1993).

contention, the Ohio Supreme Court held that "there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching." *Ibid.* Based on this determination, the court concluded that the State had failed to show "any rational basis for singling out university faculty members as the only public employees . . . precluded from bargaining over their workload." *Id.*, at 237, 699 N. E. 2d, at 470.

The dissenting justices pointed out that the majority's methodology and conclusion conflicted with this Court's standards for rational-basis review of equal protection challenges. See *id.*, at 238–241, 699 N. E. 2d, at 471–472. In their view, "that collective bargaining has not *caused* the decline in teaching proves nothing in assessing whether the faculty workload standards imposed pursuant to R. C. 3345.45 legitimately relate to that statute's purpose of restoring losses in undergraduate teaching activity." *Id.*, at 238, 699 N. E. 2d, at 471 (emphasis in original). The majority's review of the State's evidence was therefore "inconsequential" to the only question in the case: whether the challenged legislative action was arbitrary or irrational. See *id.*, at 239–242, 699 N. E. 2d, at 472–473. Answering this question, the dissent concluded that imposing uniform workload standards via the exemption "is not an irrational means of effecting an increasing in teaching activity. In fact, it was probably the most direct means of accomplishing that objective available to the General Assembly." *Id.*, at 241, 699 N. E. 2d, at 473.

We agree that the Ohio Supreme Court's holding cannot be reconciled with the requirements of the Equal Protection Clause. We have repeatedly held that "a classification neither involving fundamental rights nor proceeding along sus-

pect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe*, 509 U. S. 312, 319–321 (1993) (citations omitted); *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313–314 (1993); *Nordlinger* v. *Hahn*, 505 U. S. 1, 11 (1992). The legislative classification created by § 3345.45 passes this test. One of the statute's objectives was to increase the time spent by faculty in the classroom; the imposition of a faculty workload policy not subject to collective bargaining was an entirely rational step to accomplish this objective. The legislature could quite reasonably have concluded that the policy animating the law would have been undercut and likely varied if it were subject to collective bargaining. The State, in effect, decided that the attainment of this goal was more important than the system of collective bargaining that had previously included university professors. See *Vance* v. *Bradley*, 440 U. S. 93 (1979) (upholding a similar enactment of Congress providing that federal employees covered by the Foreign Service retirement system, but not those covered by the Civil Service retirement system, would be required to retire at age 60).

The fact that the record before the Ohio courts did not show that collective bargaining in the past had lead to the decline in classroom time for faculty does not detract from the rationality of the legislative decision. See *Heller*, *supra*, at 320 ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification"). The legislature wanted a uniform workload policy to be in place by a certain date. It could properly conclude that collective bargaining about that policy in the future would interfere with the attainment of this end. Under our precedent, this is sufficient to sustain the exclusion of university professors from the otherwise general collective-bargaining scheme for public employees.

The petition for a writ of certiorari is granted, the judgment of the Supreme Court of Ohio is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

I join the *per curiam* opinion recognizing, as the Court did in *Nordlinger* v. *Hahn*, 505 U. S. 1 (1992), that for the mine run of economic regulations that do not trigger heightened scrutiny, it is appropriate to inquire whether the lawmaker's classification

> "rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see *United States Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 174, 179 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, see *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 464 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. [432, 446 (1985)]." *Id.*, at 11.

I also recognize that a summary disposition is not a fit occasion for elaborate discussion of our rational-basis standards of review. See *Hohn* v. *United States*, 524 U. S. 236, 251 (1998) (opinions rendered without full briefing or argument have muted precedential value). JUSTICE STEVENS emphasizes that this case is of dominant importance to the state universities in Ohio, see *post*, at 131 (dissenting opinion); in that light, the Ohio Supreme Court is of course at liberty to resolve the matter under the Ohio Constitution.

JUSTICE STEVENS, dissenting.

While surveying the flood of law reviews that crosses my desk, I have sometimes wondered whether law professors have any time to spend teaching their students about the law. Apparently, a majority of the legislators in Ohio had a similar reaction to the work product of faculty members in Ohio's several state universities. By enacting Ohio Rev. Code Ann. §3345.45 (1997), the legislators decided to do something about what they perceived to be a problem that neither the State Board of Regents nor the trustees of those universities could solve for themselves. Section 3345.45 directs that board and those trustees to develop standards and policies for instructional workloads for university faculty members. It provides that faculty members of public universities, unlike any other group of public employees, may not engage in collective bargaining about their workload.

How the intellectually gifted citizens of Ohio who have selected teaching as their profession shall allocate their professional endeavors between research and teaching is a matter of great importance to themselves, to their students, and to the consumers of their scholarly writing. Who shall decide how the balance between research and teaching shall be struck presents a similarly important question.

Prior to §3345.45, the faculty members' freedom to make such decisions was constrained only by the teaching or research assignments imposed by their superiors in the educational establishment. By its enactment of §3345.45, the Ohio General Assembly has asserted an interest in playing a role in making these decisions. As a result of the filing of this lawsuit, first the Ohio courts and now this Court have also participated in this decisional process.

Buried beneath the legal arguments advanced in this case lies a debate over academic freedom. In my judgment the relevant sources of constraint on that freedom are (1) the self-discipline of the teacher, (2) her faculty or department supervisors, (3) the trustees of the university where she

teaches, (4) the State Board of Regents, (5) the state legislature, (6) state judges, and, finally, (7) the judges sitting on this Court. I omit any reference to the collective-bargaining representatives of the teachers because, as everyone agrees, there is no evidence that collective bargaining has had any effect on the increased emphasis on research over teaching that gave rise to the enactment of § 3345.45.[1]

I have neither the mandate nor the inclination to assess whether the decision of the Ohio General Assembly to enact § 3345.45 was wise or unwise. I am equally convinced that this Court should not review the role played by the Ohio judiciary in deciding how to resolve this dispute. The case is important to the state universities in Ohio, but it has little, if any, national significance. Seven of the eleven Ohio judges who reviewed the case concluded that the Ohio statute violated the Ohio Constitution.[2] Indeed, the majority

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[1] After reviewing studies prepared by the Legislative Office of Education Oversight, by a Special Task Force on Challenges & Opportunities for Higher Education in Ohio, by the Regents' Advisory Committee on Faculty Workload Standards & Guidelines, by the Regents' Advisory Committee on Faculty Workload, and by the Ohio Board of Regents, as well as statistical data collected from Ohio colleges and universities, the Ohio Supreme Court concluded:

"We have reviewed each of these reports [relied upon by Central State University], and all other evidence contained in the record, and can conclude with confidence that there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching. Indeed, these reports appear to indicate that factors other than collective bargaining are responsible for the decline in teaching activity." 83 Ohio St. 3d 229, 236, 699 N. E. 2d 463, 469 (1998).

[2] The seven judges include the four from the majority opinion of the State Supreme Court and the three judges of the Court of Appeals who originally struck down § 3345.45.

The State Supreme Court held that the statute violated Article I, § 2, of the Ohio Constitution, which provides:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter,

opinion of the Ohio Supreme Court did not cite a single case decided by this Court.

If the State Supreme Court did misconstrue the Equal Protection Clause of the Federal Constitution, the impact of that arguable error is of consequence only in the State of Ohio, and will, in any event, turn out to be totally harmless if that court adheres to its previously announced interpretation of the State Constitution. I therefore believe that the Court should deny the petition for certiorari.

If the case does warrant this Court's review, it should not be decided summarily. It surely should not be disposed of simply by quoting descriptions of the rational-basis standard of review articulated in four nonunanimous opinions of this Court deciding wholly dissimilar issues. Cases applying the rational-basis test have described that standard in various ways. Compare, *e. g.*, the Court's opinions in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), and *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 446 (1985), with the majority opinion in *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 174–177 (1980). Indeed, in the latter case there were three opinions, each of which formulated the rational-basis standard differently from the other two. *Ibid.* (majority opinion); *id.*, at 180–181 (STEVENS, J., concurring in judgment); *id.*, at 183–184 (Brennan, J., dissenting).[3]

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reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." The court found it unnecessary to consider respondent's additional arguments based, in part, on other provisions of the State Constitution. *Id.*, at 237, 699 N. E. 2d, at 470.

[3] In a footnote to the opinion in *Fritz* that cited a number of rational-basis cases, the Court made this observation:

"The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in *Lindsley* [v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911)], *[F. S.] Royster Guano*

The Court's disposition of this case seems to assume that an incantation of the rational-basis test, together with speculation that collective bargaining might interfere with the adoption of uniform faculty workload policies, makes it unnecessary to consider any other facts or arguments that might inform an exercise of judgment about the underlying issue. While I am not prepared to express an opinion about the ultimate merits of the case, I can identify a serious flaw in the Court's mechanistic analysis. The Court assumes that the question improperly answered by the Ohio Supreme Court is whether collective bargaining may interfere with the attainment of a uniform workload policy.[4] But that is not the issue, because this case involves the Equal Protection Clause, and not the principles of substantive due process.

The question posed by this case is whether there is a rational basis for discriminating against faculty members by depriving them of bargaining assistance that is available to all other public employees in the State of Ohio.[5] Even the Court's speculation about the possible adverse consequences of collective bargaining about faculty workload does not explain why collective bargaining about the workloads of all other public employees might not give rise to the same adverse consequences arising from lack of statewide uniform-

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Co. [v. *Virginia*, 253 U. S. 412 (1920)], or any of the other cases referred to in this opinion and in the dissenting opinion." 449 U. S., at 176–177, n. 10.

[4] In addition, the Court's opinion assumes that the ultimate objective of having teachers spend more time in classrooms requires that there be a single workload policy for each of the State's universities and for each of the subjects taught in those schools, whether Latin, medicine, or astrophysics. I am not at all sure that such an assumption is rational.

[5] Ohio Rev. Code Ann. § 4117.03(A)(4) (1998) provides: "Public employees have the right to: . . . Bargain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements. . . ."

ity. Indeed, I would suppose that the interest in protecting the academic freedom of university faculty members might provide a rational basis for giving them *more* bargaining assistance than other public employees. In any event, no one has explained why there is a rational basis for concluding that they should receive *less*.

I respectfully dissent.

Per Curiam

RIVERA *v.* FLORIDA DEPARTMENT OF CORRECTIONS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–7450. Decided March 22, 1999

Pro se petitioner seeks leave to proceed *in forma pauperis* on his petition for certiorari. The instant petition constitutes his 13th frivolous filing with this Court.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. He is barred from filing any further petitions for certiorari and for 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.

Motion denied.

PER CURIAM.

Pro se petitioner Rivera seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request pursuant to Rule 39.8. Rivera is allowed until April 12, 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 nor petitions for extraordinary writs from Rivera in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33.1.

Rivera has abused this Court's certiorari and extraordinary writ processes. In January of this year, we twice invoked Rule 39.8 to deny Rivera *in forma pauperis* status. See *Rivera* v. *Allin*, 525 U. S. 1065; *In re Rivera*, 525 U. S. 1066. At that time, Rivera had filed two petitions for extraordinary writs and eight petitions for certiorari, all of which were both patently frivolous and had been denied without recorded dissent. The instant petition for certiorari thus constitutes Rivera's 13th frivolous filing with this

Court. He has four additional filings—all of them patently frivolous—currently pending before this Court.

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)*. Rivera's abuse of the writ of certiorari and of the extraordinary writs has been in noncriminal cases, and so we limit our sanction accordingly. The order therefore will not prevent Rivera from petitioning to challenge criminal sanctions which might be imposed on him. 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 *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

KUMHO TIRE CO., LTD., ET AL. *v.* CARMICHAEL ET AL.

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

No. 97–1709. Argued December 7, 1998—Decided March 23, 1999

When a tire on the vehicle driven by Patrick Carmichael blew out and the vehicle overturned, one passenger died and the others were injured. The survivors and the decedent's representative, respondents here, brought this diversity suit against the tire's maker and its distributor (collectively Kumho Tire), claiming that the tire that failed was defective. They rested their case in significant part upon the depositions of a tire failure analyst, Dennis Carlson, Jr., who intended to testify that, in his expert opinion, a defect in the tire's manufacture or design caused the blowout. That opinion was based upon a visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred here was caused by a defect. Kumho Tire moved to exclude Carlson's testimony on the ground that his methodology failed to satisfy Federal Rule of Evidence 702, which says: "If scientific, technical, or other specialized knowledge will assist the trier of fact . . . , a witness qualified as an expert . . . may testify thereto in the form of an opinion." Granting the motion (and entering summary judgment for the defendants), the District Court acknowledged that it should act as a reliability "gatekeeper" under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589, in which this Court held that Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable. The court noted that *Daubert* discussed four factors—testing, peer review, error rates, and "acceptability" in the relevant scientific community—which might prove helpful in determining the reliability of a particular scientific theory or technique, *id.*, at 593–594, and found that those factors argued against the reliability of Carlson's methodology. On the plaintiffs' motion for reconsideration, the court agreed that *Daubert* should be applied flexibly, that its four factors were simply illustrative, and that other factors could argue in favor of admissibility. However, the court affirmed its earlier order because it found insufficient indications of the reliability of Carlson's methodology. In reversing, the Eleventh Circuit held that the District Court had erred as a matter of law in applying *Daubert*. Believing that *Daubert* was limited to the scientific context,

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the court held that the *Daubert* factors did not apply to Carlson's testimony, which it characterized as skill or experience based.

Held:

1. The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists. Pp. 147–153.

(a) The *Daubert* "gatekeeping" obligation applies not only to "scientific" testimony, but to all expert testimony. Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that establishes a standard of evidentiary reliability. 509 U. S., at 589–590. *Daubert* referred only to "scientific" knowledge because that was the nature of the expertise there at issue. *Id.*, at 590, n. 8. Neither is the evidentiary rationale underlying *Daubert*'s "gatekeeping" determination limited to "scientific" knowledge. Rules 702 and 703 grant all expert witnesses, not just "scientific" ones, testimonial latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. *Id.*, at 592. Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a "gatekeeping" obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge, since there is no clear line dividing the one from the others and no convincing need to make such distinctions. Pp. 147–149.

(b) A trial judge determining the admissibility of an engineering expert's testimony *may* consider one or more of the specific *Daubert* factors. The emphasis on the word "may" reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." 509 U. S., at 594. The *Daubert* factors do *not* constitute a definitive checklist or test, *id.*, at 593, and the gatekeeping inquiry must be tied to the particular facts, *id.*, at 591. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. Some of those factors may be helpful in evaluating the reliability even of experience-based expert testimony, and the Court of Appeals erred insofar as it ruled those factors out in such cases. In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability. Pp. 149–152.

(c) A court of appeals must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert

testimony. *General Electric Co.* v. *Joiner*, 522 U. S. 136, 138–139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *id.*, at 143. The Eleventh Circuit erred insofar as it held to the contrary. Pp. 152–153.

2. Application of the foregoing standards demonstrates that the District Court's decision not to admit Carlson's expert testimony was lawful. The District Court did not question Carlson's qualifications, but excluded his testimony because it initially doubted his methodology and then found it unreliable after examining the transcript in some detail and considering respondents' defense of it. The doubts that triggered the court's initial inquiry were reasonable, as was the court's ultimate conclusion that Carlson could not reliably determine the cause of the failure of the tire in question. The question was not the reliability of Carlson's methodology in general, but rather whether he could reliably determine the cause of failure of *the particular tire at issue.* That tire, Carlson conceded, had traveled far enough so that some of the tread had been worn bald, it should have been taken out of service, it had been repaired (inadequately) for punctures, and it bore some of the very marks that he said indicated, not a defect, but abuse. Moreover, Carlson's own testimony cast considerable doubt upon the reliability of both his theory about the need for at least two signs of abuse and his proposition about the significance of visual inspection in this case. Respondents stress that other tire failure experts, like Carlson, rely on visual and tactile examinations of tires. But there is no indication in the record that other experts in the industry use Carlson's *particular* approach or that tire experts normally make the very fine distinctions necessary to support his conclusions, nor are there references to articles or papers that validate his approach. Respondents' argument that the District Court too rigidly applied *Daubert* might have had some validity with respect to the court's initial opinion, but fails because the court, on reconsideration, recognized that the relevant reliability inquiry should be "flexible," and ultimately based its decision upon Carlson's failure to satisfy either *Daubert*'s factors *or any other* set of reasonable reliability criteria. Pp. 153–158.

131 F. 3d 1433, reversed.

BREYER, J., delivered the opinion of the Court, Parts I and II of which were unanimous, and Part III of which was joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG,

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JJ. SCALIA, J., filed a concurring opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 158. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 159.

Joseph P. H. Babington argued the cause for petitioners. With him on the briefs were *Warren C. Herlong, Jr.*, *John T. Dukes*, *Kenneth S. Geller*, and *Alan E. Untereiner.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *Anthony J. Steinmeyer*, and *John P. Schnitker.*

Sidney W. Jackson III argued the cause for respondents. With him on the brief were *Robert J. Hedge*, *Michael D. Hausfeld*, *Richard S. Lewis*, *Joseph M. Sellers*, and *Anthony Z. Roisman.**

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*Briefs of *amici curiae* urging reversal were filed for the American Automobile Manufacturers Association et al. by *Michael Hoenig*, *Phillip D. Brady*, and *Charles H. Lockwood II;* for the American Insurance Association et al. by *Mark F. Horning* and *Craig A. Berrington;* for the American Tort Reform Association et al. by *Victor E. Schwartz*, *Patrick W. Lee*, *Robert P. Charrow*, *Mark A. Behrens*, *Jan S. Amundson*, and *Quentin Riegel;* for the Product Liability Advisory Council, Inc., et al. by *Mary A. Wells*, *Robin S. Conrad*, and *Donald D. Evans;* for the Rubber Manufacturers Association by *Bert Black*, *Michael S. Truesdale*, and *Michael L. McAllister;* for the Washington Legal Foundation et al. by *Arvin Maskin*, *Theodore E. Tsekerides*, *Daniel J. Popeo*, and *Paul D. Kamenar;* for John Allen et al. by *Carter G. Phillips* and *David M. Levy;* and for Stephen N. Bobo et al. by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Mark S. Mandell;* for the Attorneys Information Exchange Group, Inc., by *Bruce J. McKee* and *Francis H. Hare, Jr.;* for Bona Shipping (U. S.), Inc., et al. by *Robert L. Klawetter* and *Michael F. Sturley;* for the International Association of Arson Investigators by *Kenneth M. Suggs;* for the National Academy of Forensic Engineers by *Alvin S. Weinstein*, *Larry E. Coben*, and *David V. Scott;* for Trial Lawyers for Public Justice, P. C., et al. by *Gerson H. Smoger*, *Arthur H. Bryant*, *Sarah Posner*, *William A. Rossbach*, and *Brian Wolfman;* and for Margaret A. Berger et al. by *Kenneth J. Chese-*

JUSTICE BREYER delivered the opinion of the Court.

In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593–594.

This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.

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bro, Edward J. Imwinkelried, Ms. Berger, pro se, Stephen A. Saltzburg, David G. Wirtes, Jr., Don Howarth, Suzelle M. Smith, Edward M. Ricci, C. Tab Turner, James L. Gilbert, and *David L. Perry.*

Briefs of *amici curiae* were filed for the Defense Research Institute by *Lloyd H. Milliken, Jr., Julia Blackwell Gelinas, Nelson D. Alexander,* and *Sandra Boyd Williams;* for the National Academy of Engineering by *Richard A. Meserve, Elliott Schulder,* and *Thomas L. Cubbage III;* and for Neil Vidmar et al. by *Ronald Simon, Turner W. Branch, Ronald Motley, Robert Habush,* and *M. Clay Alspaugh.*

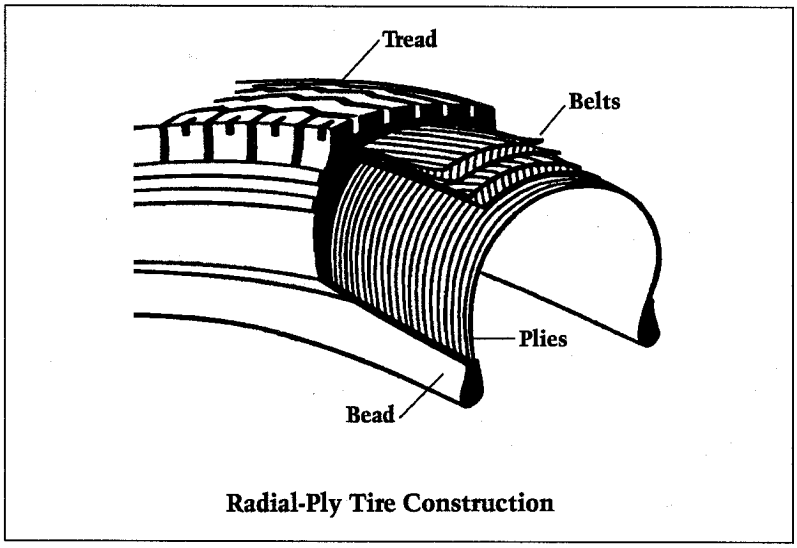
Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co.* v. *Joiner*, 522 U. S. 136, 143 (1997) (courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination). Applying these standards, we determine that the District Court's decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful.

I

On July 6, 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out. In the accident that followed, one of the passengers died, and others were severely injured. In October 1993, the Carmichaels brought this diversity suit against the tire's maker and its distributor, whom we refer to collectively as Kumho Tire, claiming that the tire was defective. The plaintiffs rested their case in significant part upon deposition testimony provided by an expert in tire failure analysis, Dennis Carlson, Jr., who intended to testify in support of their conclusion.

Carlson's depositions relied upon certain features of tire technology that are not in dispute. A steel-belted radial tire like the Carmichaels' is made up of a "carcass" containing many layers of flexible cords, called "plies," along which (between the cords and the outer tread) are laid steel strips called "belts." Steel wire loops, called "beads," hold the cords together at the plies' bottom edges. An outer layer, called the "tread," encases the carcass, and the entire tire is bound together in rubber, through the application of heat and various chemicals. See generally, *e. g.*, J. Dixon, Tires, Suspension and Handling 68–72 (2d ed. 1996). The bead of the tire sits upon a "bead seat," which is part of the wheel assembly. That assembly contains a "rim flange," which extends over the bead and rests against the side of the

tire. See M. Mavrigian, Performance Wheels & Tires 81, 83 (1998) (illustrations).



Radial-Ply Tire Construction

A. Markovich, How To Buy and Care For Tires 4 (1994).

Carlson's testimony also accepted certain background facts about the tire in question. He assumed that before the blowout the tire had traveled far. (The tire was made in 1988 and had been installed some time before the Carmichaels bought the used minivan in March 1993; the Carmichaels had driven the van approximately 7,000 additional miles in the two months they had owned it.) Carlson noted that the tire's tread depth, which was $^{11}/_{32}$ of an inch when new, App. 242, had been worn down to depths that ranged from $^{3}/_{32}$ of an inch along some parts of the tire, to nothing at all along others. *Id.*, at 287. He conceded that the tire tread had at least two punctures which had been inadequately repaired. *Id.*, at 258–261, 322.

Despite the tire's age and history, Carlson concluded that a defect in its manufacture or design caused the blowout. He rested this conclusion in part upon three premises which,

for present purposes, we must assume are not in dispute: First, a tire's carcass should stay bound to the inner side of the tread for a significant period of time after its tread depth has worn away. *Id.*, at 208–209. Second, the tread of the tire at issue had separated from its inner steel-belted carcass prior to the accident. *Id.*, at 336. Third, this "separation" caused the blowout. *Ibid.*

Carlson's conclusion that a defect caused the separation, however, rested upon certain other propositions, several of which the defendants strongly dispute. First, Carlson said that if a separation is *not* caused by a certain kind of tire misuse called "overdeflection" (which consists of underinflating the tire or causing it to carry too much weight, thereby generating heat that can undo the chemical tread/carcass bond), then, ordinarily, its cause is a tire defect. *Id.*, at 193–195, 277–278. Second, he said that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain physical symptoms. These symptoms include (a) tread wear on the tire's shoulder that is greater than the tread wear along the tire's center, *id.*, at 211; (b) signs of a "bead groove," where the beads have been pushed too hard against the bead seat on the inside of the tire's rim, *id.*, at 196–197; (c) sidewalls of the tire with physical signs of deterioration, such as discoloration, *id.*, at 212; and/or (d) marks on the tire's rim flange, *id.*, at 219–220. Third, Carlson said that where he does not find *at least two* of the four physical signs just mentioned (and presumably where there is no reason to suspect a less common cause of separation), he concludes that a manufacturing or design defect caused the separation. *Id.*, at 223–224.

Carlson added that he had inspected the tire in question. He conceded that the tire to a limited degree showed greater wear on the shoulder than in the center, some signs of "bead groove," some discoloration, a few marks on the rim flange, and inadequately filled puncture holes (which can also cause heat that might lead to separation). *Id.*, at 256–257, 258–

261, 277, 303–304, 308. But, in each instance, he testified that the symptoms were not significant, and he explained why he believed that they did not reveal overdeflection. For example, the extra shoulder wear, he said, appeared primarily on one shoulder, whereas an overdeflected tire would reveal equally abnormal wear on both shoulders. *Id.*, at 277. Carlson concluded that the tire did not bear at least two of the four overdeflection symptoms, nor was there any less obvious cause of separation; and since neither overdeflection nor the punctures caused the blowout, a defect must have done so.

Kumho Tire moved the District Court to exclude Carlson's testimony on the ground that his methodology failed Rule 702's reliability requirement. The court agreed with Kumho that it should act as a *Daubert*-type reliability "gatekeeper," even though one might consider Carlson's testimony as "technical," rather than "scientific." See *Carmichael* v. *Samyang Tires, Inc.*, 923 F. Supp. 1514, 1521–1522 (SD Ala. 1996). The court then examined Carlson's methodology in light of the reliability-related factors that *Daubert* mentioned, such as a theory's testability, whether it "has been a subject of peer review or publication," the "known or potential rate of error," and the "degree of acceptance . . . within the relevant scientific community." 923 F. Supp., at 1520 (citing *Daubert*, 509 U. S., at 589–595). The District Court found that all those factors argued against the reliability of Carlson's methods, and it granted the motion to exclude the testimony (as well as the defendants' accompanying motion for summary judgment).

The plaintiffs, arguing that the court's application of the *Daubert* factors was too "inflexible," asked for reconsideration. And the court granted that motion. *Carmichael* v. *Samyang Tires, Inc.*, Civ. Action No. 93–0860–CB–S (SD Ala., June 5, 1996), App. to Pet. for Cert. 1c. After reconsidering the matter, the court agreed with the plaintiffs that *Daubert* should be applied flexibly, that its four factors were

simply illustrative, and that other factors could argue in favor of admissibility. It conceded that there may be widespread acceptance of a "visual-inspection method" for some relevant purposes. But the court found insufficient indications of the reliability of

> "the component of Carlson's tire failure analysis which most concerned the Court, namely, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." *Id.*, at 6c.

It consequently affirmed its earlier order declaring Carlson's testimony inadmissible and granting the defendants' motion for summary judgment.

The Eleventh Circuit reversed. See *Carmichael* v. *Samyang Tire, Inc.*, 131 F. 3d 1433 (1997). It "review[ed] . . . *de novo*" the "district court's legal decision to apply *Daubert.*" *Id.*, at 1435. It noted that "the Supreme Court in *Daubert* explicitly limited its holding to cover only the 'scientific context,'" adding that "a *Daubert* analysis" applies only where an expert relies "on the application of scientific principles," rather than "on skill- or experience-based observation." *Id.*, at 1435–1436. It concluded that Carlson's testimony, which it viewed as relying on experience, "falls outside the scope of *Daubert,*" that "the district court erred as a matter of law by applying *Daubert* in this case," and that the case must be remanded for further (non-*Daubert*-type) consideration under Rule 702. 131 F. 3d, at 1436.

Kumho Tire petitioned for certiorari, asking us to determine whether a trial court "may" consider *Daubert*'s specific "factors" when determining the "admissibility of an engineering expert's testimony." Pet. for Cert. i. We granted certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon "scientific" knowledge, but rather upon "technical" or "other special-

ized" knowledge. Fed. Rule Evid. 702; compare, *e. g.*, *Watkins* v. *Telsmith, Inc.*, 121 F. 3d 984, 990–991 (CA5 1997), with, *e. g.*, *Compton* v. *Subaru of America, Inc.*, 82 F. 3d 1513, 1518–1519 (CA10), cert. denied, 519 U. S. 1042 (1996).

II

A

In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." 509 U. S., at 589. The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony. See Brief for Petitioners 19; Brief for Respondents 17.

For one thing, Rule 702 itself says:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This language makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert*, the Court specified that it is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that "establishes a standard of evidentiary reliability." 509 U. S., at 589–590. Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the Court in *Daubert* referred only to "scientific" knowledge. But as the Court there said, it referred to "sci-

entific" testimony "because that [wa]s the nature of the expertise" at issue. *Id.*, at 590, n. 8.

Neither is the evidentiary rationale that underlay the Court's basic *Daubert* "gatekeeping" determination limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*, at 592 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones.

Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases. Cf. Brief for National Academy of Engineering as *Amicus Curiae* 9 (scientist seeks to understand nature while the engineer seeks nature's modification); Brief for Rubber Manufacturers Association as *Amicus Curiae* 14–16 (engineering, as an "'applied science,'" relies on "scientific reasoning and methodology"); Brief for John Allen et al. as *Amici Curiae* 6 (engineering relies upon "scientific knowledge and methods").

Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." Hand, Historical and Practical Considerations Regarding Expert Testi-

mony, 15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." *Ibid.* The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U. S., at 590. It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U. S., at 592.

B

Petitioners ask more specifically whether a trial judge determining the "admissibility of an engineering expert's testimony" *may* consider several more specific factors that *Daubert* said might "bear on" a judge's gatekeeping determination. Brief for Petitioners i. These factors include:

—Whether a "theory or technique . . . can be (and has been) tested";

—Whether it "has been subjected to peer review and publication";

—Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and

> —Whether the theory or technique enjoys "'general acceptance'" within a "'relevant scientific community.'" 509 U. S., at 592–594.

Emphasizing the word "may" in the question, we answer that question yes.

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. See, *e. g.*, Brief for Stephen N. Bobo et al. as *Amici Curiae* 23 (stressing the scientific bases of engineering disciplines). In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. See Brief for United States as *Amicus Curiae* 18–19, and n. 5 (citing cases involving experts in drug terms, handwriting analysis, criminal *modus operandi*, land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others). Our emphasis on the word "may" thus reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." 509 U. S., at 594. *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." *Id.*, at 593. And *Daubert* adds that the gatekeeping inquiry must be "'tied to the facts'" of a particular "case." *Id.*, at 591 (quoting *United States* v. *Downing*, 753 F. 2d 1224, 1242 (CA3 1985)). We agree with the Solicitor General that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Daubert itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

At the same time, and contrary to the Court of Appeals' view, some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

We must therefore disagree with the Eleventh Circuit's holding that a trial judge may ask questions of the sort *Daubert* mentioned only where an expert "relies on the application of scientific principles," but not where an expert relies "on skill- or experience-based observation." 131 F. 3d, at 1435. We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match.

To say this is not to deny the importance of *Daubert*'s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert*, the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

C

The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U. S., at 138–139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for

"truth" and the "jus[t] determin[ation]" of proceedings. Fed. Rule Evid. 102. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *Joiner*, *supra*, at 143. And the Eleventh Circuit erred insofar as it held to the contrary.

III

We further explain the way in which a trial judge "may" consider *Daubert*'s factors by applying these considerations to the case at hand, a matter that has been briefed exhaustively by the parties and their 19 *amici*. The District Court did not doubt Carlson's qualifications, which included a masters degree in mechanical engineering, 10 years' work at Michelin America, Inc., and testimony as a tire failure consultant in other tort cases. Rather, it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." Civ. Action No. 93–0860–CB–S (SD Ala., June 5, 1996), App. to Pet. for Cert. 6c. After examining the transcript in "some detail," 923 F. Supp., at 1518–1519, n. 4, and after considering respondents' defense of Carlson's methodology, the District Court determined that Carlson's testimony was not reliable. It fell outside the range where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is "shaky." *Daubert*, 509 U. S., at 596. In our view, the doubts that triggered the District Court's initial inquiry here were reasonable, as was the court's ultimate conclusion.

For one thing, and contrary to respondents' suggestion, the specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused

the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.* That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. The tire in question, the expert conceded, had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection. See *supra,* at 143–144; App. 293–294. The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation.

Nor was the basis for Carlson's conclusion simply the general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation. Rather, the expert employed a more specific theory to establish the existence (or absence) of such abuse. Carlson testified precisely that in the absence of *at least two* of four signs of abuse (proportionately greater tread wear on the shoulder; signs of grooves caused by the beads; discolored sidewalls; marks on the rim flange), he concludes that a defect caused the separation. And his analysis depended upon acceptance of a further implicit proposition, namely, that his visual and tactile inspection could determine that the tire before him had not been abused despite some evidence of the presence of the very signs for which he looked (and two punctures).

For another thing, the transcripts of Carlson's depositions support both the trial court's initial uncertainty and its final conclusion. Those transcripts cast considerable doubt upon the reliability of both the explicit theory (about the need for two signs of abuse) and the implicit proposition (about the significance of visual inspection in this case). Among other things, the expert could not say whether the tire had trav-

eled more than 10, or 20, or 30, or 40, or 50 thousand miles, adding that 6,000 miles was "about how far" he could "say with any certainty." *Id.*, at 265. The court could reasonably have wondered about the reliability of a method of visual and tactile inspection sufficiently precise to ascertain with some certainty the abuse-related significance of minute shoulder/center relative tread wear differences, but insufficiently precise to tell "with any certainty" from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles. And these concerns might have been augmented by Carlson's repeated reliance on the "subjective[ness]" of his mode of analysis in response to questions seeking specific information regarding how he could differentiate between a tire that actually had been overdeflected and a tire that merely looked as though it had been. *Id.*, at 222, 224–225, 285–286. They would have been further augmented by the fact that Carlson said he had inspected the tire itself for the first time the morning of his first deposition, and then only for a few hours. (His initial conclusions were based on photographs.) *Id.*, at 180.

Moreover, prior to his first deposition, Carlson had issued a signed report in which he concluded that the tire had "not been . . . overloaded or underinflated," not because of the absence of "two of four" signs of abuse, but simply because "the rim flange impressions . . . were normal." *Id.*, at 335–336. That report also said that the "tread depth remaining was $\frac{3}{32}$ inch," *id.*, at 336, though the opposing expert's (apparently undisputed) measurements indicate that the tread depth taken at various positions around the tire actually ranged from $\frac{5}{32}$ of an inch to $\frac{4}{32}$ of an inch, with the tire apparently showing greater wear along *both* shoulders than along the center, *id.*, at 432–433.

Further, in respect to one sign of abuse, bead grooving, the expert seemed to deny the sufficiency of his own simple visual-inspection methodology. He testified that most tires have some bead groove pattern, that where there is reason

to suspect an abnormal bead groove he would ideally "look at a lot of [similar] tires" to know the grooving's significance, and that he had not looked at many tires similar to the one at issue. *Id.*, at 212–213, 214, 217.

Finally, the court, after looking for a defense of Carlson's methodology as applied in these circumstances, found no convincing defense. Rather, it found (1) that "none" of the *Daubert* factors, including that of "general acceptance" in the relevant expert community, indicated that Carlson's testimony was reliable, 923 F. Supp., at 1521; (2) that its own analysis "revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*," App. to Pet. for Cert. 4c; and (3) that the "parties identified no such factors in their briefs," *ibid.* For these three reasons *taken together*, it concluded that Carlson's testimony was unreliable.

Respondents now argue to us, as they did to the District Court, that a method of tire failure analysis that employs a visual/tactile inspection is a reliable method, and they point both to its use by other experts and to Carlson's long experience working for Michelin as sufficient indication that that is so. But no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience. Nor does anyone deny that, as a general matter, tire abuse may often be identified by qualified experts through visual or tactile inspection of the tire. See Affidavit of H. R. Baumgardner 1–2, cited in Brief for National Academy of Forensic Engineers as *Amicus Curiae* 16 (Tire engineers rely on visual examination and process of elimination to analyze experimental test tires). As we said before, *supra*, at 153–154, the question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors "in deciding the particular issues in the case." 4 J. McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1], p. 702–33 (2d ed. 1998); see also Advisory

Committee's Note on Proposed Fed. Rule Evid. 702, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment 126 (1998) (stressing that district courts must "scrutinize" whether the "principles and methods" employed by an expert "have been properly applied to the facts of the case").

The particular issue in this case concerned the use of Carlson's two-factor test and his related use of visual/tactile inspection to draw conclusions on the basis of what seemed small observational differences. We have found no indication in the record that other experts in the industry use Carlson's two-factor test or that tire experts such as Carlson normally make the very fine distinctions about, say, the symmetry of comparatively greater shoulder tread wear that were necessary, on Carlson's own theory, to support his conclusions. Nor, despite the prevalence of tire testing, does anyone refer to any articles or papers that validate Carlson's approach. Cf. Bobo, Tire Flaws and Separations, in Mechanics of Pneumatic Tires 636–637 (S. Clark ed. 1981); C. Schnuth, R. Fuller, G. Follen, G. Gold, & J. Smith, Compression Grooving and Rim Flange Abrasion as Indicators of Over-Deflected Operating Conditions in Tires, presented to Rubber Division of the American Chemical Society, Oct. 21–24, 1997; J. Walter & R. Kiminecz, Bead Contact Pressure Measurements at the Tire-Rim Interface, presented to the Society of Automotive Engineers, Inc., Feb. 24–28, 1975. Indeed, no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here. Of course, Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." 522 U. S., at 146.

Respondents additionally argue that the District Court too rigidly applied *Daubert*'s criteria. They read its opinion to hold that a failure to satisfy any one of those criteria automatically renders expert testimony inadmissible. The District Court's initial opinion might have been vulnerable to a form of this argument. There, the court, after rejecting respondents' claim that Carlson's testimony was "exempted from *Daubert*-style scrutiny" because it was "technical analysis" rather than "scientific evidence," simply added that "none of the four admissibility criteria outlined by the *Daubert* court are satisfied." 923 F. Supp., at 1521. Subsequently, however, the court granted respondents' motion for reconsideration. It then explicitly recognized that the relevant reliability inquiry "should be 'flexible,'" that its "'overarching subject [should be] . . . validity' and reliability," and that "*Daubert* was intended neither to be exhaustive nor to apply in every case." App. to Pet. for Cert. 4c (quoting *Daubert*, 509 U. S., at 594–595). And the court ultimately based its decision upon Carlson's failure to satisfy either *Daubert*'s factors *or any other* set of reasonable reliability criteria. In light of the record as developed by the parties, that conclusion was within the District Court's lawful discretion.

In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case. The District Court did not abuse its discretionary authority in this case. Hence, the judgment of the Court of Appeals is

Reversed.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring.

I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to

abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

JUSTICE STEVENS, concurring in part and dissenting in part.

The only question that we granted certiorari to decide is whether a trial judge "[m]ay . . . consider the four factors set out by this Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), in a Rule 702 analysis of admissibility of an engineering expert's testimony." Pet. for Cert. i. That question is fully and correctly answered in Parts I and II of the Court's opinion, which I join.

Part III answers the quite different question whether the trial judge abused his discretion when he excluded the testimony of Dennis Carlson. Because a proper answer to that question requires a study of the record that can be performed more efficiently by the Court of Appeals than by the nine Members of this Court, I would remand the case to the Eleventh Circuit to perform that task. There are, of course, exceptions to most rules, but I firmly believe that it is neither fair to litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition. See *General Electric Co.* v. *Joiner*, 522 U. S. 136, 150–151 (1997) (STEVENS, J., concurring in part and dissenting in part).

Accordingly, while I do not feel qualified to disagree with the well-reasoned factual analysis in Part III of the Court's opinion, I do not join that Part, and I respectfully dissent from the Court's disposition of the case.

Syllabus

SOUTH CENTRAL BELL TELEPHONE CO. ET AL. *v.* ALABAMA ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 97–2045. Argued January 19, 1999—Decided March 23, 1999

Alabama requires each corporation doing business in that State to pay a franchise tax based on the firm's capital. The tax for a domestic firm is based on the par value of the firm's stock, which the firm may set at a level well below its book or market value. An out-of-state firm must pay tax based on the value of the actual amount of capital it employs in the State, with no leeway to control its tax base. Reynolds Metals Company and other corporations sued the state tax authorities, seeking a refund of the foreign franchise tax they had paid on the ground that the tax discriminated against foreign corporations in violation of the Commerce and Equal Protection Clauses. The State Supreme Court rejected the claims, holding that the special burden imposed on foreign corporations simply offset a different burden imposed exclusively on domestic corporations by Alabama's domestic shares tax. Subsequently, South Central Bell Telephone Company and other foreign corporations went to trial in the present suit, asserting similar Commerce and Equal Protection Clause claims, though in respect to different tax years. The trial court agreed with the Bell plaintiffs that the tax substantially discriminates against foreign corporations, but nonetheless dismissed their claims as barred by res judicata in light of the State Supreme Court's *Reynolds Metals* decision. The State Supreme Court affirmed.

Held:

1. The State's argument that this Court lacks appellate jurisdiction under the Eleventh Amendment was considered and rejected in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U. S. 18, 30. That case confirmed a long-established and uniform practice of reviewing state-court decisions on federal matters, regardless of whether the State was the plaintiff or the defendant in the trial court. *E. g., id.,* at 28. The Court will not revisit that relatively recent precedent. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 854–855. Pp. 165–166.

2. To the extent that the State Supreme Court based its decision on claim or issue preclusion (res judicata or collateral estoppel), that decision is inconsistent with the Fourteenth Amendment's due process guarantee. Since *Reynolds Metals* and this case involve different plaintiffs

and tax years, neither is a class action, and no one claims there is privity or some other special relationship between the two sets of plaintiffs, the Bell plaintiffs are "strangers" to the earlier judgment and thus cannot be bound by that judgment. *Richards* v. *Jefferson County*, 517 U. S. 793, 801–802. That the Bell plaintiffs were aware of the Reynolds Metals litigation and that one of the Reynolds Metals lawyers also represented the Bell plaintiffs created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the Bell plaintiffs to expect to be precluded, as a res judicata matter, by the earlier judgment itself. Although the Bell plaintiffs, in a letter to the trial court, specifically requested that their case be held in abeyance until *Reynolds Metals* was decided, the letter was no more than a routine request for continuance and does not distinguish *Richards*. Pp. 167–168.

3. The state franchise tax on foreign corporations impermissibly discriminates against interstate commerce, in violation of the Commerce Clause. State law gives domestic corporations the ability to reduce their franchise tax liability simply by reducing the par value of their stock, while it denies foreign corporations that same ability. The State cannot justify this discrimination on the ground that the tax is a complementary or compensatory tax that offsets the tax burden that the domestic shares tax imposes upon domestic corporations, since the relevant tax burdens are *not* roughly approximate, nor are they similar in substance. See, *e. g.*, *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 103. Alabama imposes its foreign franchise tax on a foreign firm's decision to do business in the State; it imposes its domestic shares tax on a certain form of property ownership, namely, shares in domestic corporations. The State's invitation to reconsider and abandon the Court's negative Commerce Clause cases will not be entertained, as the State did not make clear it intended to make this argument until it filed its brief on the merits. Pp. 169–171.

711 So. 2d 1005, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court. O'CONNOR, J., *post*, p. 171, and THOMAS, J., *post*, p. 171, filed concurring opinions.

Mark L. Evans argued the cause for petitioners. With him on the briefs were *Henk Brands*, *Walter Hellerstein*, *Charles R. Morgan*, *Mark D. Hallenbeck*, *Albert G. Moore, Jr.*, *Richard W. Bell*, *Walter R. Byars*, *David J. Bowling*, and *Courtney Hyers*.

Charles J. Cooper argued the cause for respondents. With him on the brief were *Bill Pryor*, Attorney General of Alabama, *Ron Bowden* and *Dan E. Schmaeling*, Assistant Attorneys General, *Michael W. Kirk*, and *David H. Thompson*.*

JUSTICE BREYER delivered the opinion of the Court.

The basic question in this case is whether the franchise tax Alabama assesses on foreign corporations violates the Commerce Clause. We conclude that it does.

I

Alabama requires each corporation doing business in that State to pay a franchise tax based upon the firm's capital. A domestic firm, organized under the laws of Alabama, must pay tax in an amount equal to 1% of the par value of the firm's stock. Ala. Const., Art. XII, § 229; Ala. Code § 40–14–40 (1993); App. to Pet. for Cert. 50a, 52a, 61a (Stipulated Facts). A foreign firm, organized under the laws of a State other than Alabama, must pay tax in an amount equal to 0.3% of the value of "the actual amount of capital employed" in Alabama. Ala. Const., Art. XII, § 232; Ala. Code § 40–14–41(a) (Supp. 1998). Alabama law grants domestic firms considerable leeway in controlling their own tax base and tax liability, as a firm may set its stock's par value at a level well below its book or market value. App. to Pet. for Cert. 52a–53a (Stipulated Facts). Alabama law does not grant a foreign firm similar leeway to control its tax base, however, as the value of the "actual" capital upon which Alabama calculates the foreign franchise tax includes not only the value of capital stock but also other accounting items (*e. g.*, long-term debt, surplus), the value of which depends upon the

*Briefs of *amici curiae* urging reversal were filed for Avon Products, Inc., et al. by *William L. Goldman;* for Tax Executives Institute, Inc., by *Timothy J. McCormally* and *Mary L. Fahey;* and for the Committee on State Taxation by *William D. Peltz* and *Jeffrey A. Friedman.*

firm's financial status. *Id.*, at 53a–54a; Ala. Code §§ 40–14–41(b)(1)–(5), (c) (Supp. 1998).

In 1986, the Reynolds Metals Company and three other foreign corporations sued Alabama's tax authorities, seeking a refund of the foreign franchise tax they had paid on the ground that the tax discriminated against foreign corporations. Although the tax favored foreign firms in some respects (granting them a lower tax rate and excluding any capital not employed in Alabama), that favorable treatment was more than offset by the fact that a domestic firm, unlike a foreign firm, could shrink its tax base significantly simply by setting the par value of its stock at a low level. As a result, Reynolds Metals said, the tax burden borne by foreign corporations was much higher than the burden on domestic corporations, and the tax consequently violated both the Commerce and Equal Protection Clauses. U. S. Const., Art. I, § 8, cl. 3, and Amdt. 14, § 1.

The Alabama Supreme Court rejected these claims. *White* v. *Reynolds Metals Co.*, 558 So. 2d 373 (1989). Without denying that the franchise tax imposed a special burden upon foreign corporations, the court nonetheless thought that this special burden simply offset a different burden imposed exclusively upon domestic corporations by Alabama's "domestic shares tax." This latter tax is a property tax on shares of domestic stock; it is assessed against shareholders based upon the value of the shares they hold, but in practice it is normally paid by the corporation itself. *Id.*, at 386–388 (citing, *e. g.*, *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932) (permitting taxes that discriminate against interstate commerce when they compensate for burdens placed uniquely upon domestic commerce)). Any remaining discrimination, the court concluded, was constitutionally insignificant. 558 So. 2d, at 388–390.

While the Alabama courts were considering *Reynolds Metals*, a different foreign corporation, South Central Bell Telephone Company, brought the lawsuit now before us.

Bell asserted the same Commerce Clause and Equal Protection Clause claims as had Reynolds Metals, though in respect to different tax years. Bell initially agreed to hold its suit in abeyance pending the resolution of Reynolds Metals' claims. Then, after the Alabama Supreme Court decided against the taxpayers in *Reynolds Metals*, Bell (joined by other foreign corporations with similar claims) went to trial.

The Bell plaintiffs introduced evidence designed to show that the empirical premises that underlay *Reynolds Metals* were wrong: Despite the differences in franchise tax rates, Alabama's franchise tax scheme in practice discriminates substantially against foreign corporations, and the Alabama tax on shares of domestic corporations does not offset the discrimination in the franchise tax. The Alabama trial court agreed with the Bell plaintiffs that their evidence, taken together with this Court's recent Commerce Clause cases, "clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Memorandum Opinion in App. to Pet. for Cert. 21a–22a (hereinafter Mem. Op.) (citing *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93 (1994); *Associated Industries of Mo.* v. *Lohman*, 511 U. S. 641 (1994); *Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996)). But the trial court nonetheless dismissed their claims for a *different* reason, namely, that given the Alabama Supreme Court's decision in *Reynolds Metals*, "the Taxpayer[s'] claims [in this case] are barred by *res judicata*." Mem. Op. 17a.

The Alabama Supreme Court affirmed the trial court by a vote of 5 to 4. The majority's decision cited *Reynolds Metals* and a procedural rule regarding summary dispositions and simply said, "PER CURIAM. AFFIRMED. NO OPINION." 711 So. 2d 1005 (1998). One justice concurred specially to say that by requesting that their case be held in abeyance until *Reynolds Metals* was resolved, the Bell

plaintiffs had agreed to be bound by *Reynolds Metals*. 711 So. 2d, at 1005–1007 (opinion of Maddox, J.). Three dissenters wrote that given the differences between this case and *Reynolds Metals* (*e. g.*, different tax years, different plaintiffs), res judicata could not bind the Bell plaintiffs. 711 So. 2d, at 1008 (opinion of See, J.). On the merits, the dissenters concluded that the franchise tax violated the Commerce Clause. See *id.*, at 1008–1011. (One other justice dissented without opinion.)

We granted the Bell plaintiffs' petition for certiorari, agreeing to decide (1) whether the Alabama courts' refusal to permit the Bell plaintiffs to raise their constitutional claims because of res judicata "deprived" the Bell plaintiffs "of the due process of law guaranteed by the Fourteenth Amendment," Pet. for Cert. (i); see *Richards* v. *Jefferson County*, 517 U. S. 793 (1996); and (2) whether the franchise tax "impermissibly discriminates against interstate commerce, in violation of the Commerce Clause," Pet. for Cert. (i). We decide both questions in favor of the Bell plaintiffs.

II

A

At the outset, the respondents—the State of Alabama and its State Department of Revenue (collectively, the State)—argue that this Court lacks "appellate jurisdiction over this case." Brief for Respondents 15. The State points to 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 . . . ."

The State claims that this Amendment's literal language applies here because this case began in state court as a suit brought against one State, namely, Alabama, by citizens of another; because we, in hearing this case, would be exercis-

ing the "Judicial power of the United States"; and because Alabama has not waived its right to object to our exercise of that power.

This Court, however, has recently considered and rejected the very argument that the State now makes. In *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18 (1990), we unanimously held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *Id.*, at 31. We explained:

> "[I]t is 'inherent in the constitutional plan' . . . that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons, or the state itself.'" *Id.*, at 30 (quoting *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 329 (1934); *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 11 Pet. 420, 585 (1837) (Story, J., dissenting)).

Our holding in *McKesson* confirmed a long-established and uniform practice of reviewing state-court decisions on federal matters, regardless of whether the State was the plaintiff or the defendant in the trial court. 496 U. S., at 28; accord, *General Oil Co.* v. *Crain*, 209 U. S. 211, 233 (1908) (Harlan, J., concurring) ("[I]t was long ago settled" that the Eleventh Amendment does not bar "a writ of error to review the final judgment of a state court").

Although the State now asks us to "overrule *McKesson*," Brief for Respondents 27, it does not provide a convincing reason why we should revisit that relatively recent precedent, and we shall not do so. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992) (considerations relevant to overruling precedent include workability of prior precedent, its relation to other changes in law, and relevant reliance).

B

The State, in opposing Bell's petition for certiorari, argued that the Alabama Supreme Court's decision rested upon an adequate state ground, namely, state-law principles of res judicata. It now believes, however, that the Alabama Supreme Court's decision rejected the plaintiffs' claims on their merits and relied upon *Reynolds Metals* under principles of *stare decisis*, not res judicata. Brief for Respondents 3. For that reason, the State "offer[s] no defense of the decision as a valid application of the doctrine of *res judicata*." *Ibid.* Nor do we believe a valid defense could be made. See *Richards* v. *Jefferson County*, *supra*.

In *Richards*, we considered an Alabama Supreme Court holding that state-law principles of res judicata prevented certain taxpayers from bringing a case (which we will call Case Two) to challenge on federal constitutional grounds a state tax that the Alabama Supreme Court had upheld in an earlier case (Case One) brought by different taxpayers. We held that the Fourteenth Amendment forbade this "extreme" application of state-law preclusion (res judicata) principles, *id.*, at 797, because the plaintiffs in Case Two were "strangers" to the earlier judgment, *id.*, at 802.

We cannot distinguish *Richards* from the case before us. In *Richards*, we pointed out that the taxpayers in Case One "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any . . . taxpayers who were nonparties." *Id.*, at 801. We added that the taxpayers in Case One did not understand their suit "to be on behalf of" the different taxpayers involved in Case Two, nor did the Case One court make any special effort "to protect the interests" of the Case Two plaintiffs. *Id.*, at 802. As far as we are aware, the same can be said of the circumstances now before us. The two relevant cases involve different plaintiffs and different tax years. Neither is a class action, and no one claims that there

is "privity" or some other special relationship between the two sets of plaintiffs. Hence, the Case Two plaintiffs here are "strangers" to Case One, and for the reasons we explained in *Richards*, they cannot be bound by the earlier judgment.

The Alabama trial court tried to distinguish the circumstances before us from those in *Richards* by pointing out that the plaintiffs here were aware of the earlier Reynolds Metals litigation and that one of the Reynolds Metals lawyers also represented the Bell plaintiffs. See Mem. Op. 18a–19a. These circumstances, however, created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the later plaintiffs to expect to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced in *Reynolds Metals* would bind them in the same way that a decided case binds every citizen.

A concurring justice in the Alabama Supreme Court concluded that the Bell plaintiffs had "agreed that the final decision in *Reynolds Metals* would be controlling" when, in a letter to the trial court, they "specifically requested that [their] case be held in abeyance until *Reynolds Metals* was decided." 711 So. 2d, at 1006–1007 (opinion of Maddox, J.). That letter also said, however, that if "'either party desires to proceed at a later date, with the Court's permission this case would be activated.'" *Id.*, at 1006. Given this latter statement, the letter is no more than a routine request for continuance. It does not distinguish *Richards*.

In sum, if the Alabama Supreme Court's holding in this case rests on state-law claim or issue preclusion (res judicata or collateral estoppel), that holding is inconsistent with *Richards* and with the Fourteenth Amendment's due process guarantee.

C

Turning to the merits, we conclude that this Court's Commerce Clause precedent requires us to hold Alabama's franchise tax unconstitutional. Alabama law defines a domestic corporation's tax base as including only one item—the par value of capital stock—which the corporation may set at whatever level it chooses. A foreign corporation's tax base, on the other hand, contains many additional balance sheet items that are valued in accordance with generally accepted accounting principles, rather than by arbitrary assignment by the corporation. Accordingly, as the State has admitted, Alabama law gives domestic corporations the ability to reduce their franchise tax liability simply by reducing the par value of their stock, while it denies foreign corporations that same ability. App. to Pet. for Cert. 52a–53a (Stipulated Facts). And no one claims that the different tax rates for foreign and domestic corporations offset the difference in the tax base. The tax therefore facially discriminates against interstate commerce and is unconstitutional unless the State can offer a sufficient justification for it. Cf. *Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996) (state tax scheme requiring shareholders in out-of-state corporations to pay tax on a higher percentage of share value than shareholders of corporations operating solely within the State facially discriminated in violation of the Commerce Clause). This discrimination is borne out in practice, as the record, undisputed here, shows that the average domestic corporation pays only one-fifth the franchise tax it would pay if it were treated as a foreign corporation. See App. to Pet. for Cert. 36a (plaintiffs' statement of facts); Mem. Op. 21a, and n. 7 (adopting plaintiffs' statement of facts).

The State cannot justify this discrimination on the ground that the foreign franchise tax is a "complementary" or "compensatory" tax that offsets the tax burden that the domestic shares tax imposes upon domestic corporations. *E. g., Hen-*

neford v. *Silas Mason Co.*, 300 U. S. 577 (1937) (upholding a facially discriminatory use tax as "complementary" to a domestic sales tax). Our cases hold that a discriminatory tax cannot be upheld as "compensatory" unless the State proves that the special burden that the franchise tax imposes upon foreign corporations is "roughly . . . approximate" to the special burden on domestic corporations, and that the taxes are similar enough "in substance" to serve as "mutually exclusive" proxies for one another. *Oregon Waste Systems*, 511 U. S., at 103; accord, *Fulton*, *supra*, at 332–333.

In this case, however, the relevant tax burdens are *not* "roughly approximate." See App. to Pet. for Cert. 36a–37a (plaintiffs' statement of facts, showing that the foreign franchise tax burden far exceeds the domestic franchise tax and the domestic shares tax combined); Mem. Op. 21a, n. 7 (adopting plaintiffs' statement of facts); cf. 711 So. 2d, at 1011 (See, J., dissenting) (in the face of the State's "indefinite assertion," plaintiffs offered "substantial evidence . . . that the foreign franchise tax exceeds any intrastate burden" imposed through the higher franchise tax rate and the domestic shares tax). And the State has made no effort to persuade this Court otherwise.

Nor are the two tax burdens similar in substance. Alabama imposes its foreign franchise tax upon a foreign firm's decision to do business in the State; Alabama imposes its domestic shares tax upon the ownership of a certain form of property, namely, shares in domestic corporations. Compare Ala. Code § 40–14–41 with § 40–14–70 (1993 and Supp. 1998). No one has explained to us how the one could be seen as a "proxy" for the other.

Rather than dispute any of these matters, the State instead says, with "respect to the merits," that "the flaw in petitioners' claim lies not in the application to Alabama's corporate franchise tax of this Court's recent negative Commerce Clause cases; the flaw lies rather in the negative Commerce Clause cases themselves." Brief for Respondents 3.

The State adds that the Court should "formally reconsider" and "abando[n]" its negative Commerce Clause jurisprudence." *Id.*, at 3, 28. We will not entertain this invitation to reconsider our longstanding negative Commerce Clause doctrine, however, because the State did not make clear it intended to make this argument until it filed its brief on the merits. We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate. We are not aware of any convincing reason to depart from that practice in this case. And consequently we shall not do so.

For these reasons, the judgment of the Alabama Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court, and I agree that the State's failure to properly raise its challenge to our negative Commerce Clause jurisprudence supports a decision not to pass on the merits of this claim. *Ante* this page. I further note, however, that the State does nothing that would persuade me to reconsider or abandon our well-established body of negative Commerce Clause jurisprudence.

JUSTICE THOMAS, concurring.

I join the opinion of the Court. I agree that it would be inappropriate to take up the State's invitation to reconsider our negative Commerce Clause doctrine in this case because "the State did not make clear it intended to make this argument until it filed its brief on the merits." *Ante* this page.

Syllabus

MINNESOTA ET AL. *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL.

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

No. 97–1337. Argued December 2, 1998—Decided March 24, 1999

Pursuant to an 1837 Treaty, several Chippewa Bands ceded land in present-day Minnesota and Wisconsin to the United States. The United States, in turn, guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land "during the pleasure of the President of the United States." In an 1850 Executive Order, President Taylor ordered the Chippewa's removal from the ceded territory and revoked their usufructuary rights. The United States ultimately abandoned its removal policy, but its attempts to acquire Chippewa lands continued. An 1855 Treaty set aside lands as reservations for the Mille Lacs Band, but made no mention of, among other things, whether it abolished rights guaranteed by previous treaties. Minnesota was admitted to the Union in 1858. In 1990, the Mille Lacs Band and several members sued Minnesota, its Department of Natural Resources, and state officials (collectively State), seeking, among other things, a declaratory judgment that they retained their usufructuary rights and an injunction to prevent the State's interference with those rights. The United States and several counties and landowners intervened. In later stages of the case, several Wisconsin Bands of Chippewa intervened and the District Court consolidated the Mille Lacs Band litigation with the portion of another suit involving usufructuary rights under the 1837 Treaty. The District Court ultimately concluded that the Chippewa retained their usufructuary rights under the 1837 Treaty and resolved several resource allocation and regulation issues. The Eighth Circuit affirmed. As relevant here, it rejected the State's argument that the 1850 Executive Order abrogated the usufructuary rights guaranteed by the 1837 Treaty, concluded that the 1855 Treaty did not extinguish those privileges for the Mille Lacs Band, and rejected the State's argument that, under the "equal footing doctrine," Minnesota's entrance into the Union extinguished any Indian treaty rights.

Held: The Chippewa retain the usufructuary rights guaranteed to them by the 1837 Treaty. Pp. 188–208.

(a) The 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights. The President's power to issue an Executive Order must stem either from an Act of Congress or from the Constitu-

tion itself. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585. The Court of Appeals concluded that the 1830 Removal Act did not authorize the removal order, and no party challenges that conclusion here. Even if the 1830 Removal Act did not *forbid* the removal order, it did not authorize the order. There is no support for the landowners' claim that the 1837 Treaty authorized the removal order. The Treaty made no mention of removal, and the issue was not discussed during treaty negotiations. The Treaty's silence is consistent with the United States' objectives in negotiating the Treaty: the purchase of Chippewa land. The State argues that, even if the order's removal portion was invalid, the treaty privileges were nevertheless revoked because the invalid removal order was severable from the portion of the order revoking usufructuary rights. Assuming, *arguendo*, that the severability standard for statutes—whether the legislature would not have taken the valid action independently of the invalid action, *e. g.*, *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234—also applies to Executive Orders, the historical evidence indicates that President Taylor intended the 1850 order to stand or fall as a whole. That order embodied a single, coherent policy, the primary purpose of which was the Chippewa's removal. The revocation of usufructuary rights was an integral part of this policy, for the order tells the Indians to "go" and not to return to the ceded lands to hunt or fish. There is also little historical evidence that the treaty privileges themselves—rather than the Indians' presence—caused problems necessitating revocation of the privileges. Pp. 188–195.

(b) The Mille Lacs Band did not relinquish its 1837 Treaty rights in the 1855 Treaty by agreeing to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." That sentence does not mention the 1837 Treaty or hunting, fishing, and gathering rights. In fact, the entire 1855 Treaty is devoid of any language expressly mentioning usufructuary rights or providing money for abrogation of those rights. These are telling omissions, since federal treaty drafters had the sophistication and experience to use express language when abrogating treaty rights. The historical record, purpose, and context of the negotiations all support the conclusion that the 1855 Treaty was designed to transfer Chippewa land to the United States, not terminate usufructuary rights. *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753, distinguished. Pp. 195–202.

(c) The Chippewa's usufructuary rights were not extinguished when Minnesota was admitted to the Union. Congress must clearly express an intent to abrogate Indian treaty rights, *United States* v. *Dion*, 476

Syllabus

U. S. 734, 738–740, and there is no clear evidence of such an intent here. The State concedes that Minnesota's enabling Act is silent about treaty rights and points to no legislative history describing the Act's effect on such rights. The State's reliance on *Ward* v. *Race Horse*, 163 U. S. 504, is misplaced. The Court's holding that a Treaty reserving to a Tribe "'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts'" terminated when Wyoming became a State, *id.*, at 507, has been qualified by this Court's later decisions. The first part of the *Race Horse* holding—that the treaty rights conflicted irreconcilably with state natural resources regulation such that they could not survive Wyoming's admission to the Union on an "equal footing" with the 13 original States—rested on a false premise, for this Court has subsequently made clear that a tribe's treaty rights to hunt, fish, and gather on state land can coexist with state natural resources management, see, *e. g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658. Thus, statehood by itself is insufficient to extinguish such rights. *Race Horse*'s alternative holding—that the treaty rights at issue were not intended to survive Wyoming's statehood—also does not help the State here. There is no suggestion in the 1837 Treaty that the Senate intended the rights here to terminate when a State was established in the area; there is no fixed termination point contemplated in that Treaty; and treaty rights are not impliedly terminated at statehood, *e. g.*, *Wisconsin* v. *Hitchcock*, 201 U. S. 202, 213–214. Pp. 202–208.

124 F. 3d 904, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post*, p. 208. THOMAS, J., filed a dissenting opinion, *post*, p. 220.

John L. Kirwin, Assistant Attorney General of Minnesota, argued the cause for petitioners. With him on the brief were *Hubert H. Humphrey III*, Attorney General, and *Peter L. Tester* and *Michelle E. Beeman*, Assistant Attorneys General. *Randy V. Thompson* argued the cause for Thompson et al., respondents under this Court's Rule 12.6 in support of petitioners. With him on the briefs were *Gary E. Persian* and *Stephen G. Froehle*. *James Martin Johnson*, *Michael Jesse*, and *Jennifer Fahey* filed briefs in support of petition-

ers for Aitkin County et al., respondents under this Court's Rule 12.6.

Marc D. Slonim argued the cause for respondents Mille Lacs Band of Chippewa Indians et al. With him on the brief were *John B. Arum*, *Charles J. Cooper*, and *Alan K. Palmer*. *Barbara McDowell* argued the cause for the United States. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *Elizabeth Ann Peterson*. *James M. Jannetta* and *Carol Brown Biermeier* filed a brief for respondents Bad River Band of Lake Superior Chippewa Indians et al. *William R. Perry*, *Anne D. Noto*, *Henry M. Buffalo, Jr.*, *Dennis J. Peterson*, and *Milton Rosenberg* filed a brief for respondents Fond du Lac Band of Lake Superior Chippewa Indians et al. *Howard J. Bichler* and *M. Joan Warren* filed a brief for respondents St. Croix Chippewa Indians of Wisconsin et al.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1837, the United States entered into a Treaty with several Bands of Chippewa Indians. Under the terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guar-

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Richard M. Frank* and *Jan S. Stevens*, Assistant Attorneys General, and *Joel S. Jacobs*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *James E. Doyle* of Wisconsin, and *William U. Hill* of Wyoming; and for the Pacific Legal Foundation by *Brent D. Boger* and *Robin L. Rivett*.

Carter G. Phillips, *Virginia A. Seitz*, and *John Bell* filed a brief for the National Congress of American Indians et al. as *amici curiae* urging affirmance.

Douglas Y. Freeman filed a brief for the Citizens Equal Rights Alliance as *amicus curiae*.

anteed to the Indians certain hunting, fishing, and gathering rights on the ceded land. We must decide whether the Chippewa Indians retain these usufructuary rights today. The State of Minnesota argues that the Indians lost these rights through an Executive Order in 1850, an 1855 Treaty, and the admission of Minnesota into the Union in 1858. After an examination of the historical record, we conclude that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty.

I

A

In 1837, several Chippewa Bands, including the respondent Bands here, were summoned to Fort Snelling (near present-day St. Paul, Minnesota) for the negotiation of a treaty with the United States. The United States representative at the negotiations, Wisconsin Territorial Governor Henry Dodge, told the assembled Indians that the United States wanted to purchase certain Chippewa lands east of the Mississippi River, lands located in present-day Wisconsin and Minnesota. App. 46 (1837 Journal of Treaty Negotiations). The Chippewa agreed to sell the land to the United States, but they insisted on preserving their right to hunt, fish, and gather in the ceded territory. See, *e. g.*, *id.*, at 70, 75–76. In response to this request, Governor Dodge stated that he would "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them." *Id.*, at 78. To these ends, the parties signed a treaty on July 29, 1837. In the first two articles of the 1837 Treaty, the Chippewa ceded land to the United States in return for 20 annual payments of money and goods. The United States also, in the fifth article of the Treaty, guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied *[sic]* to the Indians, during the pleasure of the President of the United States." 1837 Treaty with the Chippewa, 7 Stat. 537.

In 1842, many of the same Chippewa Bands entered into another Treaty with the United States, again ceding additional lands to the Federal Government in return for annuity payments of goods and money, while reserving usufructuary rights on the ceded lands. 1842 Treaty with the Chippewa, 7 Stat. 591. This Treaty, however, also contained a provision providing that the Indians would be "subject to removal therefrom at the pleasure of the President of the United States." Art. 6, *id.*, at 592.

In the late 1840's, pressure mounted to remove the Chippewa to their unceded lands in the Minnesota Territory. On September 4, 1849, Minnesota Territorial Governor Alexander Ramsey urged the Territorial Legislature to ask the President to remove the Chippewa from the ceded land. App. 878 (Report and Direct Testimony of Dr. Bruce M. White) (hereinafter White Report). The Territorial Legislature complied by passing, in October 1849, "Joint Resolutions relative to the removal of the Chippewa Indians from the ceded lands within the Territory of Minnesota." App. to Pet. for Cert. 567 (hereinafter Joint Resolution). The Joint Resolution urged:

> "[T]o ensure the security and tranquility of the white settlements in an extensive and valuable district of this Territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that the privileges given to them by Article Fifth [of the 1837 Treaty] and Article Second [of the 1842 Treaty] be revoked." *Ibid.*

The Territorial Legislature directed its resolution to Congress, but it eventually made its way to President Zachary Taylor. App. 674 (Report and Direct Testimony of Professor Charles E. Cleland) (hereinafter Cleland Report). It is unclear why the Territorial Legislature directed this resolution to Congress and not to the President. One possible explanation is that, although the 1842 Treaty gave the President authority to remove the Chippewa from that land area, see 1842 Treaty with the Chippewa, Art. 6, 7 Stat. 592, the 1837 Treaty did not confer such authority on the President. Therefore, any action to remove the Chippewa from the 1837 ceded lands would require congressional approval. See App. 674 (Cleland Report).

The historical record provides some clues into the impetus behind this push to remove the Chippewa. In his statement to the Territorial Legislature, Governor Ramsey asserted that the Chippewa needed to be removed because the white settlers in the Sauk Rapids and Swan River area were complaining about the privileges given to the Chippewa Indians. *Id.*, at 878 (White Report). Similarly, the Territorial Legislature urged removal of the Chippewa "to ensure the security and tranquility of the white settlements" in the area. App. to Pet. for Cert. 567 (Joint Resolution). The historical evidence suggests, however, that the white settlers were complaining about the Winnebago Indians, not the Chippewa, in the Sauk Rapids area. See App. 671–672 (Cleland Report). There is also evidence that Minnesotans wanted Indians moved from Wisconsin and Michigan to Minnesota because a large Indian presence brought economic benefits with it. Specifically, an Indian presence provided opportunities to trade with Indians in exchange for their annuity payments, and to build and operate Indian agencies, schools, and farms in exchange for money. The presence of these facilities in an area also opened opportunities for patronage jobs to staff these facilities. See *id.*, at 668–671; *id.*, at 1095 (White Report). See also *id.*, at 149–150 (letter from Rice

to Ramsey, Dec. 1, 1849) ("Minnesota would reap the benefit [from the Chippewa's removal]—whereas now their annuities pass via Detroit and not one dollar do our inhabitants get"). The District Court concluded in this case that "Minnesota politicians, including Ramsey, advocated removal of the Wisconsin Chippewa to Minnesota because they wanted to obtain more of the economic benefits generated by having a large number of Indians residing in their territory." 861 F. Supp. 784, 803 (Minn. 1994).

Whatever the impetus behind the removal effort, President Taylor responded to this pressure by issuing an Executive Order on February 6, 1850. The order provided:

> "The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States,' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands." App. to Pet. for Cert. 565.

The officials charged with implementing this order understood it primarily as a removal order, and they proceeded to implement it accordingly. See Record, Doc. No. 311, Plaintiffs' Exh. 88 (letter from Brown to Ramsey, Feb. 6, 1850); App. 161 (letter from Ramsey to Livermore, Mar. 4, 1850). See also 861 F. Supp., at 805 (citing Plaintiffs' Exh. 201 (letter from Livermore to Ramsey, Apr. 2, 1850)) (describing circular prepared to notify Indians of Executive Order); App.

1101–1102 (White Report) (describing circular and stating that "the entire thrust" of the circular had to do with removal).

The Government hoped to entice the Chippewa to remove to Minnesota by changing the location where the annuity payments—the payments for the land cessions—would be made. The Chippewa were to be told that their annuity payments would no longer be made at La Pointe, Wisconsin (within the Chippewa's ceded lands), but, rather, would be made at Sandy Lake, on unceded lands, in the Minnesota Territory. The Government's first annuity payment under this plan, however, ended in disaster. The Chippewa were told they had to be at Sandy Lake by October 25 to receive their 1850 annuity payment. See B. White, The Regional Context of the Removal Order of 1850, § 6, pp. 6–9 to 6–10 (Mar. 1994). By November 10, almost 4,000 Chippewa had assembled at Sandy Lake to receive the payment, but the annuity goods were not completely distributed until December 2. *Id.*, at 6–10. In the meantime, around 150 Chippewa died in an outbreak of measles and dysentery; another 230 Chippewas died on the winter trip home to Wisconsin. App. 228–229 (letter from Buffalo to Lea, Nov. 6, 1851).

The Sandy Lake annuity experience intensified opposition to the removal order among the Chippewa as well as among non-Indian residents of the area. See *id.*, at 206–207 (letter from Warren to Ramsey, Jan. 21, 1851); *id.*, at 214 (letter from Lea to Stuart, June 3, 1851) (describing opposition to the order). See also Record, Doc. No. 311, Plaintiffs' Exh. 93 (Michigan and Wisconsin citizens voice their objections to the order to the President). In the face of this opposition, Commissioner of Indian Affairs Luke Lea wrote to the Secretary of the Interior recommending that the President's 1850 order be modified to allow the Chippewa "to remain for the present in the country they now occupy." App. 215 (letter from Lea to Stuart, June 3, 1851). According to Commissioner Lea, removal of the Wisconsin Bands "is not re-

quired by the interests of the citizens or Government of the United States and would in its consequences in all probability be disastrous to the Indians." *Ibid.* Three months later, the Acting Commissioner of Indian Affairs wrote to the Secretary to inform him that 1,000 Chippewa were assembled at La Pointe, but that they could not be removed from the area without the use of force. He sought the Secretary's approval "to suspend the removal of these Indians until the determination of the President upon the recommendation of the commissioner is made known to this office." *Id.*, at 223–224 (letter from Mix to Graham, Aug. 23, 1851). Two days later, the Secretary of the Interior issued the requested authorization, instructing the Commissioner "to suspend the removal of the Chippeway *[sic]* Indians until the final determination of the President." *Id.*, at 225 (letter from Abraham to Lea, Aug. 25, 1851). Commissioner Lea immediately telegraphed the local officials with instructions to "[s]uspend action with reference to the removal of Lake Superior Chippewas for further orders." *Ibid.* (telegram from Lea to Watrous, Aug. 25, 1851). As the State's own expert historian testified, "[f]ederal efforts to remove the Lake Superior Chippewa to the Mississippi River effectively ended in the summer of 1851." *Id.*, at 986 (Report of Alan S. Newell).

Although Governor Ramsey still hoped to entice the Chippewa to remove by limiting annuity payments to only those Indians who removed to unceded lands, see *id.*, at 235–236 (letter from Ramsey to Lea, Dec. 26, 1851), this plan, too, was quickly abandoned. In 1853, Franklin Pierce became President, and he appointed George Manypenny as Commissioner of Indian Affairs. The new administration reversed Governor Ramsey's policy, and in 1853, annuity payments were once again made within the ceded territory. See, *e. g.*, Record, Doc. No. 311, Plaintiffs' Exh. 119, p. 2 (letter from Gorman to Manypenny, Oct. 8, 1853); Plaintiffs' Exh. 122 (letter from Herriman to Gorman, Nov. 10, 1853); see also Plain-

tiffs' Exh. 120 (letter from Wheeler to Parents, Oct. 20, 1853). As Indian Agent Henry Gilbert explained, the earlier "change from La Pointe to [Sandy Lake] was only an incident of the order for removal," thus suggesting that the resumption of the payments at La Pointe was appropriate because the 1850 removal order had been abandoned. App. 243 (letter from Gilbert to Manypenny, Dec. 14, 1853).

In 1849, white lumbermen built a dam on the Rum River (within the Minnesota portion of the 1837 ceded Territory), and the Mille Lacs Band of Chippewa protested that the dam interfered with its wild rice harvest. This dispute erupted in 1855 when violence broke out between the Chippewa and the lumbermen, necessitating a call for federal troops. In February 1855, the Governor of the Minnesota Territory, Willis Gorman, who also served as the ex officio superintendent of Indian affairs for the Territory, wrote to Commissioner Manypenny about this dispute. In his letter, he noted that "[t]he lands occupied by the timbermen have been surveyed and sold by the United States and the Indians have no other treaty interests *except hunting and fishing.*" *Id.*, at 295–296 (letter of Feb. 16, 1855) (emphasis added). There is no indication that Commissioner Manypenny disagreed with Governor Gorman's characterization of Chippewa treaty rights. In June of the same year, Governor Gorman wrote to Mille Lacs Chief Little Hill that even if the dam was located within the Mille Lacs Reservation under the 1855 Treaty, the dam "was put there long before you had any rights there except to hunt and fish." Record, Doc. No. 163, Plaintiffs' Exh. 19 (letter of June 4, 1855). Thus, as of 1855, the federal official responsible for Indian affairs in the Minnesota Territory acknowledged and recognized Chippewa rights to hunt and fish in the 1837 ceded Territory.

On the other hand, there are statements by federal officials in the late 19th century and the first half of the 20th century that suggest that the Federal Government no longer recognized Chippewa usufructuary rights under the 1837 Treaty.

See, *e. g.*, App. 536–539 (letter from Acting Commissioner of Indian Affairs to Heatwole, Dec. 16, 1898); *id.*, at 547–548 (letter from Commissioner of Indian Affairs Collier to Reynolds, Apr. 30, 1934); App. to Pet. for Cert. 575–578 (letter from President Roosevelt to Whitebird, Mar. 1, 1938). But see, *e. g.*, App. 541 (letter from Meritt to Hammitt, Dec. 14, 1925) (Office of Indian Affairs noting that "[a]pparently, . . . there is merit in the claims of the Indians" that they have hunting and fishing rights under the 1837 Treaty); Additional Brief for United States in *United States* v. *Thomas*, O. T. 1893, No. 668, pp. 2–3 (with respect to the 1842 Treaty, arguing that no Executive Order requiring Chippewa removal had ever been made).

Although the United States abandoned its removal policy, it did not abandon its attempts to acquire more Chippewa land. To this end, in the spring of 1854, Congress began considering legislation to authorize additional treaties for the purchase of Chippewa lands. The House of Representatives debated a bill "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Cong. Globe, 33d Cong., 1st Sess., 1032 (1854). This bill did not require the removal of the Indians, but instead provided for the establishment of reservations within the ceded territories on which the Indians could remain.

The treaty authorization bill stalled in the Senate during 1854, but Commissioner of Indian Affairs George Manypenny began to implement it nonetheless. On August 11, he instructed Indian Agent Henry Gilbert to begin treaty negotiations to acquire more land from the Chippewa. Specifically, he instructed Gilbert to acquire "all the country" the Chippewa own or claim in the Minnesota Territory and the State of Wisconsin, except for some land that would be set aside for reservations. App. 264. Gilbert negotiated such a Treaty with several Chippewa Bands, 1854 Treaty with the Chippewa, 10 Stat. 1109, although for reasons now lost to

history, the Mille Lacs Band of Chippewa was not a party to this Treaty. The signatory Chippewa Bands ceded additional land to the United States, and certain lands were set aside as reservations for the Bands. *Id.*, Art. 2. In addition, the 1854 Treaty established new hunting and fishing rights in the territory ceded by the Treaty. *Id.*, Art. 11.

When the Senate finally passed the authorizing legislation in December 1854, Minnesota's territorial delegate to Congress recommended to Commissioner Manypenny that he negotiate a treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa Indians. App. 286–287 (letter from Rice to Manypenny, Dec. 17, 1854). Commissioner Manypenny summoned representatives of those Bands to Washington, D. C., for the treaty negotiations, which were held in February 1855. See *id.*, at 288 (letter from Manypenny to Gorman, Jan. 4, 1855). The purpose and result of these negotiations was the sale of Chippewa lands to the United States. To this end, the first article of the 1855 Treaty contains two sentences:

> "The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, viz: [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1165–1166.

Article 2 set aside lands in the area as reservations for the signatory tribes. *Id.*, at 1166–1167. The Treaty, however, makes no mention of hunting and fishing rights, whether to reserve new usufructuary rights or to abolish rights guaran-

teed by previous treaties. The Treaty Journal also reveals no discussion of hunting and fishing rights. App. 297–356 (Documents Relating to the Negotiation of the Treaty of Feb. 22, 1855) (hereinafter 1855 Treaty Journal)).

A little over three years after the 1855 Treaty was signed, Minnesota was admitted to the Union. See Act of May 11, 1858, 11 Stat. 285. The admission Act is silent with respect to Indian treaty rights.

B

In 1990, the Mille Lacs Band of Chippewa Indians and several of its members filed suit in the Federal District Court for the District of Minnesota against the State of Minnesota, the Minnesota Department of Natural Resources, and various state officers (collectively State), seeking, among other things, a declaratory judgment that they retained their usufructuary rights under the 1837 Treaty and an injunction to prevent the State's interference with those rights. The United States intervened as a plaintiff in the suit; nine counties and six private landowners intervened as defendants.[1] The District Court bifurcated the case into two phases. Phase I of the litigation would determine whether, and to what extent, the Mille Lacs Band retained any usufructuary rights under the 1837 Treaty, while Phase II would determine the validity of particular state measures regulating any retained rights.

In the first decision on the Phase I issues, the District Court rejected numerous defenses posed by the defendants and set the matter for trial. 853 F. Supp. 1118 (Minn. 1994) (Murphy, C. J.). After a bench trial on the Phase I issues, the District Court concluded that the Mille Lacs Band retained its usufructuary rights as guaranteed by the 1837 Treaty. 861 F. Supp. 784 (1994). Specifically, as relevant

[1] The intervening counties are Aitkin, Benton, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, Pine, and Sherburne. The intervening landowners are John W. Thompson, Jenny Thompson, Joseph N. Karpen, LeRoy Burling, Glenn E. Thompson, and Gary M. Kiedrowski.

here, the court rejected the State's arguments that the 1837 Treaty rights were extinguished by the 1850 Executive Order or by the 1855 Treaty with the Chippewa. *Id.*, at 822–835. With respect to the 1850 Executive Order, the District Court held, in relevant part, that the order was unlawful because the President had no authority to order removal of the Chippewa without their consent. *Id.*, at 823–826. The District Court also concluded that the United States ultimately abandoned and repealed the removal policy embodied in the 1850 order. *Id.*, at 829–830. With respect to the 1855 Treaty, the District Court reviewed the historical record and found that the parties to that agreement did not intend to abrogate the usufructuary privileges guaranteed by the 1837 Treaty. *Id.*, at 830–835.

At this point in the case, the District Court permitted several Wisconsin Bands of Chippewa to intervene as plaintiffs[2] and allowed the defendants to interpose new defenses. As is relevant here, the defendants asserted for the first time that the Bands' usufructuary rights were extinguished by Minnesota's admission to the Union in 1858. The District Court rejected this new defense. No. 3–94–1226 (D. Minn., Mar. 29, 1996) (Davis, J.), App. to Pet. for Cert. 182–189.

Simultaneously with this litigation, the Fond du Lac Band of Chippewa Indians and several of its members filed a separate suit against Minnesota state officials, seeking a declaration that they retained their rights to hunt, fish, and gather pursuant to the 1837 and 1854 Treaties. Two Minnesota landowners intervened as defendants,[3] and the District

[2] The Wisconsin Bands are also respondents in this Court: St. Croix Chippewa Indians of Wisconsin, Lac du Flambeau Band of Lake Superior Chippewas, Bad River Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Sokaogan Chippewa Community, and Red Cliff Band of Lake Superior Chippewa.

[3] The landowners who intervened in this suit are Robert J. Edmonds and Michael Sheff. These landowners, along with the six landowners who intervened in the Mille Lacs Band suit, have filed briefs in this Court in

Court issued an order, like the order in the Mille Lacs Band case, bifurcating the litigation into two phases. In March 1996, the District Court held that the Fond du Lac Band retained its hunting and fishing rights. *Fond du Lac Band of Chippewa Indians* v. *Carlson,* Civ. No. 5–92–159 (D. Minn., Mar. 18, 1996) (Kyle, J.), App. to Pet. for Cert. 419.

In June 1996, the District Court consolidated that part of the Fond du Lac litigation concerning the 1837 Treaty rights with the Mille Lacs litigation for Phase II. In Phase II, the State and the Bands agreed to a Conservation Code and Management Plan to regulate hunting, fishing, and gathering in the Minnesota portion of the territory ceded in the 1837 Treaty. Even after this agreement, however, several resource allocation and regulation issues remained unresolved; the District Court resolved these issues in a final order issued in 1997. See 952 F. Supp. 1362 (Minn.) (Davis, J.).

On appeal, the Court of Appeals for the Eighth Circuit affirmed. 124 F. 3d 904 (1997). Three parts of the Eighth Circuit's decision are relevant here. First, the Eighth Circuit rejected the State's argument that President Taylor's 1850 Executive Order abrogated the Indians' hunting, fishing, and gathering rights as guaranteed by the 1837 Treaty. The Court of Appeals concluded that President Taylor did not have the authority to issue the removal order and that the invalid removal order was inseverable from the portion of the order purporting to abrogate Chippewa usufructuary rights. *Id.,* at 914–918.

Second, the Court of Appeals concluded that the 1855 Treaty did not extinguish the Mille Lacs Band's usufructuary privileges. *Id.,* at 919–921. The court noted that the revocation of hunting and fishing rights was neither discussed during the Treaty negotiations nor mentioned in the Treaty itself. *Id.,* at 920. The court also rejected the State's argument that this Court's decision in *Oregon Dept. of Fish and*

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support of the State. The counties, too, have filed briefs in support of the State.

Wildlife v. *Klamath Tribe*, 473 U. S. 753 (1985), required a different result. 124 F. 3d, at 921. Third, the court rejected the State's argument that, under the "equal footing doctrine," Minnesota's entrance into the Union extinguished any Indian treaty rights. *Id.*, at 926–929. Specifically, the Court of Appeals found no evidence of congressional intent in enacting the Minnesota statehood Act to abrogate Chippewa usufructuary rights, *id.*, at 929, and it rejected the argument that *Ward* v. *Race Horse*, 163 U. S. 504 (1896), controlled the resolution of this issue, 124 F. 3d, at 926–927.

In sum, the Court of Appeals held that the Chippewa retained their usufructuary rights under the 1837 Treaty with respect to land located in the State of Minnesota. This conclusion is consistent with the Court of Appeals for the Seventh Circuit's earlier decision holding that the Chippewa retained those same rights with respect to the ceded land located in Wisconsin. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F. 2d 341, appeal dism'd and cert. denied *sub nom. Besadny* v. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U. S. 805 (1983) (Brennan, Marshall, and STEVENS, JJ., would affirm). The Court of Appeals for the Eighth Circuit denied a petition for rehearing and a suggestion for rehearing en banc. The State of Minnesota, the landowners, and the counties all filed petitions for writs of certiorari, and we granted the State's petition. 524 U. S. 915 (1998).

II

We are first asked to decide whether President Taylor's Executive Order of February 6, 1850, terminated Chippewa hunting, fishing, and gathering rights under the 1837 Treaty. The Court of Appeals began its analysis of this question with a statement of black letter law: " 'The President's power, if any, to issue the order must stem either from an act of Con-

gress or from the Constitution itself.'" 124 F. 3d, at 915 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952)). The court considered whether the President had authority to issue the removal order under the 1830 Removal Act (hereinafter Removal Act), 4 Stat. 411. The Removal Act authorized the President to convey land west of the Mississippi to Indian tribes that chose to "exchange the lands where they now reside, and remove there." *Id.*, at 412. According to the Court of Appeals, the Removal Act only allowed the removal of Indians who had consented to removal. 124 F. 3d, at 915–916. Because the Chippewa had not consented to removal, according to the court, the Removal Act could not provide authority for the President's 1850 removal order. *Id.*, at 916–917.

In this Court, no party challenges the Court of Appeals' conclusion that the Removal Act did not authorize the President's removal order. The landowners argue that the Removal Act was irrelevant because it applied only to land *exchanges*, and that even if it required consent for such land exchanges, it did not prohibit other means of removing Indians. See Brief for Respondent Thompson et al. 22–23. We agree that the Removal Act did not forbid the President's removal order, but as noted by the Court of Appeals, it also did not authorize that order.

Because the Removal Act did not authorize the 1850 removal order, we must look elsewhere for a constitutional or statutory authorization for the order. In this Court, only the landowners argue for an alternative source of authority; they argue that the President's removal order was authorized by the 1837 Treaty itself. See *ibid.* There is no support for this proposition, however. The Treaty makes no mention of removal, and there was no discussion of removal during the Treaty negotiations. Although the United States could have negotiated a treaty in 1837 providing for removal of the Chippewa—and it negotiated several such re-

moval treaties with Indian tribes in 1837[4]—the 1837 Treaty with the Chippewa did not contain any provisions authorizing a removal order. The silence in the Treaty, in fact, is consistent with the United States' objectives in negotiating it. Commissioner of Indian Affairs Harris explained the United States' goals for the 1837 Treaty in a letter to Governor Dodge on May 13, 1837. App. 42. In this letter, Harris explained that through this Treaty, the United States wanted to purchase Chippewa land for the pinewoods located on it; the letter contains no reference to removal of the Chippewa. *Ibid.* Based on the record before us, the proposition that the 1837 Treaty authorized the President's 1850 removal order is unfounded. Because the parties have pointed to no colorable source of authority for the President's removal order, we agree with the Court of Appeals' conclusion that the 1850 removal order was unauthorized.

The State argues that even if the *removal* portion of the order was invalid, the 1837 Treaty privileges were nevertheless revoked because the invalid removal order was severable from the portion of the order revoking Chippewa

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[4] See 1837 Treaty with the Saganaw Chippewa, Art. 6, 7 Stat. 530 ("The said tribe agrees to remove from the State of Michigan, as soon as a proper location can be obtained"); 1837 Treaty with the Potawatomie, Art. 1, 7 Stat. 533 ("And the chiefs and head men above named, for themselves and their bands, do hereby cede to the United States all their interest in said lands, and agree to remove to a country that may be provided for them by the President of the United States, southwest of the Missouri river, within two years from the ratification of this treaty"); 1837 Treaty with the Sacs and Foxes, Art. 4, 7 Stat. 541 ("The Sacs and Foxes agree to remove from the tract ceded, with the exception of Keokuck's village, possession of which may be retained for two years, within eight months from the ratification of this treaty"); 1837 Treaty with the Winnebago, Art. 3, 7 Stat. 544–545 ("The said Indians agree to remove within eight months from the ratification of this treaty, to that portion of the neutral ground west of the Mississippi, which was conveyed to them in the second article of the treaty of September 21st, 1832, and the United States agree that the said Indians may hunt upon the western part of said neutral ground until they shall procure a permanent settlement").

usufructuary rights. Although this Court has often considered the severability of *statutes*, we have never addressed whether *Executive Orders* can be severed into valid and invalid parts, and if so, what standard should govern the inquiry. In this case, the Court of Appeals assumed that Executive Orders are severable, and that the standards applicable in statutory cases apply without modification in the context of Executive Orders. 124 F. 3d, at 917 (citing *In re Reyes*, 910 F. 2d 611, 613 (CA9 1990)). Because no party before this Court challenges the applicability of these standards, for purposes of this case we shall assume, *arguendo*, that the severability standard for statutes also applies to Executive Orders.

The inquiry into whether a statute is severable is essentially an inquiry into legislative intent. *Regan* v. *Time, Inc.*, 468 U. S. 641, 653 (1984) (plurality opinion). We stated the traditional test for severability over 65 years ago: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932). See also *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Regan* v. *Time, Inc.*, *supra*, at 653. Translated to the present context, we must determine whether the President would not have revoked the 1837 Treaty privileges if he could not issue the removal order.

We think it is clear that President Taylor intended the 1850 order to stand or fall as a whole. The 1850 order embodied a single, coherent policy, the predominant purpose of which was removal of the Chippewa from the lands that they had ceded to the United States. The federal officials charged with implementing the order certainly understood it as such. As soon as the Commissioner of Indian Affairs received a copy of the order, he sent it to Governor Ramsey and placed him in charge of its implementation. The Com-

missioner's letter to Ramsey noted in passing that the order revoked the Chippewa's usufructuary privileges, but it did not discuss implementation of that part of the order. Rather, the letter addressed the mechanics of implementing the *removal* order. Record, Doc. No. 311, Plaintiffs' Exh. 88 (letter from Brown to Ramsey, Feb. 6, 1850). Governor Ramsey immediately wrote to his subagent at La Pointe (on Lake Superior), noting that he had enclosed a "copy of the order of the President *for the removal* of the Chippewas, from the lands they have ceded." App. 161 (letter from Ramsey to Livermore, Mar. 4, 1850) (emphasis added). This letter made no mention of the revocation of Indian hunting and fishing rights. *Id.*, at 161–163. The La Pointe subagent, in turn, prepared a circular to notify the Wisconsin Bands of the Executive Order, but this circular, too, focused on removal of the Chippewa. See 861 F. Supp., at 805 (describing circular).

When the 1850 order is understood as announcing a removal policy, the portion of the order revoking Chippewa usufructuary rights is seen to perform an integral function in this policy. The order tells the Indians to "go," and also tells them not to return to the ceded lands to hunt and fish. The State suggests that President Taylor might also have revoked Chippewa usufructuary rights as a kind of "incentive program" to *encourage* the Indians to remove had he known that he could not order their removal directly. The State points to no evidence, however, that the President or his aides ever considered the abrogation of hunting and fishing rights as an "incentive program." Moreover, the State does not explain how this incentive was to operate. As the State characterizes Chippewa Treaty rights, the revocation of those rights would not have prevented the Chippewa from hunting, fishing, and gathering on the ceded territory; the revocation of treaty rights would merely have subjected Chippewa hunters, fishers, and gatherers to territorial, and, later, state regulation. Brief for Petitioners 47, n. 21. The

State does not explain how, if the Chippewa were still permitted to hunt, fish, and gather on the ceded territory, the revocation of the treaty rights would have encouraged the Chippewa to remove to their unceded lands.

There is also no evidence that the treaty privileges themselves—as opposed to the presence of the Indians—caused any problems necessitating the revocation of those privileges. In other words, there is little historical evidence that the treaty privileges would have been revoked for some other purpose. The only evidence in this regard is Governor Ramsey's statement to the Minnesota Territorial Legislature that settlers in the Sauk Rapids and Swan River area were complaining about the Chippewa Treaty privileges. But the historical record suggests that the settlers were complaining about the Winnebago Indians, and not the Chippewa, in that area. See App. 671–672 (Cleland Report). When Governor Ramsey was put in charge of enforcing the 1850 Executive Order, he made no efforts to remove the Chippewa from the Sauk Rapids area or to restrict hunting and fishing privileges there. In fact, his attempts to enforce the order consisted primarily of efforts to move the Chippewa from the Wisconsin and Michigan areas to Minnesota—closer to the Sauk Rapids and Swan River settlements. App. 1099–1100 (White Report); *id.*, at 677–678, 1025–1027 (Cleland Report). More importantly, Governor Ramsey and the Minnesota Territorial Legislature explicitly tied revocation of the treaty privileges to removal. Common sense explains the logic of this strategy: If the legislature was concerned with ensuring "the security and tranquility of the white settlements," App. to Pet. for Cert. 567 (Joint Resolution), this concern was not addressed by merely revoking Indian treaty rights; the Indians had to be removed.

We conclude that President Taylor's 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights under the 1837 Treaty. The State has pointed to no statutory or constitutional authority for the President's removal

order, and the Executive Order, embodying as it did one coherent policy, is inseverable.[5] We do not mean to suggest that a President, now or in the future, cannot revoke

[5] THE CHIEF JUSTICE disagrees with this conclusion primarily because he understands the removal order to be a mechanism for enforcing the revocation of usufructuary rights. *Post*, at 213–214 (dissenting opinion). The implicit premise of this argument is that the President had the inherent power to order the removal of the Chippewa from public lands; this premise is flawed. The Chippewa were on the land long before the United States acquired title to it. The 1837 Treaty does not speak to the right of the United States to order them off the land upon acquisition of title, and in fact, the usufructuary rights guaranteed by the Treaty presumed that the Chippewa would continue to be on the land. Although the revocation of the rights might have justified measures to make sure that the Chippewa were not hunting, fishing, or gathering, it does not follow that revocation of the usufructuary rights permitted the United States to remove the Chippewa from the land completely. THE CHIEF JUSTICE's suggestion that the removal order was merely a measure to enforce the revocation of the usufructuary rights is thus unwarranted. It cannot be presumed that the ends justified the means; it cannot be presumed that the rights of the United States under the Treaty included the right to order removal in defense of the revocation of usufructuary rights. The Treaty, the statutory law, and the Constitution were silent on this matter, and to presume the existence of such Presidential power would run counter to the principles that treaties are to be interpreted liberally in favor of the Indians, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979), and treaty ambiguities to be resolved in their favor, *Winters* v. *United States*, 207 U. S. 564, 576–577 (1908).

THE CHIEF JUSTICE also argues that the removal order ought to be severable from the part of the order purporting to extinguish Chippewa usufructuary rights because of the strong presumption supporting the legality of executive action that has been authorized expressly or by implication. *Post*, at 215–216. Presumably, THE CHIEF JUSTICE understands the 1837 Treaty to authorize the executive action in question. In this context, however, any general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians. *Winters* v. *United States*, *supra*, at 576–577; see also *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992). We do not think the general presumption relied upon by THE CHIEF JUSTICE carries the same weight when balanced against the counterpresumption specific to Indian treaties.

Chippewa usufructuary rights in accordance with the terms of the 1837 Treaty. All we conclude today is that the President's 1850 Executive Order was insufficient to accomplish this revocation because it was not severable from the invalid removal order.

III

The State argues that the Mille Lacs Band of Chippewa Indians relinquished its usufructuary rights under the 1855 Treaty with the Chippewa. Specifically, the State argues that the Band unambiguously relinquished its usufructuary rights by agreeing to the second sentence of Article 1 in that Treaty:

> "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1166.

This sentence, however, does not mention the 1837 Treaty, and it does not mention hunting, fishing, and gathering rights. The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months after Commissioner Manypenny completed the 1855 Treaty, he negotiated a Treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier Treaty. See Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's

. . . secured to them by the treaty of June 16, 1820").[6] See, *e. g.*, *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970) (rejecting argument that language in Treaty had special meaning when United States was competent to state that meaning more clearly).

The State argues that despite any explicit reference to the 1837 Treaty rights, or to usufructuary rights more generally, the second sentence of Article 1 nevertheless abrogates those rights. But to determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation* v. *United States*, 318 U. S. 423, 432 (1943); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 167 (1999). In this case, an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979); *United States* v. *Winans*, 198 U. S. 371, 380–381 (1905).

The 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa usufructuary rights. It was negotiated under the authority of the Act of December 19, 1854. This Act authorized treaty

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[6] See also, *e. g.*, 1846 Treaty with the Winnebago, Art. IV, 9 Stat. 878 (Government agrees to pay Winnebago Indians $40,000 "for release of hunting privileges, on the lands adjacent to their present home"); 1837 Treaty with the Sacs and Foxes, Art. 2, 7 Stat. 543 (specifically ceding "all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th 1830").

negotiations with the Chippewa "for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Ch. 7, 10 Stat. 598. The Act is silent with respect to authorizing agreements to terminate Indian usufructuary privileges, and this silence was likely not accidental. During Senate debate on the Act, Senator Sebastian, the chairman of the Committee on Indian Affairs, stated that the treaties to be negotiated under the Act would "reserv[e] to them [*i. e.*, the Chippewa] those rights which are secured by former treaties." Cong. Globe, 33d Cong., 1st Sess., 1404 (1854).

In the winter of 1854–1855, Commissioner Manypenny summoned several Chippewa chiefs to Washington, D. C., to begin negotiations over the sale of Chippewa land in Minnesota to the United States. See App. 288 (letter from Manypenny to Gorman, Jan. 4, 1855). The negotiations ran from February 12 through February 22. Commissioner Manypenny opened the negotiations by telling the Chippewa chiefs that his goal for the negotiations was to buy a portion of their land, *id.*, at 304 (1855 Treaty Journal), and he stayed firm to this proposed course throughout the talks, focusing the discussions on the purchase of Chippewa land. Indeed all of the participants in the negotiations, including the Indians, understood that the purpose of the negotiations was to transfer Indian land to the United States. The Chief of the Pillager Band of Chippewa stated: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." *Id.*, at 309 (1855 Treaty Journal) (statement of Flat Mouth). Commissioner Manypenny confirmed that the chief correctly understood the purpose of the negotiations:

> "He appears to understand the object of the interview. His people had more land than they wanted or could use, and stood in need of money; and I have more money than I need, but want more land." *Ibid.*

See also *id.*, at 304 (statement of Hole-in-the-Day, the principal negotiator for the Chippewa: "Your words strike us in this way. They are very short. 'I want to buy your land.' These words are very expressive—very curt").

Like the authorizing legislation, the Treaty Journal, recording the course of the negotiations themselves, is silent with respect to usufructuary rights. The journal records no discussion of the 1837 Treaty, of hunting, fishing, and gathering rights, or of the abrogation of those rights. *Id.*, at 297–356. This silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties. It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment.

After the Treaty was signed, President Pierce submitted it to the Senate for ratification, along with an accompanying memorandum from Commissioner Manypenny describing the Treaty he had just negotiated. Like the Treaty and the Treaty Journal, this report is silent about hunting, fishing, and gathering rights. *Id.*, at 290–294 (message of the President of the United States communicating a treaty made with the Mississippi, the Pillager, and the Lake Winnibigoshish Bands of Chippewa Indians).

Commissioner Manypenny's memorandum on the 1855 Treaty is illuminating not only for what it did not say, but also for what it did say: The report suggests a purpose for the second sentence of Article 1. According to the Commissioner's report, the Treaty provided for the purchase of between 11 and 14 million acres of Chippewa land within the boundaries defined by the first article. In addition to this defined tract of land, the Commissioner continued, "those Indians (and especially the Pillager and Lake Winnibigoshish bands) have some right of interest in a large extent of other lands in common with other Indians in Minnesota, and which

right or interest . . . is also ceded to the United States." *Id.*, at 292. This part of the Commissioner's report suggests that the second sentence of Article 1 was designed not to extinguish usufructuary rights, but rather to extinguish remaining Chippewa *land claims.* The "other lands" do not appear to be the lands ceded by the 1837 Treaty. The Pillager and Lake Winnibigoshish Bands did not occupy lands in the 1837 ceded territory, so it is unlikely that the Commissioner would have described the usufructuary rights guaranteed by the 1837 Treaty as belonging "especially" to those Bands. Moreover, the 1837 Treaty privileges were held in common largely with Chippewa bands in Wisconsin, not with "other Indians in Minnesota." In other words, the second sentence of Article 1 did not extinguish usufructuary privileges, but rather it extinguished Chippewa land claims that Commissioner Manypenny could not describe precisely. See *e. g., id.,* at 317–318 (1855 Treaty Journal) (Pillager negotiator declines to "state precisely what our bands claim as a right"). See also 861 F. Supp., at 816–817.

One final part of the historical record also suggests that the 1855 Treaty was a land purchase treaty and not a treaty that also terminated usufructuary rights: the 1854 Treaty with the Chippewa. Most of the Chippewa Bands that resided within the territory ceded by the 1837 Treaty were signatories to the 1854 Treaty; only the Mille Lacs Band was a party to the 1855 Treaty. If the United States had intended to abrogate Chippewa usufructuary rights under the 1837 Treaty, it almost certainly would have included a provision to that effect in the 1854 Treaty, yet that Treaty contains no such provision. To the contrary, it expressly secures *new* usufructuary rights to the signatory Bands on the newly ceded territory. The State proposes no explanation—compelling or otherwise—for why the United States would have wanted to abrogate the Mille Lacs Band's hunting and fishing rights, while leaving intact the other Bands' rights to hunt and fish on the same territory.

To summarize, the historical record provides no support for the theory that the second sentence of Article 1 was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty, but it does support the theory that the Treaty, and Article 1 in particular, was designed to transfer Chippewa land to the United States. At the very least, the historical record refutes the State's assertion that the 1855 Treaty "unambiguously" abrogated the 1837 hunting, fishing, and gathering privileges. Given this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights. We have held that Indian treaties are to be interpreted liberally in favor of the Indians, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S., at 675–676; *Choctaw Nation* v. *United States*, 318 U. S., at 432, and that any ambiguities are to be resolved in their favor, *Winters* v. *United States*, 207 U. S. 564, 576–577 (1908). See also *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992).

To attack the conclusion that the 1855 Treaty does not abrogate the usufructuary rights guaranteed under the 1837 Treaty, the State relies primarily on our decision in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985). *Klamath* required this Court to interpret two agreements. In the first agreement, an 1864 Treaty between the United States and several Indian Tribes now collectively known as the Klamath Indian Tribe, the Indians conveyed their remaining lands to the United States, and a portion of this land was set aside as a reservation. *Id.*, at 755. The 1864 Treaty provided that the Tribe had the "'exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits,'" but it provided for no off-reservation usufructuary rights. *Ibid.* (quoting Treaty of Oct. 14, 1864). Due to a surveying error, the reservation excluded land that, under the terms of the Treaty, should

have been included within the reservation. Thus, in 1901, the United States and the Tribe entered into a second agreement, in which the United States agreed to compensate the Tribe for those lands, and the Tribe agreed to " 'cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to' " the lands erroneously excluded from the reservation. *Id.*, at 760. The Tribe contended that the 1901 agreement had not abrogated its usufructuary rights under the 1864 Treaty with respect to those lands.

We rejected the Tribe's argument and held that it had in fact relinquished its usufructuary rights to the lands at issue. We recognized that the 1864 Treaty had secured certain usufructuary rights to the Tribe, but we also recognized, based on an analysis of the specific terms of the Treaty, that the 1864 Treaty restricted those rights to the lands within the reservation. *Id.*, at 766–767. Because the rights were characterized as "exclusive," this "foreclose[d] the possibility that they were intended to have existence outside of the reservation." *Id.*, at 767. In other words, "because the right to hunt and fish reserved in the 1864 Treaty was an exclusive right to be exercised within the reservation, that right could not consistently survive off the reservation" on the lands the Tribe had sold. *Id.*, at 769–770. This understanding of the Tribe's usufructuary rights under the 1864 Treaty—that those rights were exclusive, on-reservation rights—informed our conclusion that the Klamath Tribe did not retain any usufructuary rights on the land that it ceded in the 1901 agreement, land that was not part of the reservation. In addition, we noted that there was nothing in the historical record of the 1901 agreement that suggested that the parties intended to change the background understanding of the scope of the usufructuary rights. *Id.*, at 772–773.

Klamath does not control this case. First, the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership; they were neither tied to a

reservation nor exclusive. In contrast to *Klamath*, there is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished. Without this background understanding, there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land. More importantly, however, the State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction. Our holding in *Klamath* was not based *solely* on the bare language of the 1901 agreement. Rather, to reach our conclusion about the meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S., at 167. As we described above, an analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 Treaty rights in the 1855 Treaty.

IV

Finally, the State argues that the Chippewa's usufructuary rights under the 1837 Treaty were extinguished when Minnesota was admitted to the Union in 1858. In making this argument, the State faces an uphill battle. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. *United States* v. *Dion*, 476 U. S. 734, 738–740 (1986); see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S., at 690; *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968). There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose

to resolve that conflict by abrogating the treaty." *United States* v. *Dion, supra,* at 740. There is no such "clear evidence" of congressional intent to abrogate the Chippewa Treaty rights here. The relevant statute—Minnesota's enabling Act—provides in relevant part:

> "[T]he State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever." Act of May 11, 1858, 11 Stat. 285.

This language, like the rest of the Act, makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act. The State concedes that the Act is silent in this regard, Brief for Petitioners 36, and the State does not point to any legislative history describing the effect of the Act on Indian treaty rights.

With no direct support for its argument, the State relies principally on this Court's decision in *Ward* v. *Race Horse,* 163 U. S. 504 (1896). In *Race Horse,* we held that a Treaty reserving to a Tribe "'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts'" terminated when Wyoming became a State in 1890. *Id.,* at 507 (quoting Art. 4 of the Treaty). This case does not bear the weight the State places on it, however, because it has been qualified by later decisions of this Court.

The first part of the holding in *Race Horse* was based on the "equal footing doctrine," the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty (*i. e.,* on equal footing) as the original 13 States. See *Coyle* v. *Smith,* 221 U. S. 559 (1911). As relevant here, it prevents the Federal Government from impair-

ing fundamental attributes of state sovereignty when it admits new States into the Union. *Id.*, at 573. According to the *Race Horse* Court, because the treaty rights conflicted irreconcilably with state regulation of natural resources—"an essential attribute of its governmental existence," 163 U. S., at 516—the treaty rights were held an invalid impairment of Wyoming's sovereignty. Thus, those rights could not survive Wyoming's admission to the Union on "equal footing" with the original States.

But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. See, *e. g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn., supra;* see also *Antoine* v. *Washington*, 420 U. S. 194 (1975). Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. U. S. Const., Art. VI, cl. 2. See, *e. g., Missouri* v. *Holland*, 252 U. S. 416 (1920); *Kleppe* v. *New Mexico*, 426 U. S. 529 (1976); *United States* v. *Winans*, 198 U. S., at 382–384; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876). See also *Menominee Tribe* v. *United States*, *supra*, at 411, n. 12. Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation. *Oregon Dept. of Fish and Wildlife* v. *Klamath*

Tribe, 473 U. S., at 765, n. 16. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation. See *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 398 (1968); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S., at 682; *Antoine* v. *Washington*, *supra*, at 207–208. This "conservation necessity" standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights. Thus, because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.[7]

We do not understand JUSTICE THOMAS to disagree with this fundamental conclusion. *Race Horse* rested on the premise that treaty rights are irreconcilable with state sovereignty. It is this conclusion—the conclusion undergirding the *Race Horse* Court's equal footing holding—that we have consistently rejected over the years. JUSTICE THOMAS' only disagreement is as to the scope of state regulatory authority. His disagreement is premised on a purported distinction between "rights" and "privileges." This Court has never used a distinction between rights and privileges

[7] THE CHIEF JUSTICE asserts that our criticism of *Race Horse* is inappropriate given our recent "reaffirm[ation]" of that case in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985). *Post*, at 219. Although we cited *Race Horse* in *Klamath*, we did not in so doing reaffirm the equal footing doctrine as a bar to the continuation of Indian treaty-based usufructuary rights. *Klamath* did not involve the equal footing doctrine. Rather, we cited *Race Horse* for the second part of its holding, discussed in the text, *infra*, at 206–208. See 473 U. S., at 773, n. 23. In any event, the *Race Horse* Court's reliance on the equal footing doctrine to terminate Indian treaty rights rested on foundations that were rejected by this Court within nine years of that decision. See *United States* v. *Winans*, 198 U. S. 371, 382–384 (1905).

to justify any differences in state regulatory authority. Moreover, as JUSTICE THOMAS acknowledges, *post*, at 223 (dissenting opinion), the starting point for any analysis of these questions is the treaty language itself. The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S., at 576–577. There is no evidence that the Chippewa understood any fine legal distinctions between rights and privileges. Moreover, under JUSTICE THOMAS' view of the 1837 Treaty, the guarantee of hunting, fishing, and gathering privileges was essentially an empty promise because it gave the Chippewa nothing that they did not already have.

The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian tribes through a treaty, and that "it would be also within the power of Congress to continue them in the State, on its admission into the Union." 163 U. S., at 515. We also acknowledged that if Congress intended the rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the Treaty at issue there—"the right to hunt on the unoccupied lands of the United States"—were not intended to survive statehood. *Id.*, at 514; see *id.*, at 514–515.

THE CHIEF JUSTICE reads *Race Horse* to establish a rule that "temporary and precarious" treaty rights, as opposed to treaty rights "which were 'of such a nature as to imply their perpetuity,'" are not intended to survive statehood. *Post*, at 219. But the "temporary and precarious" language in *Race Horse* is too broad to be useful in distinguishing rights that survive statehood from those that do not. In *Race*

Horse, the Court concluded that the right to hunt on federal lands was temporary because Congress could terminate the right at any time by selling the lands. 163 U. S., at 510. Under this line of reasoning, any right created by operation of federal law could be described as "temporary and precarious," because Congress could eliminate the right whenever it wished. In other words, the line suggested by *Race Horse* is simply too broad to be useful as a guide to whether treaty rights were intended to survive statehood.

The focus of the *Race Horse* inquiry is whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood. *Id.*, at 514–515. The 1837 Treaty itself defines the circumstances under which the rights would terminate: when the exercise of those rights was no longer the "pleasure of the President." There is no suggestion in the Treaty that the President would have to conclude that the privileges should end when a State was established in the area. Moreover, unlike the rights at issue in *Race Horse*, there is no fixed termination point to the 1837 Treaty rights. The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. *Id.*, at 509. By contrast, the 1837 Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event. Finally, we note that there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood. *Wisconsin* v. *Hitchcock*, 201 U. S. 202, 213–214 (1906); *Johnson* v. *Gearlds*, 234 U. S. 422, 439–440 (1914). The *Race Horse* Court's decision to the contrary—that Indian treaty rights were impliedly repealed by Wyoming's statehood Act—was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty

over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood. But as we described above, Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources. See *supra*, at 204–205. Thus, contrary to the State's contentions, *Race Horse* does not compel the conclusion that Minnesota's admission to the Union extinguished Chippewa usufructuary rights guaranteed by the 1837 Treaty.

Accordingly, the judgment of the United States Court of Appeals for the Eighth Circuit is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court holds that the various Bands of Chippewa Indians retain a usufructuary right granted to them in an 1837 Treaty. To reach this result, the Court must successively conclude that: (1) an 1850 Executive Order explicitly revoking the privilege as authorized by the 1837 Treaty was unlawful; (2) an 1855 Treaty under which certain Chippewa Bands ceded "all" interests to the land does not include the treaty right to come onto the land and hunt; and (3) the admission of Minnesota into the Union in 1858 did not terminate the discretionary hunting privilege, despite established precedent of this Court to the contrary. Because I believe that each one of these three conclusions is demonstrably wrong, I dissent.

I

I begin with the text of the Treaty negotiated in 1837. In that Treaty, the Chippewa ceded land to the United States in exchange for specified consideration. Article 1 of the Treaty describes the land ceded by the Chippewa to the United States. Article 2 of the 1837 Treaty provides:

"In consideration of the cession aforesaid, the United States agree to make to the Chippewa nation, annually, for the term of twenty years, from the date of the ratification of this treaty, the following payments.

"1. Nine thousand five hundred dollars, to be paid in money.

"2. Nineteen thousand dollars, to be delivered in goods.

"3. Three thousand dollars for establishing three blacksmiths shops, supporting the blacksmiths, and furnishing them with iron and steel.

"4. One thousand dollars for farmers, and for supplying them and the Indians, with implements of labor, with grain or seed; and whatever else may be necessary to enable them to carry on their agricultural pursuits.

"5. Two thousand dollars in provisions.

"6. Five hundred dollars in tobacco.

"The provisions and tobacco to be delivered at the same time with the goods, and the money to be paid; which time or times, as well as the place or places where they are to be delivered, shall be fixed upon under the direction of the President of the United States.

"The blacksmiths shops to be placed at such points in the Chippewa country as shall be designated by the Superintendent of Indian Affairs, or under his direction.

"If at the expiration of one or more years the Indians should prefer to receive goods, instead of the nine thousand dollars agreed to be paid to them in money, they shall be at liberty to do so. Or, should they conclude to appropriate a portion of that annuity to the establishment and support of a school or schools among them, this shall be granted them." 7 Stat. 536–537.

Thus, in exchange for the land cessions, the Chippewa agreed to receive an annuity payment of money, goods, and the implements necessary for creating blacksmith's shops and farms, for a limited duration of 20 years.

Articles 3 and 4 of the Treaty deal with cash payments to persons not parties to this suit, but Article 5 is involved here. As the Court notes, there was some discussion during the treaty negotiations that the Chippewa wished to preserve some right to hunt in the ceded territory. See *ante*, at 176. The United States agreed to this request to some extent, and the agreement of the parties was embodied in Article 5 of the Treaty, which provides that:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." 7 Stat. 537.

As the Court also notes, the Chippewa were aware that their right to come onto the ceded land was not absolute—the Court quotes the statement of Governor Dodge to the Chippewa that he would "'make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them.'" *Ante*, at 176; App. 46 (1837 Journal of Treaty Negotiations).

Thus, the Treaty by its own plain terms provided for a *quid pro quo:* Land was ceded in exchange for a 20-year annuity of money and goods. Additionally, the United States granted the Chippewa a quite limited "privilege" to hunt and fish, "guarantied . . . during the pleasure of the President." Art. 5, 7 Stat. 537.

II

In 1850, President Taylor expressly terminated the 1837 Treaty privilege by Executive Order. The Executive Order provides:

> "The privileges granted temporarily to the Chippewa Indians of the Mississippi by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the

> lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States . . . are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands." App. to Pet. for Cert. 565.

In deciding that this seemingly ironclad revocation was not effective as a matter of law, the Court rests its analysis on four findings. First, the Court notes that the President's power to issue the order must stem either from an Act of Congress or the Constitution itself. Second, the Court determines that the Executive Order was a "removal order." Third, the Court finds no authority for the President to order the Chippewa to remove from the ceded lands. And fourth, the Court holds that the portion of the Executive Order extinguishing the hunting and fishing rights is not severable from the "removal order" and thus also was illegal. I shall address each of these dubious findings in turn.

The Court's first proposition is the seemingly innocuous statement that a President's Executive Order must be authorized by law in order to have any legal effect. In so doing, the Court quotes our decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952), which held that President Truman's seizure of the steel mills by Executive Order during the Korean War was unlawful. However, the Court neglects to note that treaties, every bit as much as statutes, are sources of law and may also authorize Executive actions. See *Dames & Moore* v. *Regan*, 453 U. S. 654, 680 (1981). In *Dames & Moore*, we noted that where the President acts with the implied consent of Congress in his Executive actions, "he exercises not only his own powers but also those delegated by Congress," and that such an action was entitled to high deference as to its legality. *Id.*, at 668. This case involves an even stronger case for deference to Executive power than *Dames & Moore*, in which Presidential power under an Executive agreement was impliedly authorized by Congress, because the Executive Order in this

case was issued pursuant to a Treaty ratified by the advice and consent of the Senate, and thus became the supreme law of the land. See U. S. Const., Art. VI; *United States* v. *Belmont*, 301 U. S. 324 (1937). The Court's contrary conclusion is simply wrong.

The Court's second assumption is that the Executive Order was a "removal order"—that its primary purpose was the removal of the Chippewa. This assumption rests upon scattered historical evidence that, in the Court's view, "[t]he officials charged with implementing this order understood it primarily as a removal order, and they proceeded to implement it accordingly." *Ante*, at 179. Regardless of what the President's remote frontier agents may have thought, the plain meaning of the *text* of President Taylor's order can only support the opposite conclusion. The structure of the Executive Order is not that of a removal order, with the revocation of the hunting privileges added merely as an afterthought. Instead, the first part of the order (not to mention the bulk of its text) deals with the extinguishment of the Indians' privilege to enter onto the lands ceded to the United States and hunt. Only then (and then only in its final five words) does the Executive Order require the Indians to "remove to their unceded lands." App. to Pet. for Cert. 565 (Exec. Order, Feb. 6, 1850).

If the structure and apparent plain meaning of the Executive Order reveal that the order was primarily a revocation of the privilege to hunt during the President's pleasure, what then should we make of the fact that the officials charged with "implementing" the order viewed their task as primarily effecting removal? The answer is simple. First, the bulk of the Executive Order that terminates the hunting privilege was self-executing. Second, while the President could terminate the legal right (*i. e.*, the privilege to enter onto the ceded lands and hunt) without taking enforcement action, a removal order *would* require actual implementation. The historical evidence cited by the Court is best

understood thus as an implementation of President Taylor's unequivocal (and legally effective) termination of the usufructuary privileges. But while the removal portion may have required implementation to be effective, this cannot turn the Executive Order into a "removal order." And even if the President's agents viewed the order as a removal order (a proposition for which the historical evidence is far more ambiguous than the Court admits), their interpretation is not binding on this Court; nor should it be, since the agents had nothing to do with the bulk of the order which terminated the treaty privileges.

The Court's third finding is that the removal portion of the order is invalid because President Taylor had no authority to order removal. Although the Court sensibly concludes that the Removal Act of 1830 is inapplicable to this case, it then curiously rejects the notion that the 1837 Treaty authorizes removal, largely on the grounds that "[t]he Treaty makes no mention of removal." *Ante*, at 189. The Court is correct that the Treaty does not *mention* removal, but this is because the Treaty was essentially a deed of conveyance—it transferred land to the United States in exchange for goods and money. After the Treaty was executed and ratified, the ceded lands belonged to the United States, and the only real property interest in the land remaining to the Indians was the privilege to come onto it and hunt during the pleasure of the President. When the President terminated that privilege (a legal act that the Court appears to concede he had a right to make, *ante*, at 193–194), he terminated the Indians' right to come onto the ceded lands and hunt. The Indians had no legal right to remain on the ceded lands for that purpose, and the removal portion of the order should be viewed in this context. Indeed, the Indians then had no legal rights at all with respect to the ceded lands, in which all title was vested in the United States. And this Court has long held that the President has the implied power to administer the public lands. See, *e. g.*, *United States* v. *Mid-*

west Oil Co., 236 U. S. 459 (1915). Dealing with persons whose legal right to come onto the lands and hunt had been extinguished would appear to fall squarely under this power. Whether the President chose to enforce his revocation through an order to leave the land or the ambiguous lesser "measures to make sure that the Chippewa were not hunting, fishing, or gathering" proposed by the Court, *ante*, at 194, n. 5, is not ours to second-guess a century and a half later. Indeed, although the Court appears to concede that the President had the power to enforce the revocation order, it is difficult to imagine what steps he could have taken to prevent hunting other than ordering the Chippewa not to come onto the land for that purpose. The ceded lands were not a national park, nor did the President have an army of park rangers available to guard Minnesota's wildlife from Chippewa poachers. Removal was the only viable option in enforcing his power under the Treaty to terminate the hunting privilege. Thus, in my view, the final part of the Executive Order discussing removal was lawful.[1]

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[1] The Court's assumption that "any general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians," *ante*, at 194, n. 5, illogically confuses the difference between executive authority and a principle of treaty construction. The principle of *Winters* v. *United States*, 207 U. S. 564, 567–577 (1908), and *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992), that ambiguities in treaties are to be resolved in favor of the Indians, is only relevant to determining the intent of the *parties to a treaty* (that is the United States and the Indian tribe), and stems from the idea that in determining the intent of the parties, Indian tribes should be given the benefit of the doubt as against the United States in cases of ambiguous treaty provisions because the United States was presumptively a more sophisticated bargainer. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675–676 (1979). But the determination of whether the President has power to enforce his revocation by removal is irrelevant to the intent of the parties to the treaty (the United States and the Chippewa in this case) and presents instead an issue of separation of powers (between the President and the Congress).

The fourth element essential to today's holding is the conclusion that if the final part of the Executive Order requiring removal were not authorized, the bulk of the order would fail as not severable. Because this is the first time we have had occasion to consider the severability of Executive Orders, the Court first assumes that the standards for severability of statutes also apply to the severability of Executive Orders. Next, the Court determines to seek the "legislative intent" of President Taylor in issuing the order. *Ante*, at 191. And finally, the Court concludes that President Taylor would not have issued the Executive Order in the absence of a removal provision, because the 1850 order embodied a coherent policy of Indian removal. As noted above, this approach to the Executive Order stands it on its head—the order *first* extinguishes the hunting privilege and only then—in its last five words—orders removal.

But even if I were to assume that the President were without authority to order removal, I would conclude that the removal provision is severable from that terminating the treaty privileges. There is no dispute that the President had authority under the 1837 Treaty to terminate the treaty privileges. We have long held that "[w]hen the President acts pursuant to an express or implied authorization from Congress, . . . the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U. S., at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S., at 637 (Jackson, J., concurring)). Against this deferential standard, the Court musters little more than conjecture and inference, reinforced by its upside-down reading of the Executive Order's plain text. Not only does the Court invert the plain meaning of the Executive Order, it inverts the proper standard of review. Given the deference we are to accord this valid action made pursuant to a treaty, the order's termination of

the treaty privileges should be sustained unless the Chippewa are able to clearly demonstrate that President Taylor would *not* have terminated them without a removal order. But there is no such evidence, and in the absence of evidence challenging the "strongest of presumptions and the widest latitude of judicial interpretation" that we are required to afford President Taylor's actions, we have only the Court's misguided excursion into historiographical clairvoyance. Accordingly, I would conclude, if necessary, that the termination portion of the Executive Order is severable.

Rather than engage in the flawed analysis put forward by the Court, I would instead hold that the Executive Order constituted a valid revocation of the Chippewa's hunting and fishing privileges. Pursuant to a Treaty, the President terminated the Indians' hunting and fishing privileges in an Executive Order which stated, in effect, that the privilege to come onto federal lands and hunt was terminated, and that the Indians move themselves from those lands.

No party has questioned the President's power to terminate the hunting privilege; indeed, the only other evidence in the record of a President's intent regarding the Executive Order is a 1938 letter from President Franklin Roosevelt to one of the Chippewa, in which he stated his understanding that the Indians had "temporarily" enjoyed "the right to hunt and fish on the area ceded by them until such right was revoked by the President" in the 1850 Executive Order. App. to Pet. for Cert. 575 (letter from President Roosevelt to Whitebird, Mar. 1, 1938). President Roosevelt went on to add that since the right to hunt and fish was terminated in 1850, the Chippewa "now have no greater right to hunt or fish on the ceded area . . . than do the other citizens of the State. Therefore, the Indians who hunt or fish . . . are amenable to the State game laws and are subject to arrest and conviction [f]or violation thereof." *Id.*, at 576.

President Roosevelt's letter reflects the settled expectations of the President, in whose office the discretion to terminate the privilege granted in Article 5 of the 1837 Treaty was vested, that the 1850 Executive Order was a valid termination of the treaty privileges. And because the 1837 Treaty, in conjunction with the Presidential power over public lands, gave the President the power to order removal in conjunction with his termination of the hunting rights, the Court's severability analysis is unnecessary. In sum, there is simply no principled reason to invalidate the 150-year-old Executive Order, particularly in view of the heightened deference and wide latitude that we are required to give orders of this sort.

III

Although I believe that the clear meaning of the Executive Order is sufficient to resolve this case, and that it is unnecessary to address the Court's treatment of the 1855 Treaty and the 1858 admission of Minnesota to the Union, I shall briefly express my strong disagreement with the Court's analysis on these issues also.

As the Court notes, in 1855, several of the Chippewa Bands agreed, in exchange for further annuity payments of money and goods, to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1166. The plain meaning of this provision is a relinquishment of the Indians of "all" rights to the land. The Court, however, interprets this provision in a manner contrary to its plain meaning by first noting that the provision does not mention "usufructuary" rights. It argues, citing examples, that since the United States "had the sophistication and experience to use express language for the abrogation of treaty rights," *ante,* at 195, but did not mention the 1837 Treaty rights in drafting this

language,[2] it perhaps did not intend to extinguish those rights, thus creating an interpretation at odds with the Treaty's language. Then, using our canons of construction that ambiguities in treaties are often resolved in favor of the Indians, it concludes that the Treaty did not apply to the hunting rights.

I think this conclusion strained, indeed. First, the language of the Treaty is so broad as to encompass "*all*" interests in land possessed or claimed by the Indians. Second, while it is important to the Court that the Treaty "is devoid of any language expressly mentioning—much less abrogating—usufructuary rights," *ibid.*, the definition of "usufructuary rights" explains further why this is so. Usufructuary rights are "a real right of limited duration on the property of another." See Black's Law Dictionary 1544 (6th ed. 1990). It seems to me that such a right would fall clearly under the sweeping language of the Treaty under any reasonable interpretation, and that this is not a case where "even 'learned lawyers' of the day would probably have offered differing interpretations of the [treaty language]." Cf. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677 (1979). And third, although the Court notes that in other treaties the United States sometimes expressly mentioned cessions of usufructuary rights, there was no need to do so in this case, because the settled expectation of the United States was that the 1850 Executive Order had terminated the hunting rights of the Chippewa. Thus, rather than applying the plain and unequivocal language of the 1855 Treaty, the Court holds that "all" does not in fact mean "all."

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[2] One notices the irony that where the President chose to explicitly eliminate the 1837 Treaty rights, the Court finds this specificity subsumed in the "removal order," and invalidates it as well.

IV

Finally, I note my disagreement with the Court's treatment of the equal footing doctrine, and its apparent overruling *sub silentio* of a precedent of 103 years' vintage. In *Ward* v. *Race Horse*, 163 U. S. 504 (1896), we held that a Treaty granting the Indians "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts," did not survive the admission of Wyoming to the Union since the treaty right was "temporary and precarious." *Id.*, at 515.

But the Court, in a feat of jurisprudential legerdemain, effectively overrules *Race Horse sub silentio.* First, the Court notes that Congress may only abrogate Indian treaty rights if it clearly expresses its intent to do so. Next, it asserts that Indian hunting rights are not irreconcilable with state sovereignty, and determines that "because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Ante*, at 205. And finally, the Court hints that *Race Horse* rested on an incorrect premise—that Indian rights were inconsistent with state sovereignty.

Without saying so, this jurisprudential bait-and-switch effectively overrules *Race Horse*, a case which we reaffirmed as recently as 1985 in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985). *Race Horse* held merely that treaty rights which were only "temporary and precarious," as opposed to those which were "of such a nature as to imply their perpetuity," do not survive statehood.[3] 163 U. S.,

[3] The Court maintains that this reading of *Race Horse* is overbroad and would render any right created by operation of federal law "temporary and precarious." *Ante*, at 206. Nothing could be further from the truth. The outer limit of what constitutes a "temporary and precarious" right is not before the Court (nor, since *Race Horse* is apparently overruled, will it ever

at 515. Here, the hunting privileges were clearly, like those invalidated in *Race Horse*, temporary and precarious: The privilege was only guaranteed "during the pleasure of the President"; the legally enforceable annuity payments themselves were to terminate after 20 years; and the Indians were on actual notice that the President might end the rights in the future, App. 78 (1837 Journal of Treaty Negotiations).

Perhaps the strongest indication of the temporary nature of the treaty rights is presented unwittingly by the Court in its repeated (and correct) characterizations of the rights as "usufructuary." As noted *supra*, at 218, usufructuary rights are *by definition* "of limited duration." Black's Law Dictionary, *supra*, at 1544. Thus, even if the Executive Order is invalid; and even if the 1855 Treaty did not cover the usufructuary rights: Under *Race Horse*, the temporary and precarious treaty privileges were eliminated by the admission of Minnesota to the Union on an equal footing in 1858. Today the Court appears to invalidate (or at least substantially limit) *Race Horse*, without offering any principled reason to do so.

V

The Court today invalidates for no principled reason a 149-year-old Executive Order, ignores the plain meaning of a 144-year-old treaty provision, and overrules *sub silentio* a 103-year-old precedent of this Court. I dissent.

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent, but also write separately because contrary to the majority's assertion, in dicta,

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be), but the hunting privileges granted in *Race Horse* and by the 1837 Treaty in this case reveal themselves to be "temporary and precarious" by their plain text: The privilege in *Race Horse* ended upon occupation of the hunting districts or the outbreak of hostilities, while the privilege in this case lasted only during the pleasure of the President. Both rights were temporary and precarious, as neither was guaranteed, either expressly or impliedly, in perpetuity.

ante, at 204, our prior cases do not dictate the conclusion that the 1837 Treaty curtails Minnesota's regulatory authority.

As the Court has ruled today that the Chippewa retain the privilege to hunt, fish, and gather on the land they ceded in the 1837 Treaty, the question of the scope of the State's regulatory power over the Chippewas' exercise of those privileges assumes great significance—any limitations that the Federal Treaty may impose upon Minnesota's sovereign authority over its natural resources exact serious federalism costs. The questions presented, however, do not require the Court to decide whether the 1837 Treaty limits the State's regulatory authority in any way. All that they require is a judgment as to whether the usufructuary privileges at issue survive three potentially extinguishing events: President Taylor's 1850 Executive Order, the 1855 Treaty, and Minnesota's admission to the Union in 1858.

The Court nevertheless offers the following observation:

> "Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory *free of territorial, and later state, regulation*, a privilege that others did not enjoy. Today, this freedom from state regulation *curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands.*" *Ante*, at 204 (emphases added).

In light of the importance of this federalism question, the Court should not pass on it, even in dicta, without the benefit of the parties' briefing and argument. But as the Court has done so, I think it important to explain my disagreement with the italicized propositions.

The plain language of the 1837 Treaty says nothing about territorial, let alone future state, regulation. The historical evidence that the Court reviews, *ante*, at 176–178, to the extent that it is relevant, is likewise silent as to whether the Chippewa expected to be subject to any form of regulation

in the exercise of their reserved treaty privileges. The historical evidence certainly indicates that the Chippewa desired the privilege of access to the land they were ceding. But the 1837 Journal of Treaty Negotiations does not show that the Chippewa demanded access to the land on any particular terms. See App. 70–78.

Indeed, the Court retreats from its assertion that the 1837 Treaty gave the Chippewa an unlimited right to hunt, fish, and gather free from regulation when it states: "We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Ante*, at 205. If the 1837 Treaty gives the Chippewa a right to be free from state regulation, why may Minnesota impose any regulations, reasonable and necessary or otherwise? The Court's answer to that question is that our prior decisions have established that Indians never have "'absolute freedom,'" *ante*, at 204, from state regulation, no matter what a treaty might say; rather, Indians' hunting, fishing, and gathering activities are limited by those state regulations which are necessary for ensuring the conservation of natural resources.

To be sure, Indians do not have absolute freedom from state regulation of their off-reservation activities. Indeed, the general rule is that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent express federal law to the contrary. See, *e. g.*, *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753, 765, n. 16 (1985); *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 335, n. 18 (1983). The majority, however, overlooks the fact that the scope of a State's regulatory authority depends upon the language of the treaty in question. At a *minimum*, States may issue and enforce those regulations of Indians' off-reservation usufructuary activities that are necessary in the interest of conservation. Our decisions suggest that state regulatory authority is so limited when, with

the treaty in question, the Indians reserved a *right* to fish, hunt, or gather on ceded lands. But it is doubtful that the so-called "conservation necessity" standard applies in cases, such as this one, where Indians reserved no more than a *privilege* to hunt, fish, and gather.

The conservation necessity standard appears to have its origin in *Tulee* v. *Washington*, 315 U. S. 681 (1942). In the 1859 Treaty with the Yakima Indians, the Yakima reserved "'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.'" *Id.*, at 683 (quoting 12 Stat. 953). The Court held that Washington State had the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*," but that the Treaty foreclosed "the state from charging the Indians a fee of the kind in question." 315 U. S., at 684 (emphasis added). Its conclusion was driven by the language of the Treaty as well as the report of the treaty negotiations and what it revealed to be the Yakimas' understanding of the Treaty—to preserve their right "to hunt and fish *in accordance with the immemorial customs of their tribes.*" *Ibid.* (emphasis added).[1] Subsequent decisions evaluating state regulation by the conservation necessity standard similarly focused upon the language of the Treaty or agreement at issue and the Indians' understanding of the Treaty as revealed by the historical evidence. See *Washington* v. *Washington State Commercial Passenger Fishing Assn.*, 443 U. S. 658, 665–669, 674–685 (1979) (recognizing that the Court had construed the same Treaty language several times before, and emphasizing

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[1] A prior case interpreting the same 1859 Treaty held that the language fixed in the land an easement for the Yakima so that they could cross private property to fish in the Columbia River. *United States* v. *Winans*, 198 U. S. 371, 381–382 (1905). But the Court also wrote that the Treaty did not "restrain the State unreasonably, *if at all*, in the regulation of the right." *Id.*, at 384 (emphasis added).

the historical background against which the Treaty at issue was signed); *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 395, 397 (1968) (involving treaty language almost identical to that at issue in *United States* v. *Winans*, 198 U. S. 371 (1905), and *Tulee*, *supra*); see also *Antoine* v. *Washington*, 420 U. S. 194, 206 (1975) (favorably comparing the somewhat different language of the agreement at issue with the language of the Treaties at issue in *Winans* and *Puyallup*). Most important, all the cases that the majority cites in support of the proposition that States may enforce against Indians in their exercise of off-reservation usufructuary activities only those regulations necessary for purposes of conservation, *ante*, at 204–205, involved the same or substantially similar treaty language reserving a *right* to hunt or fish. And all but *Antoine* also provided that the Indians could exercise their reserved rights at the usual and accustomed places.

In *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916), the Court considered significantly different language. The Big Tree Treaty of 1797, as the agreement was known, provided that the Seneca were to retain "the *privilege* of fishing and hunting on the said tract of land" conveyed by the agreement. 7 Stat. 602 (emphasis added); see also 241 U. S., at 562 (quoting the reservation clause). The Court characterized the Senecas' claim as one "sought to be maintained in derogation of the sovereignty of the State." *Ibid.* In rejecting such a claim, it stated:

> "[I]t can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to

> reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands *in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.*" *Id.*, at 563–564 (emphasis added).

The only fair reading of *Kennedy* is that the Treaty reserved for the Seneca a privilege in common with all persons to whom the State chose to extend fishing and hunting privileges. The Court did not indicate that the Treaty limited New York's regulatory authority with respect to the Seneca in any way. See *id.*, at 564 (the treaty privilege was subject to "that necessary power of appropriate regulation, *as to all those privileged*, which inhered in the sovereignty of the State over the lands where the privilege was exercised" (emphasis added)). Of course, then, what was "appropriate" state regulation as applied to non-Indians was "appropriate" regulation as applied to the Seneca. Cf. *Puyallup Tribe*, *supra*, at 402, n. 14 ("The measure of the legal propriety of [regulations that are to be measured by the conservation necessity standard] is . . . distinct from the federal constitutional standard concerning the scope of the police power of a State").[2]

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[2] As already noted, *supra*, at 222, the Court has said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973) (State of New Mexico permitted to tax off-reservation activities of Tribe as they would any non-Indians). In support of that proposition in *Mescalero*, the Court cited the *Puyallup Tribe* and *Tulee* decisions, but not *Kennedy*. A possible explanation is

The 1837 Treaty at issue here did not reserve "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" like those involved in *Tulee* and *Puyallup Tribe*. Rather, it provided:

> "The *privilege* of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." 1837 Treaty with the Chippewa, 7 Stat. 537 (emphasis added).

This language more closely resembles the language of the Big Tree Treaty at issue in *Kennedy*. Although Minnesota's regulatory authority is not at issue here, in the appropriate case we must explain whether reserved treaty *privileges* limit States' ability to regulate Indians' off-reservation usufructuary activities in the same way as a treaty reserving *rights*.[3] This is especially true with respect to the privileges reserved by the Chippewa in the 1837 Treaty, which, as THE CHIEF JUSTICE explains, *ante*, at 219–220 (dissenting opinion), were clearly of a temporary and precarious nature.

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that the Treaties at issue in *Puyallup Tribe* and *Tulee* provided express federal law to the contrary, while the Treaty in *Kennedy* did not.

[3] Various representatives of the United States have previously taken the position that treaty rights are "more substantial vested rights than treaty reserved privileges." Holt, Can Indians Hunt in National Parks?, 16 Envtl. L. 207, 236–238 (1986) (citing letters from the Department of Agriculture, Department of the Interior, and the Department of Justice to that effect).

Syllabus

JONES *v.* UNITED STATES

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

No. 97–6203. Argued October 5, 1998—Decided March 24, 1999

Petitioner was charged with, *inter alia*, carjacking, in violation of 18 U. S. C. § 2119, which at the time provided, as relevant here, that a person possessing a firearm who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall—(1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and (3) if death results, be . . . imprisoned for any number of years up to life . . . ." The indictment made no reference to § 2119's numbered subsections and charged none of the facts mentioned in the latter two. Petitioner was told at the arraignment that he faced a maximum 15-year sentence for carjacking, and the jury instructions at his trial defined that offense by reference solely to § 2119(1). After he was found guilty, however, the District Court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury. The court rejected petitioner's objection that serious bodily injury was an element of the offense, which had been neither pleaded in the indictment nor proven before the jury. In affirming, the Ninth Circuit agreed that § 2119(2) set out a sentencing factor, not an element of an independent offense.

Held: Section 2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. Pp. 232–252.

(a) The superficial impression that § 2119's subsections are only sentencing provisions loses clarity when one looks at subsections (2) and (3), which not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (force, violence, intimidation). The Government stresses that the numbered subsections do not stand alone in defining offenses, most of whose elements are set out in the statute's opening paragraph, and that this integrated structure suggests that the statute establishes only a single offense. The Government also argues that the numbered subsections come after the word "shall," which often divides offense-defining provisions from those that specify sentences. A number of countervailing structural considerations, how-

ever, weaken those points. First, if the shorter subsection (2) does not stand alone, neither does § 2119's more voluminous first paragraph, which by itself would merely describe some obnoxious behavior, never actually telling the reader that it is a crime. Only the numbered subsections complete the thought. Second, "shall" does not invariably separate offense-defining clauses from sentencing provisions. Section 2119's text alone does not justify any confident inference. Statutory drafting, however, occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts, like degree of injury to victims, in relation to particular crimes. If a statute is unclear about whether it treats a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, since Congress is unlikely to intend any radical departures from past practice without making a point of saying so. See *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230. Here, a search for comparable examples suggests that Congress had separate and aggravated offenses in mind when it employed numbered subsections in § 2119, for it unmistakably identified serious bodily injury or related facts of violence as an offense element in several other federal statutes, including two of the three robbery statutes on which it modeled the carjacking statute. This conclusion is bolstered by the States' practice of treating serious bodily injury as an element defining a distinct offense of aggravated robbery. Neither a 1996 amendment to the statute nor the statute's legislative history supports the Government's reading. Pp. 232–239.

(b) The Government's construction of the statute would raise a serious constitutional question under the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees: when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime? Although this question has been recognized in a series of cases over the past quarter century, see, *e. g.*, *Mullaney* v. *Wilbur*, 421 U. S. 684, it has not been resolved by those cases, see, *e. g.*, *Almendarez-Torres* v. *United States*, *supra*. Any doubt on the issue of statutory construction should thus be resolved in favor of avoiding the question, under the rule that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. Pp. 239–252.

116 F. 3d 1487, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, SCALIA, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., *post,* p. 252, and SCALIA, J., *post,* p. 253, filed concurring opinions. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and BREYER, JJ., joined, *post,* p. 254.

Quin Denvir argued the cause for petitioner. With him on the briefs were *Francine Zepeda* and *John P. Balazs.*

Edward C. DuMont argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Nina Goodman.**

JUSTICE SOUTER delivered the opinion of the Court.

This case turns on whether the federal carjacking statute, 18 U. S. C. § 2119, as it was when petitioner was charged, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict. We think the better reading is of three distinct offenses, particularly in light of the rule that any interpretive uncertainty should be resolved to avoid serious questions about the statute's constitutionality.

I

In December 1992, petitioner, Nathaniel Jones, and two others, Oliver and McMillan, held up two men, Mutanna and Mardaie. While Jones and McMillan went through the victims' pockets, Oliver stuck his gun in Mutanna's left ear, and later struck him on the head. Oliver and McMillan made their getaway in the Cadillac Jones had driven to the scene, while Jones forced Mardaie into Mutanna's Honda and drove off after them. After stopping to put Mardaie out, Jones

**David M. Porter* and *Edward M. Chikofsky* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

sped away in the stolen car subject to police pursuit, which ended when Jones crashed into a telephone pole. *United States* v. *Oliver*, 60 F. 3d 547, 549 (CA9 1995); Tr. 159, 387, 310 (July 27–28, 1993).

A grand jury in the Eastern District of California indicted Jones and his two accomplices on two counts: using or aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U. S. C. § 924(c), and carjacking or aiding and abetting carjacking, in violation of 18 U. S. C. § 2119, which then read as follows:

> "Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> "(1) be fined under this title or imprisoned not more than 15 years, or both,
>
> "(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> "(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both." 18 U. S. C. § 2119 (1988 ed., Supp. V).[1]

The indictment made no reference to the statute's numbered subsections and charged none of the facts mentioned in the latter two, and at the arraignment the Magistrate Judge told

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[1] Congress amended the statute in 1994 and 1996. In the Violent Crime Control and Law Enforcement Act of 1994, it deleted the phrase in the first paragraph concerning firearm possession and replaced it with the phrase, "with the intent to cause death or serious bodily harm." § 60003(a)(14), 108 Stat. 1970. It also made death a possible punishment for offenses committed under subsection (3). *Ibid.* In the Carjacking Correction Act of 1996, Congress specified that the term "serious bodily injury" in subsection (2) includes certain sexual assaults. § 2, 110 Stat. 3020.

Jones that he faced a maximum sentence of 15 years on the carjacking charge. App. 4–5, 7. Consistently with this advice, the District Court's subsequent jury instructions defined the elements subject to the Government's burden of proof by reference solely to the first paragraph of § 2119, with no mention of serious bodily injury. *Id.*, at 10. The jury found Jones guilty on both counts.

The case took a new turn, however, with the arrival of the presentence report, which recommended that petitioner be sentenced to 25 years for the carjacking because one of the victims had suffered serious bodily injury. The report noted that Mutanna had testified that Oliver's gun caused profuse bleeding in Mutanna's ear, and that a physician had concluded that Mutanna had suffered a perforated eardrum, with some numbness and permanent hearing loss. *Id.*, at 15–16; 60 F. 3d, at 554. Jones objected that the 25-year recommendation was out of bounds, since serious bodily injury was an element of the offense defined in part by § 2119(2), which had been neither pleaded in the indictment nor proven before the jury. App. 12–13. The District Court saw the matter differently and, based on its finding that the serious bodily injury allegation was supported by a preponderance of the evidence, imposed a 25-year sentence on the carjacking count, *ibid.*, together with a consecutive 5-year sentence for the firearm offense, 60 F. 3d, at 549.

Like the trial court, the Court of Appeals did not read § 2119(2) as setting out an element of an independent offense.[2] *Id.*, at 551–554. The Ninth Circuit thus agreed with the Eleventh, see *United States* v. *Williams*, 51 F. 3d 1004, 1009–1010 (1995), in reasoning that the structure of

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[2] The Ninth Circuit vacated another portion of the District Court's sentencing decision and remanded. *United States* v. *Oliver*, 60 F. 3d 547, 555–556 (1995). On remand, the District Court reduced petitioner's carjacking sentence to 20 years and his total sentence to 25 years, and the Court of Appeals affirmed. App. 41–43; judgt. order reported at 116 F. 3d 1487 (1997).

the statute, particularly the grammatical dependence of the numbered subsections on the first paragraph, demonstrated Congress's understanding that the subsections did not complete the definitions of separate crimes. 60 F. 3d, at 552–553. For its view that the subsections provided sentencing factors, the court found additional support in the statute's legislative history. The heading on the subtitle of the bill creating § 2119 was "Enhanced Penalties for Auto Theft," which the court took as indicating that the statute's numbered subsections merely defined sentencing enhancements. *Id.*, at 553. The court also noted several references in the Committee Reports and floor debate on the bill to enhanced penalties for an apparently single carjacking offense. *Ibid.* Because of features arguably distinguishing this case from *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), we granted certiorari, 523 U. S. 1045 (1998), and now reverse.

II

Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. See, *e. g.*, *Hamling* v. *United States*, 418 U. S. 87, 117 (1974); *United States* v. *Gaudin*, 515 U. S. 506, 509–510 (1995). Accordingly, some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85–86 (1986) (express identification of statutory provision as sentencing factor). Even without any such help, however, § 2119 at first glance has a look to it suggesting that the numbered subsections are only sentencing provisions. It begins with a principal paragraph listing a series of obvious elements (possession of a firearm, taking a motor vehicle, connection with interstate commerce, and so on). That paragraph comes close to standing on its own, followed by sentencing provisions, the first of which,

subsection (1), certainly adds no further element. But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (*e. g.*, force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit. The "look" of the statute, then, is not a reliable guide to congressional intentions, and the Government accordingly advances two, more subtle structural arguments for its position that the fact specified in subsection (2) is merely a sentencing factor.

Like the Court of Appeals, the Government stresses that the statute's numbered subsections do not stand alone in defining offenses, most of whose elements on anyone's reckoning are set out in the statute's opening paragraph. This integrated structure is said to suggest that the statute establishes only a single offense. To the same point, the Government argues that the numbered subsections come after the word "shall," which often divides offense-defining provisions from those that specify sentences. Brief for United States 15–18. While these points are sound enough as far as they go, they are far short of dispositive even on their own terms, whereas they are weakened here by a number of countervailing structural considerations. First, as petitioner notes, Reply Brief for Petitioner 1–2, if the shorter subsection (2) of § 2119 does not stand alone, neither does the section's more voluminous first paragraph. In isolation, it would merely describe some very obnoxious behavior, leaving any reader assuming that it must be a crime, but never being actually told that it is. Only the numbered subsidiary provisions complete the thought. Section 2119 is thus unlike most offense-defining provisions in the federal criminal

code, which genuinely stand on their own grammatical feet thanks to phrases such as "shall be unlawful," see, *e. g.*, 18 U. S. C. § 922(g), "shall be punished," see, *e. g.*, § 511A(a), or "shall be guilty of," see, *e. g.*, 18 U. S. C. § 514 (1994 ed., Supp. II), which draw a provision to its close. Second, as for the significance of the word "shall," although it frequently separates offense-defining clauses from sentencing provisions, it hardly does so invariably. One of the robbery statutes that served as a model for § 2119,[3] see 18 U. S. C. §§ 2118(a)(3), (b)(3), for example, places elements of the offense on either side of "shall." And, of course, where the supposedly "elements" side is itself grammatically incomplete (as here), the placement of "shall" is oddly equivocal. Indeed, both the Government and the Courts of Appeals treat the statute perhaps most closely resembling this one, § 1365(a) (consumer tampering), as defining basic and aggravated offenses, one of which is defined in terms of serious bodily injury. See, *e. g.*, *United States* v. *Meling*, 47 F. 3d 1546, 1551 (CA9 1995).

These clues derived from attention to structure and parsing of wording, like those the dissent holds up to distinguish the carjacking act both from the robbery statutes upon which it was modeled and state aggravated robbery statutes, see *post*, at 260–262, 263–264 (opinion of KENNEDY, J.), turn out to move us only so far in our effort to infer congressional intent. The text alone does not justify any confident inference. But statutory drafting occurs against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts, like the degree of injury to victims of crime, in relation to particular crimes. If a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so.

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[3] See n. 4, *infra.*

We engaged in just such an enquiry this past Term in *Almendarez-Torres*, where we stressed the history of treating recidivism as a sentencing factor, and noted that, with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful. 523 U. S., at 230. Here, on the contrary, the search for comparable examples more readily suggests that Congress had separate and aggravated offenses in mind when it employed the scheme of numbered subsections in § 2119. Although Congress has explicitly treated serious bodily injury as a sentencing factor, see, *e. g.*, 18 U. S. C. § 2262(b)(2) (interstate violation of a protection order); § 248(b)(2) (free access to clinic entrances; bodily injury), it has unmistakably identified serious bodily injury as an offense element in any number of statutes, see, *e. g.*, 10 U. S. C. § 928(b)(2) (assault by a member of the armed forces); 18 U. S. C. § 37(a)(1) (violence at international airports); § 1091(a)(2) (genocide). The likelihood that Congress understood injury to be an offense element here follows all the more from the fact that carjacking is a type of robbery, and serious bodily injury has traditionally been treated, both by Congress and by the state legislatures, as defining an element of the offense of aggravated robbery. As the Government acknowledges, Brief for United States 20–21, and n. 8, Congress modeled the federal carjacking statute on several other federal robbery statutes.[4] One of them, 18 U. S. C. § 2118 (robbery involving controlled substances), clearly makes causing serious bodily injury an element of the offense. It provides that "[w]hoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any [of certain controlled

[4] Legislative history identifies three such models. See H. R. Rep. No. 102–851, pt. 1, p. 17 (1992) ("The definition of the offense tracks the language used in other federal robbery statutes (18 U. S. C. §§ 2111, 2113, 2118)"). One of them, 18 U. S. C. § 2111 (robbery in areas of federal maritime or territorial jurisdiction), lacks aggravated forms of the offense altogether, and thus is not on point here.

substances] shall . . . be fined . . . or imprisoned not more than twenty years, or both, if (1) the replacement cost of the [controlled substance] was not less than $500, . . . or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt." § 2118(a)(3); see also § 2118(b)(3).[5] A second model, § 2113 (bank robbery), as the Government concedes, see Brief for United States 17, makes related facts of violence, that is, assault and jeopardizing life by using a dangerous weapon, elements defining an aggravated form of that type of robbery. See §§ 2113(d), (e); cf. *Almendarez-Torres*, *supra*, at 231 (citing bank robbery statute as example of statute establishing greater and lesser included offenses); *McMillan*, 477 U. S., at 88 (contrasting § 2113(d) with provision defining a sentencing enhancement).

When pressed at oral argument, the Government proved unable to explain why Congress might have chosen one treatment of serious bodily harm or violence in defining two of the three offenses it used as its models for § 2119 and a different treatment in writing the carjacking statute itself, see Tr. of Oral Arg. 41–44, and we are unable to imagine a convincing reason ourselves. We thus think it fair to say that, as in the earlier robbery statutes, so in the carjacking statute, Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime.

State practice bolsters the conclusion. Many States use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery. See, *e. g.*, Ala. Code § 13A–8–41(a)(2) (1994) (robbery in the first degree defined in part by the causing of "serious physical injury");

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[5] The dissent, in passing, questions our view that § 2118(a) makes the causing of significant bodily injury an element of the offense defined by that section, see *post*, at 261–262, but it offers no reason to doubt our reading. Given that § 2118(a) establishes only one maximum punishment, and that it makes eligibility for such punishment contingent on the establishment of at least one of three facts, one of which is the causing of death or significant bodily injury, we think our reading is the only sensible one.

Alaska Stat. Ann. § 11.41.500(a)(3) (1996) (same); Ark. Code Ann. § 5–12–103 (1997) (aggravated robbery; "[i]nflicts or attempts to inflict death or serious physical injury"); Conn. Gen. Stat. § 53a–134(a)(1) (1994) (robbery in the first degree; "[c]auses serious physical injury"); Iowa Code § 711.2 (1993) (robbery in the first degree; "purposely inflicts or attempts to inflict serious injury"); Kan. Stat. Ann. § 21–3427 (1995) (aggravated robbery; "inflicts bodily harm"); Ky. Rev. Stat. Ann. § 515.020(1)(a) (Michie 1990) (robbery in the first degree; "causes physical injury"); N. H. Rev. Stat. Ann. § 636:1(III)(c) (1996) (class A felony of robbery; "[i]nflicted or attempted to inflict death or serious injury"); N. Y. Penal Law § 160.15 (McKinney 1988) (robbery in the first degree; "[c]auses serious physical injury"); Ore. Rev. Stat. § 164.415(1)(c) (1990) (robbery in the first degree; "[c]auses or attempts to cause serious physical injury"); Tex. Penal Code Ann. § 29.03(a)(1) (1994) (aggravated robbery; "causes serious bodily injury"); Utah Code Ann. § 76–6–302(1)(b) (1995) (aggravated robbery; "causes serious bodily injury"); Wash. Rev. Code § 9A.56.200(1)(c) (1994) (robbery in the first degree; "[i]nflicts bodily injury"). While the state practice is not, admittedly, direct authority for reading the federal carjacking statute, it does show that in treating serious bodily injury as an element, Congress would have been treading a well-worn path.

Despite these indications and the equivocal structural clues, the Government suggests that a 1996 amendment supports its reading of the carjacking statute as previously enacted. In the Carjacking Correction Act of 1996, 110 Stat. 3020, Congress provided that the term "serious bodily injury" in subsection (2) should include sexual abuse and aggravated sexual abuse as defined in §§ 2241 and 2242. The Government points to several statements in the 1996 amendment's legislative history in which subsection (2) is described as providing a "penalty enhancement," see, *e. g.*, H. R. Rep. No. 104–787, pp. 2, 3 (1996), as showing that subsection (2)

defines a sentencing factor. Even those of us disposed to treat legislative history as authority, however, find the quoted statements unimpressive. Assuming that "penalty enhancement" was meant to be synonymous with "sentencing factor," the legislative history also contains contrary indications in some of the statements made by the 1996 amendment's sponsors, suggesting an assumption that subsection (2) established an element or elements that had to be proven at trial. See 142 Cong. Rec. 19769 (1996) (statement of Sen. Biden) ("[T]he defendant had been *convicted* of raping the woman" (emphasis added)). This hardly seems the occasion to doubt that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990) (quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960)). Indeed, our leeriness of relying on hindsight expressed in legislative history is only confirmed by recognizing what oddity there would be in defining the fact of serious bodily injury by reference to a distinct offense with its own offense elements, like sexual abuse, while at the same time assuming that the fact so defined is merely a sentencing consideration.

Nor do we think the legislative history that attracted the Court of Appeals is any more helpful to the Government. See 60 F. 3d, at 553. The Committee Reports and floor debate on the statute refer to its augmentation of the criminal law in the singular, not the plural, speaking only of a new federal "crime" or "offense" of carjacking in the singular. See, *e. g.*, H. R. Rep. No. 102–851, pt. 1, p. 17 (1992); 138 Cong. Rec. 32500 (1992) (statement of Rep. Dingell). But what we make of the singular-plural distinction turns on the circumstances. Characterizing a cluster of provisions as enacting something to be described by the singular terms "offense" or "crime" would signify a good deal if the speakers or writers were addressing a point on which the distinction mattered. That is not, however, what they were doing in the

passages cited, where those references couched in the singular did not occur in discussions of the issue of offense elements versus sentencing factors that we confront here. So, we think their significance is slight. On the subject of legislative history, we should add that we see nothing favorable to the Government in the fact that the statement in the House Report explaining that the drafters of the carjacking statute drew on the examples of other federal robbery statutes referred to an early version of the carjacking statute when it lacked any reference to the aggravated forms of the offense now defined by subsections (2) and (3). See H. R. Rep. No. 102–851, *supra*, at 17. As against the suggestion that Congress looked to the earlier robbery statutes only when it settled on the language contained in the carjacking statute's first paragraph, we think it would have been strange for Congress to find guidance in the other robbery statutes at the beginning of the legislative process and then just forget about them. As the Government itself suggests in a somewhat different context, there is no reason to think that Congress "might have abandoned [those] ready federal models" in developing the more fully elaborated version of the statute that it ultimately adopted. Brief for United States 21, n. 8.

III

While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule, repeatedly affirmed, that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); see also *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). It is "out

of respect for Congress, which we assume legislates in the light of constitutional limitations," *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991), that we adhere to this principle, which "has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); see also *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994).

As the Government would have us construe it, the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury. The first of these, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), reviewed a Maine murder statute providing that the element of malice (in the sense of want of provocation, *Patterson* v. *New York*, 432 U. S. 197, 215 (1977)) would be presumed upon proof of intent to kill resulting in death, subject to a defendant's right of rebuttal that he had acted on provocation in the heat of passion, which would reduce the offense to manslaughter. *Mullaney*, *supra*, at 686, and n. 3. The challenge was that the presumption subject to rebuttal relieved the State of its due process burden to prove every element of the crime beyond a reasonable doubt, as explained in *In re Winship*, 397 U. S. 358, 364 (1970). The State replied that the challenge was merely formalistic, that the State's law in effect established a generic crime of felonious homicide, *Mullaney*, *supra*, at 688, 696–697, on which view the fact subject to presumption and rebuttal would have gone simply to sentence, and *Winship* would not have been controlling. But the Court declined to accord the State this license to recharacterize the issue, in part because the State's reading left its statute at odds both with the centuries-old common law recognition of malice as the fact distinguishing murder from manslaughter and with the widely held modern view that heat of passion, once raised by the evidence, was a subject of the State's burden, 421 U. S., at 692–696, and in part because an unlimited

choice over characterizing a stated fact as an element would leave the State substantially free to manipulate its way out of *Winship*, 421 U. S., at 698.

Two Terms later, in *Patterson* v. *New York*, *supra*, the Court ruled on a *Winship* challenge to a scheme defining murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance for which there was a reasonable explanation. 432 U. S., at 205–206. Unlike Maine's law, New York's raised no presumption of malice; malice was omitted from the elements of murder. Patterson contended that because the presence or absence of an extreme emotional disturbance affected the severity of sentence, *Winship* and *Mullaney* required the State to prove the absence of that fact beyond a reasonable doubt. We rejected this argument and "decline[d] to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 432 U. S., at 210. We identified the use of a presumption to establish an essential ingredient of the offense as the curse of the Maine law, because the "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Id.*, at 215. With one caveat, therefore, *Patterson* left the States free to choose the elements that define their crimes, without any impediment from *Winship*. The caveat was a stated recognition of some limit upon state authority to reallocate the traditional burden of proof, 432 U. S., at 210, which in that case was easily satisfied by the fact that "at common law the burden of proving" the mitigating circumstances of severe emotional disturbance "rested on the defendant." *Id.*, at 202; see also *id.*, at 211; *Mullaney*, *supra*, at 693–694. While a narrow reading of this limit might have been no more than a ban on using presumptions to reduce elements to the point of being nominal, a broader reading was equally open, that the State

lacked the discretion to omit "traditional" elements from the definition of crimes and instead to require the accused to disprove such elements.

These cases about allocation of burden, with their implications about the charging obligation and the requisite quantum of proof, were succeeded by *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), in which the *Winship* issue rose from a provision that a judge's finding (by a preponderance) of visible possession of a firearm would require a mandatory minimum sentence for certain felonies, but a minimum that fell within the sentencing ranges otherwise prescribed. Although the Court rejected the petitioner's claim insofar as it would have required a finding beyond a reasonable doubt of any fact upon which a mandatory minimum sentence depended (and rejected certain subsidiary arguments as well), it did observe that the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact. 477 U. S., at 88.

McMillan is notable not only for acknowledging the question of due process requirements for factfinding that raises a sentencing range, but also for disposing of a claim that the Pennsylvania law violated the Sixth Amendment right to jury trial as well. The petitioner's basic argument was for a right to jury determination of all "ultimate facts concerning the offense committed," *id.*, at 93, and although the Court disposed of this by reference back to its due process discussion, that discussion had broached the potential constitutional significance of factfinding that raised the sentencing ceiling.

McMillan, then, recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?

The seriousness of the due process issue is evident from *Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof; the substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element.[6]

The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink

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[6] The dissent repeatedly chides us for failing to state precisely enough the principle animating our view that the carjacking statute, as construed by the Government, may violate the Constitution. See *post*, at 254, 266, 277. The preceding paragraph in the text expresses that principle plainly enough, and we restate it here: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

Contrary to the dissent's suggestion, the constitutional proposition that drives our concern in no way "call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature." *Post*, at 270 (internal quotation marks omitted). The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof.

from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.

The question might well be less serious than the constitutional doubt rule requires if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. But such is not the history. To be sure, the scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing. On the other hand, several studies demonstrate that on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right.

The fact that we point to no statutes of the earlier time exemplifying the distinction between elements and facts that elevate sentencing ranges is unsurprising, given the breadth of judicial discretion over fines and corporal punishment in less important, misdemeanor cases, see, *e. g.*, J. Baker, Introduction to English Legal History 584 (3d ed. 1990); 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) (hereinafter Blackstone); Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 350 (1982), and the norm of fixed sentences in cases of felony, see Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900, pp. 36–37 (A. Schioppa ed.

1987); 4 Blackstone 238–239; A. Scott, Criminal Law in Colonial Virginia 27–28, 103–106 (1930).

Even in this system, however, competition developed between judge and jury over the real significance of their respective roles. The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part. 4 Blackstone 238–239.[7]

Countervailing measures to diminish the juries' power were naturally forthcoming, with ensuing responses both in the mother country and in the Colonies that validate, though they do not answer, the question that the Government's position here would raise. One such move on the Government's side was a parliamentary practice of barring the right to jury trial when defining new, statutory offenses. See, *e. g.*, Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 925–930 (1926); 4 Blackstone 277–279. This practice extended to violations of the Stamp Act and recurred in statutes regulating imperial trade, see C. Ubbelohde, Vice-Admiralty Courts and the American Revolution 16–21, 74–80 (1960); Wroth, The Massachusetts Vice Admiralty Court, in

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[7] For English practice, see, *e. g.*, Langbein, Shaping the Eighteenth-Century Criminal Trial, 50 U. Chi. L. Rev. 1, 22, 52–54 (1983); Green, The English Criminal Trial Jury, in The Trial Jury in England, France, Germany 1700–1900, pp. 41, 48–49 (A. Schioppa ed. 1987). For Colonial American practice, see, *e. g.*, J. Goebell & T. Naughton, Law Enforcement in Colonial New York 673–674 (1944); *State* v. *Bennet*, 3 Brevard 515 (S. C. 1815).

Law and Authority in Colonial America 32, 50 (G. Billias ed. 1965), and was one of the occasions for the protest in the Declaration of Independence against deprivation of the benefit of jury trial, see P. Maier, American Scripture 118 (1997). But even before the Declaration, a less revolutionary voice than the Continental Congress had protested against the legislative practice, in words widely read in America. The use of nonjury proceedings had "of late been so far extended," Blackstone warned in the 1760's, "as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury." 4 Blackstone 278. Identifying trial by jury as "the grand bulwark" of English liberties, Blackstone contended that other liberties would remain secure only "so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these 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." *Id.*, at 342–344.

A second response to the juries' power to control outcomes occurred in attempts to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification. Ultimately, of course, the attempt failed, the juries' victory being embodied in Fox's Libel Act in Britain, see generally T. Green, Verdict According to Conscience 318–355 (1985), and exemplified in John Peter Zenger's acquittal in the Colonies, see, *e. g.*, J. Rakove, Original Meanings 300–302 (1996). It is significant here not merely that the denouement of the restrictive efforts left the juries in control, but

that the focus of those efforts was principally the juries' control over the ultimate verdict, applying law to fact (or "finding" the law, see, *e. g.*, *id.*, at 301), and not the factfinding role itself.[8] There was apparently some accepted understanding at the time that the finding of facts was simply too sacred a jury prerogative to be trifled with in prosecution for such a significant and traditional offense in the common-law courts.[9] That this history had to be in the minds of the Framers is beyond cavil. According to one authority, the leading account of Zenger's trial was, with one possible exception, "the most widely known source of libertarian thought in England and America during the eighteenth century." L. Levy, Freedom of Speech and Press in Early American History 133 (1963). It is just as much beyond

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[8] The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b (1628) *("ad questionem facti non respondent judices; ad questionem juris non respondent juratores").* See also Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany, *supra,* at 34, n. 60. Even the traditional, jury-restrictive view of libel law recognized the jury's authority over matters of fact. See, *e. g.*, *King* v. *Francklin*, 17 How. St. Tr. 626, 672 (K. B. 1731) ("These [publications and the words having the meaning ascribed to them] are the two matters of fact that come under your consideration; and of which you are proper judges. But then there is a third thing, to wit, Whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; and of which the Court are the only proper judges"). Thus most participants in the struggle over jury autonomy in seditious libel cases viewed the debate as concerned with the extent of the jury's law-finding power, not its unquestioned role as the determiner of factual issues. See T. Green, Verdict According to Conscience 318–319 (1985). Some influential jurists suggested that it might also be seen as a struggle over the jury's right to find a particular fact, namely, the required criminal intent. See 10 W. Holdsworth, History of English Law 680–683 (1938).

[9] See 4 Blackstone 354 (*jurors* could choose to stop at special verdicts if they wished).

question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion. See *supra,* at 245–247. One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need "to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY." A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997).

In sum, there is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern. It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.

Our position that the Sixth Amendment and due process issues are by no means by the boards calls for a word about several cases that followed *McMillan.* *Almendarez-Torres* v. *United States,* 523 U. S. 224 (1998), decided last Term, stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged. But the case is not dispositive of the question here, not merely because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by

Almendarez-Torres, but because the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing. See *id.*, at 230 ("At the outset, we note that the relevant statutory subject matter is recidivism"); *ibid.* ("With recidivism as the subject matter in mind, we turn to the statute's language"); *id.*, at 243 ("First, the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); *id.*, at 245 (distinguishing *McMillan* "in light of the particular sentencing factor at issue in this case—recidivism"). One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges.[10]

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[10] The dissent insists that *Almendarez-Torres* "controls the question before us," *post*, at 266, but in substantiating that assertion, it tellingly relies more heavily on the claims of the *Almendarez-Torres* dissenters than on the statements of the *Almendarez-Torres* majority. Neither source bears out the current dissent's conclusion. If, as the dissenters in this case suggest, *Almendarez-Torres* did not turn on the particular "sentencing factor at issue" there, 523 U. S., at 243, but instead stood for the broad proposition that any fact increasing the maximum permissible punishment may be determined by a judge by a preponderance, it is a mystery why the *Almendarez-Torres* majority engaged in so much discussion of recidivism, or why, at the crux of its constitutional discussion, it turned first to discuss

Nor is the question resolved by a series of three cases dealing with factfinding in capital sentencing. The first of these, *Spaziano* v. *Florida*, 468 U. S. 447 (1984), contains no discussion of the sort of factfinding before us in this case. It addressed the argument that capital sentencing must be a jury task and rejected that position on the ground that capital sentencing is like sentencing in other cases, being a choice of the appropriate disposition, as against an alternative or a range of alternatives. *Id.*, at 459.

Spaziano was followed in a few years by *Hildwin* v. *Florida*, 490 U. S. 638 (1989) *(per curiam)*, holding that the determination of death-qualifying aggravating facts could be entrusted to a judge, following a verdict of guilty of murder and a jury recommendation of death, without violating the Sixth Amendment's jury clause. Although citing *Spaziano* as authority, 490 U. S., at 639–640, *Hildwin* was the first case to deal expressly with factfinding necessary to authorize imposition of the more severe of alternative sentences, and thus arguably comparable to factfinding necessary to expand the sentencing range available on conviction of a lesser crime than murder. Even if we were satisfied that the analogy was sound, *Hildwin* could not drive the answer to the Sixth Amendment question raised by the Government's position here. In *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the de-

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the "tradition" of recidivism's treatment as a sentencing factor, *ibid.*, or why it never announced the unqualified holding that today's dissenters claim to find in it. Admittedly, as the dissent here notes, the dissenters in *Almendarez-Torres* criticized the majority for what they considered the majority's unsupportable restraint in restricting their holding to recidivism. But that very criticism would have lacked its target if the *Almendarez-Torres* majority had not so doggedly refrained from endorsing the general principle the dissent in this case now attributes to them. The majority and the dissenters in *Almendarez-Torres* disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that.

termination that at least one aggravating factor had been proved. *Hildwin*, therefore, can hardly be read as resolving the issue discussed here, as the reasoning in *Walton* v. *Arizona*, 497 U. S. 639 (1990), confirms.

Walton dealt with an argument only slightly less expansive than the one in *Spaziano*, that every finding underlying a sentencing determination must be made by a jury. Although the Court's rejection of that position cited *Hildwin*, it characterized the nature of capital sentencing by quoting from *Poland* v. *Arizona*, 476 U. S. 147, 156 (1986). See 497 U. S., at 648. There, the Court described statutory specifications of aggravating circumstances in capital sentencing as "standards to guide the . . . choice between the alternative verdicts of death and life imprisonment." *Ibid.* (quoting *Poland*, *supra*, at 156 (internal quotation marks omitted)). The Court thus characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available. We are frank to say that we emphasize this careful reading of *Walton*'s rationale because the question implicated by the Government's position on the meaning of § 2119(2) is too significant to be decided without being squarely faced.

In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions.[11] This is

[11] In tones of alarm, the dissent suggests, see *post*, at 254, 271, that our decision will unsettle the efforts of many States to bring greater consistency to their sentencing practices through provisions for determinate sentences and statutorily or administratively established guidelines governing sentencing decisions. The dissent's concern is misplaced for several reasons. Most immediately, our decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century. But even

done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Like JUSTICE SCALIA, see *post*, at 253, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

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if we assume that the question we raise will someday be followed by the answer the dissenters seem to fear, that answer would in no way hinder the States (or the National Government) from choosing to pursue policies aimed at rationalizing sentencing practices. If the constitutional concern we have expressed should lead to a rule requiring jury determination of facts that raise a sentencing ceiling, that rule would in no way constrain legislative authority to identify the facts relevant to punishment or to establish fixed penalties. The constitutional guarantees that prompt our interpretation bear solely on the procedures by which the facts that raise the possible penalty are to be found, that is, what notice must be given, who must find the facts, and what burden must be satisfied to demonstrate them. Finally, while we disagree with the dissent's dire prediction about the effect of our decision on the States' ability to choose certain sentencing policies, it should go without saying that, if such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees. See, *e. g.*, *Burch* v. *Louisiana*, 441 U. S. 130, 139 (1979) (Nonunanimous verdicts by six-person criminal juries "sufficiently threate[n] the constitutional principles [animating the jury trial guarantee] that any countervailing interest of the State should yield"); cf. *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973) ("The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards").

It is equally clear that such facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in *In re Winship*, 397 U. S. 358 (1970), *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977). To permit anything less "with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Id.*, at 215. This principle was firmly embedded in our jurisprudence through centuries of common-law decisions. See, *e. g.*, *Winship*, 397 U. S., at 361–364; *Duncan* v. *Louisiana*, 391 U. S. 145, 151–156 (1968). Indeed, in my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence, and also facts that must be established before a defendant may be put to death. If *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), and Part II of the Court's opinion in *Walton* v. *Arizona*, 497 U. S. 639, 647–649 (1990), departed from that principle, as I think they did, see *McMillan*, 477 U. S., at 95–104 (STEVENS, J., dissenting), and *Walton*, 497 U. S., at 709–714 (STEVENS, J., dissenting), they should be reconsidered in due course. It is not, however, necessary to do so in order to join the Court's opinion today, which I do.

JUSTICE SCALIA, concurring.

In dissenting in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), I suggested the possibility, and in dissenting in *Monge* v. *California*, 524 U. S. 721, 737 (1998), I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed. Because I think it necessary to resolve all ambiguities in criminal statutes in such fashion as to avoid violation of this constitutional principle, I join the opinion of the Court.

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

The question presented is whether the federal carjacking statute, prohibiting the taking of a motor vehicle from the person or presence of another by force and violence or by intimidation, contains in the first paragraph a complete definition of the offense, with all of the elements of the crime Congress intended to codify. 18 U. S. C. §2119. In my view, shared by every Court of Appeals to have addressed the issue, it does. The Court adopts a contrary, strained reading according to which the single statutory section prohibits three distinct offenses.

Had it involved simply a question of statutory interpretation, the majority opinion would not have been cause for much concern. Questions of statutory interpretation can be close but nonetheless routine. That should have been so in today's case. The Court, however, is unwilling to rest its opinion on textual analysis. Rather, to bolster its statutory interpretation, the Court raises the specter of "'grave and doubtful constitutional questions,'" *ante,* at 239, without an adequate explanation of the origins, contours, or consequences of its constitutional concerns. The Court's reliance on the so-called constitutional doubt rule is inconsistent with usual principles of *stare decisis* and contradicts the approach followed just last Term in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). Our precedents admit of no real doubt regarding the power of Congress to establish serious bodily injury and death as sentencing factors rather than offense elements, as we made clear in *Almendarez-Torres.* Departing from this recent authority, the Court's sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States. Thus, among other unsettling consequences, today's decision intrudes upon legitimate and vital state interests, upsetting the proper federal balance. I dissent from this unfortunate and unnecessary result.

Before it departs on its troubling constitutional discussion, the Court analyzes the text of § 2119. This portion of the Court's opinion, it should be acknowledged, is careful and comprehensive. In my submission, however, the analysis suggests the presence of more interpretative ambiguity than in fact exists and reaches the wrong result. Like the Court, I begin with the textual question.

I

Criminal laws proscribe certain conduct and specify punishment for transgressions. A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements. As a general rule, each element of a charged crime must be set forth in an indictment, *Hamling* v. *United States*, 418 U. S. 87, 117 (1974), and established by the government by proof beyond a reasonable doubt, *In re Winship*, 397 U. S. 358, 364 (1970), as determined by a jury, assuming the jury right is invoked, *Sullivan* v. *Louisiana*, 508 U. S. 275, 277–278 (1993); *Almendarez-Torres* v. *United States*, 523 U. S., at 239. The same rigorous requirements do not apply with respect to "factors relevant only to the sentencing of an offender found guilty of the charged crime." *Id.*, at 228; see also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986). "[T]he question of which factors are which is normally a matter for Congress." *Almendarez-Torres* v. *United States*, 523 U. S., at 228.

In determining whether clauses (1)–(3) of § 2119 set forth sentencing factors or define distinct criminal offenses, our task is to "look to the statute before us and ask what Congress intended." *Ibid.* The statute is as follows:

> "Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

> "(1) be fined under this title or imprisoned not more than 15 years, or both,
>
> "(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> "(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both." 18 U. S. C. § 2119 (1988 ed., Supp. V).

As the Court is quite fair to acknowledge, the first reading or initial look of the statute suggests that clauses (1)–(3) are sentencing provisions. *Ante*, at 232. In my view, this conclusion survives further and meticulous examination.

Section 2119 begins by setting forth in its initial paragraph elements typical of a robbery-type offense. For all ordinary purposes, this is a complete crime. If, for instance, there were only a single punishment, as provided in clause (1), I think there could be no complaint with jury instructions drawn from the first paragraph of § 2119, without reference to the punishment set forth in clause (1). The design of the statute yields the conclusion that the following numbered provisions do not convert each of the clauses into additional elements. These are punishment provisions directed to the sentencing judge alone. To be sure, the drafting could have been more clear, and my proffered interpretation would have been better implemented, if the word "shall" at the end of the first paragraph had been followed by a verb form (*e. g.*, "be punished") and a period. Even as written, though, the statute sets forth a complete crime in the first paragraph. It is difficult to see why Congress would double back and insert additional elements for the jury's consideration in clauses (2) and (3). The more likely explanation is that Congress set forth the offense first and the punishment second, without intending to combine the two.

Unlike the Court, I am unpersuaded by other factors that this commonsense reading is at odds with congressional intent. As to the substance of clauses (2) and (3), the harm

from a crime—including whether the crime, after its commission, results in the serious bodily injury or death of a victim—has long been deemed relevant for sentencing purposes. Like recidivism, it is "as typical a sentencing factor as one might imagine," *Almendarez-Torres* v. *United States*, *supra*, at 230, a point the Court cannot dispute. To fix punishment based on the harm resulting from a crime has been the settled practice under traditional, discretionary sentencing regimes. See, *e. g.*, U. S. Dept. of Justice, W. Rhodes & C. Conly, Analysis of Federal Sentencing X–13, XV–11 (Federal Justice Research Program Rep. No. FJRP–81/004, 1981) (under preguidelines practice, with respect to a variety of crimes, the amount of harm threatened or done to victims made a significant difference in the length of sentence). Even if we confine our attention to codified law, however, examples abound to prove the point. Other federal statutes, as the Court notes, treat serious bodily injury as a sentencing factor. *Ante*, at 235. As for state law, common practice discloses widespread reliance on victim-impact factors for sentencing purposes. See, *e. g.*, Alaska Stat. Ann. § 12.55.125(c)(2) (1998) ("physical injury"); Ariz. Rev. Stat. Ann. § 13.702(C) (Supp. 1998–1999) ("serious physical injury"); Colo. Rev. Stat. § 18–1–105(9)(f) (1997) ("serious bodily injury"); Fla. Stat. Ann. § 921.0016(3)(*l*) (Supp. 1999) ("permanent physical injury"); Haw. Rev. Stat. § 706–662(5) (Supp. 1996) ("serious or substantial bodily injury" upon certain victims); Ill. Comp. Stat., ch. 730, § 5/5–5–3.2(a) (1997) ("serious harm"); La. Code Crim. Proc. Ann., Art. 894.1(B)(5) (West 1997) ("risk of death or great bodily harm to more than one person"); N. J. Stat. Ann. § 2C:44–1(a)(2) (West 1995) ("gravity and seriousness of harm inflicted on the victim"); N. C. Gen. Stat. § 15A–1340.16(d)(19) (1997) ("[t]he serious injury inflicted upon the victim is permanent and debilitating"); Ohio Rev. Code Ann. § 2929.12(B)(2) (1997) ("serious physical . . . harm"); Ore. Admin. Rules § 213–008–0002(1)(b)(I) (1997) ("permanent injury"); Tenn. Code Ann.

§ 40–35–114(12) (1997) ("death . . . or serious bodily injury"); Utah Code of Judicial Admin., App. D, Form 2 (1998) ("substantial bodily injury"). Given this widespread understanding, there is nothing surprising or anomalous in the conclusion that Congress chose to treat serious bodily injury and resulting death as sentencing factors in § 2119.

In addition, the plain reading of § 2119 is reinforced by common patterns of statutory drafting. For example, in one established statutory model, Congress defines the elements of an offense in an initial paragraph ending with the phrase "shall be punished as provided in" a separate subsection. The subsection provides for graded sentencing ranges, predicated upon specific findings (such as serious bodily injury or death). See, *e. g.*, 8 U. S. C. § 1324(a)(1). Section 2119 follows a similar logic. It is true that clauses (1)–(3) are not separated into a separate subsection, thus giving rise to the textual problem we must resolve. Congress does not always separate sentencing factors into separate subsections, however. See, *e. g.*, 18 U. S. C. § 1347 (1994 ed., Supp. III) (health-care fraud; enhanced penalties if the violation "results in serious bodily injury" or "results in death"). As with statutes like § 1324, the structure of § 2119 suggests a design which defines the offense first and the punishment afterward.

In addition, there is some significance in the use of the active voice in the main paragraph and the passive voice in clauses (2) and (3) of § 2119. In the more common practice, criminal statutes use the active voice to define prohibited conduct. See, *e. g.*, 18 U. S. C. § 1116 (1994 ed., Supp. III) ("[w]hoever kills or attempts to kill"); § 2114 ("assaults," "robs or attempts to rob," "receives, possesses, conceals, or disposes"); Tex. Penal Code Ann. §§ 29.03(a)(1), (2) (1994) (aggravated robbery; "causes serious bodily injury," or "uses or exhibits a deadly weapon"); cf. 18 U. S. C. § 248(b) (setting forth, as sentencing factors, "if bodily injury results," and "if death results"); United States Sentencing

Commission, Guidelines Manual §2B3.1(b)(3) (Nov. 1998) (robbery guideline; "[i]f any victim sustained bodily injury").

These drafting conventions are not absolute rules. Congress uses active language in phrasing sentencing factors in some instances. See, *e. g.*, 18 U. S. C. §2262(b)(3) (1994 ed., Supp. III) ("if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense"). Nevertheless, the more customary drafting conventions support, rather than contradict, the interpretation that §2119 sets forth but one offense.

The Court offers specific arguments regarding these background considerations, each deserving of consideration and response.

First, as its principal argument, the Court cites the three federal robbery statutes on which (according to the legislative history) §2119 was modeled. As the Court acknowledges, however, one of those statutes, 18 U. S. C. §2111, does not refer to "serious bodily injury" or "death" "result[ing]" at all. Because of the omission, the Court deems this statute irrelevant for our purposes. Yet the Committee Report cited by the Court states that "'[t]he definition of the offense'" in §2119 "'tracks the language used in other federal robbery statutes'" including §2111. *Ante*, at 235, n. 4 (quoting H. R. Rep. No. 102–851, pt. 1, p. 17 (1992)). The definition of the offense in §2119 includes "tak[ing]" or "attempt[ing]" to take a motor vehicle, "from the person or presence of another," "by force and violence or by intimidation." This is altogether consistent with the definition of the offense in §2111, which provides in part that "[w]hoever . . . by force and violence, or by intimidation, takes or attempts to take from the person or presence of another" something of value "shall be imprisoned." Of course §§2111 and 2119 each include at least one element the other does not (*e. g.*, "within the special maritime and territorial jurisdiction of the United States" in the former, "transported, shipped, or received in interstate or foreign commerce" in the latter). Those ele-

ments, however, are included in unambiguous fashion in the offense-defining part of the statutes. With respect to the debatable interpretive question—whether serious bodily injury and death are part of the carjacking offense—the circumstance that the definition of the offense in § 2119 is based on § 2111 and that § 2111 does not include these elements suggests § 2119 does not include the elements either.

Passing over § 2111, the Court suggests §§ 2113 and 2118 support its reading of § 2119. I disagree. Section 2113, captioned "Bank robbery and incidental crimes," consists of eight subsections. The last three are definitional and irrelevant to the question at hand. The first subsection, subsection (a), proscribes the crime of bank robbery in language that tracks the definition of the offense in § 2119, *i. e.*, "tak-[ing], or attempt[ing] to take," something of value "from the person or presence of another," "by force and violence, or by intimidation." Subsection (b) proceeds to define the offense of bank larceny and is cast in different terms—as is natural in light of the different conduct proscribed. Subsections (d) and (e) of § 2113, the two subsections relied upon by the Court, provide as follows:

> "(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
>
> "(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment."

We have not held that subsections (d) and (e) set forth separate offenses. (The Court's citations to *Almendarez-Torres* and *McMillan* on this score are inapt. In neither case did we hold that §§ 2113(d) and (e) set forth distinct offenses.) Assuming they do, however, they fail to prove the Court's point, for two reasons. First, as a matter of structure, § 2113 is divided into distinct subsections with a parallel form. Excluding the definitional provisions at the end, each of the five subsections begins with the word "[w]hoever," followed by specified conduct. Given that some of these subsections (*e. g.*, subsections (a) and (b)) set forth distinct offenses, it is fair to presume their like structured neighbors do so as well. One finds no analogous subsections in § 2119 with which clauses (1)–(3) can be matched. On the contrary, clause (1) plainly fails to introduce anything that could be construed as an offense element, making it all the less likely that offense elements are introduced in clauses (2) and (3). Second, the phrases from § 2113 cited by the Court—"assaults any person" and "puts in jeopardy the life of any person by the use of a dangerous weapon or device"—are rather different from the "serious bodily injury results" and "death results" language of § 2119. The former phrases occur before, not after, the punishment-introducing clause "shall be . . . ." They are also phrased in the active voice, placing attention on the defendant's actions, rather than their consequences. The "or if death results" phrase at the end of subsection (e) is a closer analogue to clauses (2) and (3) of § 2119, but there is no reason to assume that this phrase by itself—as opposed to the preceding portion of subsection (e)—defines an element of an offense.

With respect to § 2118, the Court asserts without citation to authority that the phrase "another person . . . suffered significant bodily injury" in subsection (a)(3) is an element of the offense. *Ante*, at 235–236. Even assuming the Court is correct on the point, however, the differences in structure between that provision and § 2119 show them not to be com-

parable. Clauses (1)–(3) in § 2119 set forth alternative sentences; but the three clauses in § 2118(a) set forth alternative ways of qualifying for the only punishment provided. The more natural reading is that the drafters of § 2119 took from § 2118 the same thing they took from §§ 2111 and 2113: the language defining the basic elements of robbery. It is this language, and not other provisions, that is common to all four statutes.

In short, even indulging the Court's assumptions, the federal robbery statutes do not support the conclusion that § 2119 contains three substantive offenses. Rather, all four statutes employ similar language to define the elements of a basic robbery-type offense. It is in this sense that § 2119 is modeled on §§ 2111, 2113, and 2118.

The Court next relies on the consumer product-tampering statute, 18 U. S. C. § 1365(a), as support for its reading of § 2119. It is indeed true, as the Court suggests, that the structure and phrasing of § 1365(a) is similar to the carjacking statute. However, neither the Court nor, my research indicates, any Court of Appeals has held that § 1365(a) creates multiple offenses. The only case cited for the proposition that "the Courts of Appeals treat the statute . . . as defining basic and aggravated offenses," *ante*, at 234, establishes nothing of the kind. There, the Court of Appeals did no more than recite that the defendant had been charged and convicted on multiple counts of product tampering, under three subsections of § 1365(a). *United States* v. *Meling*, 47 F. 3d 1546, 1551 (CA9 1995). None of the issues presented turned on whether the subsections set forth additional elements.

The Court's final justification for its reading of § 2119 rests on state practice. Of course, the Court cannot argue that States do not take factors like serious bodily injury into account at sentencing; as discussed above, they do. Instead, the Court says many States have created a distinct offense of aggravated robbery, requiring proof of serious bodily in-

jury or harm. This is unremarkable. The laws reflect nothing more than common intuition that a forcible theft, all else being equal, is more blameworthy when it results in serious bodily injury or death. I have no doubt Congress was responding to this same intuition when it added clauses (2) and (3) to § 2119. Recognizing the common policy concern, however, gives scant guidance on the question before us: whether Congress meant to give effect to the policy by making serious bodily injury and death elements of distinct offenses or by making them sentencing factors. I agree with the Court that these state statutes are not direct authority for the issue presented here. *Ante*, at 237.

The persuasive force of the Court's state-law citations is further undercut by the structural differences between those laws and § 2119. Ten of the thirteen statutes cited by the Court follow the same pattern. One statutory section sets forth the elements of the basic robbery offense. Another section (captioned "Aggravated robbery" or "Robbery in the first degree") incorporates the basic robbery offense (either by explicit cross-reference or by obvious implication), adds the bodily or physical injury element (in the active voice), and then provides that the aggravated crime is subject to a higher penalty set forth elsewhere (*e. g.*, "a class A felony"). Two of the remaining three statutes, N. Y. Penal Law § 160.15 (McKinney 1988), and Ky. Rev. Stat. Ann. § 515.020 (Michie 1990), deviate from this pattern in only minor respects while the third, N. H. Rev. Stat. Ann. § 636:1 (1996), has a singular structure.

Had Congress wished to emulate this state practice in detail, one might have expected it to structure § 2119 in a similar manner to the majority model. Cf. 18 U. S. C. §§ 2113(e), (d). It did not do so. This suggests to me either (i) that Congress chose a different structure than utilized by the States in order to show its intent to treat "serious bodily injury" as a sentencing factor, or (ii) that Congress simply did not concentrate on state practice in deciding whether "se-

rious bodily injury" should be classed as an element or a sentencing factor. Neither possibility sustains the Court's interpretation of § 2119.

II

Although the Court, in my view, errs in its reading of § 2119 as a simple matter of statutory construction, of far greater concern is its constitutional discussion. In order to inject the rule of constitutional doubt into the case, the Court treats the relevant line of authorities from *Winship* to *Almendarez-Torres* as if it had been the Court's purpose to write them at odds with each other, not to produce a coherent body of case law interpreting the relevant constitutional provisions. This attempt to create instability is neither a proper use of the rule of constitutional doubt nor a persuasive reading of our precedents. We have settled more than the Court's opinion says.

In re Winship, 397 U. S. 358 (1970), made clear what has long been accepted in our criminal justice system. It is the principle that in a criminal case the government must establish guilt beyond a reasonable doubt. To implement this constitutional protection, it follows, there must be an understanding of the essential elements of the crime; and cases like this one will arise, requiring statutory analysis.

Nonetheless, the holding of the first case decided in the wake of *Winship*, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), now seems straightforward. In homicide cases, Maine sought to presume malice from the fact of an intentional killing alone, subject to the defendant's right to prove he had acted in the heat of passion. This was so even though "the fact at issue . . .—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Id.*, at 696. As we later explained, *Mullaney* "held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that

it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson* v. *New York*, 432 U. S. 197, 215 (1977).

In *Patterson*, the Court confronted a state rule placing on the defendant the burden of establishing extreme emotional disturbance as an affirmative defense to murder. As today's majority opinion recognizes, *Patterson* stands for the proposition that the State has considerable leeway in determining which factors shall be included as elements of its crimes. We determined that New York was permitted to place the burden of proving the affirmative defense on defendants because "nothing was presumed or implied against" them. *Id.*, at 216.

In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), we upheld a state law requiring imposition of a mandatory minimum sentence upon the trial judge's determination that the defendant had visibly possessed a firearm during the commission of an enumerated offense. Today's majority errs, in my respectful view, by suggesting *McMillan* is somewhat inconsistent with *Patterson*. *McMillan*'s holding follows easily from *Patterson*. *McMillan* confirmed the State's authority to treat aggravated behavior as a factor increasing the sentence, rather than as an element of the crime. The opinion made clear that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." 477 U. S., at 84 (quoting *Patterson* v. *New York*, *supra*, at 214).

In today's decision, the Court chooses to rely on language from *McMillan* to create a doubt where there should be none. *Ante*, at 242. Yet any uncertainty on this score ought to have been put to rest by our decision last Term in *Almendarez-Torres*. To say otherwise, the majority must strive to limit *Almendarez-Torres*, just as it must struggle

with *Patterson* and *McMillan*. *Almendarez-Torres*, however, controls the question before us.

As an initial matter, *Almendarez-Torres* makes clear that the constitutional doubt methodology employed by the Court today is incorrect. It teaches that the constitutional doubt canon of construction is applicable only if the statute at issue is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one." 523 U. S., at 238. For the reasons given in Part I, *supra*, the Court of Appeals' interpretation of § 2119 is, in my view, superior to petitioner's reading. At a minimum, the question whether 8 U. S. C. § 1326(b), the statute at issue in *Almendarez-Torres*, set forth sentencing factors or elements of distinct offenses was a closer one than the statutory question presented here. Yet we found insufficient ambiguity to warrant application of the constitutional doubt principle there. 523 U. S., at 238. Unless we are to abandon any pretense of consistency in the application of the principle, it is incumbent on the Court to explain how it reconciles its analysis with *Almendarez-Torres*.

Not only is the proper construction of the statute clearer here, but there is less reason, in light of *Almendarez-Torres* itself, to question the constitutionality of the statute as construed by the Court of Appeals. The insubstantiality of the Court's constitutional concern is indicated by its quite summary reference to the principle of constitutional law the statute might offend. The Court puts the argument this way: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Ante*, at 243, n. 6. It suggests the carjacking statute violates this principle because absent a finding of serious bodily injury, a defendant may be sentenced to a maximum of 15 years' imprisonment and, absent a finding of death, he may be sentenced to a maximum of 25 years' imprisonment.

A finding of serious bodily injury increases the maximum penalty for the crime of carjacking from 15 to 25 years' imprisonment and a finding of death increases the maximum to life imprisonment.

If the Court is to be taken at its word, Congress could comply with this principle by making only minor changes of phraseology that would leave the statutory scheme, for practical purposes, unchanged. Congress could leave the initial paragraph of § 2119 intact, and provide that one who commits the conduct described there shall "be imprisoned for any number of years up to life." It could then add that "if the sentencing judge determines that no death resulted, one convicted under this section shall be imprisoned not more than 25 years" and "if the sentencing judge determines that no serious bodily injury resulted, one convicted under this section shall be imprisoned not more than 15 years." The practical result would be the same as the current version of § 2119 (as construed by the Court of Appeals): The jury makes the requisite findings under the initial paragraph, and the court itself sentences the defendant within one of the prescribed ranges based on the judge's own determination whether serious bodily injury or death resulted.

The Court does not tell us whether this version of the statute would pass constitutional muster. If so, the Court's principle amounts to nothing more than chastising Congress for failing to use the approved phrasing in expressing its intent as to how carjackers should be punished. No constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down or, as today, misconstrued, are real.

If, on the other hand, a rephrased § 2119 would still violate the Court's underlying constitutional principle, the Court ought to explain how it would determine which sentencing schemes cross the constitutional line. For example, a statute that sets a maximum penalty and then provides detailed sentencing criteria to be applied by a sentencing judge (along

the lines of the federal Sentencing Guidelines) would be only a more detailed version of the rephrased § 2119 suggested above. We are left to guess whether statutes of that sort might be in jeopardy. (Further, by its terms, JUSTICE SCALIA's view—"that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," *ante*, at 253 (concurring opinion)—would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*. Once the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered.) In light of these uncertainties, today's decision raises more questions than the Court acknowledges.

In any event, the Court's constitutional doubts are not well founded. In *Almendarez-Torres*, we squarely rejected the petitioner's argument that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement"; as we said, the Constitution "does not impose that requirement." 523 U. S., at 247. See also *Monge* v. *California*, 524 U. S. 721, 729 (1998) ("[T]he Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed"). Indeed, the dissenters in *Almendarez-Torres* had no doubt on this score. 523 U. S., at 260 (opinion of SCALIA, J.) (arguing that "there was, until today's unnecessary resolution of the point, 'serious doubt' whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt").

The Court suggests two bases on which *Almendarez-Torres* is distinguishable, neither of which is persuasive. First, the Court suggests that this case is "concerned with the Sixth Amendment right to jury trial and not alone the

rights to indictment and notice as claimed by Almendarez-Torres." *Ante*, at 248–249. This is not a valid basis upon which to distinguish *Almendarez-Torres*. The petitioner in *Almendarez-Torres* claimed that "the Constitution requires Congress to treat recidivism as an element of the offense" and that, as a corollary, "[t]he Government must prove that 'element' to a jury." 523 U. S., at 239.

The Court has not suggested in its previous opinions, moreover, that there is a difference, in the context relevant here, between, on the one hand, a right to a jury determination, and, on the other, a right to notice by indictment and to a determination based upon proof by the prosecution beyond a reasonable doubt. The Court offers no reason why the concept of an element of a crime should mean one thing for one inquiry and something else for another. There would be little to guide us in formulating a standard to differentiate between elements of a crime for purposes of indictment, jury trial, and proof beyond a reasonable doubt. Inviting such confusion is a curious way to safeguard the important procedural rights of criminal defendants.

Second, the Court is eager to find controlling significance in the fact that the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing factor at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise. It is true that our statutory analysis was informed in substantial measure by the fact that recidivism is a common sentencing factor. *Id.*, at 230. In our constitutional analysis we invoked the long history of using recidivism as a basis for increasing an offender's sentence to illustrate the novel and anomalous character of the petitioner's proposed constitutional rule—*i. e.*, that under *McMillan* v. *Pennsylvania* any factor that increases the maximum penalty for a crime must be deemed an element of the offense. We proceeded to reject that rule. *Almendarez-Torres* v. *United States*, 523 U. S., at 247. The

dissenters there (like the Court today) misunderstood the import of this discussion, but they were correct in their observation that "[i]t is impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue." *Id.*, at 258 (opinion of SCALIA, J.).

The constitutional portion of *Almendarez-Torres* also rejected the argument that constitutional concerns were raised by a "different 'tradition'—that of courts having treated recidivism as an element of the related crime." *Id.*, at 246. We found this argument unconvincing because "any such tradition is not uniform." *Ibid.* Of course, the same is true with respect to the sentencing factors at issue here. See *supra*, at 257–258. In sum, "there is no rational basis for making recidivism an exception." 523 U. S., at 258 (SCALIA, J., dissenting) (emphasis deleted).

If the Court deems its new direction to be a justified departure from *stare decisis*, it does not make the case. There is no support for the view that *Almendarez-Torres* was based on a historical misunderstanding or misinterpretation. By the Court's own submission, its historical discussion demonstrates no more than that "the tension between jury powers and powers exclusively judicial" would probably and generally have informed the Framers' conception of the jury right. *Ante*, at 244. That must be correct, but it does not call into question the principle that "'[t]he definition of the elements of a criminal offense is entrusted to the legislature.'" *Staples* v. *United States*, 511 U. S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U. S. 419, 424 (1985)).

The Court's historical analysis might have some bearing on the instant case if § 2119 disclosed the intent to serve the real objective of punishing (without constitutional safeguards) those who caused serious bodily harm, rather than to prevent the underlying conduct of carjacking. See *Almendarez-Torres* v. *United States*, *supra*, at 243, 246. No

such inference or implication can be drawn from the text and statutory history of the offense here under consideration. In fact, the Court makes no attempt to argue that anything particular to the carjacking statute suggests the jury's role has been unconstitutionally diminished. The gravamen of the offense is carjacking coupled with a threat of bodily harm. The jury resolves these issues, *i. e.*, whether a vehicle is taken "by force and violence or by intimidation." Indeed, whether serious bodily injury results can be outside of the defendant's control. As already explained, it is not in the least a novel view that after the offense is established, the extent of the harm caused is taken into account in the sentencing phase. In this respect, today's case is far easier than *McMillan*, where the sentencing factor was inherent in the criminal conduct itself.

The rationale of the Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States. Sentencing is one of the most difficult tasks in the enforcement of the criminal law. In seeking to bring more order and consistency to the process, some States have sought to move from a system of indeterminate sentencing or a grant of vast discretion to the trial judge to a regime in which there are more uniform penalties, prescribed by the legislature. See A. Campbell, Law of Sentencing §§ 1:3, 4:6–4:8 (2d ed. 1991). These States should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury. This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed criminal act.

A further disconcerting result of today's decision is the needless doubt the Court's analysis casts upon our cases involving capital sentencing. For example, while in *Walton* v. *Arizona*, 497 U. S. 639, 648 (1990), we viewed the aggravat-

ing factors at issue as sentencing enhancements and not as elements of the offense, the same is true of serious bodily injury under the reading of § 2119 the Court rejects as constitutionally suspect. The question is why, given that characterization, the statutory scheme in *Walton* was constitutionally permissible. Under the relevant Arizona statute, Walton could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. See Ariz. Rev. Stat. Ann. § 13–703 (1989). Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment. If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, *Walton* would appear to have been a better candidate for the Court's new approach than is the instant case. In *Walton*, the question was the aggravated character of the defendant's conduct, not, as here, a result that followed after the criminal conduct had been completed.

In distinguishing this line of precedent, the Court suggests *Walton* did not "squarely fac[e]" the key constitutional question "implicated by the Government's position on the meaning of § 2119(2)." *Ante*, at 251. The implication is clear. Reexamination of this area of our capital jurisprudence can be expected.

* * *

The Court misreads § 2119 and seeks to create constitutional doubt where there is none. In my view, *Almendarez-Torres* controls this case. I would hold § 2119 as interpreted by the Court of Appeals constitutional, and I dissent from the opinion and judgment of the Court.

Per Curiam

LOWE *v.* POGUE ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–7591. Decided March 29, 1999*

Pro se petitioner seeks leave to proceed *in forma pauperis* on his petitions for certiorari. Including these petitions, he has had 31 frivolous filings with this Court.

Held: Petitioner's motions to proceed *in forma pauperis* are denied. He is barred from filing any further petitions for certiorari and for 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 Lowe seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny this request pursuant to Rule 39.8. Lowe is allowed until April 19, 1999, within which to pay the docketing fee required by Rule 38 and to submit his petitions in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari nor petitions for extraordinary writs from Lowe in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33.1.

Lowe has abused this Court's certiorari and extraordinary writ processes. In November of last year and earlier this month, we invoked Rule 39.8 to deny Lowe *in forma pauperis* status. See *Lowe* v. *Cantrell*, 525 U. S. 1176 (1999); *In re Lowe*, 525 U. S. 960 (1998) (three cases). Before these 4 denials, Lowe had filed 23 petitions, all of which were both patently frivolous and had been denied without re-

*Together with No. 98–7952, *Lowe* v. *Oklahoma Department of Corrections*, No. 98–8073, *Lowe* v. *Federal Bureau of Investigation*, and No. 98–8082, *Lowe* v. *Woodall et al.*, also on motion for leave to proceed *in forma pauperis*.

corded dissent. The 4 instant petitions for certiorari thus bring Lowe's total number of frivolous filings to 31. He has several additional filings—all of them patently frivolous—currently pending before this Court.

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)*. Lowe's abuse of the writ of certiorari and of the extraordinary writs has been in noncriminal cases, and so we limit our sanction accordingly. The order therefore will not prevent Lowe from petitioning to challenge criminal sanctions which might be imposed on him. 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 *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited, I respectfully dissent.

Syllabus

UNITED STATES *v.* RODRIGUEZ-MORENO

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

No. 97–1139. Argued December 7, 1998—Decided March 30, 1999

A drug distributor hired respondent and others to find a New York drug dealer who stole cocaine from him during a Texas drug transaction and to hold captive the middleman in the transaction, Ephrain Avendano, during the search. The group drove from Texas to New Jersey to New York to Maryland, taking Avendano with them. Respondent took possession of a revolver in Maryland and threatened to kill Avendano. Avendano eventually escaped and called police, who arrested respondent and the others. Respondent was charged in a New Jersey District Court with, *inter alia*, using and carrying a firearm in relation to Avendano's kidnaping, in violation of 18 U. S. C. § 924(c)(1). He moved to dismiss that count, arguing that venue was proper only in Maryland, the only place where the Government had proved he had actually used a gun. The court denied the motion, and respondent was convicted of the § 924(c)(1) offense. The Third Circuit reversed. After applying what it called the "verb test," it determined that venue was proper only in the district where a defendant actually uses or carries a firearm.

Held: Venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence" in violation of § 924(c)(1) is proper in any district where the crime of violence was committed. Under the *locus delicti* test, a court must initially identify the conduct constituting the offense (the nature of the offense) and then discern where the criminal acts occurred. See *United States* v. *Cabrales*, 524 U. S. 1, 6–7. Although the Third Circuit relied on the statute's verbs to determine the nature of the offense, this Court has never held that verbs are the sole consideration, to the exclusion of other relevant statutory language. A defendant's violent acts are essential conduct elements of the § 924(c)(1) offense despite being embedded in the prepositional phrase, "during and in relation to any crime of violence." Thus, the statute contains two distinct conduct elements—as is relevant to this case, using and carrying a gun and committing a kidnaping. Where a crime consists of distinct parts which have different localities, venue is proper for the whole charge where any part can be proved to have been committed. See *United States* v. *Lombardo*, 241 U. S. 73. Respondent's argument that § 924(c)(1) is a "point-in-time" offense that only is committed in the place where the kidnaping and use of a gun coincide is unpersuasive. Kidnap-

ing is a unitary crime, which, once begun, does not end until the victim is free. It does not matter that respondent used the gun only in Maryland because he did so "during and in relation to" a kidnaping that began in Texas and continued in New York, New Jersey, and Maryland. The kidnaping, to which the § 924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge was appropriate in any of them. Where venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense. Pp. 278–282.

121 F. 3d 841, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 282.

Paul R. Q. Wolfson argued the cause for the United States. With him on the briefs were *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Daniel S. Goodman.*

John P. McDonald, by appointment of the Court, 525 U. S. 806, argued the cause for respondent. With him on the brief were *Jeffrey T. Green* and *Robert C. Nissen.**

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence," in violation of 18 U. S. C. § 924(c)(1), is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in a single district.

I

During a drug transaction that took place in Houston, Texas, a New York drug dealer stole 30 kilograms of a Texas drug distributor's cocaine. The distributor hired respondent, Jacinto Rodriguez-Moreno, and others to find the dealer and to hold captive the middleman in the transaction,

**Steven Wisotsky* and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Ephrain Avendano, during the search. In pursuit of the dealer, the distributor and his henchmen drove from Texas to New Jersey with Avendano in tow. The group used Avendano's New Jersey apartment as a base for their operations for a few days. They soon moved to a house in New York and then to a house in Maryland, taking Avendano with them.

Shortly after respondent and the others arrived at the Maryland house, the owner of the home passed around a .357 magnum revolver and respondent took possession of the pistol. As it became clear that efforts to find the New York drug dealer would not bear fruit, respondent told his employer that he thought they should kill the middleman and end their search for the dealer. He put the gun to the back of Avendano's neck but, at the urging of his cohorts, did not shoot. Avendano eventually escaped through the back door and ran to a neighboring house. The neighbors called the Maryland police, who arrested respondent along with the rest of the kidnapers. The police also seized the .357 magnum, on which they later found respondent's fingerprint.

Rodriguez-Moreno and his codefendants were tried jointly in the United States District Court for the District of New Jersey. Respondent was charged with, *inter alia*, conspiring to kidnap Avendano, kidnaping Avendano, and using and carrying a firearm in relation to the kidnaping of Avendano, in violation of 18 U. S. C. § 924(c)(1). At the conclusion of the Government's case, respondent moved to dismiss the § 924(c)(1) count for lack of venue. He argued that venue was proper only in Maryland, the only place where the Government had proved he had actually used a gun. The District Court denied the motion, App. 54, and the jury found respondent guilty on the kidnaping counts and on the § 924(c)(1) charge as well. He was sentenced to 87 months' imprisonment on the kidnaping charges, and was given a mandatory consecutive term of 60 months' imprisonment for committing the § 924(c)(1) offense.

On a 2-to-1 vote, the Court of Appeals for the Third Circuit reversed respondent's § 924(c)(1) conviction. *United States* v. *Palma-Ruedas*, 121 F. 3d 841 (1997). A majority of the Third Circuit panel applied what it called the "verb test" to § 924(c)(1), and determined that a violation of the statute is committed only in the district where a defendant "uses" or "carries" a firearm. *Id.*, at 849. Accordingly, it concluded that venue for the § 924(c)(1) count was improper in New Jersey even though venue was proper there for the kidnaping of Avendano. The dissenting judge thought that the majority's test relied too much "on grammatical arcana," *id.*, at 865, and argued that the proper approach was to "look at the substance of the statutes in question," *ibid.* In his view, the crime of violence is an essential element of the course of conduct that Congress sought to criminalize in enacting § 924(c)(1), and therefore, "venue for a prosecution under [that] statute lies in any district in which the defendant committed the underlying crime of violence." *Id.*, at 863. The Government petitioned for review on the ground that the Third Circuit's holding was in conflict with a decision of the Court of Appeals for the Fifth Circuit, *United States* v. *Pomranz*, 43 F. 3d 156 (1995). We granted certiorari, 524 U. S. 915 (1998), and now reverse.

II

Article III of the Constitution requires that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. Its command is reinforced by the Sixth Amendment's requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," and is echoed by Rule 18 of the Federal Rules of Criminal Procedure ("prosecution shall be had in a district in which the offense was committed").

As we confirmed just last Term, the "'*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States* v. *Cabrales*, 524 U. S. 1, 6–7 (1998) (quoting *United States* v. *Anderson*, 328 U. S. 699, 703 (1946)).[1] In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.[2] See *Cabrales*, *supra*, at 6–7; *Travis* v. *United States*, 364 U. S. 631, 635–637 (1961); *United States* v. *Cores*, 356 U. S. 405, 408–409 (1958); *Anderson*, *supra*, at 703–706.

At the time respondent committed the offense and was tried, 18 U. S. C. § 924(c)(1) provided:

> "Whoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to imprisonment for five years . . . ."[3]

The Third Circuit, as explained above, looked to the verbs of the statute to determine the nature of the substantive of-

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[1] When we first announced this test in *United States* v. *Anderson*, 328 U. S., at 703, we were comparing § 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, in which Congress did "not indicate where [it] considered the place of committing the crime to be," 328 U. S., at 703, with statutes where Congress was explicit with respect to venue. Title 18 U. S. C. § 924(c)(1), like the Selective Training and Service Act, does not contain an express venue provision.

[2] The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense. Brief for United States 16–17. Because this case only concerns the *locus delicti*, we express no opinion as to whether the Government's assertion is correct.

[3] The statute recently has been amended, see Pub. L. 105–386, 112 Stat. 3469, but it is not argued that the amendment is in any way relevant to our analysis in this case.

fense. But we have never before held, and decline to do so here, that verbs are the sole consideration in identifying the conduct that constitutes an offense. While the "verb test" certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.

In our view, the Third Circuit overlooked an essential conduct element of the § 924(c)(1) offense. Section 924(c)(1) prohibits using or carrying a firearm "during and in relation to any crime of violence . . . for which [a defendant] may be prosecuted in a court of the United States." That the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs does not dissuade us from concluding that a defendant's violent acts are essential conduct elements. To prove the charged § 924(c)(1) violation in this case, the Government was required to show that respondent used a firearm, that he committed all the acts necessary to be subject to punishment for kidnaping (a crime of violence) in a court of the United States, and that he used the gun "during and in relation to" the kidnaping of Avendano. In sum, we interpret § 924(c)(1) to contain two distinct conduct elements—as is relevant to this case, the "using and carrying" of a gun and the commission of a kidnaping.[4]

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[4] By way of comparison, last Term in *United States* v. *Cabrales*, 524 U. S. 1 (1998), we considered whether venue for money laundering, in violation of 18 U. S. C. §§ 1956(a)(1)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." *Cabrales*, 524 U. S., at 7. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct—defendant's money laundering activity—occurred "'after the fact' of an offense begun and completed by others." *Ibid.* Here, by contrast, given

Respondent, however, argues that for venue purposes "the New Jersey kidnapping is completely irrelevant to the firearm crime, because respondent did not *use* or *carry* a gun *during* the New Jersey crime." Brief for Respondent 12. In the words of one *amicus*, § 924(c)(1) is a "point-in-time" offense that only is committed in the place where the kidnaping and the use of a gun coincide. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 11. We disagree. Several Circuits have determined that kidnaping, as defined by 18 U. S. C. § 1201 (1994 ed. and Supp. III), is a unitary crime, see *United States* v. *Seals*, 130 F. 3d 451, 461–462 (CADC 1997); *United States* v. *Denny-Shaffer*, 2 F. 3d 999, 1018–1019 (CA10 1993); *United States* v. *Godinez*, 998 F. 2d 471, 473 (CA7 1993); *United States* v. *Garcia*, 854 F. 2d 340, 343–344 (CA9 1988), and we agree with their conclusion. A kidnaping, once begun, does not end until the victim is free. It does not make sense, then, to speak of it in discrete geographic fragments. Section 924(c)(1) criminalized a defendant's use of a firearm "during and in relation to" a crime of violence; in doing so, Congress proscribed both the use of the firearm *and* the commission of acts that constitute a violent crime. It does not matter that respondent used the .357 magnum revolver, as the Government concedes, only in Maryland because he did so "during and in relation to" a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland. In our view, § 924(c)(1) does not define a "point-in-time" offense when a firearm is used during and in relation to a continuing crime of violence.

As we said in *United States* v. *Lombardo*, 241 U. S. 73 (1916), "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *Id.*, at 77; cf. *Hyde* v. *United States*, 225 U. S. 347, 356–367 (1912) (venue proper

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the "during and in relation to" language, the underlying crime of violence is a critical part of the § 924(c)(1) offense.

against defendant in district where co-conspirator carried out overt acts even though there was no evidence that the defendant had ever entered that district or that the conspiracy was formed there). The kidnaping, to which the § 924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them. (Congress has provided that continuing offenses can be tried "in any district in which such offense was begun, continued, or completed," 18 U. S. C. § 3237(a).) Where venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense. As the kidnaping was properly tried in New Jersey, the § 924(c)(1) offense could be tried there as well.

* * *

We hold that venue for this prosecution was proper in the district where it was brought. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

I agree with the Court that in deciding where a crime was committed for purposes of the venue provision of Article III, § 2, of the Constitution, and the vicinage provision of the Sixth Amendment, we must look at "the nature of the crime alleged and the location of the act or acts constituting it." *Ante*, at 279 (quoting *United States* v. *Cabrales*, 524 U. S. 1, 7 (1998), in turn quoting *United States* v. *Anderson*, 328 U. S. 699, 703 (1946)) (internal quotation marks omitted). I disagree with the Court, however, that the crime defined in 18 U. S. C. § 924(c)(1) is "committed" either where the defendant commits the predicate offense or where he uses or carries the gun. It seems to me unmistakably clear from the text of the law that this crime can be committed only where the

defendant *both* engages in the acts making up the predicate offense *and* uses or carries the gun.

At the time of respondent's alleged offense, § 924(c)(1) read:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years."

This prohibits the act of using or carrying a firearm "during" (and in relation to) a predicate offense. The provisions of the United States Code defining the particular predicate offenses already punish all of the defendant's alleged criminal conduct except his use or carriage of a gun; § 924(c)(1) itself criminalizes and punishes such use or carriage "during" the predicate crime, because that makes the crime more dangerous. Cf. *Muscarello* v. *United States*, 524 U. S. 125, 132 (1998). This is a simple concept, and it is embodied in a straightforward text. To answer the question before us we need only ask where the defendant's alleged act of using a firearm during (and in relation to) a kidnaping occurred. Since it occurred only in Maryland, venue will lie only there.

The Court, however, relies on *United States* v. *Lombardo*, 241 U. S. 73, 77 (1916), for the proposition that "'where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.'" *Ante*, at 281. The fallacy in this reliance is that the crime before us does *not* consist of "distinct" parts that can occur in different localities. Its two parts are bound inseparably together by the word "during." Where the gun is being used, the predicate act must be occurring as well, and vice versa. The Court quite simply reads this requirement out of the statute—as though there were no difference between a statute making it a crime to steal a cookie

and eat it (which could be prosecuted either in New Jersey, where the cookie was stolen, or in Maryland, where it was eaten) and a statute making it a crime to eat a cookie while robbing a bakery (which could be prosecuted only where the ingestive theft occurred).

The Court believes its holding is justified by the continuing nature of the kidnaping predicate offense, which invokes the statute providing that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U. S. C. § 3237(a). To disallow the New Jersey prosecution here, the Court suggests, is to convert § 924(c)(1) from a continuing offense to a "point-in-time" offense. *Ante*, at 281. That is simply not so. I in no way contend that the kidnaping, or, for that matter, the use of the gun, can occur only at one point in time. Each can extend over a protracted period, and in many places. But § 924(c)(1) is violated only so long as, *and where*, both continuing acts are being committed simultaneously. That is what the word "during" means. Thus, if the defendant here had used or carried the gun throughout the kidnaping, in Texas, New Jersey, New York, and Maryland, he could have been prosecuted in any of those States. As it was, however, he used a gun during a kidnaping only in Maryland.

Finally, the Government contends that focusing on the "use or carry" element of § 924(c)(1) is "difficult to square" with the cases holding that there can be only one § 924(c)(1) violation for each predicate offense. Reply Brief for United States 9 (citing *United States* v. *Palma-Ruedas*, 121 F. 3d 841, 862–863 (CA3 1997) (Alito, J., concurring in part and dissenting in part) (case below)). See, *e. g.*, *United States* v. *Anderson*, 59 F. 3d 1323, 1328–1334 (CADC) (en banc), cert. denied, 516 U. S. 999 (1995); *United States* v. *Taylor*, 13 F. 3d 986, 992–994 (CA6 1994); *United States* v. *Lindsay*, 985 F. 2d 666, 672–676 (CA2), cert. denied, 510 U. S. 832 (1993). This

is an odd argument for the Government to make, since it has disagreed with those cases, see, *e. g.*, *Anderson*, *supra*, at 1328; *Lindsay*, *supra*, at 674, and has succeeded in persuading two Circuits to the contrary, see *United States* v. *Camps*, 32 F. 3d 102, 106–109 (CA4 1994), cert. denied, 513 U. S. 1158 (1995); *United States* v. *Lucas*, 932 F. 2d 1210, 1222–1223 (CA8), cert. denied *sub nom. Shakur, aka Tyler* v. *United States*, 502 U. S. 869 (1991). But this dispute has nothing to do with the point before us here. I do not contend that using the firearm is "the entire essence of the offense." Reply Brief for United States 9. The predicate offense is assuredly an element of the crime—and if, for whatever reason, that element has the effect of limiting prosecution to one violation per predicate offense, it can do so just as effectively even if the "during" requirement is observed rather than ignored.

The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was "committed," U. S. Const., Art. III, § 2, cl. 3; Amdt. 6, has been prosecuted for using a gun during a kidnaping in a State and district where all agree he did not use a gun during a kidnaping. If to state this case is not to decide it, the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.

Syllabus

CONN ET AL. *v.* GABBERT

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

No. 97–1802. Argued February 23, 1999—Decided April 5, 1999

Petitioners Conn and Najera, prosecutors in the "Menendez Brothers" case on retrial, learned that Lyle Menendez had written a letter to Traci Baker, in which he may have instructed her to testify falsely at the first trial. Baker was subpoenaed to testify before a grand jury and to produce any correspondence that she had received from Menendez. She later responded that she had given Menendez's letters to her attorney, respondent Gabbert. When Baker appeared to testify before the grand jury, accompanied by Gabbert, Conn directed police to secure a warrant to search Gabbert for the letter. At the same time that Gabbert was being searched, Najera called Baker before the grand jury for questioning. Gabbert brought suit against the prosecutors under 42 U. S. C. § 1983, contending, *inter alia*, that his Fourteenth Amendment right to practice his profession without unreasonable government interference was violated when the prosecutors executed a search warrant at the same time his client was testifying before the grand jury. The Federal District Court granted petitioners summary judgment, but the Ninth Circuit reversed in part, holding that Gabbert had a right to practice his profession without undue and unreasonable government interference, and that because the right was clearly established, petitioners were not entitled to qualified immunity.

Held: A prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession by executing a search warrant while the attorney's client is testifying before a grand jury. To prevail in a § 1983 action for civil damages from a government official performing discretionary functions, the qualified immunity defense requires that the official be shown to have violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818. There is no support in this Court's cases for the Ninth Circuit's conclusion that the prosecutors' actions in this case deprived Gabbert of a liberty interest in practicing law. See *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 578; *Meyer* v. *Nebraska*, 262 U. S. 390, 399. The cases relied upon by the Ninth Circuit or suggested by Gabbert all deal with a complete prohibition of the right to engage in a calling, and not the sort of brief interruption as a result of legal process which occurred here. See, *e. g.*, *Dent* v. *West*

Virginia, 129 U. S. 114. Gabbert's argument that the search's improper timing interfered with his client's right to have him outside the grand jury room and available to consult with her is unavailing, since a grand jury witness has no constitutional right to have counsel present during the proceeding, and none of this Court's decisions has held that such a witness has a right to have her attorney present outside the jury room. This Court need not decide whether such a right exists, because Gabbert had no standing to raise the alleged infringement of his client's rights. Although he does have standing to complain of the allegedly unreasonable timing of the search warrant's execution to prevent him from advising his client, challenges to the reasonableness of the execution of a search warrant must be assessed under the Fourth Amendment, not the Fourteenth, see *Graham* v. *Connor*, 490 U. S. 386, 395. Pp. 290–293.

131 F. 3d 793, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 293.

Kevin C. Brazile argued the cause for petitioners. With him on the briefs were *Lloyd W. Pellman*, *Donovan Main*, and *Louis V. Aguilar*.

Michael J. Lightfoot argued the cause for respondent. With him on the brief were *Stephen B. Sadowsky* and *Melissa N. Widdifield*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case, 525 U. S. 809 (1998), to decide whether a prosecutor violates an attorney's Fourteenth Amendment right to practice his profession when the prosecutor causes the attorney to be searched at the same time his client is testifying before a grand jury. We con-

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**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the National Association of Criminal Defense Lawyers et al. by *John D. Cline* and *Barbara E. Bergman*.

clude that such conduct by a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession.

This case arises out of the high-profile California trials of the "Menendez Brothers," Lyle and Erik Menendez, for the murder of their parents. Petitioners David Conn and Carol Najera are Los Angeles County Deputy District Attorneys, and respondent Paul Gabbert is a criminal defense attorney. In early 1994, after the first Menendez trial ended in a hung jury, the Los Angeles County District Attorney's Office assigned Conn and Najera to prosecute the case on retrial. Conn and Najera learned that Lyle Menendez had written a letter to Traci Baker, his former girlfriend, in which he may have instructed her to testify falsely at trial. Gabbert represented Baker, who had testified as a defense witness in the first trial. Conn obtained and served Baker with a subpoena directing her to testify before the Los Angeles County grand jury and also directing her to produce at that time any correspondence that she had received from Lyle Menendez. After Gabbert unsuccessfully sought to quash the portion of the subpoena directing Baker to produce the Menendez correspondence, Conn and Najera obtained a warrant to search Baker's apartment for any such correspondence. When police tried to execute the warrant, Baker told the police that she had given all her letters from Menendez to Gabbert.

Three days later, on March 21, 1994, Baker appeared as directed before the grand jury, accompanied by Gabbert. Believing that Gabbert might have the letter on his person, Conn directed a police detective to secure a warrant to search Gabbert. California law provides that a warrant to search an attorney must be executed by a court-appointed special master. When the Special Master arrived, Gabbert requested that the search take place in a private room. He did not request that his client's grand jury testimony be postponed. The Special Master searched Gabbert in the private

room, and Gabbert produced two pages of a three-page letter from Lyle Menendez to Baker.

At approximately the same time that the search of Gabbert was taking place, Najera called Baker before the grand jury and began to question her. After being sworn, Najera asked Baker whether she was acquainted with Lyle Menendez. Baker replied that she had been unable to speak with her attorney because he was "still with the special master." Brief for Petitioners 6. A short recess was taken during which time Baker was unable to speak with Gabbert. He was aware that Baker sought to speak with him, but apparently stated that the prosecutors would simply have to delay the questioning until they finished searching him. Baker returned to the grand jury room and declined to answer the question "upon the advice of [my] counsel" on the basis of her Fifth Amendment privilege against self-incrimination. *Id.*, at 7. Najera asked a followup question, and Baker again asked for a short recess to confer with Gabbert. Baker was again unable to locate Gabbert, and she again returned to the grand jury room and asserted her Fifth Amendment privilege. At this point, the grand jury recessed.

Believing that the actions of the prosecutors were illegal, Gabbert brought suit against them and other officials in Federal District Court under Rev. Stat. § 1979, 42 U. S. C. § 1983. Relevant to this appeal by Conn and Najera, he contended that his Fourteenth Amendment right to practice his profession without unreasonable government interference was violated when the prosecutors executed a search warrant at the same time his client was testifying before the grand jury.* Conn and Najera moved for summary judgment on the basis of qualified immunity, and the District Court granted the motion.

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*Gabbert also brought a claim under § 1983 that Conn and Najera had violated his rights under the Fourth Amendment. That claim is not before us and we express no opinion on it.

The Court of Appeals reversed in part, holding that Conn and Najera were not entitled to qualified immunity on Gabbert's Fourteenth Amendment claim. 131 F. 3d 793 (CA9 1997). Relying on *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 572 (1972), and earlier cases of this Court recognizing a right to choose one's vocation, the Court of Appeals concluded that Gabbert had a right to practice his profession without undue and unreasonable government interference. 131 F. 3d, at 800. The Court of Appeals also held that based upon notions of "'common sense,'" *id.*, at 801, the right allegedly violated in this case was clearly established, and as a result, Conn and Najera were not entitled to qualified immunity: "The plain and intended result [of the prosecutors' actions] was to prevent Gabbert from consulting with Baker during her grand jury appearance. These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert's Fourteenth Amendment claim." *Id.*, at 802–803. We granted certiorari and now reverse.

Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. 42 U. S. C. § 1983. In order to prevail in a § 1983 action for civil damages from a government official performing discretionary functions, the defense of qualified immunity that our cases have recognized requires that the official be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). Thus a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. See *Siegert* v. *Gilley*, 500 U. S. 226, 232–233 (1991); see also *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998).

We find no support in our cases for the conclusion of the Court of Appeals that Gabbert had a Fourteenth Amendment right which was violated in this case. The Court of Appeals relied primarily on *Board of Regents* v. *Roth.* In *Roth,* this Court repeated the pronouncement in *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923), that the liberty guaranteed by the Fourteenth Amendment "'denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'" *Roth, supra,* at 572 (quoting *Meyer, supra,* at 399). But neither *Roth* nor *Meyer* even came close to identifying the asserted "right" violated by the prosecutors in this case. *Meyer* held that substantive due process forebade a State from enacting a statute that prohibited teaching in any language other than English. 262 U. S., at 399, 402–403. And *Roth* was a *procedural* due process case which held that an at-will college professor had no "property" interest in his job within the meaning of the Fourteenth Amendment so as to require the university to hold a hearing before terminating him. 408 U. S., at 578. Neither case will bear the weight placed upon it by either the Court of Appeals or Gabbert: Neither case supports the conclusion that the actions of the prosecutors in this case deprived Gabbert of a liberty interest in practicing law.

Similarly, none of the other cases relied upon by the Court of Appeals or suggested by Gabbert provide any more than scant metaphysical support for the idea that the use of a search warrant by government actors violates an attorney's right to practice his profession. In a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some

generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation. See, *e. g.*, *Dent* v. *West Virginia*, 129 U. S. 114 (1889) (upholding a requirement of licensing before a person can practice medicine); *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) (invalidating on equal protection grounds a state law requiring companies to employ 80% United States citizens). These cases all deal with a complete prohibition of the right to engage in a calling, and not the sort of brief interruption which occurred here.

Gabbert also relies on *Schware* v. *Board of Bar Examiners of N. M.*, 353 U. S. 232, 238–239 (1957), for the proposition that a State cannot exclude a person from the practice of law for reasons that contravene the Due Process Clause. *Schware* held that former membership in the Communist Party and an arrest record relating to union activities could not be the basis for completely excluding a person from the practice of law. Like *Dent*, *supra*, and *Truax*, *supra*, it does not deal with a brief interruption as a result of legal process. No case of this Court has held that such an intrusion can rise to the level of a violation of the Fourteenth Amendment's liberty right to choose and follow one's calling. That right is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process, which all of us may experience from time to time.

Gabbert next argues that the improper timing of the search interfered with his client's right to have him outside the grand jury room and available to consult with her. A grand jury witness has no constitutional right to have counsel present during the grand jury proceeding, *United States* v. *Mandujano*, 425 U. S. 564, 581 (1976), and no decision of this Court has held that a grand jury witness has a right to have her attorney present outside the jury room. We need not decide today whether such a right exists, because Gabbert clearly had no standing to raise the alleged infringement of the rights of his client Tracy Baker. "[T]he plaintiff

generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975).

Gabbert of course does have standing to complain of the allegedly unreasonable timing of the execution of the search warrant to prevent him from advising his client. In essence then, he argues that the prosecutors searched him in an unreasonable manner. We have held that where another provision of the Constitution "provides an explicit textual source of constitutional protection," a court must assess a plaintiff's claims under that explicit provision and "not the more generalized notion of 'substantive due process.'" *Graham* v. *Connor*, 490 U. S. 386, 395 (1989). Challenges to the reasonableness of a search by government agents clearly fall under the Fourth Amendment, and not the Fourteenth.

We hold that the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness. In so holding, we thus of course pretermit the question whether such a right was "clearly established" as of a given day. The judgment of the Court of Appeals holding to the contrary is therefore reversed.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Respondent claims that petitioners violated his constitutional right to practice his profession by unreasonably timing the service and execution of a warrant to search his papers. There is, however, no evidence that respondent's income, reputation, clientele, or professional qualifications were adversely affected by the search. Nor is there any real evidence or allegation that respondent's client was substantially prejudiced by what occurred. See App. to Pet. for Cert. B–17. Accordingly, despite the shabby character of petitioners' conduct, I agree with the Court that it did not deprive

respondent of liberty or property in violation of the Fourteenth Amendment.

My conclusion that the judgment of the Court of Appeals must be reversed is reached independently of the question whether petitioners may have violated the Fourth Amendment because their method of conducting the search was arguably unreasonable—an issue not squarely presented and argued by petitioners in this Court. If their conduct had violated the Due Process Clause of the Fourteenth Amendment, there is no reason why such a violation would cease to exist just because they also violated some other constitutional provision. Thus the suggestion in the penultimate paragraph of the Court's opinion—that the possible existence of a second source of constitutional protection provides a sufficient reason for reversal, *ante*, at 293—is quite unpersuasive. Indeed, if that ground for decision were valid, most of the reasoning in the preceding pages of the Court's opinion would be unnecessary to the decision.

Syllabus

WYOMING *v.* HOUGHTON

CERTIORARI TO THE SUPREME COURT OF WYOMING

No. 98–184. Argued January 12, 1999—Decided April 5, 1999

During a routine traffic stop, a Wyoming Highway Patrol officer noticed a hypodermic syringe in the driver's shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what respondent, a passenger in the car, claimed was her purse. He found drug paraphernalia there and arrested respondent on drug charges. The trial court denied her motion to suppress all evidence from the purse as the fruit of an unlawful search, holding that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. Respondent was convicted. In reversing, the Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should know that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. Applying that rule here, the court concluded that the search violated the Fourth and Fourteenth Amendments.

Held: Police officers with probable cause to search a car, as in this case, may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In determining whether a particular governmental action violates the Fourth Amendment, this Court inquires first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed, see, *e. g.*, *Wilson* v. *Arkansas*, 514 U. S. 927, 931. Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interests against legitimate governmental interests, see, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653. This Court has concluded that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to believe contained contraband, *Carroll* v. *United States*, 267 U. S. 132, as well as the warrantless search of containers *within* the automobile, *United States* v. *Ross*, 456 U. S. 798. Neither *Ross* nor the historical evidence it relied upon admits of a distinction based on ownership. The analytical principle underlying *Ross*'s rule is also fully consistent with the balance of this

Syllabus

Court's Fourth Amendment jurisprudence. Even if the historical evidence were equivocal, the balancing of the relative interests weighs decidedly in favor of searching a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. See, *e. g.*, *Cardwell* v. *Lewis*, 417 U. S. 583, 590. The degree of intrusiveness of a package search upon personal privacy and personal dignity is substantially less than the degree of intrusiveness of the body searches at issue in *United States* v. *Di Re*, 332 U. S. 581, and *Ybarra* v. *Illinois*, 444 U. S. 85. In contrast to the passenger's reduced privacy expectations, the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained, *California* v. *Carney*, 471 U. S. 386; since a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, cf. *Maryland* v. *Wilson*, 519 U. S. 408, 413–414; and since a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 102. The Wyoming Supreme Court's "passenger property" rule would be unworkable in practice. Finally, an exception from the historical practice described in *Ross* protecting only a passenger's property, rather than property belonging to *anyone* other than the driver, would be less sensible than the rule that a package may be searched, whether or not its owner is present as a passenger or otherwise, because it might contain the object of the search. Pp. 299–307.

956 P. 2d 363, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 307. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 309.

Paul S. Rehurek, Deputy Attorney General of Wyoming, argued the cause for petitioner. With him on the briefs were *Gay Woodhouse*, Acting Attorney General, and *D. Michael Pauling*, Senior Assistant Attorney General.

Barbara McDowell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, and *Deputy Solicitor General Dreeben*.

Donna D. Domonkos, by appointment of the Court, 525 U. S. 980, argued the cause for respondent. With her on the brief were *Sylvia Lee Hackl* and *Michael Dinnerstein*.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband.

I

In the early morning hours of July 23, 1995, a Wyoming Highway Patrol officer stopped an automobile for speeding and driving with a faulty brake light. There were three

*Briefs of *amici curiae* urging reversal were filed for the State of Kentucky et al. by *Albert B. Chandler III*, Attorney General of Kentucky, *Matthew Nelson*, Assistant Attorney General, *Dan Schweitzer*, and *John M. Bailey*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Gus F. Diaz* of Guam, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *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, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, and *Jan Graham* of Utah; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the National Association of Police Organizations by *Stephen R. McSpadden.*

Briefs of *amici curiae* urging affirmance were filed for the Legal Aid Society of New York City et al. by *M. Sue Wycoff;* for the National Association of Criminal Defense Lawyers by *Paul Mogin* and *Lisa B. Kemler;* and for the Rutherford Institute by *Steven H. Aden* and *John W. Whitehead.*

passengers in the front seat of the car: David Young (the driver), his girlfriend, and respondent. While questioning Young, the officer noticed a hypodermic syringe in Young's shirt pocket. He left the occupants under the supervision of two backup officers as he went to get gloves from his patrol car. Upon his return, he instructed Young to step out of the car and place the syringe on the hood. The officer then asked Young why he had a syringe; with refreshing candor, Young replied that he used it to take drugs.

At this point, the backup officers ordered the two female passengers out of the car and asked them for identification. Respondent falsely identified herself as "Sandra James" and stated that she did not have any identification. Meanwhile, in light of Young's admission, the officer searched the passenger compartment of the car for contraband. On the back seat, he found a purse, which respondent claimed as hers. He removed from the purse a wallet containing respondent's driver's license, identifying her properly as Sandra K. Houghton. When the officer asked her why she had lied about her name, she replied: "In case things went bad."

Continuing his search of the purse, the officer found a brown pouch and a black wallet-type container. Respondent denied that the former was hers, and claimed ignorance of how it came to be there; it was found to contain drug paraphernalia and a syringe with 60 ccs of methamphetamine. Respondent admitted ownership of the black container, which was also found to contain drug paraphernalia, and a syringe (which respondent acknowledged was hers) with 10 ccs of methamphetamine—an amount insufficient to support the felony conviction at issue in this case. The officer also found fresh needle-track marks on respondent's arms. He placed her under arrest.

The State of Wyoming charged respondent with felony possession of methamphetamine in a liquid amount greater than three-tenths of a gram. See Wyo. Stat. Ann. § 35–7–1031(c)(iii) (Supp. 1996). After a hearing, the trial court de-

nied her motion to suppress all evidence obtained from the purse as the fruit of a violation of the Fourth and Fourteenth Amendments. The court held that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband. A jury convicted respondent as charged.

The Wyoming Supreme Court, by divided vote, reversed the conviction and announced the following rule:

> "Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection." 956 P. 2d 363, 372 (1998).

The court held that the search of respondent's purse violated the Fourth and Fourteenth Amendments because the officer "knew or should have known that the purse did not belong to the driver, but to one of the passengers," and because "there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse." *Ibid.* We granted certiorari, 524 U. S. 983 (1998).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. See *Wilson* v. *Arkansas*, 514 U. S. 927, 931 (1995); *California* v. *Hodari D.*, 499 U. S. 621, 624 (1991). Where that inquiry yields no answer, we must

evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. See, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995).

It is uncontested in the present case that the police officers had probable cause to believe there were illegal drugs in the car. *Carroll* v. *United States*, 267 U. S. 132 (1925), similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband—in that case, bootleg liquor. The Court concluded that the Framers would have regarded such a search as reasonable in light of legislation enacted by Congress from 1789 through 1799—as well as subsequent legislation from the founding era and beyond—that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty. *Id.*, at 150–153. See also *United States* v. *Ross*, 456 U. S. 798, 806 (1982); *Boyd* v. *United States*, 116 U. S. 616, 623–624 (1886). Thus, the Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" where probable cause exists. *Carroll*, *supra*, at 153.

We have furthermore read the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile. In *Ross*, *supra*, we upheld as reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant's car by officers who had probable cause to believe that the trunk contained drugs. JUSTICE STEVENS, writing for the Court, observed:

> "It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. . . . Presumably such merchandise was shipped then in con-

> tainers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.*, at 820, n. 26.

Ross summarized its holding as follows: "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search." *Id.*, at 825 (emphasis added). And our later cases describing *Ross* have characterized it as applying broadly to *all* containers within a car, without qualification as to ownership. See, *e. g.*, *California* v. *Acevedo*, 500 U. S. 565, 572 (1991) ("[T]his Court in *Ross* took the critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile"); *United States* v. *Johns*, 469 U. S. 478, 479–480 (1985) (*Ross* "held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the object of the search").

To be sure, there was no passenger in *Ross*, and it was not claimed that the package in the trunk belonged to anyone other than the driver. Even so, if the rule of law that *Ross* announced were limited to contents belonging to the driver, or contents other than those belonging to passengers, one would have expected that substantial limitation to be ex-

pressed. And, more importantly, one would have expected that limitation to be apparent in the historical evidence that formed the basis for *Ross*'s holding. In fact, however, nothing in the statutes *Ross* relied upon, or in the practice under those statutes, would except from authorized warrantless search packages belonging to passengers on the suspect ship, horse-drawn carriage, or automobile.

Finally, we must observe that the analytical principle underlying the rule announced in *Ross* is fully consistent—as respondent's proposal is not—with the balance of our Fourth Amendment jurisprudence. *Ross* concluded from the historical evidence that the permissible scope of a warrantless car search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." 456 U. S., at 824. The same principle is reflected in an earlier case involving the constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime: "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 556 (1978). This statement was illustrated by citation and description of *Carroll*, 267 U. S., at 158–159, 167. 436 U. S., at 556–557.

In sum, neither *Ross* itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership. When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the founding era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband *in* the car.

Even if the historical evidence, as described by *Ross*, were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "trave[l] public thoroughfares," *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974), "seldom serv[e] as . . . the repository of personal effects," *ibid.*, are subjected to police stop and examination to enforce "pervasive" governmental controls "[a]s an everyday occurrence," *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976), and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

In this regard—the degree of intrusiveness upon personal privacy and indeed even personal dignity—the two cases the Wyoming Supreme Court found dispositive differ substantially from the package search at issue here. *United States* v. *Di Re*, 332 U. S. 581 (1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned on the unique, significantly heightened protection afforded against searches of one's person. "Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U. S. 1, 24–25 (1968). Such traumatic consequences are not to be expected when the police examine an item of personal property found in a car.[1]

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[1] The dissent begins its analysis, *post*, at 309–310 (opinion of STEVENS, J.), with an assertion that this case is governed by our decision in *United States* v. *Di Re*, 332 U. S. 581 (1948), which held, as the dissent describes it, that the automobile exception to the warrant requirement did not justify "searches of the passenger's pockets and the space between his shirt and underwear," *post*, at 309. It attributes that holding to "the settled dis-

Whereas the passenger's privacy expectations are, as we have described, considerably diminished, the governmental interests at stake are substantial. Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car. As in all car-search cases, the "ready mobility" of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is obtained. *California* v. *Carney*, 471 U. S. 386, 390 (1985). In addition, a car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver, and have the same interest in

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tinction between drivers and passengers," rather than to a distinction between search of the person and search of property, which the dissent claims is "newly minted" by today's opinion—a "new rule that is based on a distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse." *Post*, at 309, 309–310.

In its peroration, however, the dissent quotes extensively from Justice Jackson's opinion in *Di Re*, which makes it very clear that it is *precisely* this distinction between search of the person and search of property that the case relied upon:

"The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car." 332 U. S., at 587 (quoted *post*, at 312).

Does the dissent really believe that Justice Jackson was saying that a house search could not inspect *property* belonging to persons found in the house—say a large standing safe or violin case belonging to the owner's visiting godfather? Of course that is not what Justice Jackson meant at all. He was referring *precisely* to that "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse" that the dissent disparages, *post*, at 309. This distinction between searches of the person and searches of property is assuredly *not* "newly minted," see *post*, at 310. And if the dissent thinks "pockets" and "clothing" do not count as part of the person, it must believe that the only searches of the person are strip searches.

concealing the fruits or the evidence of their wrongdoing. Cf. *Maryland* v. *Wilson*, 519 U. S. 408, 413–414 (1997). A criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car, see, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 102 (1980)—perhaps even surreptitiously, without the passenger's knowledge or permission. (This last possibility provided the basis for respondent's defense at trial; she testified that most of the seized contraband must have been placed in her purse by her traveling companions at one or another of various times, including the time she was "half asleep" in the car.)

To be sure, these factors favoring a search will not always be present, but the balancing of interests must be conducted with an eye to the generality of cases. To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to know that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation—in the form of both civil lawsuits and motions to suppress in criminal trials—involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband

into the package with or without the passenger's knowledge.[2] When balancing the competing interests, our determinations of "reasonableness" under the Fourth Amendment must take account of these practical realities. We think they militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.

Finally, if we were to invent an exception from the historical practice that *Ross* accurately described and summarized, it is perplexing why that exception should protect only property belonging to a passenger, rather than (what seems much more logical) property belonging to *anyone* other than the driver. Surely Houghton's privacy would have been invaded to the same degree whether she was present or absent when her purse was searched. And surely her presence in the car with the driver provided more, rather than less, reason to believe that the two were in league. It may ordinarily be easier to identify the property as belonging to someone other than the driver when the purported owner is present to identify it—but in the many cases (like *Ross* itself) where the car is seized, that identification may occur later, at the sta-

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[2] The dissent is "confident in a police officer's ability to apply a rule requiring a warrant or individualized probable cause to search belongings that are . . . obviously owned by and in the custody of a passenger," *post*, at 311. If this is the dissent's strange criterion for warrant protection ("*obviously* owned by and in the custody of") its preceding paean to the importance of preserving passengers' privacy rings a little hollow on rehearing. Should it not be enough if the passenger *says* he owns the briefcase, and the officer has no concrete reason to believe otherwise? Or would the dissent consider *that* an example of "obvious" ownership? On reflection, it seems not at all obvious precisely what constitutes obviousness—and so even the dissent's on-the-cheap protection of passengers' privacy interest in their property turns out to be unclear, and hence unadministrable. But maybe the dissent does not mean to propose an obviously-owned-by-and-in-the-custody-of test after all, since a few sentences later it endorses, *simpliciter*, "a rule requiring a warrant or individualized probable cause to search passenger belongings," *post*, at 312. For the reasons described in text, that will not work.

tion house; and even at the site of the stop one can readily imagine a package clearly marked with the owner's name and phone number, by which the officer can confirm the driver's denial of ownership. The sensible rule (and the one supported by history and case law) is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car.

* * *

We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. The judgment of the Wyoming Supreme Court is reversed.

It is so ordered.

JUSTICE BREYER, concurring.

I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question. *Ante*, at 299–300. I also agree with the Court that when a police officer has probable cause to search a car, say, for drugs, it is reasonable for that officer also to search containers within the car. If the police must establish a container's ownership prior to the search of that container (whenever, for example, a passenger says "that's mine"), the resulting uncertainty will destroy the workability of the bright-line rule set forth in *United States* v. *Ross*, 456 U. S. 798 (1982). At the same time, police officers with probable cause to search a car for drugs would often have probable cause to search containers regardless. Hence a bright-line rule will authorize only a limited number of searches that the law would not otherwise justify.

At the same time, I would point out certain limitations upon the scope of the bright-line rule that the Court de-

scribes. Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile. As the Court notes, and as *United States* v. *Di Re*, 332 U. S. 581, 586–587 (1948), relied on heavily by JUSTICE STEVENS' dissent, makes clear, the search of a person, including even "'a limited search of the outer clothing,'" *ante*, at 303 (quoting *Terry* v. *Ohio*, 392 U. S. 1, 24–25 (1968)), is a very different matter in respect to which the law provides "significantly heightened protection." *Ante*, at 303; cf. *Ybarra* v. *Illinois*, 444 U. S. 85, 91 (1979); *Sibron* v. *New York*, 392 U. S. 40, 62–64 (1968).

Less obviously, but in my view also important, is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to make that kind of distinction. *United States* v. *Ross*, *supra*, at 822. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," *Terry* v. *Ohio*, *supra*, at 24, which under the Court's cases would properly receive increased protection. See *post*, at 312–313 (STEVENS, J., dissenting) (quoting *United States* v. *Di Re*, *supra*, at 587). In this case, the purse was separate from the person, and no one has claimed that, under those circumstances, the type of container makes a difference. For that reason, I join the Court's opinion.

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

After Wyoming's highest court decided that a state highway patrolman unlawfully searched Sandra Houghton's purse, the State of Wyoming petitioned for a writ of certiorari. The State asked that we consider the propriety of searching an automobile *passenger's* belongings when the government has developed probable cause to search the vehicle for contraband based on the *driver's* conduct. The State conceded that the trooper who searched Houghton's purse lacked a warrant, consent, or "probable cause specific to the purse or passenger." Pet. for Cert. i. In light of our established preference for warrants and individualized suspicion, I would respect the result reached by the Wyoming Supreme Court and affirm its judgment.

In all of our prior cases applying the automobile exception to the Fourth Amendment's warrant requirement, either the defendant was the operator of the vehicle and in custody of the object of the search, or no question was raised as to the defendant's ownership or custody.[1] In the only automobile case confronting the search of a passenger defendant—*United States* v. *Di Re*, 332 U. S. 581 (1948)—the Court held that the exception to the warrant requirement did not apply. *Id.*, at 583–587 (addressing searches of the passenger's pockets and the space between his shirt and underwear, both of which uncovered counterfeit fuel rations). In *Di Re*, as here, the information prompting the search directly implicated the driver, not the passenger. Today, instead of adhering to the settled distinction between drivers and passengers, the Court fashions a new rule that is based on a distinction between property contained in clothing worn by

[1] See, *e. g.*, *California* v. *Acevedo*, 500 U. S. 565 (1991); *California* v. *Carney*, 471 U. S. 386 (1985); *United States* v. *Johns*, 469 U. S. 478 (1985); *United States* v. *Ross*, 456 U. S. 798 (1982); *Carroll* v. *United States*, 267 U. S. 132 (1925); 3 W. LaFave, Search and Seizure § 7.2(c), pp. 487–488, and n. 113 (3d ed. 1996); *id.*, § 7.2(d), at 506, n. 167.

a passenger and property contained in a passenger's briefcase or purse. In cases on both sides of the Court's newly minted test, the property is in a "container" (whether a pocket or a pouch) located in the vehicle. Moreover, unlike the Court, I think it quite plain that the search of a passenger's purse or briefcase involves an intrusion on privacy that may be just as serious as was the intrusion in *Di Re*. See, *e. g.*, *New Jersey* v. *T. L. O.*, 469 U. S. 325, 339 (1985); *Ex parte Jackson*, 96 U. S. 727, 733 (1878).

Even apart from *Di Re*, the Court's rights-restrictive approach is not dictated by precedent. For example, in *United States* v. *Ross*, 456 U. S. 798 (1982), we were concerned with the interest of the driver in the integrity of "his automobile," *id.*, at 823, and we categorically rejected the notion that the scope of a warrantless search of a vehicle might be "defined by the nature of the container in which the contraband is secreted," *id.*, at 824. "Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ibid.* We thus disapproved of a possible container-based distinction between a man's pocket and a woman's pocketbook. Ironically, while we concluded in *Ross* that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," *ibid.*, the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle.

Nor am I persuaded that the mere spatial association between a passenger and a driver provides an acceptable basis for presuming that they are partners in crime or for ignoring privacy interests in a purse.[2] Whether or not the Fourth

[2] See *United States* v. *Di Re*, 332 U. S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"); *Chandler* v. *Miller*, 520 U. S. 305, 308 (1997) (emphasizing in-

Amendment required a warrant to search Houghton's purse, cf. *Carroll* v. *United States*, 267 U. S. 132, 153 (1925), at the very least the trooper in this case had to have probable cause to believe that her purse contained contraband. The Wyoming Supreme Court concluded that he did not. 956 P. 2d 363, 372 (1998); see App. 20–21.

Finally, in my view, the State's legitimate interest in effective law enforcement does not outweigh the privacy concerns at issue.[3] I am as confident in a police officer's ability to apply a rule requiring a warrant or individualized probable cause to search belongings that are—as in this case—obviously owned by and in the custody of a passenger as is the Court in a "passenger-confederate[']s" ability to circumvent the rule. *Ante*, at 305. Certainly the ostensible clarity of the Court's rule is attractive. But that virtue is insufficient justification for its adoption. *Arizona* v. *Hicks*, 480 U. S.

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dividualized suspicion); *Ybarra* v. *Illinois*, 444 U. S. 85, 91, 94–96 (1979) (explaining that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person," and discussing *Di Re*); *Brown* v. *Texas*, 443 U. S. 47, 52 (1979); *Sibron* v. *New York*, 392 U. S. 40, 62–63 (1968); see also *United States* v. *Padilla*, 508 U. S. 77, 82 (1993) *(per curiam)* ("Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds to nor detracts from them").

[3] To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law "yields no answer." *Ante*, at 299. Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach. In a later discussion, the Court does attempt to address the contemporary privacy and governmental interests at issue in cases of this nature. *Ante*, at 303–306. Either the majority is unconvinced by its own recitation of the historical materials, or it has determined that considering additional factors is appropriate in any event. The Court does not admit the former; and of course the latter, standing alone, would not establish uncertainty in the common law as the prerequisite to looking beyond history in Fourth Amendment cases.

321, 329 (1987); *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978). Moreover, a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule; it simply protects more privacy.

I would decide this case in accord with what we *have* said about passengers and privacy, rather than what we *might have* said in cases where the issue was not squarely presented. See *ante*, at 301–302. What Justice Jackson wrote for the Court 50 years ago is just as sound today:

> "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?
>
> "We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Di Re*, 332 U. S., at 587.

Accord, *Ross*, 456 U. S., at 823, 825 (the proper scope of a warrantless automobile search based on probable cause is "no broader" than the proper scope of a search authorized

by a warrant supported by probable cause).[4] Instead of applying ordinary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.

I respectfully dissent.

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[4] In response to this dissent the Court has crafted an imaginative footnote suggesting that the *Di Re* decision rested, not on Di Re's status as a mere occupant of the vehicle and the importance of individualized suspicion, but rather on the intrusive character of the search. See *ante*, at 303–304, n. 1. That the search of a safe or violin case would be less intrusive than a strip search does not, however, persuade me that the *Di Re* case would have been decided differently if Di Re had been a woman and the gas coupons had been found in her purse. Significantly, in commenting on the *Carroll* case immediately preceding the paragraphs that I have quoted in the text, the *Di Re* Court stated: "But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver." *United States* v. *Di Re*, 332 U. S., at 586–587.

Syllabus

MITCHELL *v.* UNITED STATES

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

No. 97–7541. Argued December 9, 1998—Decided April 5, 1999

Petitioner pleaded guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine, but reserved the right to contest at sentencing the drug quantity attributable under the conspiracy count. Before accepting her plea, the District Court made the inquiries required by Federal Rule of Criminal Procedure 11; told petitioner that she faced a mandatory minimum of 1 year in prison for distributing cocaine, but a 10-year minimum for conspiracy if the Government could show the required five kilograms; and explained that by pleading guilty she would be waiving, *inter alia*, her right "at trial to remain silent." Indicating that she had done "some of" the proffered conduct, petitioner confirmed her guilty plea. At her sentencing hearing, three codefendants testified that she had sold 1½ to 2 ounces of cocaine twice a week for 1½ years, and another person testified that petitioner had sold her two ounces of cocaine. Petitioner put on no evidence and argued that the only reliable evidence showed that she had sold only two ounces of cocaine. The District Court ruled that as a consequence of petitioner's guilty plea, she had no right to remain silent about her crime's details; found that the codefendants' testimony put her over the 5-kilogram threshold, thus mandating the 10-year minimum; and noted that her failure to testify was a factor in persuading the court to rely on the codefendants' testimony. The Third Circuit affirmed.

Held:

1. In the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. Pp. 321–327.

(a) The well-established rule that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details is justified by the fact that a witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the statements' trustworthiness and diminishing the factual inquiry's integrity. The privilege is waived for matters to which the witness testifies, and the waiver's scope is determined by the scope of relevant cross-examination. *Brown* v. *United States*, 356 U. S. 148, 154. The concerns justifying cross-examination at trial are absent at a plea colloquy, which protects

the defendant from an unintelligent or involuntary plea. There is no convincing reason why the narrow inquiry at this stage should entail an extensive waiver of the privilege. A defendant who takes the stand cannot reasonably claim immunity on the matter he has himself put in dispute, but the defendant who pleads guilty takes matters out of dispute, leaving little danger that the court will be misled by selective disclosure. Here, petitioner's "some of" statement did not pose a threat to the factfinding proceeding's integrity, for the purpose of the District Court's inquiry was simply to ensure that she understood the charges and there was a factual basis for the Government's case. Nor does Rule 11 contemplate a broad waiver. Its purpose is to inform the defendant of what she loses by forgoing a trial, not to elicit a waiver of privileges that exist beyond the trial's confines. Treating a guilty plea as a waiver of the privilege would be a grave encroachment on defendants' rights. It would allow prosecutors to indict without specifying a drug quantity, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the quantity. To enlist a defendant as an instrument of his or her own condemnation would undermine the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power. *Rogers* v. *Richmond*, 365 U. S. 534, 541. Pp. 321–325.

(b) Where a sentence has yet to be imposed, this Court has already rejected the proposition that incrimination is complete once guilt has been adjudicated. See *Estelle* v. *Smith*, 451 U. S. 454, 462. That proposition applies only to cases in which the sentence has been fixed and the judgment of conviction has become final. See, *e. g.*, *Reina* v. *United States*, 364 U. S. 507, 513. Before sentencing a defendant may have a legitimate fear of adverse consequences from further testimony, and any effort to compel that testimony at sentencing "clearly would contravene the Fifth Amendment," *Estelle*, *supra*, at 463. *Estelle* was a capital case, but there is no reason not to apply its principle to noncapital sentencing hearings. The Fifth Amendment prevents a person from being compelled in any criminal case to be a witness against himself. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the Federal Rules of Criminal Procedure and to common sense. Pp. 325–327.

2. A sentencing court may not draw an adverse inference from a defendant's silence in determining facts relating to the circumstances and details of the crime. The normal rule in a criminal case permits no negative inference from a defendant's failure to testify. See *Griffin* v. *California*, 380 U. S. 609, 614. A sentencing hearing is part of the criminal case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing. This holding

is a product not only of *Griffin* but also of *Estelle*'s conclusion that there is no basis for distinguishing between a criminal case's guilt and sentencing phases so far as the protection of the Fifth Amendment privilege is concerned. There is little doubt that the rule against adverse inferences has become an essential feature of the Nation's legal tradition, teaching that the Government must prove its allegations while respecting the defendant's individual rights. The Court expresses no opinion on the questions whether silence bears upon the determination of lack of remorse, or upon acceptance of responsibility for the offense for purposes of a downward adjustment under the United States Sentencing Guidelines. Pp. 327–330.

122 F. 3d 185, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and THOMAS, JJ., joined, *post*, p. 331. THOMAS, J., filed a dissenting opinion, *post*, p. 341.

Steven A. Morley, by appointment of the Court, 525 U. S. 806, argued the cause for petitioner. With him on the briefs was *Jeffrey T. Green*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Barbara McDowell*, and *Joel M. Gershowitz*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Two questions relating to a criminal defendant's Fifth Amendment privilege against self-incrimination are presented to us. The first is whether, in the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. We hold the plea is not a waiver of the privilege at sentencing. The second question is whether, in determining facts

**Peter Goldberger*, *Lisa Bondareff Kemler*, and *Kyle O'Dowd* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. We hold a sentencing court may not draw the adverse inference.

I

Petitioner Amanda Mitchell and 22 other defendants were indicted for offenses arising from a conspiracy to distribute cocaine in Allentown, Pennsylvania, from 1989 to 1994. According to the indictment, the leader of the conspiracy, Harry Riddick, obtained large quantities of cocaine and resold the drug through couriers and street sellers, including petitioner. Petitioner was charged with one count of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U. S. C. § 846, and with three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of § 860(a). In 1995, without any plea agreement, petitioner pleaded guilty to all four counts. She reserved the right to contest the drug quantity attributable to her under the conspiracy count, and the District Court advised her the drug quantity would be determined at her sentencing hearing.

Before accepting the plea, the District Court made the inquiries required by Rule 11 of the Federal Rules of Criminal Procedure. Informing petitioner of the penalties for her offenses, the District Judge advised her, "the range of punishment here is very complex because we don't know how much cocaine the Government's going to be able to show you were involved in." App. 39. The judge told petitioner she faced a mandatory minimum of one year in prison under § 860 for distributing cocaine near a school or playground. She also faced "serious punishment depending on the quantity involved" for the conspiracy, with a mandatory minimum of 10 years in prison under § 841 if she could be held responsible for at least 5 kilograms but less than 15 kilograms of cocaine. *Id.*, at 42. By pleading guilty, the District Court explained,

petitioner would waive various rights, including "the right at trial to remain silent under the Fifth Amendment." *Id.*, at 45.

After the Government explained the factual basis for the charges, the judge, having put petitioner under oath, asked her, "Did you do that?" Petitioner answered, "Some of it." *Id.*, at 47. She indicated that, although present for one of the transactions charged as a substantive cocaine distribution count, she had not herself delivered the cocaine to the customer. The Government maintained she was liable nevertheless as an aider and abettor of the delivery by another courier. After discussion with her counsel, petitioner reaffirmed her intention to plead guilty to all the charges. The District Court noted she might have a defense to one count on the theory that she was present but did not aid or abet the transaction. Petitioner again confirmed her intention to plead guilty, and the District Court accepted the plea.

In 1996, 9 of petitioner's original 22 codefendants went to trial. Three other codefendants had pleaded guilty and agreed to cooperate with the Government. They testified petitioner was a regular seller for ringleader Riddick. At petitioner's sentencing hearing, the three adopted their trial testimony, and one of them furnished additional information on the amount of cocaine petitioner sold. According to him, petitioner worked two to three times a week, selling 1½ to 2 ounces of cocaine a day, from April 1992 to August 1992. Then, from August 1992 to December 1993 she worked three to five times a week, and from January 1994 to March 1994 she was one of those in charge of cocaine distribution for Riddick. On cross-examination, the codefendant conceded he had not seen petitioner on a regular basis during the relevant period.

Both petitioner and the Government referred to trial testimony by one Alvitta Mack, who had made a series of drug buys under the supervision of law enforcement agents, including three purchases from petitioner totaling two ounces

of cocaine in 1992. Petitioner put on no evidence at sentencing, nor did she testify to rebut the Government's evidence about drug quantity. Her counsel argued, however, that the three documented sales to Mack constituted the only evidence of sufficient reliability to be credited in determining the quantity of cocaine attributable to her for sentencing purposes.

After this testimony at the sentencing hearing the District Court ruled that, as a consequence of her guilty plea, petitioner had no right to remain silent with respect to the details of her crimes. The court found credible the testimony indicating petitioner had been a drug courier on a regular basis. Sales of 1½ to 2 ounces twice a week for a year and a half put her over the 5-kilogram threshold, thus mandating a minimum sentence of 10 years. "One of the things" persuading the court to rely on the testimony of the codefendants was petitioner's "not testifying to the contrary." *Id.*, at 95.

The District Judge told petitioner:

> "'I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. . . . I'm taking the position that you should come forward and explain your side of this issue.
>
> "'Your counsel's taking the position that you have a Fifth Amendment right not to. . . . If he's—if it's determined by a higher Court that he's right in that regard, I would be willing to bring you back for resentencing. And if you—if—and then I might take a closer look at the [codefendants'] testimony.'" *Id.*, at 98–99.

The District Court sentenced petitioner to the statutory minimum of 10 years of imprisonment, 6 years of supervised release, and a special assessment of $200.

The Court of Appeals for the Third Circuit affirmed the sentence. 122 F. 3d 185 (1997). According to the Court of Appeals: "By voluntarily and knowingly pleading guilty to

the offense Mitchell waived her Fifth Amendment privilege." *Id.*, at 189. The court acknowledged other Circuits have held a witness can "claim the Fifth Amendment privilege if his or her testimony might be used to enhance his or her sentence," *id.*, at 190 (citing *United States* v. *Garcia*, 78 F. 3d 1457, 1463, and n. 8 (CA10), cert. denied, 517 U. S. 1239 (1996)), but it said this rule "does not withstand analysis," 122 F. 3d, at 191. The court thought it would be illogical to "fragment the sentencing process," retaining the privilege against self-incrimination as to one or more components of the crime while waiving it as to others. *Ibid.* Petitioner's reservation of the right to contest the amount of drugs attributable to her did not change the court's analysis. In the Court of Appeals' view:

> "Mitchell opened herself up to the full range of possible sentences for distributing cocaine when she was told during her plea colloquy that the penalty for conspiring to distribute cocaine had a maximum of life imprisonment. While her reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." *Ibid.*

The court acknowledged a defendant may plead guilty and retain the privilege with respect to other crimes, but it observed: "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense." *Ibid.* (citing 18 Pa. Cons. Stat. § 111 (1998), a statute that bars, with certain exceptions, a state prosecution following a federal conviction based on the same conduct).

Judge Michel concurred, reasoning that any error by the District Court in drawing an adverse factual inference from petitioner's silence was harmless because "the evidence amply supported [the judge's] finding on quantity" even with-

out consideration of petitioner's failure to testify. 122 F. 3d, at 192.

Other Circuits to have confronted the issue have held that a defendant retains the privilege at sentencing. See, *e. g.*, *United States* v. *Kuku*, 129 F. 3d 1435, 1437–1438 (CA11 1997); *United States* v. *Garcia*, 78 F. 3d 1457, 1463 (CA10 1996); *United States* v. *De La Cruz*, 996 F. 2d 1307, 1312–1313 (CA1 1993); *United States* v. *Hernandez*, 962 F. 2d 1152, 1161 (CA5 1992); *Bank One of Cleveland, N. A.* v. *Abbe*, 916 F. 2d 1067, 1075–1076 (CA6 1990); *United States* v. *Lugg*, 892 F. 2d 101, 102–103 (CADC 1989); *United States* v. *Paris*, 827 F. 2d 395, 398–399 (CA9 1987). We granted certiorari to resolve the apparent Circuit conflict created by the Court of Appeals' decision, 524 U. S. 925 (1998), and we now reverse.

II

The Government maintains that petitioner's guilty plea was a waiver of the privilege against compelled self-incrimination with respect to all the crimes comprehended in the plea. We hold otherwise and rule that petitioner retained the privilege at her sentencing hearing.

A

It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. See *Rogers* v. *United States*, 340 U. S. 367, 373 (1951). The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross-examination," *Brown* v. *United States*, 356 U. S. 148, 154–155 (1958). "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry," *id.*, at 155. Nice questions will arise, of course, about the extent of the initial testimony and whether the ensuing questions are compre-

hended within its scope, but for now it suffices to note the general rule.

The justifications for the rule of waiver in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry. As noted in *Rogers*, a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony," 340 U. S., at 371. It would, as we said in *Brown*, "make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell," 356 U. S., at 156. The illogic of allowing a witness to offer only self-selected testimony should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege.

We may assume for purposes of this opinion, then, that if petitioner had pleaded not guilty and, having taken the stand at a trial, testified she did "some of it," she could have been cross-examined on the frequency of her drug deliveries and the quantity of cocaine involved. The concerns which justify the cross-examination when the defendant testifies are absent at a plea colloquy, however. The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea. The Government would turn this constitutional shield into a prosecutorial sword by having the defendant relinquish all rights against compelled self-incrimination upon entry of a guilty plea, including the right to remain silent at sentencing.

There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, who "cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters

he has himself put in dispute," *id.*, at 155–156, the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute, often by making a joint statement with the prosecution or confirming the prosecution's version of the facts. Under these circumstances, there is little danger that the court will be misled by selective disclosure. In this respect a guilty plea is more like an offer to stipulate than a decision to take the stand. Here, petitioner's statement that she had done "some of" the proffered conduct did not pose a threat to the integrity of factfinding proceedings, for the purpose of the District Court's inquiry was simply to ensure that petitioner understood the charges and that there was a factual basis for the Government's case.

Nor does Federal Rule of Criminal Procedure 11, which governs pleas, contemplate the broad waiver the Government envisions. Rule 11 directs the district court, before accepting a guilty plea, to ascertain the defendant understands he or she is giving up "the right to be tried by a jury and at that trial . . . the right against compelled self-incrimination." Rule 11(c)(3). The transcript of the plea colloquy in this case discloses that the District Court took care to comply with this and the other provisions of Rule 11. The District Court correctly instructed petitioner: "You have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy. . . . If you plead guilty, all of those rights are gone." App. 45.

Neither the Rule itself nor the District Court's explication of it indicates that the defendant consents to take the stand in the sentencing phase or to suffer adverse consequences from declining to do so. Both the Rule and the District Court's admonition were to the effect that by entry of the plea petitioner would surrender the right "at trial" to invoke the privilege. As there was to be no trial, the warning would not have brought home to petitioner that she was also

waiving the right to self-incrimination at sentencing. The purpose of Rule 11 is to inform the defendant of what she loses by forgoing the trial, not to elicit a waiver of the privilege for proceedings still to follow. A waiver of a right to trial with its attendant privileges is not a waiver of the privileges which exist beyond the confines of the trial.

Of course, a court may discharge its duty of ensuring a factual basis for a plea by "question[ing] the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded." Rule 11(c)(5). We do not question the authority of a district court to make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis. A defendant who withholds information by invoking the privilege against self-incrimination at a plea colloquy runs the risk the district court will find the factual basis inadequate. At least once the plea has been accepted, statements or admissions made during the preceding plea colloquy are later admissible against the defendant, as is the plea itself. A statement admissible against a defendant, however, is not necessarily a waiver of the privilege against self-incrimination. Rule 11 does not prevent the defendant from relying upon the privilege at sentencing.

Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants. At oral argument, we asked counsel for the United States whether, on the facts of this case, if the Government had no reliable evidence of the amount of drugs involved, the prosecutor "could say, well, we can't prove it, but we'd like to put her on the stand and cross-examine her and see if we can't get her to admit it." Tr. of Oral Arg. 45. Counsel answered: "[T]he waiver analysis that we have put forward suggests that at least as to the facts surrounding the conspiracy to which she admitted, the Government could do that." *Ibid.* Over 90% of federal criminal defendants

whose cases are not dismissed enter pleas of guilty or *nolo contendere*. U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1996, p. 448 (24th ed. 1997). Were we to accept the Government's position, prosecutors could indict without specifying the quantity of drugs involved, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the drug quantity. The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power. *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961) ("[O]urs is an accusatorial and not an inquisitorial system").

We reject the position that either petitioner's guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing.

B

The centerpiece of the Third Circuit's opinion is the idea that the entry of the guilty plea completes the incrimination of the defendant, thus extinguishing the privilege. Where a sentence has yet to be imposed, however, this Court has already rejected the proposition that "'incrimination is complete once guilt has been adjudicated,'" *Estelle* v. *Smith*, 451 U. S. 454, 462 (1981), and we reject it again today.

The Court of Appeals cited Wigmore on Evidence for the proposition that upon conviction "'criminality ceases; and with criminality the privilege.'" 122 F. 3d, at 191 (citing 8 J. Wigmore, Evidence §2279, p. 481 (J. McNaughton rev. 1961)). The passage relied upon does not support the Third Circuit's narrow view of the privilege. The full passage is as follows: "Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege." *Ibid.* It could be argued that liability for punishment continues until

sentence has been imposed, and so does the privilege. Even if the Court of Appeals' interpretation of the treatise were correct, however, and it means the privilege ceases upon conviction but before sentencing, we would respond that the suggested rule is simply wrong. A later supplement to the treatise, indeed, states the proper rule that, "[a]lthough the witness has pleaded guilty to a crime charged but has not been sentenced, his constitutional privilege remains unimpaired." J. Wigmore, Evidence § 2279, p. 991, n. 1 (A. Best ed. Supp. 1998).

It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final. See, *e. g., Reina* v. *United States,* 364 U. S. 507, 513 (1960). If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared.

Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court stated in *Estelle:* "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U. S., at 463. *Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.,* at 462 (emphasis in original) (quoting *Culombe* v. *Connecticut,* 367 U. S. 568, 581–582 (1961)). The Government itself makes the implicit concession that the acceptance of a guilty plea does not eliminate the possibility of further incrimination. In its brief to the Court, the Gov-

ernment acknowledges that a defendant who awaits sentencing after having pleaded guilty may assert the privilege against self-incrimination if called as a witness in the trial of a codefendant, in part because of the danger of responding "to questions that might have an adverse impact on his sentence or on his prosecution for other crimes." Brief for United States 31.

The Fifth Amendment by its terms prevents a person from being "compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the law and to common sense. As to the law, under the Federal Rules of Criminal Procedure, a court must impose sentence before a judgment of conviction can issue. See Rule 32(d)(1) ("A judgment of conviction must set forth the plea . . . and the sentence"); cf. *Mempa* v. *Rhay,* 389 U. S. 128, 134 (1967). As to common sense, it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important. Our rule is applicable whether or not the sentencing hearing is deemed a proceeding separate from the Rule 11 hearing, an issue we need not resolve.

III

The Government suggests in a footnote that even if petitioner retained an unwaived privilege against self-incrimination in the sentencing phase of her case, the District Court was entitled, based on her silence, to draw an adverse inference with regard to the amount of drugs attributable to her. Brief for United States 31–32, n. 18. The

normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. *Griffin* v. *California*, 380 U. S. 609, 614 (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.

This Court has recognized "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter* v. *Palmigiano*, 425 U. S. 308, 318 (1976), at least where refusal to waive the privilege does not lead "automatically and without more to [the] imposition of sanctions," *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 808, n. 5 (1977). In ordinary civil cases, the party confronted with the invocation of the privilege by the opposing side has no capacity to avoid it, say, by offering immunity from prosecution. The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed. Another reason for treating civil and criminal cases differently is that "the stakes are higher" in criminal cases, where liberty or even life may be at stake, and where the government's "sole interest is to convict." *Baxter*, 425 U. S., at 318–319.

Baxter itself involved state prison disciplinary proceedings which, as the Court noted, "are not criminal proceedings" and "involve the correctional process and important state interests other than conviction for crime." *Id.*, at 316, 319. Cf. *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272 (1998) (adverse inference permissible from silence in clemency proceeding, a nonjudicial postconviction process which is not part of the criminal case). Unlike a prison disciplinary proceeding, a sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we

must accord the privilege the same protection in the sentencing phase of "any criminal case" as that which is due in the trial phase of the same case, see *Griffin*, *supra*.

The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing. Without question, the stakes are high: Here, the inference drawn by the District Court from petitioner's silence may have resulted in decades of added imprisonment. The Government often has a motive to demand a severe sentence, so the central purpose of the privilege—to protect a defendant from being the unwilling instrument of his or her own condemnation—remains of vital importance.

Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle* v. *Smith*, in which the Court could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U. S., at 462–463. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. See *supra*, at 326. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann* v. *United States*, 350 U. S. 422, 426 (1956). Later, it quoted with apparent approval Wigmore's observation that "'[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confes-

sion of crime,'" *Lakeside* v. *Oregon*, 435 U. S. 333, 340, n. 10 (1978) (quoting 8 Wigmore, Evidence § 2272, at 426). It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence. Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition. This process began even before *Griffin*. When *Griffin* was being considered by this Court, some 44 States did not allow a prosecutor to invite the jury to make an adverse inference from the defendant's refusal to testify at trial. See *Griffin*, *supra*, at 611, n. 3. The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it.

By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I agree with the Court that Mitchell had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case. In my view, however, she did not have the right to have the sentencer abstain from making the adverse inferences that reasonably flow from her failure to testify. I therefore respectfully dissent.

I

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As an original matter, it would seem to me that the threat of an adverse inference does not "compel" anyone to testify. It is one of the natural (and not governmentally imposed) consequences of failing to testify—as is the fact-finder's increased readiness to believe the incriminating testimony that the defendant chooses not to contradict. Both of these consequences are assuredly cons rather than pros in the "to testify or not to testify" calculus, but they do not *compel* anyone to take the stand. Indeed, I imagine that in most instances, a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his own cross-examined testimony.

Despite the text, we held in *Griffin* v. *California*, 380 U. S. 609, 614 (1965), that it was impermissible for the prosecutor or judge to comment on a defendant's refusal to testify. We called it a "penalty" imposed on the defendant's exercise of the privilege. *Ibid.* And we did not stop there, holding in *Carter* v. *Kentucky*, 450 U. S. 288 (1981), that a judge must, if the defendant asks, instruct the jury that it may not *sua sponte* consider the defendant's silence as evidence of his guilt.

The majority muses that the no-adverse-inference rule has found "wide acceptance in the legal culture" and has even

become "an essential feature of our legal tradition." *Ante*, at 330. Although the latter assertion strikes me as hyperbolic, the former may be true—which is adequate reason not to overrule these cases, a course I in no way propose. It is not adequate reason, however, to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them. The illogic of the *Griffin* line is plain, for it runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear. Indeed, we have on other occasions recognized the significance of silence, saying that "'[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.'" *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976) (quoting *United States* v. *Hale*, 422 U. S. 171, 176 (1975)). See also *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154 (1923) ("Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character").

And as for history, *Griffin*'s pedigree is equally dubious. The question whether a factfinder may draw a logical inference from a criminal defendant's failure to offer formal testimony would not have arisen in 1791, because common-law evidentiary rules prevented a criminal defendant from testifying in his own behalf even if he wanted to do so. See generally *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). That is not to say, however, that a criminal defendant was not allowed to *speak* in his own behalf, and a tradition of expecting the defendant to do so, and of drawing an adverse inference when he did not, strongly suggests that *Griffin* is out of sync with the historical understanding of the Fifth Amendment. Traditionally, defendants were expected to speak rather extensively at both the pretrial and trial stages of a criminal proceeding. The longstanding common-law principle, *nemo*

tenetur seipsum prodere, was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony. See T. Barlow, The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 189–190 (1745).

Pretrial procedure in colonial America was governed (as it had been for centuries in England) by the Marian Committal Statute, which provided:

> "[S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination. . . ." 2 & 3 Philip & Mary, ch. 10 (1555).

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, this would also have been reported to the jury. Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (R. Helmholz et al. eds. 1997).

At trial, defendants were expected to speak directly to the jury. Sir James Stephen described 17th- and 18th-century English trials as follows:

> "[T]he prisoner in cases of felony could not be defended by counsel, and had therefore to speak for himself. He was thus unable to say . . . that his mouth was closed. On the contrary his mouth was not only open, but the evidence given against him operated as so much indirect questioning, and if he omitted to answer the questions it suggested he was very likely to be convicted." J. Ste-

phen, 1 History of the Criminal Law of England 440 (1883).

See also J. Beattie, Crime and the Courts in England: 1660–1800, pp. 348–349 (1986) ("And the assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence"); 2 W. Hawkins, Pleas of the Crown, ch. 39, § 2 (8th ed. 1824) (confirming that defendants were expected to speak in their own defense at trial). Though it is clear that adverse inference from silence was permitted, I have been unable to find any case adverting to that inference in upholding a conviction—which suggests that defendants rarely thought it in their interest to remain silent. See Langbein, *supra*, at 95–96.

No one, however, seemed to think this system inconsistent with the principle of *nemo tenetur seipsum prodere*. And there is no indication whatever that criminal procedure in America made an abrupt about-face when this principle was ratified as a fundamental right in the Fifth Amendment and its state-constitution analogues. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination, *supra*, at 139–140. Justices of the peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial. See, *e. g.*, Fourth Report of the Commissioners on Practice and Pleadings in New York—Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873). If any objection was raised to the pretrial procedure, it was on the purely statutory ground that the Marian Committal Statute had no force in the new Republic. See, *e. g.*, W. Hening, The Virginia Justice: Comprising the Office and Authority of a Justice of the Peace 285 (4th ed. 1825). And defendants continued to speak at their trials until the assistance of counsel became more common, which occurred gradually

throughout the 19th century. See W. Beaney, The Right to Counsel in American Courts 226 (1955).

The *Griffin* question did not arise until States began enacting statutes providing that criminal defendants were competent to testify under oath on their own behalf. Maine was first in 1864, and the rest of the States and the Federal Government eventually followed. See 2 J. Wigmore, Evidence § 579 (3d ed. 1940). Although some of these statutes (including the federal statute, 18 U. S. C. § 3481) contained a clause cautioning that no negative inference should be drawn from the defendant's failure to testify, disagreement with this approach was sufficiently widespread that, as late as 1953, the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws provided that "[i]f an accused in a criminal action does not testify, counsel may comment upon *[sic]* accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom." Uniform Rule of Evidence 23(4). See also Model Code of Evidence Rule 201(3) (1942) (similar).

Whatever the merits of prohibiting adverse inferences as a legislative policy, see *ante*, at 329–330, the text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence. Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure. And it is implausible that the Americans of 1791, who were subject to adverse inferences for failing to give unsworn testimony, would have viewed an adverse inference for failing to give sworn testimony as a violation of the Fifth Amendment. Nor can it reasonably be argued that the new statutes somehow created a "revised" understanding of the Fifth Amendment that was incorporated into the Due Process Clause of the Fourteenth Amendment, since only nine States (and not the Federal Government) had enacted competency statutes

when the Fourteenth Amendment was adopted, and three of them did *not* prohibit adverse inferences from failure to testify.[1]

The Court's decision in *Griffin*, however, did not even pretend to be rooted in a historical understanding of the Fifth Amendment. Rather, in a breathtaking act of sorcery it simply transformed legislative policy into constitutional command, quoting a passage from an earlier opinion describing the benevolent purposes of 18 U. S. C. § 3481, and then decreeing, with literally nothing to support it: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." 380 U. S., at 613–614. Imagine what a Constitution we would have if this mode of exegesis were generally applied—if, for example, without any evidence to prove the point, the Court could simply say of all federal procedural statutes: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Due Process Clause is reflected." To my mind, *Griffin* was a wrong turn—which is not cause enough to overrule it, but is cause enough to resist its extension.

II

The Court asserts that it will not "adopt an exception" to *Griffin* for the sentencing phase of a criminal case. *Ante*, at 328. That characterization of what we are asked to do is evidently demanded, in the Court's view, by the very text of the Fifth Amendment: The phrase "any criminal case" *requires* us to "accord the privilege the same protection in the sentencing phase . . . as that which is due in the trial phase of the same case." *Ante*, at 329. That is demonstrably not so.

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[1] The statutes prohibiting an adverse inference were: 1866 Mass. Acts, ch. 260; 1866 Vt. Laws No. 40; 1867 Nev. Stats., ch. XVIII; 1867 Ohio Leg. Acts 260; 1868 Conn. Laws, ch. XCVI; 1868 Minn. Laws, ch. LXX. The statutes not prohibiting an adverse inference were: 1864 Me. Acts, ch. 280; 1866 Cal. Stats., ch. DCXLIV; 1866 S. C. Acts No. 4780.

Our case law has long recognized a natural dichotomy between the guilt and penalty phases. The jury-trial right contained in the Sixth Amendment—whose guarantees apply "[i]n all criminal prosecutions," a term indistinguishable for present purposes from the Fifth Amendment's "in any criminal case"—does not apply at sentencing. *Spaziano* v. *Florida*, 468 U. S. 447, 462–463 (1984). Nor does the Sixth Amendment's guarantee of the defendant's right "to be confronted with the witnesses against him." (The sentencing judge may consider, for example, reports of probation officers and psychiatrists without affording any cross-examination.) See *Williams* v. *New York*, 337 U. S. 241, 252 (1949). Likewise inapplicable at sentencing is the requirement of the Due Process Clause that the prosecution prove the essential facts beyond a reasonable doubt. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 92 (1986).

The Court asserts that refusing to apply *Griffin* would "truncate" our holding in *Estelle* v. *Smith*, 451 U. S. 454 (1981), that the Fifth Amendment applies to sentencing proceedings. *Id.*, at 462. With the contrary indications in our case law, however, it seems to me quite impossible to read *Estelle* as holding, not only that the Fifth Amendment applies to sentencing as to guilt, but also that it has precisely the same scope in both phases. Thus the question before us, fairly put, is not whether we will "truncate" *Estelle* or create an "exception" to *Griffin*, but whether we will, for the first time, extend *Griffin* beyond the guilt phase. For the answer to that question, one would normally look to the historical understanding of the "no adverse inference" constitutional practice. Since, as described in Part I, there was no such practice, history is of no help here, except to suggest that a mistakenly created constitutional right should not be expanded.

Consistency with other areas of our jurisprudence points in the same direction. We have permitted adverse inferences to be drawn from silence where the consequence is a

denial of clemency, see *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 285–286 (1998), the imposition of punishment for violation of prison rules, see *Baxter* v. *Palmigiano*, 425 U. S., at 318–319, and even deportation, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1043–1044 (1984) (citing *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S., at 153–154).[2] There is no reason why the increased punishment to which the defendant is exposed in the sentencing phase of a completed criminal trial should be treated differently—unless it is the theory that the guilt and sentencing phases form one inseparable "criminal case," which I have refuted above. Nor, I might add—despite the broad dicta that it quotes from *Estelle*—does the majority really believe that the guilt and sentencing phases are a unified whole, else it would not leave open the possibility that the acceptance-of-responsibility Sentencing Guideline escapes the ban on negative inferences. *Ante*, at 330.

Which brings me to the greatest—the most bizarre—inconsistency of all: the combination of the rule that the Court adopts today with the balance of our jurisprudence relating to sentencing in particular. "[C]ourts in this country and in England," we have said, have "practiced a policy under which a sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him in de-

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[2] Even at trial, I might note, we have not held the "no adverse inference" rule to be absolute. One year after *Griffin* v. *California*, 380 U. S. 609 (1965), we did say in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), that a defendant's postarrest silence could not be introduced as substantive evidence against him at trial. *Id.*, at 468, n. 37 (dictum). But we have also held that the Fifth Amendment permits a defendant to be impeached with his prearrest silence, *Jenkins* v. *Anderson*, 447 U. S. 231, 238 (1980), or postarrest silence, *Fletcher* v. *Weir*, 455 U. S. 603 (1982) *(per curiam)*, if he later takes the stand during his criminal trial; we have also recognized the vitality of our pre-*Griffin* rule that a testifying defendant may be impeached with his refusal to take the stand in a prior trial. *Jenkins*, *supra*, at 235–236, and n. 2 (recognizing vitality of *Raffel* v. *United States*, 271 U. S. 494 (1926)).

termining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, *supra*, at 246. "[A] sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols* v. *United States*, 511 U. S. 738, 747 (1994) (quoting *United States* v. *Tucker*, 404 U. S. 443, 446 (1972)). "Few facts available to a sentencing judge," we have observed, "are more relevant to 'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society'" than a defendant's willingness to cooperate. *Roberts* v. *United States*, 445 U. S. 552, 558 (1980). See also 18 U. S. C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence"). Today's opinion states, in as inconspicuous a manner as possible at the very end of its analysis (one imagines that if the statement were delivered orally it would be spoken in a very low voice, and with the Court's hand over its mouth), that its holding applies only to inferences drawn from silence "in determining the facts of the offense." *Ante*, at 330. "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question" on which the majority expresses no view. *Ibid.* Never mind that we have said before, albeit in dicta, that "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts*, *supra*, at 557, n. 4.

Of course the clutter swept under the rug by limiting the opinion to "determining facts of the offense" is not merely application of today's opinion to §3E1.1, but its application to *all* determinations of acceptance of responsibility, repentance, character, and future dangerousness, in both federal and state prosecutions—that is to say, to what is probably the *bulk* of what most sentencing is all about. If the Court ultimately decides—in the fullness of time and after a decent period of confusion in the lower courts—that the "no inference" rule is indeed *limited* to "determining facts of the offense," then we will have a system in which a state court *can* increase the sentence of a convicted drug possessor who refuses to say how many ounces he possessed—not because that suggests he possessed the larger amount (to make such an inference would be unconstitutional!) but because his refusal to cooperate suggests he is unrepentant. Apart from the fact that there is no logical basis for drawing such a line *within* the sentencing phase (whereas drawing a line between guilt and sentencing is entirely logical), the result produced provides new support for Mr. Bumble's renowned evaluation of the law. Its only sensible feature is that it will almost always be unenforceable, since it will ordinarily be impossible to tell whether the sentencer has used the silence for either purpose or for neither.

If, on the other hand, the Court ultimately decides—in the fullness of time and after a decent period of confusion in the lower courts—that the extension of *Griffin* announced today is *not* limited to "determining facts of the offense," then it will have created a system in which we give the sentencing judge access to all sorts of out-of-court evidence, including the most remote hearsay, concerning the character of the defendant, his prior misdeeds, his acceptance of responsibility and determination to mend his ways, but declare taboo the most obvious piece of firsthand evidence standing in front of the judge: the defendant's refusal to cooperate with

the court. Such a rule orders the judge to avert his eyes from the elephant in the courtroom when it is the judge's job to size up the elephant.

The patent inadequacy of *both* of these courses with regard to determining matters other than the "facts of the offense" is not finessed by simply resolving, for the time being, not to choose between them. Sooner or later the choice must be made, and the fact that both alternatives are unsatisfactory cries out that the Court's extension of *Griffin* is a mistake.

The Court asserts that the rule against adverse inferences from silence, even in sentencing proceedings, "is of proven utility." *Ante,* at 329. Significantly, however, the only utility it proceeds to describe—that it is a "vital instrument" for teaching jurors that "the question in a criminal case is not whether the defendant committed the acts of which he is accused," but rather "whether the Government has carried its burden to prove its allegations"—is a utility that has no bearing upon sentencing, or indeed even upon the usual sentenc*er,* which is a judge rather than a jury. *Ante,* at 330.

* * *

Though the Fifth Amendment protects Mitchell from being compelled to take the stand, and also protects her, as we have held, from adverse inferences drawn from her silence at the guilt phase of the trial, there is no reason why it must also shield her from the natural and appropriate consequences of her uncooperativeness at the sentencing stage. I respectfully dissent.

JUSTICE THOMAS, dissenting.

JUSTICE SCALIA's dissenting opinion persuasively demonstrates that this Court's decision in *Griffin* v. *California,* 380 U. S. 609 (1965), lacks foundation in the Constitution's text, history, or logic. The vacuousness of *Griffin* supplies "cause enough to resist its extension." *Ante,* at 336. And, in my view, it also illustrates that *Griffin* and its progeny, in-

cluding *Carter* v. *Kentucky*, 450 U. S. 288 (1981), should be reexamined.

As JUSTICE SCALIA notes, the "*illogic* of the *Griffin* line is plain" and its historical "pedigree is equally dubious." *Ante*, at 332 (emphasis added). Not only does *Griffin* fail to withstand a proper constitutional analysis, it rests on an unsound assumption. *Griffin* relied partly on the premise that comments about a defendant's silence (and the inferences drawn therefrom) penalized the exercise of his Fifth Amendment privilege. See *Griffin*, *supra*, at 614; *Carter*, *supra*, at 301. As the dissenting Justices in *Griffin* rightly observed, such comments or inferences do not truly "penalize" a defendant. See 380 U. S., at 620–621 (opinion of Stewart, J., joined by White, J.) ("Exactly what the penalty imposed consists of is not clear"); *id.*, at 621 ("[T]he Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive"). Prosecutorial comments on a defendant's decision to remain silent at trial surely impose no greater "penalty" on a defendant than threats to indict him on more serious charges if he chooses not to enter into a plea bargain—a practice that this Court previously has validated. See, *e. g.*, *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365 (1978) (finding no due process violation where plea negotiations "presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution"). Moreover, this so-called "penalty" lacks any constitutional significance, since the explicit constitutional guarantee has been fully honored—a defendant is not "compelled . . . to be a witness against himself," U. S. Const., Amdt. 5, merely because the jury has been told that it may draw an adverse inference from his failure to testify. See *Griffin*, *supra*, at 621 (Stewart, J., joined by White, J., dissenting) ("[C]omment by counsel and the court does not compel testimony by creating such an awareness" of a de-

fendant's decision not to testify); *Carter*, *supra*, at 306 (Powell, J., concurring) ("But nothing in the [Self-Incrimination] Clause requires that jurors not draw logical inferences when a defendant chooses not to explain incriminating circumstances").* Therefore, at bottom, *Griffin* constitutionalizes a policy choice that a majority of the Court found desirable at the time. *Carter* compounded the error. This sort of undertaking is not an exercise in constitutional interpretation but an act of judicial willfulness that has no logical stopping point. See *Carter*, *supra*, at 310 (REHNQUIST, J., dissenting) ("Such Thomistic reasoning is now carried from the constitutional provision itself, to the *Griffin* case, to the present case, and where it will stop no one can know").

We have previously recognized that *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). Given their indefensible foundations, I would be willing to reconsider *Griffin* and *Carter* in the appropriate case. For purposes of this case, which asks only whether the principle established in *Griffin* should be extended, I agree that the Fifth Amendment does not prohibit a sentencer from drawing an adverse inference from a defendant's failure to testify and, therefore, join JUSTICE SCALIA's dissent.

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*I also agree with JUSTICE SCALIA, *ante*, at 336, that *Griffin* improperly relied on a prior decision interpreting a federal statute to inform its resolution of a constitutional question—an error the Court later repeated in *Carter*. See *Griffin* v. *California*, 380 U. S. 609, 613–614 (1965); *Carter* v. *Kentucky*, 450 U. S. 288, 300–301, n. 16 (1981).

Syllabus

MURPHY BROTHERS, INC. *v.* MICHETTI PIPE STRINGING, INC.

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

No. 97–1909. Argued March 1, 1999—Decided April 5, 1999

On January 26, 1996, respondent Michetti Pipe Stringing, Inc. (Michetti), filed a complaint in Alabama state court seeking damages for an alleged breach of contract and fraud by petitioner Murphy Bros., Inc. (Murphy). Michetti did not serve Murphy then, but three days later it faxed a "courtesy copy" of the file-stamped complaint to a Murphy vice president. Michetti officially served Murphy under local law by certified mail on February 12, 1996. On March 13, 1996 (30 days after service but 44 days after receiving the faxed copy of the complaint), Murphy removed the case under 28 U. S. C. § 1441 to the Federal District Court. Michetti moved to remand the case to the state court on the ground that Murphy filed the removal notice 14 days too late under § 1446(b), which specifies, in relevant part, that the notice "shall be filed within thirty days after the receipt by the defendant, *through service or otherwise*, of a copy of the [complaint]." (Emphasis added.) Because the notice had not been filed within 30 days of the date on which Murphy's vice president received the facsimile transmission, Michetti asserted, the removal was untimely. The District Court denied the remand motion on the ground that the 30-day removal period did not commence until Murphy was officially served with a summons. On interlocutory appeal, the Eleventh Circuit reversed and remanded, instructing the District Court to remand the action to state court. Emphasizing the statutory words "receipt . . . or otherwise," the Eleventh Circuit held that the defendant's receipt of a faxed copy of the filed initial pleading sufficed to commence the 30-day removal period.

Held: A named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service. Pp. 350–356.

(a) Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. In the absence of such service (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the

complaint names as defendant. See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 104. Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. See Fed. Rules Civ. Proc. 4(a) and 12(a)(1)(A). Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights. Pp. 350–351.

(b) In enacting § 1446(b), Congress did not endeavor to break away from the traditional understanding. Prior to 1948, a defendant could remove a case any time before the expiration of the time to respond to the complaint under state law. Because that time limit varied from State to State, however, the removal period correspondingly varied. To reduce the disparity, Congress in 1948 enacted the original version of § 1446(b), which required that the removal petition in a civil action be filed within 20 days after commencement of the action or service of process, whichever was later. However, as first framed, § 1446(b) did not give adequate time or operate uniformly in States such as New York, where service of the summons commenced the action and could precede the filing of the complaint, so that the removal period could have expired *before* the defendant obtained access to the complaint. To ensure such access before commencement of the removal period, Congress in 1949 enacted the current version of § 1446(b). Nothing in the 1949 amendment's legislative history so much as hints that Congress, in making changes to accommodate atypical state commencement and complaint filing procedures, intended to dispense with the historic function of service of process as the official trigger for responsive action by a named defendant. Pp. 351–353.

(c) Relying on the "plain meaning" of § 1446(b) that the panel perceived, the Eleventh Circuit was of the view that "[receipt] through service or otherwise" opens a universe of means besides service for putting the defendant in possession of the complaint. However, the Eleventh Circuit did not delineate the dimensions of that universe. Nor can one tenably maintain that the words "or otherwise" provide a clue. Cf., *e. g.*, *Potter* v. *McCauley*, 186 F. Supp. 146, 149. The interpretation of § 1446(b) adopted here adheres to tradition, makes sense of the phrase "or otherwise," and assures defendants adequate time to decide whether to remove an action to federal court. The various state provisions for service of the summons and the filing or service of the complaint fit into one or another of four main categories. See *ibid.* In each of those categories, the defendant's removal period will be no less than 30 days

from service, and in some of the categories, it will be more than 30 days from service, depending on when the complaint is received. First, if the summons and complaint are served together, the 30-day removal period runs at once. Second, if the defendant is served with the summons but is furnished with the complaint sometime after, the removal period runs from the receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Finally, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons. See *ibid.* Notably, Rule 81(c), amended in 1949, uses the identical "receipt through service or otherwise" language in specifying the 20-day period in which the defendant must answer the complaint once the case has been removed. Rule 81(c) has been interpreted to afford the defendant at least 20 days after service of process to respond. See *Silva* v. *Madison,* 69 F. 3d 1368, 1376–1377. In *Silva,* the Seventh Circuit distinguished its earlier decision in *Roe* v. *O'Donohue,* 38 F. 3d 298 (defendant need not receive service before time for removal under § 1446(b) begins to run), but did not adequately explain why one who has not yet lawfully been made a party to an action should be required to decide in which court system the case should be heard. If, as the *Silva* court rightly determined, the "service or otherwise" language was not intended to abrogate the service requirement for purposes of Rule 81(c), that same language also was not intended to bypass service as a starter for § 1446(b)'s clock. The fact that the Seventh Circuit could read the phrase "or otherwise" differently in *Silva* and *Roe,* moreover, undercuts the Eleventh Circuit's position that the phrase has an inevitably "plain meaning." Furthermore, the so-called "receipt rule"—starting the time to remove on receipt of a copy of the complaint, however informally, despite the absence of any formal service—could operate with notable unfairness to defendants in foreign nations. Because facsimile machines transmit instantaneously, but formal service abroad may take much longer than 30 days, plaintiffs would be able to dodge international treaty requirements and trap foreign opponents into keeping their suits in state courts. Pp. 353–356.

(d) In sum, it would take a clearer statement than Congress has made to read its endeavor to extend removal time (by adding receipt of the complaint) to effect so strange a change—to set removal apart from all other responsive acts, to render removal the sole instance in which one's procedural rights slip away before service of a summons, *i. e.,* before one is subject to any court's authority. P. 356.

125 F. 3d 1396, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 357.

Deborah Alley Smith argued the cause for petitioner. With her on the briefs was *Rhonda Pitts Chambers.*

J. David Pugh argued the cause for respondent. With him on the brief was *James F. Archibald III.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the time within which a defendant named in a state-court action may remove the action to a federal court. The governing provision is 28 U. S. C. § 1446(b), which specifies, in relevant part, that the removal notice "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the [complaint]." The question presented is whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run. Or, may the 30-day period start earlier, on the named defendant's receipt, before service of official process, of a "courtesy copy" of the filed complaint faxed by counsel for the plaintiff?

We read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *Kent L. Jones*, *Barbara L. Herwig,* and *Robert D. Kamenshine;* for the American Federation of Labor and Congress of Industrial Organizations by *Laurence Gold*, *Jonathan P. Hiatt*, and *Marsha S. Berzon;* and for the Product Liability Advisory Council, Inc., by *Patrick W. Lee* and *Robert P. Charrow.*

David C. Lewis filed a brief for the Defense Research Institute as *amicus curiae.*

remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.

I

On January 26, 1996, respondent Michetti Pipe Stringing, Inc. (Michetti), filed a complaint in Alabama state court seeking damages for an alleged breach of contract and fraud by petitioner Murphy Bros., Inc. (Murphy). Michetti did not serve Murphy at that time, but three days later it faxed a "courtesy copy" of the file-stamped complaint to one of Murphy's vice presidents. The parties then engaged in settlement discussions until February 12, 1996, when Michetti officially served Murphy under local law by certified mail.

On March 13, 1996 (30 days after service but 44 days after receiving the faxed copy of the complaint), Murphy removed the case under 28 U. S. C. § 1441 to the United States District Court for the Northern District of Alabama.[1] Michetti moved to remand the case to the state court on the ground that Murphy filed the removal notice 14 days too late. The notice of removal had not been filed within 30 days of the date on which Murphy's vice president received the facsimile transmission. Consequently, Michetti asserted, the removal was untimely under 28 U. S. C. § 1446(b), which provides:

> "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, *through service or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the de-

[1] Murphy invoked the jurisdiction of the Federal District Court under 28 U. S. C. § 1332 based on diversity of citizenship. Michetti is a Canadian company with its principal place of business in Alberta, Canada; Murphy is an Illinois corporation with its principal place of business in that State.

> fendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." (Emphasis added.)

The District Court denied the remand motion on the ground that the 30-day removal period did not commence until Murphy was officially served with a summons. The court observed that the phrase "or otherwise" was added to § 1446(b) in 1949 to govern removal in States where an action is commenced merely by the service of a summons, without any requirement that the complaint be served or even filed contemporaneously. See App. A–24. Accordingly, the District Court said, the phrase had "no field of operation" in States such as Alabama, where the complaint must be served along with the summons. See *ibid.*

On interlocutory appeal permitted pursuant to 28 U. S. C. § 1292(b), the Court of Appeals for the Eleventh Circuit reversed and remanded, instructing the District Court to remand the action to state court. 125 F. 3d 1396, 1399 (1997). The Eleventh Circuit held that "the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading." *Id.*, at 1397. "By and large," the appellate court wrote, "our analysis begins and ends with" the words "receipt . . . or otherwise." *Id.*, at 1397–1398 (emphasis deleted). Because lower courts have divided on the question whether service of process is a prerequisite for the running of the 30-day removal period under § 1446(b),[2] we granted certiorari. 525 U. S. 960 (1998).

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[2] Compare *Reece* v. *Wal-Mart Stores, Inc.*, 98 F. 3d 839, 841 (CA5 1996) (removal period begins with receipt of a copy of the initial pleading through any means, not just service of process); *Roe* v. *O'Donohue*, 38 F. 3d 298, 303 (CA7 1994) ("Once the defendant possesses a copy of the complaint, it must decide promptly in which court it wants to proceed."), with *Bowman* v. *Weeks Marine, Inc.*, 936 F. Supp. 329, 333 (SC 1996) (removal period begins only upon proper service of process); *Baratt* v. *Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333, 336 (WDNY 1992) (proper service is a prerequisite to commencement of removal period).

II

Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. At common law, the writ of *capias ad respondendum* directed the sheriff to secure the defendant's appearance by taking him into custody. See 1 J. Moore, Moore's Federal Practice ¶ 0.6[2.–2], p. 212 (2d ed. 1996) ("[T]he three royal courts, Exchequer, Common Pleas, and King's Bench . . . obtained an *in personam* jurisdiction over the defendant in the same manner through the writ of *capias ad respondendum.*"). The requirement that a defendant be brought into litigation by official service is the contemporary counterpart to that writ. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945) ("[T]he *capias ad respondendum* has given way to personal service of summons or other form of notice.").

In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444–445 (1946) ("[S]ervice of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served."). Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. See Fed. Rule Civ. Proc. 4(a) ("[The summons] shall . . . state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant."); Rule 12(a)(1)(A) (a defendant shall serve an answer within 20 days of being

served with the summons and complaint). Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.

III

When Congress enacted § 1446(b), the legislators did not endeavor to break away from the traditional understanding. Prior to 1948, a defendant could remove a case any time before the expiration of her time to respond to the complaint under state law. See, *e. g.*, 28 U. S. C. § 72 (1940 ed.). Because the time limits for responding to the complaint varied from State to State, however, the period for removal correspondingly varied. To reduce the disparity, Congress in 1948 enacted the original version of § 1446(b), which provided that "[t]he petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." Act of June 25, 1948, 62 Stat. 939, as amended, 28 U. S. C. § 1446(b). According to the relevant House Report, this provision was intended to "give adequate time and operate uniformly throughout the Federal jurisdiction." H. R. Rep. No. 308, 80th Cong., 1st Sess., A135 (1947).

Congress soon recognized, however, that § 1446(b), as first framed, did not "give adequate time and operate uniformly" in all States. In States such as New York, most notably, service of the summons commenced the action, and such service could precede the filing of the complaint. Under § 1446(b) as originally enacted, the period for removal in such a State could have expired *before* the defendant obtained access to the complaint.

To ensure that the defendant would have access to the complaint before commencement of the removal period, Congress in 1949 enacted the current version of § 1446(b): "The petition for removal of a civil action or proceeding shall be

filed within twenty days [now thirty days][3] after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." Act of May 24, 1949, § 83(a), 63 Stat. 101. The accompanying Senate Report explained:

> "In some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all the States." S. Rep. No. 303, 81st Cong., 1st Sess., 6 (1949).

See also H. R. Rep. No. 352, 81st Cong., 1st Sess., 14 (1949) ("The first paragraph of the amendment to subsection (b) corrects [the New York problem] by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.").[4] Nothing in the legislative history of the 1949

[3] Congress extended the period for removal from 20 days to 30 days in 1965. See Act of Sept. 29, 1965, 79 Stat. 887.

[4] The second half of the revised § 1446(b), providing that the petition for removal shall be filed "within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter," § 83(b), 63 Stat. 101, was added to address the situation in States such as Kentucky, which required the complaint to be filed at the time the summons issued, but did not require service of the complaint along with the summons. See H. R. Rep. No. 352, 81st Cong., 1st Sess., 14 (1949)

amendment so much as hints that Congress, in making changes to accommodate atypical state commencement and complaint filing procedures, intended to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant.[5]

IV

The Eleventh Circuit relied on the "plain meaning" of § 1446(b) that the panel perceived. See 125 F. 3d, at 1398. In the Eleventh Circuit's view, because the term "'[r]eceipt' is the nominal form of 'receive,' which means broadly 'to come into possession of' or to 'acquire,'" the phrase "'[receipt] through service or otherwise' opens a universe of means besides service for putting the defendant in possession of the complaint." *Ibid.* What are the dimensions of that "universe"? The Eleventh Circuit's opinion is uninformative. Nor can one tenably maintain that the words "or otherwise" provide a clue. Cf. *Potter* v. *McCauley*, 186 F. Supp. 146, 149 (Md. 1960) ("It is not possible to state definitely in general terms the precise scope and effect of the word 'otherwise' in its context here because its proper application in particular situations will vary with state procedural requirements."); *Apache Nitrogen Products, Inc.* v.

("Th[e first clause of revised § 1446(b)], however, without more, would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly . . . the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.").

[5] It is evident, too, that Congress could not have foreseen the situation posed by this case, for, as the District Court recognized, "[i]n 1949 Congress did not anticipate use of facsmile *[sic]* transmissions." App. A–23, n. 1. Indeed, even the photocopy machine was not yet on the scene at that time. See 9 New Encyclopædia Britannica 400 (15th ed. 1985) (noting that photocopiers "did not become available for commercial use until 1950").

Harbor Ins. Co., 145 F. R. D. 674, 679 (Ariz. 1993) ("[I]f in fact the words 'service or otherwise' had a plain meaning, the cases would not be so hopelessly split over their proper interpretation.").

The interpretation of § 1446(b) adopted here adheres to tradition, makes sense of the phrase "or otherwise," and assures defendants adequate time to decide whether to remove an action to federal court. As the court in *Potter* observed, the various state provisions for service of the summons and the filing or service of the complaint fit into one or another of four main categories. See 186 F. Supp., at 149. In each of the four categories, the defendant's period for removal will be no less than 30 days from service, and in some categories, it will be more than 30 days from service, depending on when the complaint is received.

As summarized in *Potter*, the possibilities are as follows. First, if the summons and complaint are served together, the 30-day period for removal runs at once. Second, if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant's receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Finally, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons. See *ibid.*

Notably, Federal Rule of Civil Procedure 81(c), amended in 1949, uses the identical "receipt through service or otherwise" language in specifying the time the defendant has to answer the complaint once the case has been removed:

> "In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules

> within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based."

Rule 81(c) sensibly has been interpreted to afford the defendant at least 20 days after service of process to respond. See *Silva* v. *Madison*, 69 F. 3d 1368, 1376–1377 (CA7 1995). In *Silva*, the Seventh Circuit Court of Appeals observed that "nothing . . . would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process." *Id.*, at 1376. In reaching this conclusion, the court distinguished an earlier decision, *Roe* v. *O'Donohue*, 38 F. 3d 298 (CA7 1994), which held that a defendant need not receive service of process before his time for removal under § 1446(b) begins to run. See 69 F. 3d, at 1376. But, as the United States maintains in its *amicus curiae* brief, the *Silva* court "did not adequately explain why one who has not yet lawfully been made a party to an action should be required to decide in which court system the case should be heard." Brief for United States as *Amicus Curiae* 13, n. 4. If, as the Seventh Circuit rightly determined, the "service or otherwise" language was not intended to abrogate the service requirement for purposes of Rule 81(c), that same language also was not intended to bypass service as a starter for § 1446(b)'s clock. The fact that the Seventh Circuit could read the phrase "or otherwise" differently in *Silva* and *Roe*, moreover, undercuts the Eleventh Circuit's position that the phrase has an inevitably "plain meaning."[6]

[6] Contrary to a suggestion made at oral argument, see Tr. of Oral Arg. 6–7, 28 U. S. C. § 1448 does not support the Eleventh Circuit's position. That section provides that "[i]n all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has

Furthermore, the so-called "receipt rule"—starting the time to remove on receipt of a copy of the complaint, however informally, despite the absence of any formal service—could, as the District Court recognized, operate with notable unfairness to individuals and entities in foreign nations. See App. A–24. Because facsimile machines transmit instantaneously, but formal service abroad may take much longer than 30 days,[7] plaintiffs "would be able to dodge the requirements of international treaties and trap foreign opponents into keeping their suits in state courts." *Ibid.*

* * *

In sum, it would take a clearer statement than Congress has made to read its endeavor to extend removal time (by adding receipt of the complaint) to effect so strange a change—to set removal apart from all other responsive acts, to render removal the sole instance in which one's procedural rights slip away before service of a summons, *i. e.*, before one is subject to any court's authority. Accordingly, for the reasons stated in this opinion, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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not been perfected prior to removal . . . such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court." Nothing in § 1448 requires the defendant to take any action. The statute simply allows the plaintiff to serve an unserved defendant or to perfect flawed service once the action has been removed. In fact, the second paragraph of § 1448, which provides that "[t]his section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case," explicitly reserves the unserved defendant's right to take action (move to remand) *after* service is perfected.

[7] See, *e. g.*, Fed. Rule Civ. Proc. 4(f) (describing means of service upon individuals in a foreign country).

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

Respondent faxed petitioner a copy of the file-stamped complaint in its commenced state-court action, and I believe that the receipt of this facsimile triggered the 30-day removal period under the plain language of 28 U. S. C. § 1446(b). The Court does little to explain why the plain language of the statute should not control, opting instead to superimpose a judicially created service of process requirement onto § 1446(b). In so doing, it departs from this Court's practice of strictly construing removal and similar jurisdictional statutes. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 108–109 (1941). Because I believe the Eleventh Circuit's analysis of the issue presented in this case was cogent and correct, see 125 F. 3d 1396, 1397–1398 (1997), I would affirm the dismissal of petitioner's removal petition for the reasons stated by that court.

Syllabus

UNUM LIFE INSURANCE CO. OF AMERICA *v.* WARD

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

No. 97–1868. Argued February 24, 1999—Decided April 20, 1999

Defendant-petitioner UNUM Life Insurance Company of America (UNUM) issued a long-term group disability policy to Management Analysis Company (MAC) as an insured welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). The policy provides that proofs of claim must be furnished to UNUM, at the latest, one year and 180 days after the onset of disability. Under the admitted facts of this case, plaintiff-respondent Ward, a MAC employee, became permanently disabled on May 5, 1992. In late February or early March 1993, he qualified for state disability benefits in California, where he worked, and thereupon informed MAC of his disability. In April 1994, Ward asked MAC whether its long-term disability plan covered his condition. When MAC told him it did, Ward completed a benefits application and sent it to MAC, which processed the application and forwarded it to UNUM. UNUM received proof of Ward's claim on April 11, 1994. Because this notice was late under the policy terms, UNUM advised Ward that his claim was denied as untimely. Ward filed this suit under ERISA's civil enforcement provision, 29 U. S. C. § 1132(a), to recover the disability benefits provided by the plan. He argued that, because a California employer administering an insured group health plan should be deemed to act as the insurance company's agent under *Elfstrom* v. *New York Life Ins. Co.*, 67 Cal. 2d 503, 512, 432 P. 2d 731, 737, his notice of permanent disability to MAC, in February or March 1993, sufficed to supply timely notice to UNUM. The District Court rejected this argument, concluding that California's *Elfstrom* rule is subject to ERISA's preemption clause, § 1144(a), which states that ERISA provisions "shall supersede . . . State laws" to the extent that those laws "relate to any employee benefit plan." In rendering summary judgment for UNUM, the District Court further held that the *Elfstrom* rule is not preserved under ERISA's saving clause, § 1144(b)(2)(A), which exempts from preemption "any law of any State which regulates insurance." The Ninth Circuit reversed, identifying two grounds on which Ward might prevail. First, that court relied on California's "notice-prejudice" rule, under which an insurer cannot avoid liability although the proof of claim is untimely, unless the insurer shows it suffered actual prejudice from the delay. Following its precedent,

the appeals court held that the notice-prejudice rule is saved from ERISA preemption as a law that "regulates insurance." Second, and contingently, the Ninth Circuit held that the *Elfstrom* agency rule does not "relate to" employee benefit plans, and therefore is not preempted by reason of ERISA. The court remanded the case for a determination whether UNUM suffered actual prejudice from Ward's late notice of claim; and if so, whether, under *Elfstrom*, Ward could prevail because he had timely filed his claim.

Held:

1. California's notice-prejudice rule is a "law . . . which regulates insurance," and is therefore saved from preemption by ERISA. Pp. 366–375.

(a) Because the parties agree that the notice-prejudice rule falls under ERISA's preemption clause as a state law that "relate[s] to" employee benefit plans, their dispute hinges on whether the rule "regulates insurance" and thus escapes preemption under the saving clause. This Court's precedent provides a framework for resolving that question. First, the Court asks whether, from a "common-sense view of the matter," the contested prescription regulates insurance. *E. g., Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 740. Second, the Court considers three factors to determine whether the regulation fits within the "business of insurance" as that phrase is used in the McCarran-Ferguson Act: whether the regulation (1) has the effect of transferring or spreading a policyholder's risk, (2) is an integral part of the policy relationship between the insurer and the insured, and (3) is limited to entities within the insurance industry. *Id.*, at 743. Pp. 366–368.

(b) The Ninth Circuit correctly concluded that the notice-prejudice rule "regulates insurance" as a matter of common sense. This Court does not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law, see *Runyon* v. *McCrary*, 427 U. S. 160, 181–182, and there is no cause to do so here. Because it controls the terms of the insurance relationship by requiring the insurer to prove prejudice before enforcing proof-of-claim requirements, the California rule, by its very terms, is directed specifically at the insurance industry and is applicable only to insurance contracts. The rule thus appears to satisfy the common-sense view as a regulation that homes in on the insurance industry and does not just have an impact on that industry. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50. The Court rejects UNUM's argument that the rule cannot be held to "regulate insurance" because it is merely an industry-specific application of the general principle that disproportionate forfeiture should be avoided in

the enforcement of contracts. While the notice-prejudice rule is an application of the maxim that law abhors a forfeiture, it is an application of a special order, a rule mandatory for insurance contracts, not a principle a court may pliably employ when the circumstances so warrant. Tellingly, UNUM has identified no California authority outside the insurance-specific notice-prejudice context indicating that, as a matter of law, failure to abide by a contractual time condition does not work a forfeiture absent prejudice. Outside the notice-prejudice context, the burden of justifying a departure from a contract's written terms generally rests with the party seeking the departure. Moreover, California and other States have adopted the notice-prejudice rule to address policy concerns specific to the insurance industry. Pp. 368–373.

(c) The notice-prejudice rule regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act. Preliminarily, the Court rejects UNUM's assertion that a state regulation must satisfy all three McCarran-Ferguson factors in order to "regulate insurance." Those factors are considerations to be weighed, *Pilot Life*, 481 U. S., at 49, and none is necessarily determinative in itself, *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129. The *Metropolitan Life* Court called the factors "relevant," 471 U. S., at 743, and looked to them as checking points, not separate essential elements that must each be satisfied. The Court need not determine whether the rule at issue satisfies the first, "risk-spreading," McCarran-Ferguson factor, because the remaining factors, verifying the common-sense view, are securely satisfied. Meeting the second factor, the notice-prejudice rule serves as an integral part of the insurance relationship because it changes the bargain between insurer and insured; it effectively creates a mandatory contract term that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision. The third factor—whether the rule is limited to insurance entities—is also well met, since it is aimed at the insurance industry and does not merely have an impact upon it. See *FMC Corp.* v. *Holliday*, 498 U. S. 52, 61. Pp. 373–375.

2. The Court rejects UNUM's assertion that the notice-prejudice rule conflicts in three ways with substantive provisions of ERISA. First, UNUM's contention that the rule, by altering the notice provisions of the insurance contract, conflicts with ERISA's requirement that plan fiduciaries act "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), overlooks controlling precedent and makes scant sense. This Court has repeatedly held that state laws mandating insurance contract terms are saved from preemption under § 1144(b)(2)(A). See, *e. g.*, *Metropolitan Life*, 471 U. S., at 758. Under UNUM's interpretation, however, States would be powerless to alter

the terms of the insurance relationship in ERISA plans; insurers could displace any state regulation simply by inserting a contrary term in plan documents. This interpretation would virtually read the saving clause out of ERISA. Second, whatever the merits of UNUM's view that § 1132(a) preempts any action for plan benefits brought under state rules such as notice-prejudice, the issue is not implicated here. Because Ward sued under § 1132(a)(1)(B) "to recover benefits due . . . under the terms of his plan," invoking the notice-prejudice rule as the relevant rule of decision for his § 1132(a) suit, the case does not raise the question whether § 1132(a) provides the sole launching ground for an ERISA enforcement action. Finally, the Court rejects UNUM's suggestion that the notice-prejudice rule conflicts with § 1133, which requires plans to provide notice and the opportunity for review of denied claims, or with Department of Labor regulations providing that a claim is filed when the requirements of a reasonable claim filing procedure have been met. By allowing a longer period to file than the *minimum* filing terms mandated by federal law, the notice-prejudice rule complements rather than contradicts ERISA and the regulations. Pp. 375–377.

3. California's *Elfstrom* agency rule "relate[s] to" ERISA plans, and therefore does not occupy ground outside ERISA's preemption clause. Contrary to the Ninth Circuit's view that *Elfstrom* is consistent with this Court's ERISA preemption precedent because it does not dictate the manner in which the plan will be administered, deeming the policyholder-employer the agent of the insurer would have a marked effect on plan administration: It would force the employer, as plan administrator, to assume a role, with attendant legal duties and consequences, that it has not undertaken voluntarily; and it would affect not merely the plan's bookkeeping obligations regarding to whom benefits checks must be sent, but would also regulate the basic services that a plan may or must provide to its participants and beneficiaries. Pp. 377–379.

135 F. 3d 1276, affirmed in part, reversed in part, and remanded.

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

William J. Kayatta, Jr., argued the cause for petitioner. With him on the briefs were *David L. Bacon*, *Charles M. Dyke*, *Barbara H. Furey*, *Brian G. Kanner*, *Tamarra T. Rennick*, *Lesley C. Green*, and *Russell G. Petti.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With

him on the briefs were *Solicitor General Waxman*, *James A. Feldman*, *Judith E. Kramer*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Elizabeth Hopkins*.

Jeffrey Isaac Ehrlich argued the cause for respondent. With him on the briefs were *Brian Stuart Koukoutchos*, *Janice Mazur*, *Brooks Iler*, and *Arthur M. Palkowitz*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Council of Life Insurance et al. by *Robert N. Eccles*, *Karen M. Wahle*, *Jeffrey L. Gabardi*, and *Phillip E. Stano;* for the Association of California Life and Health Insurance Companies by *James H. Fleming;* for the Association of Private Pension and Welfare Plans et al. by *Michael E. Malamut*, *Loretta M. Smith*, *Jan Amundson*, *Quentin Riegel*, and *Stephen A. Bokat;* and for the Business Roundtable by *Charles Rothfeld* and *Lawrence S. Robbins*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, and *David C. Mattax*, *Eliot Spitzer*, Attorney General of New York, *Peter Schiff*, Acting Solicitor General, *Patricia Smith*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Winston Bryant* of Arkansas, *Bill Lockyer* of California, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *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, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Patricia A. Madrid* of New Mexico, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mike Fisher* of Pennsylvania, *Jose Fuentes-Agostini* of Puerto Rico, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw* of West Virginia, and *Gay Woodhouse* of Wyoming; for the Council of State Governments et al. by *Richard Ruda* and *Steven H. Goldblatt;* for the National Association of Insurance Commissioners by *Sally B. Sur-*

JUSTICE GINSBURG delivered the opinion of the Court.

This case, brought under § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, as amended, 29 U. S. C. § 1132(a), concerns ERISA's preemption and saving clauses. The preemption clause, § 514(a), 29 U. S. C. § 1144(a), broadly states that ERISA provisions "shall supersede . . . State laws" to the extent that those laws "relate to any employee benefit plan." The saving clause, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), phrased with similar breadth, exempts from preemption "any law of any State which regulates insurance." The key words "regulates insurance" in § 514(b)(2)(A), and "relate to" in § 514(a), once again require interpretation, for their meaning is not "plain"; sensible construction of ERISA, our decisions indicate, requires that we measure these words in context. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 47 (1987) (noting that repeated calls for interpretation are not surprising in view of "the wide variety of state statutory and decisional law arguably affected" by ERISA's preemption and saving clauses).

The context here is a suit to recover disability benefits under an ERISA-governed insurance policy issued by defendant-petitioner UNUM Life Insurance Company of America (UNUM). Plaintiff-respondent John E. Ward submitted his proof of claim to UNUM outside the time limit set in the policy, and UNUM therefore denied Ward's claim.

Ruling in Ward's favor, and reversing the District Court's summary judgment for UNUM, the Court of Appeals for the Ninth Circuit relied on decisional law in California, the State in which Ward worked and in which his employer operated. The Ninth Circuit's judgment rested on two grounds. That

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ridge; and for the National Employment Lawyers Association by *Daniel M. Feinberg* and *Paula A. Brantner.*

Mary Ellen Signorille and *Melvin Radowitz* filed a brief for the American Association of Retired Persons as *amicus curiae.*

court relied first on California's "notice-prejudice" rule, under which an insurer cannot avoid liability although the proof of claim is untimely, unless the insurer shows it was prejudiced by the delay. The notice-prejudice rule is saved from preemption, the Court of Appeals held, because it is "law . . . which regulates insurance." See *Ward* v. *Management Analysis Co. Employee Disability Benefit Plan*, 135 F. 3d 1276, 1280 (1998).

The Court of Appeals announced a further ground for reversing the District Court's judgment for UNUM, one that would come into play if the insurer proved prejudice due to the delayed notice. Under California's decisions, the Ninth Circuit said, the employer could be deemed an agent of the insurer in administering group insurance policies. Ward's employer knew of his disability within the time the policy allowed for proof of claim. The Ninth Circuit held that the generally applicable agency law reflected in the California cases does not "relate to" employee benefit plans, and therefore is not preempted. See *id.*, at 1281–1283, 1287–1288.

We granted certiorari, 525 U. S. 928 (1998), and now affirm the Court of Appeals' first disposition, and reverse the second. California's notice-prejudice rule, we agree, is a "law . . . which regulates insurance," and is therefore saved from preemption by ERISA. California's agency law, we further hold, does "relate to" employee benefit plans, and therefore does not occupy ground outside ERISA's preemption clause.

I

UNUM issued a long-term group disability policy to Management Analysis Company (MAC) as an insured welfare benefit plan governed by ERISA, effective November 1, 1983. The policy provides that proofs of claim must be furnished to UNUM, at the latest, one year and 180 days after the onset of disability.

Ward was employed by MAC from 1983 until May 1992. Throughout this period, premiums for the disability policy

were deducted from Ward's paycheck. Under the admitted facts of the case, Ward became permanently disabled with severe leg pain on the date of his resignation, May 5, 1992. See 135 F. 3d, at 1280.

Ward's condition was diagnosed as diabetic neuropathy in December 1992. In late February or early March 1993, he qualified for state disability benefits and thereupon informed MAC of his disability and inquired about continuing health insurance benefits. In July 1993, Ward received a determination of eligibility for Social Security disability benefits and forwarded a copy of this determination to MAC's human resources division. See *id.*, at 1279. In April 1994, Ward discovered among his papers a booklet describing the long-term disability plan and asked MAC whether the plan covered his condition. When MAC told him he was covered, Ward completed an application for benefits and forwarded it to MAC. In turn, and after filling in the employer information section, MAC forwarded the application to UNUM. UNUM received proof of Ward's claim on April 11, 1994. See *ibid.* This notice was late under the terms of the policy, which required submission of proof of claim by November 5, 1993. See *id.*, at 1280. By letter dated April 13, 1994, UNUM advised Ward that his claim was denied as untimely. See *id.*, at 1279.

In September 1994, Ward filed suit against the MAC plan under § 502 of ERISA, 29 U. S. C. § 1132, to recover the disability benefits provided by the plan. UNUM appeared as a defendant and answered on behalf of itself and the plan. See 135 F. 3d, at 1279. To the District Court, Ward argued that under *Elfstrom* v. *New York Life Ins. Co.*, 67 Cal. 2d 503, 512, 432 P. 2d 731, 737 (1967) (en banc), a California employer that administers an insured group health plan should be deemed to act as the agent of the insurance company. Therefore, Ward asserted, his notice of permanent disability to MAC, in February or March 1993, sufficed to supply timely notice to UNUM. See App. to Pet. for Cert. 30a. The Dis-

trict Court rejected this argument, concluding that the agency rule announced in *Elfstrom* "relate[s] to" ERISA plans; hence it is preempted under § 514(a), 29 U. S. C. § 1144(a). See App. to Pet. for Cert. 30a. The District Court further held that the *Elfstrom* rule is not saved from preemption as a law that "regulates insurance" within the compass of ERISA's insurance saving clause, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A). App. to Pet. for Cert. 31a. Accordingly, the court rendered summary judgment in UNUM's favor. See *id.*, at 33a.

The Court of Appeals for the Ninth Circuit reversed, identifying two grounds on which Ward might prevail. First, following the Ninth Circuit's recent decision in *Cisneros* v. *UNUM Life Ins. Co.*, 134 F. 3d 939 (1998), the appeals court held that California's notice-prejudice rule is saved from ERISA preemption as a law that "regulates insurance"; under the notice-prejudice rule, Ward's late notice would not preclude his ERISA claim absent proof that the insurer suffered actual prejudice because of the delay. See 135 F. 3d, at 1280. Second, and contingently, the Ninth Circuit held that the *Elfstrom* rule, under which the employer could be deemed an agent of the insurer, does not "relate to" employee benefit plans, and therefore is not preempted by reason of ERISA. See 135 F. 3d, at 1287 (internal quotation marks omitted). The court accordingly remanded the case to the District Court for a determination whether UNUM suffered actual prejudice on account of the late submission of Ward's notice of claim; and if so, whether, under the reasoning of *Elfstrom*, Ward could nevertheless prevail because he had timely filed his claim. See 135 F. 3d, at 1289.

II

California's notice-prejudice rule prescribes:

> "[A] defense based on an insured's failure to give timely notice [of a claim] requires the insurer to prove that it suffered substantial prejudice. Prejudice is not pre-

> sumed from delayed notice alone. The insurer must show actual prejudice, not the mere possibility of prejudice." *Shell Oil Co.* v. *Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760–761, 15 Cal. Rptr. 2d 815, 845 (1st Dist. 1993) (citations omitted).

The parties agree that the notice-prejudice rule falls under ERISA's preemption clause, § 514(a), as a state law that "relate[s] to" an employee benefit plan.[1] Their dispute hinges on this question: Does the rule "regulat[e] insurance" and thus escape preemption under the saving clause, § 514(b)(2)(A).[2]

Our precedent provides a framework for resolving whether a state law "regulates insurance" within the meaning of the saving clause. First, we ask whether, from a "common-sense view of the matter," the contested prescription regulates insurance. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 740 (1985); see *Pilot Life*, 481 U. S., at 48. Second, we consider three factors employed to determine whether the regulation fits within the "business of insurance" as that phrase is used in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Metropolitan Life*,

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[1] Common-law rules developed by decisions of state courts are "State law" under ERISA. See 29 U. S. C. § 1144(c)(1) ("The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law.").

[2] State laws that purport to regulate insurance by "deem[ing]" a plan to be an insurance company are outside the saving clause and remain subject to preemption. See § 1144(b)(2)(B). Self-insured ERISA plans, therefore, are generally sheltered from state insurance regulation. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 747 (1985). Because this case does not involve a self-insured plan, this limitation on state regulatory authority is not at issue here.

471 U. S., at 743 (emphasis, citations, and internal quotation marks omitted); see also *Pilot Life*, 481 U. S., at 48–49.

A

The Ninth Circuit concluded that California's notice-prejudice rule "regulates insurance" as a matter of common sense. See *Cisneros*, 134 F. 3d, at 945. We do not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law, see *Runyon* v. *McCrary*, 427 U. S. 160, 181–182 (1976), and we lack cause to do so here. The California notice-prejudice rule controls the terms of the insurance relationship by "requiring the insurer to prove prejudice before enforcing proof-of-claim requirements." *Cisneros*, 134 F. 3d, at 945. As the Ninth Circuit observed, the rule, by its very terms, "is directed specifically at the insurance industry and is applicable only to insurance contracts." *Ibid.;* see Brief for United States as *Amicus Curiae* 12 ("[O]ur survey of California law reveals no cases where the state courts apply the notice-prejudice rule as such outside the insurance area. Nor is this surprising, given that the rule is stated in terms of prejudice to an 'insurer' resulting from untimeliness of notice."). The rule thus appears to satisfy the common-sense view as a regulation that homes in on the insurance industry and does "not just have an impact on [that] industry." *Pilot Life*, 481 U. S., at 50.

UNUM and its *amici* urge in opposition to the Ninth Circuit's common-sense conclusion that the notice-prejudice rule is merely an industry-specific application of the general principle that "disproportionate forfeiture should be avoided in the enforcement of contracts." See Brief for American Council of Life Insurance et al. as *Amici Curiae* 13; Brief for Association of California Life and Health Insurance Companies as *Amicus Curiae* 5 ("[N]otice-prejudice is merely a branch of the broad doctrine of harmless error."). Given the tenet from which the notice-prejudice rule springs, UNUM

maintains, the rule resembles the Mississippi law at issue in *Pilot Life;* under that law, punitive damages could be sought for "bad faith" in denying claims without any reasonably arguable basis for the refusal to pay. See 481 U. S., at 50. We determined in *Pilot Life* that although Mississippi had "identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law." *Ibid.* "Any breach of contract," we observed, "and not merely breach of an insurance contract, may lead to liability for punitive damages under [the Mississippi common law of bad faith]." *Ibid.* Accordingly, we concluded, the Mississippi law did not "regulat[e] insurance" within the meaning of ERISA's saving clause. *Ibid.*

We do not find it fair to bracket California's notice-prejudice rule for insurance contracts with Mississippi's broad gauged "bad faith" claim for relief. Insurance policies like UNUM's frame timely notice provisions as conditions precedent to be satisfied by the insured before an insurer's contractual obligation arises. See 1 B. Witkin, Summary of California Law, Contracts § 726, p. 657 (9th ed. 1987); *Zurn Engineers* v. *Eagle Star Ins. Co.*, 61 Cal. App. 3d 493, 499, 132 Cal. Rptr. 206, 210 (2d Dist. 1976). Ordinarily, "failure to comply with conditions precedent . . . prevents an action by the defaulting party to enforce the contract." 14 Cal. Jur. 3d, Contracts § 245, p. 542 (3d ed. 1974). A recent California decision, *Platt Pacific Inc.* v. *Andelson*, 6 Cal. 4th 307, 862 P. 2d 158 (1993) (en banc), is illustrative. In that case, the California Supreme Court adhered to the normal course: It refused to excuse a plaintiff's failure to comply with a contractual requirement to timely demand arbitration, although there was no allegation that the defendant had been prejudiced by the plaintiff's lapse. The plaintiff had forfeited the right to pursue arbitration, the court concluded, for "the condition precedent [of a timely demand] was neither legally excused nor changed by modification of the par-

ties' written agreement." *Id.*, at 321, 862 P. 2d, at 167. "A contrary conclusion," the court stated, "would undermine the law of contracts by vesting in one contracting party the power to unilaterally convert the other contracting party's conditional obligation into an independent, unconditional obligation notwithstanding the terms of the agreement." *Id.*, at 314, 862 P. 2d, at 162.

It is no doubt true that diverse California decisions bear out the maxim that "law abhors a forfeiture"[3] and that the

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[3] UNUM cites a handful of California cases of this genre. They do not cast doubt on our disposition. In *Conservatorship of Rand*, 49 Cal. App. 4th 835, 57 Cal. Rptr. 2d 119 (4th Dist. 1996), the court found that a county court rule governing notice to a conservatee of potential liability for fees and costs did not comply with statutory notice requirements, but excused the defective notice because the conservatee had suffered no prejudice. See *id.*, at 838–841, 57 Cal. Rptr. 2d, at 121–123. *Rand* was not a contract case at all; it concerned the consequences of a court's violation of a state-created notice provision in the context of a judicial proceeding. *Industrial Asphalt Inc.* v. *Garrett Corp.*, 180 Cal. App. 3d 1001, 226 Cal. Rptr. 17 (2d Dist. 1986), concerned the notice requirements imposed by California's mechanics lien law and turned on principles of statutory rather than contract interpretation. See *id.*, at 1005–1006, 226 Cal. Rptr., at 18–19. In *Industrial Asphalt*, moreover, the complaining party had received actual notice of the claim underlying the lien. *Ibid.* Neither case suggests that California courts are generally unwilling or reluctant to enforce time conditions in private contracts as written.

The older decisions on which UNUM relies are no more instructive. The contract at issue in *Ballard* v. *MacCallum*, 15 Cal. 2d 439, 101 P. 2d 692 (1940) (en banc), contained contradictory clauses, some appearing to provide for forfeiture in the event of default, others appearing to contemplate an opportunity to cure. See *id.*, at 442, 101 P. 2d, at 694. The court invoked a general presumption against forfeitures only to resolve the conflict. See *id.*, at 444, 101 P. 2d, at 695. Finally, in *Henck* v. *Lake Hemet Water Co.*, 9 Cal. 2d 136, 69 P. 2d 849 (1937) (en banc), a water supplier attempted to escape the terms of a long-term delivery contract on the ground that the water recipient had not timely made annual payment. The California Supreme Court rejected the supplier's plea, observing that "in a proper case," equity permits a court to excuse a lapse like the recipient's in order to avoid forfeiture. See *id.*, at 141, 142, 69 P. 2d, at 852. The *Henck* court carefully weighed the competing interests of the parties

notice-prejudice rule is an application of that maxim. But it is an application of a special order, a rule mandatory for insurance contracts, not a principle a court may pliably employ when the circumstances so warrant. Tellingly, UNUM has identified no California authority outside the insurance-specific notice-prejudice context indicating that as a matter of law, failure to abide by a contractual time condition does not work a forfeiture absent prejudice. Outside the notice-prejudice context, the burden of justifying a departure from a contract's written terms generally rests with the party seeking the departure. See, *e. g.*, *American Bankers Mortgage Corp.* v. *Federal Home Loan Mortgage Corp.*, 75 F. 3d 1401, 1413 (CA9 1996); *CQL Original Products, Inc.* v. *National Hockey League Players' Assn.*, 39 Cal. App. 4th 1347, 1357–1358, n. 6, 46 Cal. Rptr. 2d 412, 418, n. 6 (4th Dist. 1995). In short, the notice-prejudice rule is distinctive most notably because it is a rule firmly applied to insurance contracts, not a general principle guiding a court's discretion in a range of matters.[4]

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and relied in part on the water supplier's fault in inducing the late payment. See *id.*, at 144–145, 69 P. 2d, at 853; cf. Restatement (Second) of Contracts § 229, Comment *c*, Reporter's Note (1979) (courts are likely to excuse obligor's failure strictly to adhere to a performance timetable where obligee has induced the failure).

These decisions support the uncontested propositions that the law disfavors forfeitures and that in case-specific circumstances California courts will excuse the breach of a time or notice provision in order to avoid an inequitable forfeiture. None of the decisions even remotely suggests that failures to comply with contractual notice periods are excused as a matter of law absent prejudice; none, therefore, suggests that the notice-prejudice rule is merely a routine application of a general antiforfeiture principle.

[4] UNUM features § 229 of the Restatement (Second) of Contracts (1979), and urges that the notice-prejudice rule fits within its compass. Section 229 provides that "[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." The notice-prejudice rule, however, is mandatory rather than permissive; it requires California courts to excuse a failure to

California's insistence that insurers show prejudice before they may deny coverage because of late notice is grounded in policy concerns specific to the insurance industry. See Brief for Council of State Governments et al. as *Amici Curiae* 10–14. That grounding is key to our decision. Announcing the notice-prejudice rule in *Campbell* v. *Allstate Ins. Co.*, 60 Cal. 2d 303, 384 P. 2d 155 (1963) (en banc), the California Supreme Court emphasized the "public policy of this state" in favor of compensating insureds. *Id.*, at 307, 384 P. 2d, at 157; see *ibid.* (weighing the relative burdens of notice-prejudice on insurers and insureds). Subsequent notice-prejudice rulings have likewise focused on insurance industry policy and governance. See, *e. g.*, *Hanover Ins. Co.* v. *Carroll*, 241 Cal. App. 2d 558, 570, 50 Cal. Rptr. 704, 712 (1st Dist. 1966) (public policy respecting compensation of insured injured parties); *Northwestern Title Security Co.* v. *Flack*, 6 Cal. App. 3d 134, 143–144, 85 Cal. Rptr. 693, 698 (1st Dist. 1970) (extending notice-prejudice rule to "claims-type" policies, rejecting contention that sound public policy required limitation of rule to "occurrence-type" policies); *Pacific Employers Ins. Co.* v. *Superior Court*, 221 Cal. App. 3d 1348, 1359–1360, 270 Cal. Rptr. 779, 784–785 (2d Dist. 1990) (evaluating insurance industry public policy considerations in reaching the opposite conclusion). Decisions of courts in other States similarly indicate that the notice-prejudice rule addresses policy concerns specific to insurance. See, *e. g.*, *Cooper* v. *Government Employees Ins. Co.*, 51 N. J. 86, 94, 237 A. 2d 870, 874 (1968) (failure to adopt notice-prejudice would "disserve the public interest, for insurance is an instrument of a social policy that the victims of negligence be compensated"); *Great American Ins. Co.* v. *C. G. Tate Construction Co.*, 303 N. C. 387, 395, 279 S. E. 2d 769, 774 (1981) ("The [notice-prejudice] rule we adopt today has the advan-

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provide timely notice whenever the insurer cannot carry the burden of showing actual prejudice, and it allows no argument over the materiality of the time prescription.

tages of promoting social policy and fulfilling the reasonable expectations of the purchaser while fully protecting the ability of the insurer to protect its own interests."); *Alcazar* v. *Hayes*, 982 S. W. 2d 845, 851–853 (Tenn. 1998) (surveying the "compelling public policy justifications" that support departing from traditional contract interpretation in favor of notice-prejudice).

In sum, the Ninth Circuit properly concluded that notice-prejudice is a rule of law governing the insurance relationship distinctively. We reject UNUM's contention that the rule merely restates a general principle disfavoring forfeitures and conclude instead that notice-prejudice, as a matter of common sense, regulates insurance.

B

We next consider the criteria used to determine whether a state law regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act. Preliminarily, we reject UNUM's assertion that a state regulation must satisfy all three McCarran-Ferguson factors in order to "regulate insurance" under ERISA's saving clause. Our precedent is more supple than UNUM conceives it to be. We have indicated that the McCarran-Ferguson factors are "considerations [to be] weighed" in determining whether a state law regulates insurance, *Pilot Life*, 481 U. S., at 49, and that "[n]one of these criteria is necessarily determinative in itself," *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982). In *Metropolitan Life*, the case in which we first used the McCarran-Ferguson formulation to assess whether a state law "regulates insurance" for purposes of ERISA's saving clause, we called the McCarran-Ferguson factors "relevant"; we did not describe them as "required." See 471 U. S., at 743; *O'Connor* v. *UNUM Life Ins. Co. of America*, 146 F. 3d 959, 963 (CADC 1998) ("That the factors are merely 'relevant' suggests that they need not all point in the same direction, else they would be 'required.' "). As the Ninth

Circuit correctly recognized, *Metropolitan Life* asked first whether the law there in question "fit a common-sense understanding of insurance regulation," *Cisneros*, 134 F. 3d, at 945, and then looked to the McCarran-Ferguson factors as checking points or "guideposts, not separate essential elements . . . that must each be satisfied" to save the State's law, *id.*, at 946.

The first McCarran-Ferguson factor asks whether the rule at issue "has the effect of transferring or spreading a policyholder's risk." *Metropolitan Life*, 471 U. S., at 743 (internal quotation marks omitted). The Ninth Circuit determined that the notice-prejudice rule does not satisfy that criterion because it "does not alter the allocation of risk for which the parties initially contracted, namely the risk of lost income from long-term disability." *Cisneros*, 134 F. 3d, at 946. The United States as *amicus curiae*, however, suggests that the notice-prejudice rule might be found to satisfy the McCarran-Ferguson "risk-spreading" factor: "Insofar as the notice-prejudice rule shifts the risk of late notice and stale evidence from the insured to the insurance company in some instances, it has the effect of raising premiums and spreading risk among policyholders." Brief for United States as *Amicus Curiae* 14. We need not pursue this point, because the remaining McCarran-Ferguson factors, verifying the common-sense view, are securely satisfied.

Meeting the second factor, the notice-prejudice rule serves as "an integral part of the policy relationship between the insurer and the insured." *Metropolitan Life*, 471 U. S., at 743. California's rule changes the bargain between insurer and insured; it "effectively creates a mandatory contract term" that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision. *Cisneros*, 134 F. 3d, at 946. As the Ninth Circuit stated: "The [notice-prejudice] rule dictates the terms of the relationship be-

tween the insurer and the insured, and consequently, is integral to that relationship." *Ibid.*[5]

The third McCarran-Ferguson factor—which asks whether the rule is limited to entities within the insurance industry—is also well met. As earlier explained, see *supra*, at 368–373, California's notice-prejudice rule focuses on the insurance industry. The rule "does not merely have an impact on the insurance industry; it is aimed at it." *FMC Corp.* v. *Holliday*, 498 U. S. 52, 61 (1990).

III

UNUM and its *amici* assert that even if the notice-prejudice rule is saved under 29 U. S. C. § 1144(b)(2)(A), it is nonetheless preempted because it conflicts with substantive provisions of ERISA in three ways. UNUM first contends that the notice-prejudice rule, by altering the notice provisions of the insurance contract, conflicts with ERISA's requirement that plan fiduciaries act "in accordance with the documents and instruments governing the plan." § 1104(a)(1)(D). According to UNUM, § 1104(a)(1)(D) preempts any state law contrary to a written plan term. See Brief for Petitioner 32–33; Tr. of Oral Arg. 8.

UNUM's "contra plan term" argument overlooks controlling precedent and makes scant sense. We have repeatedly held that state laws mandating insurance contract terms are saved from preemption under § 1144(b)(2)(A). See *Metropolitan Life*, 471 U. S., at 758 ("Massachusetts' mandated-benefit law is a 'law which regulates insurance' and so is not pre-empted by ERISA as it applies to insurance contracts

[5] We reject UNUM's suggestion that because the notice-prejudice rule regulates only the administration of insurance policies, not their substantive terms, it cannot be an integral part of the policy relationship. See *Metropolitan Life*, 471 U. S., at 728, n. 2 (including laws regulating claims practices and requiring grace periods in catalog of state laws that regulate insurance).

purchased for plans subject to ERISA."); *FMC Corp.*, 498 U. S., at 64 ("[I]f a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts."). Under UNUM's interpretation of § 1104(a)(1)(D), however, States would be powerless to alter the terms of the insurance relationship in ERISA plans; insurers could displace any state regulation simply by inserting a contrary term in plan documents. This interpretation would virtually "rea[d] the saving clause out of ERISA." *Metropolitan Life*, 471 U. S., at 741.[6]

UNUM next contends that ERISA's civil enforcement provision, § 502(a), 29 U. S. C. § 1132(a), preempts any action for plan benefits brought under state rules such as notice-prejudice. Whatever the merits of UNUM's view of § 502(a)'s preemptive force,[7] the issue is not implicated here.

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[6] We recognize that applying the States' varying insurance regulations creates disuniformities for "national plans that enter into local markets to purchase insurance." *Metropolitan Life*, 471 U. S., at 747. As we have observed, however, "[s]uch disuniformities . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." *Ibid.*

[7] We discussed this issue in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41 (1987). That case concerned Mississippi common law creating a cause of action for bad-faith breach of contract, law not specifically directed to the insurance industry and therefore not saved from ERISA preemption. In that context, the Solicitor General, for the United States as *amicus curiae*, urged the exclusivity of § 502(a), ERISA's civil enforcement provision, and observed that § 502(a) was modeled on the exclusive remedy provided by § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185. The Court agreed with the Solicitor General's submission. 481 U. S., at 52–56.

In the instant case, the Solicitor General, for the United States as *amicus curiae*, has endeavored to qualify the argument advanced in *Pilot Life*. See Brief 20–25. Noting that "LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision," the Solicitor General now maintains that the discussion of § 502(a) in *Pilot Life* "does not in itself require that a state law that 'regulates insurance,' and so comes within the terms of the savings clause, is nevertheless preempted if it provides a state-law cause of action or remedy." Brief 25; see also *id.*, at 23 ("[T]he insurance savings clause, on its face,

Ward sued under § 502(a)(1)(B) "to recover benefits due . . . under the terms of his plan." The notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit. The case therefore does not raise the question whether § 502(a) provides the sole launching ground for an ERISA enforcement action.

Finally, we reject UNUM's suggestion that the notice-prejudice rule conflicts with § 503 of ERISA, 29 U. S. C. § 1133, which requires plans to provide notice and the opportunity for review of denied claims, or with Department of Labor regulations providing that "[a] claim is filed when the requirements of a reasonable claim filing procedure . . . have been met," 29 CFR § 2560.503–1(d) (1998). By allowing a longer period to file than the *minimum* filing terms mandated by federal law, the notice-prejudice rule complements rather than contradicts ERISA and the regulations. See Brief for United States as *Amicus Curiae* 19, n. 9.

IV

Ward successfully maintained in the Ninth Circuit that MAC had timely notice of his disability and that his notice to MAC could be found to have served as notice to UNUM on the theory that MAC, as administrator of the group policy, acted as UNUM's agent. The policy itself provides otherwise:

> "For all purposes of this policy, the policyholder [MAC] acts on its own behalf or as agent of the employee. Under no circumstances will the policyholder be deemed the agent of the Company [UNUM] without a written authorization." App. to Pet. for Cert. 44a.

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saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state mandated-benefits laws."). We need not address the Solicitor General's current argument, for Ward has sued under § 502(a)(1)(B) for benefits due, and seeks only the application of saved state insurance law as a relevant rule of decision in his § 502(a) action.

California law rendered that policy provision ineffective, the Ninth Circuit appeared to conclude, because under the rule stated in *Elfstrom* v. *New York Life Ins. Co.*, 67 Cal. 2d, at 512, 432 P. 2d, at 737, "the employer is the agent of the insurer in performing the duties of administering group insurance policies." Thus, the Ninth Circuit instructed that, on remand, if UNUM was found to have suffered actual prejudice on account of Ward's late notice of claim, the District Court should then determine whether the claim was timely under *Elfstrom*. 135 F. 3d, at 1289.

Ward does not argue in this Court that the *Elfstrom* rule, as comprehended by the Ninth Circuit, is a law that "regulates insurance." See Brief for Respondent 35 (the Ninth Circuit applied "general principles of agency law," not a rule determining when "employers who administer insured plans are agents of the insurer as a *matter of law*"). Indeed, it is difficult to tell from the Court of Appeals opinion precisely what rule or principle that court derived from *Elfstrom*. See Brief for Respondent 35 ("[T]he court below did not actually apply the *Elfstrom* rule in this case."); 135 F. 3d, at 1283, and n. 6 (endorsing the reasoning of *Paulson* v. *Western Life Ins. Co*, 292 Ore. 38, 636 P. 2d 935 (1981), an Oregon Supreme Court decision that purported to reconcile *Elfstrom* with an apparently conflicting body of case law). Whatever the contours of *Elfstrom* may be, the Ninth Circuit held that the state law emerging from that case does not "relat[e] to" an ERISA plan within the meaning of § 1144(a), and therefore escapes preemption. See 135 F. 3d, at 1287.

In this determination, the Ninth Circuit was mistaken. The Court of Appeals stated, without elaboration, that *Elfstrom* does not dictate "the manner in which the plan will be administered," and therefore is consistent with this Court's ERISA preemption precedent. *Ibid.;* see *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 657–658 (1995) (identifying among laws that "relat[e] to" employee benefit plans those that

"mandat[e] employee benefit structures or their administration"). The Ninth Circuit's statement is not firmly grounded.

As persuasively urged by the United States in its *amicus curiae* brief, deeming the policyholder-employer the agent of the insurer would have a marked effect on plan administration. It would "forc[e] the employer, as plan administrator, to assume a role, with attendant legal duties and consequences, that it has not undertaken voluntarily"; it would affect "not merely the plan's bookkeeping obligations regarding to whom benefits checks must be sent, but [would] also regulat[e] the basic services that a plan may or must provide to its participants and beneficiaries." Brief 27. Satisfied that the *Elfstrom* rule "relate[s] to" ERISA plans, we reject the Ninth Circuit's contrary determination.

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For the reasons stated, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES *v.* HAGGAR APPAREL CO.

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

No. 97–2044. Argued January 11, 1999—Decided April 21, 1999

Respondent sought a refund for customs duties imposed on garments it shipped to this country from an assembly plant it controlled in Mexico. If there were mere assembly in Mexico without other steps, the garments would have been eligible for a partial duty exemption under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), 19 U. S. C. § 1202, which applies to articles assembled abroad and not otherwise improved except by an "operatio[n] incidental to the assembly process." Respondent, however, also sought to permapress the garments in order to maintain their creases and avoid wrinkles. To accomplish this, respondent baked the chemically pretreated garments at the Mexican plant. Claiming the baking was an added process in addition to assembly, the Customs Service denied a duty exemption under 19 CFR § 10.16(c)(4), its regulation deeming all permapressing operations to be an additional step in manufacture, not part of or incidental to the assembly process. Respondent brought this suit in the Court of International Trade, which declined to treat the regulation as controlling and ruled in respondent's favor. The Court of Appeals for the Federal Circuit affirmed, declining to analyze the regulation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held:

1. The regulation in question is subject to *Chevron* analysis. Pp. 385–393.

(a) The statutes authorizing customs classification regulations are consistent with the usual rule that regulations of an administering agency warrant judicial deference; and nothing in the regulation in question persuades the Court that the agency intended the regulation to have some lesser force and effect. The statutory scheme does not support respondent's contention that the regulation is limited in application to customs officers themselves and is not intended to govern the adjudication of importers' refund suits in the Court of International Trade. The Customs Service (which is within the Treasury Department) is charged with fixing duties applicable to imported goods under regulations prescribed by the Secretary of the Treasury. See 19 U. S. C.

§ 1500(b). Respondent argues in vain that § 1502(a), which directs the Secretary to make classification rules for "the various ports of entry," authorizes regulations that have no bearing on the importer's rights, but simply ensure that customs officers around the country classify goods according to a similar and consistent scheme. Like other regulations which help to define the legal relations between the Government and regulated entities, customs regulations were authorized by Congress at least in part to clarify the rights and obligations of importers. This conclusion is not altered by the circumstance that the United States Trade Representative and the International Trade Commission have certain responsibilities for recommending and proclaiming changes in the HTSUS. These powers pertain to changing or amending the tariff schedules themselves; the Treasury Department and the Customs Service are charged with administering the adopted schedules applicable on the date of importation. Language respondent cites in 19 CFR § 10.11(a) does not suffice to displace the usual *Chevron* deference. Particularly in light of the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations, the argument that they were not intended to be entitled to judicial deference implies a sufficient departure from conventional contemporary administrative practice that this Court ought not to adopt it absent a different statutory structure and more express language to this effect in the regulations themselves. Pp. 385–390.

(b) The Court also rejects respondent's argument that even if the Treasury Department did intend the regulation to bear on the determination of refund suits, 28 U. S. C. §§ 2643, 2640(a), and 2638 empower the Court of International Trade to interpret the tariff statute without giving *Chevron* deference to regulations issued by the administering agency. A central theme in respondent's argument is that such deference is not owed because the trial court proceedings may be, as they were below, *de novo*. The conclusion does not follow from the premise. *De novo* proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the court's authority to make factual determinations, and to apply those determinations to the law, *de novo*. Under *Chevron*, if the agency's statutory interpretation clarifies an ambiguity in a way that is reasonable in light of the legislature's revealed design, the Court gives that judgment controlling weight. *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 257. Although the statute under which respondent claims an exemption gives direction not only by stating a general policy (to grant the partial exemption where only assembly and incidental opera-

tions were abroad) but also by determining some specifics of the policy (finding that painting, for example, is incidental to assembly), the statute is ambiguous nonetheless in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms. Finally, contrary to respondent's contention, the historical practice in customs cases is not so uniform and clear as to convince the Court that judicial deference would thwart congressional intent. See, *e. g., United States* v. *Vowell*, 5 Cranch 368. Pp. 390–393.

2. If the regulation in question is a reasonable interpretation and implementation of an ambiguous statutory provision, it must be given judicial deference. Pp. 394–395.

(a) The customs regulations may not be disregarded. Application of the *Chevron* framework is the beginning of the legal analysis, and the Court of International Trade must, when appropriate, give regulations *Chevron* deference. Cf. *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U. S. 382, 389. That court's expertise guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present. P. 394.

(b) This Court declines to reach the question whether 19 CFR § 10.16(c) meets the preconditions for *Chevron* deference as a reasonable interpretation of the statutory phrase "operations incidental to the assembly process." Because the Federal Circuit determined the *Chevron* framework was not applicable, it did not go on to consider whether the regulation ultimately warrants deference under that framework. Respondent's various arguments turning on the details and facts of its manufacturing process are best addressed in the first instance to the courts below. Pp. 394–395.

127 F. 3d 1460, vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post*, p. 395.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *William Kanter*, and *Bruce G. Forrest.*

Carter G. Phillips argued the cause for respondent. With him on the briefs were *Mark E. Haddad*, *Ronald W. Gerdes*, *Gilbert Lee Sandler*, *Edward M. Joffe*, and *Marc W. Joseph.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case concerns regulations relating to the customs classification of certain imported goods. The regulations were issued by the United States Customs Service with approval of the Secretary of the Treasury. The question is whether these regulations, deemed controlling by the Treasury, are entitled to judicial deference in a refund suit brought in the Court of International Trade. Contrary to the position of that court and the Court of Appeals for the Federal Circuit, we hold the regulation in question is subject to the analysis required by *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and that if it is a reasonable interpretation and implementation of an ambiguous statutory provision, it must be given judicial deference.

I

Respondent Haggar Apparel Co. designs, manufactures, and markets apparel for men. This matter arises from a refund proceeding for duties imposed on men's trousers shipped by respondent to this country from an assembly plant it controlled in Mexico. The fabric had been cut in the United States and then shipped to Mexico, along with the thread, buttons, and zippers necessary to complete the garments. App. 37–38. There the trousers were sewn and reshipped to the United States. If that had been the full extent of it, there would be no dispute, for if there were

*Briefs of *amici curiae* urging affirmance were filed for Anhydrides & Chemicals, Inc., et al. by *Richard C. King;* and for the Customs and International Trade Bar Association by *Terence P. Stewart*, *Bernard J. Babb*, *Munford Paige Hall II*, *Rufus E. Jarman, Jr.*, *William D. Outman II*, *Christopher E. Pey*, *Melvin Schwechter*, *David Serko*, *Sidney N. Weiss*, and *Sandra Liss Friedman.*

mere assembly without other steps, all agree the imported garments would have been eligible for the duty exemption which respondent claims.

Respondent, however, in the Government's view, added one other step at the Mexican plant: permapressing. Permapressing is designed to maintain a garment's crease in the desired place and to avoid other creases or wrinkles that detract from its proper appearance. There are various methods and sequences by which permapressing can be accomplished, and one of respondent's contentions is that the Treasury's categorical approach fails to take these differences into account.

For the permapressed garments in question here, respondent purchased fabric in the United States that had been treated with a chemical resin. *Id.*, at 37. After the treated fabric had been cut in the United States, shipped to Mexico, and sewn and given a regular pressing there, respondent baked the garments in an oven at the Mexican facility before tagging and shipping them to the United States. The baking operation took some 12 to 15 minutes. *Id.*, at 38. With the right heat, the preapplied chemical was activated and the permapress quality was imparted to the garment. If it had delayed baking until the articles returned to the United States, respondent would have had to take extra, otherwise unnecessary steps in the United States before shipping the garments to retailers. *Id.*, at 127–128; App. to Pet. for Cert. 20a–21a. In addition, respondent maintained below, there would have been a risk that during shipping unwanted creases and wrinkles might have developed in the otherwise finished garments. *Ibid.*

The Customs Service claimed the baking was an added process in addition to assembly, and denied a duty exemption; respondent claimed the baking was simply part of the assembly process, or, in the words of the controlling statute, an "operatio[n] incidental to the assembly process." Subheading 9802.00.80, Harmonized Tariff Schedule of the

United States (HTSUS), 19 U. S. C. § 1202; Item 807.00, Tariff Schedule of the United States (TSUS), 19 U. S. C. § 1202 (1982 ed.). Respondent's case was made more difficult by a regulation, to be discussed further, that deems all permapressing operations to be an additional step in manufacture, not part of or incidental to the assembly process. See 19 CFR § 10.16(c) (1998). The issue before us is the force and effect of the regulation in subsequent judicial proceedings.

After being denied the exemption it sought for the permapressed articles, respondent brought suit for refund in the Court of International Trade. The court declined to treat the regulation as controlling. 938 F. Supp. 868, 874–875 (1996). In making its determination, the court relied on a detailed analysis stemming from *United States* v. *Mast Industries, Inc.*, 668 F. 2d 501 (CCPA 1981), a leading precedent on this duty exemption from the predecessor to the Court of Appeals for the Federal Circuit. *Mast Industries*, in fact, involved garment fabrication and assembly, though the Court of International Trade drew also on cases involving other assembly operations. *E. g.*, 938 F. Supp., at 872 (citing *General Motors Corp.* v. *United States*, 976 F. 2d 716 (CA Fed. 1992) (painting of sheet metal component parts used in motor vehicles)). The court ruled in favor of respondent. 938 F. Supp., at 875. On review, the Court of Appeals for the Federal Circuit declined to analyze the regulation under *Chevron*, and affirmed. 127 F. 3d 1460, 1462 (1997). We granted certiorari, 524 U. S. 981 (1998), and we now vacate the judgment of the Court of Appeals and remand the case for further proceedings.

II

The statute on which respondent relies provides importers a partial exemption from duties otherwise imposed. The exemption extends to:

> "Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States,

> which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80, HTSUS, 19 U. S. C. § 1202.

(The HTSUS became law on January 1, 1989, replacing the provisions of the former TSUS. See 19 U. S. C. § 3004. Item 807.00 of the TSUS, the previous statute which governs some of the shipments at issue in this case, is identical to HTSUS Subheading 9802.00.80.)

The relevant regulation interpreting the statute with respect to permapressed articles provides as follows:

> "Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly . . . :
>
> . . . . . .
>
> "(4) Chemical treatment of components or assembled articles to impart new characteristics, such as shower-proofing, permapressing, sanforizing, dying or bleaching of textiles." 19 CFR § 10.16(c) (1998).

The regulation was adopted in 1975 by the Commissioner of Customs upon approval by the Treasury Department, after notice-and-comment rulemaking. See 39 Fed. Reg. 24651 (1974) (proposed regulation); 40 Fed. Reg. 43021 (1975) (final regulation).

In contending that the regulation is not within the general purview of the *Chevron* framework, respondent advances two sets of arguments. First, citing the terms of the regula-

tion and its enabling statutes, respondent contends the regulation is limited in application to customs officers themselves and is not intended to govern the adjudication of importers' refund suits in the Court of International Trade. Second, in reliance on the authority and jurisdiction of the Court of International Trade, respondent argues that even if the Treasury Department did intend the regulation to bear on the determination of refund suits, the Court of International Trade is empowered to interpret the tariff statute without giving the usual deference to regulations issued by the administering agency.

As to the first set of arguments, respondent says the regulation binds Customs Service employees when they classify imported merchandise under the tariff schedules but does not bind the importers themselves. The statutory scheme does not support this limited view of the force and effect of the regulation. The Customs Service (which is within the Treasury Department) is charged with the classification of imported goods under the proper provision of the tariff schedules in the first instance. There is specific statutory direction to this effect: "The Customs Service shall, under rules and regulations prescribed by the Secretary [of the Treasury,] . . . fix the final classification and rate of duty applicable to" imported goods. 19 U. S. C. § 1500(b). In addition, the Secretary is directed by statute to "establish and promulgate such rules and regulations not inconsistent with the law . . . as may be necessary to secure a just, impartial and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry." § 1502(a). See also General Headnote 11, TSUS, 19 U. S. C. § 1202 (1982 ed.) (authorizing the Secretary "to issue rules and regulations governing the admission of articles under the provisions" of the tariff schedules); General Note 20, HTSUS, 19 U. S. C. § 1202 (same). The Secretary, in turn, has delegated to the Commissioner of Customs the authority to issue generally applicable regulations, sub-

ject to the Secretary's approval. Treasury Dept. Order No. 165, T. D. 53160 (Dec. 15, 1952).

Respondent relies on the specific direction to the Secretary to make rules of classification for "the various ports of entry" to argue that the statute authorizes promulgation of regulations that do nothing more than ensure that customs officers in field offices around the country classify goods according to a similar and consistent scheme. The regulations issued under the statute have no bearing, says respondent, on the rights of the importer. We disagree. The phrase in question is explained by the simple fact that classification decisions must be made at the port where goods enter. We shall not assume Congress was concerned only to ensure that customs officials at the various ports of entry make uniform decisions but that it had no concern for uniformity once the goods entered the country and judicial proceedings commenced. The tariffs do not mean one thing for customs officers and another for importers. It is of course possible, even common, for agencies to give instructions or legal opinions to their officers and employees in one form or another, without intending to bind the public. Cf. *Crandon* v. *United States*, 494 U. S. 152, 177 (1990) (SCALIA, J., concurring in judgment). The statutory authorization for the regulations in this case, we conclude, was not limited in this way. Like other regulations which help to define the legal relations between the Government and regulated entities, customs regulations were authorized by Congress at least in part to clarify the rights and obligations of importers.

Our conclusion is not altered by the circumstance that the United States Trade Representative (USTR), by delegation from the President, and the International Trade Commission (ITC) have certain responsibilities for recommending and proclaiming changes in the HTSUS. See 19 U. S. C. §§ 3004(c), 3005, 3006; 3 CFR 443 (1992). These powers pertain to changing or amending the tariff schedules themselves; the Treasury Department and the Customs Service

are charged with administering the adopted schedules applicable on the date of importation. This also is the position of the Government, for it acknowledged at oral argument that it is for the Treasury Department and the Customs Service, not for the USTR or ITC, to issue regulations entitled to judicial deference in the interpretation of the tariff schedules. Tr. of Oral Arg. 14.

Respondent further cites a portion of the regulation and argues that the Customs Service itself views its regulatory authority as limited to controlling its own agents' classification decisions, without affecting the course of later proceedings. It cites subsection (a) of 19 CFR § 10.11 (1998), which introduces § 10.16 and the other classification regulations adopted at the same time. Section 10.11(a) provides that "[t]he definitions and regulations that follow are promulgated to inform the public of the constructions and interpretations that the United States Customs Service shall give to relevant statutory terms and to assure the impartial and uniform assessment of duties upon merchandise claimed to be partially exempt from duty . . . at the various ports of entry." It further provides that "[n]othing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein." *Ibid.*

This language, in our view, does not suffice to displace the usual rule of *Chevron* deference. Subsections (a) and (b) of § 10.11 together serve to introduce the two kinds of regulations which follow. Section 10.11(b) advises that a refund claimant must comply with both the substantive terms of the statute and with certain "documentary requirements" set forth in § 10.24. If the importer fails to comply with the documentary requirements, it is foreclosed from judicial review of the classification decision. § 10.11(b). In contrast, subsection (a) recites that nothing in the substantive classification regulations "purports or is intended to restrict the legal right . . . to a judicial review of the matters contained

therein." Assuming an importer complies with the documentary requirements of § 10.24, the disclaimer in § 10.11(a) is applicable, and the importer is entitled to bring a refund suit challenging Customs' decision in federal court.

Apart from underscoring this distinction between substantive rules and documentary requirements, the quoted language from § 10.11(a) may be thought surplusage in that it merely confirms the existence of judicial review. Even if the language is thought to be unnecessary, however, we do not view it as a tacit instruction for courts to disregard the substantive regulations. Particularly in light of the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations, the argument that they were not intended to be entitled to judicial deference implies a sufficient departure from conventional contemporary administrative practice that we ought not to adopt it absent a different statutory structure and more express language to this effect in the regulations themselves.

III

For the reasons we have given, the statutes authorizing customs classification regulations are consistent with the usual rule that regulations of an administering agency warrant judicial deference; and nothing in the regulation itself persuades us that the agency intended the regulation to have some lesser force and effect. We turn to respondent's second major contention, that the statutes governing the reviewing authority of the Court of International Trade in classification cases displace this customary framework.

In support of the argument that *Chevron* rules are inapplicable, both respondent and the Court of Appeals rely on 28 U. S. C. § 2643. It provides:

> "If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such

> further administrative or adjudicative procedures as the court considers necessary to reach the correct decision."

The authority of the Court of International Trade to order additional proceedings to reach the correct decision, as well as its duty to "make its determinations upon the basis of the record made before the court," § 2640(a), and its authority to consider new grounds not advanced to the agency, § 2638, are said to be inconsistent with deference to an agency's regulation.

A central theme in respondent's argument is that the trial court proceedings may be, as they were in this case, *de novo*, and hence the court owes no deference to the regulation under *Chevron* principles. Brief for Respondent 16–28. The conclusion does not follow from the premise. Valid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents. Though Congress might have chosen to direct the court not to pay deference to the agency's views, we do not find that directive in these statutes. Cf. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 515–516 (suggesting that "[i]f . . . Congress had specified that in all suits involving interpretation or application of [a statute] the courts were to give no deference to the agency's views, but were to determine the issue de novo," *Chevron* deference would be inappropriate). *De novo* proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*.

The Court of Appeals held in this case, and in previous cases presenting the issue, that these regulations were not entitled to deference because the Court of International Trade is charged to "'reach the correct decision'" in deter-

mining the proper classification of goods. 127 F. 3d, at 1462; see also *Rollerblade, Inc.* v. *United States*, 112 F. 3d 481, 483 (CA Fed. 1997); *Universal Elecs. Inc.* v. *United States*, 112 F. 3d 488, 491–493 (CA Fed. 1997). The whole point of regulations such as these, however, is to ensure that the statute is applied in a consistent and proper manner. Deference to an agency's expertise in construing a statutory command is not inconsistent with reaching a correct decision.

The analysis of a regulation's application in any particular case, of course, may disclose an imprecise or imperfect implementation of the statute. "One can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority." *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 714 (1995) (O'CONNOR, J., concurring). In the process of considering a regulation in relation to specific factual situations, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it. In those instances, the regulation will not control. Under *Chevron*, if a court determines that "Congress has directly spoken to the precise question at issue," then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U. S., at 842–843. If, however, the agency's statutory interpretation "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment 'controlling weight.'" *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 257 (1995) (quoting *Chevron*, *supra*, at 844).

A statute may be ambiguous, for purposes of *Chevron* analysis, without being inartful or deficient. The present case exemplifies the familiar proposition that Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect. Here Congress has authorized the agency to issue rules so that the tariff statutes may be applied to unforeseen situations and

changing circumstances in a manner consistent with Congress' general intent. The statute under which respondent claims an exemption gives direction not only by stating a general policy (to grant the partial exemption where only assembly and incidental operations were abroad) but also by determining some specifics of the policy (finding that painting, for example, is incidental to assembly). For purposes of the *Chevron* analysis, the statute is ambiguous nonetheless, ambiguous in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms. Those specifics are instructive to the agency as to the general congressional purpose, and the agency's rules as to instances not covered by the statute should be parallel, to the extent possible, with the specific cases Congress did address.

Finally, respondent and a supporting *amicus* contend *Chevron* deference is inconsistent with the historical practice in customs cases. Brief for Respondent 1–6; Brief for Customs and International Trade Bar Association as *Amicus Curiae* 6–11. This history, suffice it to say, is not so uniform and clear as to convince us that judicial deference would thwart congressional intent. As early as 1809, Chief Justice Marshall noted in a customs case that "[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions." *United States* v. *Vowell*, 5 Cranch 368, 372. See also P. Reed, The Role of Federal Courts in U. S. Customs & International Trade Law 289 (1997) ("Consistent with the *Chevron* methodology, and as has long been the rule in customs cases, customs regulations are sustained if they represent reasonable interpretations of the statute"); cf. *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978) (deferring to the Treasury Department's "longstanding and consistent administrative interpretation" of the countervailing duty provision of the Tariff Act).

IV

A

The customs regulations may not be disregarded. Application of the *Chevron* framework is the beginning of the legal analysis. Like other courts, the Court of International Trade must, when appropriate, give regulations *Chevron* deference. Cf. *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U. S. 382, 389 (1998) (when a term in the Internal Revenue Code is ambiguous, "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one"). The expertise of the Court of International Trade, somewhat like the expertise of the Tax Court, guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present.

B

In addition to the applicability of the *Chevron* framework in general, we also granted certiorari on a second question, asking whether 19 CFR § 10.16(c) (1998) met the preconditions for *Chevron* deference as a reasonable interpretation of the statutory phrase "operations incidental to the assembly process," Subheading 9802.00.80, HTSUS, 19 U. S. C. § 1202, and Item 807.00, TSUS, 19 U. S. C. § 1202 (1982 ed.). Because the Court of Appeals determined the *Chevron* framework was not applicable, it did not go on to consider whether the regulation ultimately warrants deference under that framework.

Respondent has made various arguments turning on the details and facts of its manufacturing process, including substantial arguments challenging the regulation's interpretation of the statutory language as well as the application of the regulation to the particular process and goods at issue

here. For instance, the Customs Service granted the exemption for trousers made from a pure synthetic fabric, which were apparently pressed in the Mexico facility. App. 33, 37; Brief for Respondent 47. Yet it denied the exemption when ovenbaking was used for 12 to 15 minutes after some pressing, notwithstanding the fact that the permapress characteristics could have been achieved on the trousers involved here by pressing them for an additional period of time in lieu of ovenbaking. Tr. 79–87. Moreover, though the regulation refers to the "[c]hemical treatment of components, . . . such as . . . permapressing," 19 CFR § 10.16(c)(4) (1998), it is undisputed that the chemical resin was applied to the trousers in the United States. App. 37.

It will be open to respondent on remand to argue that the baking of the garments in quantity is, from the standpoint of the statute or the regulation itself, no less incidental to the assembly process which the statute permits, or no more within the regulation's reference to permapressing, than is a pressing-only operation. We conclude that these and similar arguments, which raise the difficult question of how the regulation at issue fares under the *Chevron* framework, are best addressed in the first instance to the Court of Appeals for the Federal Circuit or to the Court of International Trade. Declining to reach the second question on which certiorari was granted, we remand the case to the Court of Appeals.

The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Like the statutory provision it explicates, the Customs Service regulation at issue begins with a generally applicable standard for a duty exemption, and concludes with relatively specific examples that indicate how that standard should be interpreted. See Subheading 9802.00.80, Harmo-

nized Tariff Schedule of the United States, 19 U. S. C. § 1202 (listing operations taking place abroad that meet the standard); Item 807.00, Tariff Schedule of the United States, 19 U. S. C. § 1202 (1982 ed.) (same); 19 CFR § 10.16(c) (1998) (listing such operations that do not meet the standard). Surely the agency's effort to enumerate "significant" and common operations not to be considered incidental to the assembly process was both permissible and sensible. Nothing in the statute or its history convinces me otherwise; in my opinion, the regulation is clearly valid.

Respondent's strongest challenge to the judgment of the Customs Service is that the Service has misinterpreted and misapplied one of its excluded examples: "Chemical treatment . . . to impart new characteristics, such as . . . permapressing." 19 CFR § 10.16(c)(4) (1998). With respect to the entries denied a duty exemption in this case, the fabric was resin treated in the United States at the textile mill, but pressed and ovenbaked in Mexico after assembly. Yet the Service apparently granted a duty exemption for trousers respondent assembled from synthetic fabric; these trousers did not require ovenbaking or resin treatment, but they were pressed in Mexico after assembly. See App. to Pet. for Cert. 8a–9a, 15a–16a; App. 33–34, 37–38. Respondent contends that the Service cannot treat pressing-plus-ovenbaking, but not pressing alone, as a species of chemical treatment that is not incidental to the assembly process.

There is a rather obvious answer to this contention. One can certainly discern a meaningful difference between merely pressing a synthetic fabric, on the one hand, and using ovenbaking (or perhaps extended pressing) to treat a fabric to which another substance has been added. Based on that difference, the Service could logically conclude, in accord with its understanding of its own regulation, that only the latter is a form of "chemical treatment" excluded from a duty exemption. Indeed, distinguishing these two operations in this fashion is the product of the kind of line-drawing

decisions that must be made by agencies to which Congress has delegated the job of administering legislation that contains ambiguous terms. When lines must be drawn to determine whether a particular facility is a "stationary source" of air pollution, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), or whether an operation performed abroad was "incidental to the assembly process," there will always be cases on opposite sides of the line that are almost identical. That consequence, however, does not necessarily compromise the integrity of the line that the agency has drawn or the manner in which the rule was applied.

In my view, the regulation before us is a reasonable elaboration of the statute, and the Customs Service's denial of a duty allowance in this case was consistent with its regulation and well within the scope of its congressionally delegated authority. If we had not granted certiorari to decide the reasonableness of the regulation, I would agree with the Court's disposition of the case. See *Kumho Tire Co.* v. *Carmichael*, 526 U. S. 137, 159 (1999) (STEVENS, J., concurring in part and dissenting in part). But since we did direct the parties to enlighten us on these issues, and since I think the answer is clear, I would simply reverse the judgment of the Court of Appeals. I do, however, join Parts I, II, and III of the Court's well-reasoned opinion.

Syllabus

UNITED STATES *v.* SUN-DIAMOND GROWERS OF CALIFORNIA

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

No. 98–131. Argued March 2, 1999—Decided April 27, 1999

Respondent trade association was charged with violating, *inter alia*, 18 U. S. C. § 201(c)(1)(A), which prohibits giving "anything of value" to a present, past, or future public official "for or because of any official act performed or to be performed by such public official." Count One of the indictment asserted that respondent gave illegal gratuities to former Secretary of Agriculture Michael Espy while two matters in which it had an interest in favorable treatment were pending before Espy. The indictment did not, however, allege a specific connection between either of those matters (or any other Espy action) and the gratuities conferred. In denying respondent's motion to dismiss Count One because of this omission, the District Court stated that, to sustain a § 201(c)(1)(A) charge, it is sufficient to allege that the defendant provided things of value to the official because of his position. At trial, the court instructed the jury along these same lines. The jury convicted respondent on Count One, and the court imposed a fine. The Court of Appeals reversed that conviction and remanded for a new trial, stating that, because § 201(c)(1)(A)'s "for or because of any official act" language means what it says, the instructions invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position. In rejecting respondent's attack on the indictment, however, the court stated that the Government need not show that a gratuity was given "for or because of" any particular act or acts: That an official has relevant matters before him should not insulate him as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely.

Held:

1. In order to establish a § 201(c)(1)(A) violation, the Government must prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given. The Government's contention that § 201(c)(1)(A) is satisfied merely by a showing that respondent gave Secretary Espy a gratuity because of his official position does not fit comfortably with the statutory text, the more natural meaning of which is "for or because of some particular

official act of whatever identity." The statute's insistence upon an "official act," carefully defined (in § 201(a)(3)), seems pregnant with the requirement that some particular official act be identified and proved. The Government's alternative reading would produce peculiar results, criminalizing, *e. g.*, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits. Although, under the more narrow interpretation, the jerseys could be regarded as having been conferred (perhaps principally) "for or because of" the official act of receiving sports teams at the White House, such receipt—while assuredly an "official act" in some sense—is not an "action on [a] matter . . . before any public official, in [his] official capacity, or in [his] place of trust or profit" within the meaning of the § 201(a)(3) definition. The Government's insistence that its interpretation is the only one that gives effect to § 201(c)(1)(A)'s forward-looking prohibition on gratuities to selectees for federal office is rejected because the section can readily be applied to such persons even under the more narrow interpretation. Pp. 404–408.

2. The Court's holding is supported by the fact that when Congress has wanted to adopt a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion. See, *e. g.*, § 209(a). Finally, a narrow, rather than a sweeping, prohibition is more compatible with the fact that § 201(c)(1)(A) is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials. Because this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions, a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Pp. 408–412.

3. The Court rejects the Government's contention that the District Court's mistaken instructions concerning § 201(c)(1)(A)'s scope—which essentially and incorrectly substituted the term "official position" for "official act"—constituted harmless error. The Government's argument that the jury's verdict rendered pursuant to the instructions necessarily included a finding that respondent's gratuities were given and received "for or because of" official acts is but a restatement of the same flawed premise that permeated the instructions themselves and that the Court has herein rejected. Pp. 412–414.

138 F. 3d 961, affirmed.

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

Robert W. Ray argued the cause for the United States. With him on the briefs were *Donald C. Smaltz*, *Charles M. Kagay*, and *Stephen R. McAllister*.

Eric W. Bloom argued the cause for respondent. With him on the brief were *Richard A. Hibey* and *Charles B. Klein*.*

JUSTICE SCALIA delivered the opinion of the Court.

Talmudic sages believed that judges who accepted bribes would be punished by eventually losing all knowledge of the divine law. The Federal Government, dealing with many public officials who are not judges, and with at least some judges for whom this sanction holds no terror, has constructed a framework of human laws and regulations defining various sorts of impermissible gifts, and punishing those who give or receive them with administrative sanctions, fines, and incarceration. One element of that framework is 18 U. S. C. § 201(c)(1)(A), the "illegal gratuity statute," which prohibits giving "anything of value" to a present, past, or future public official "for or because of any official act performed or to be performed by such public official." In this case, we consider whether conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position.

I

Respondent is a trade association that engaged in marketing and lobbying activities on behalf of its member cooperatives, which were owned by approximately 5,000 individual

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*Briefs of *amici curiae* urging affirmance were filed for the American League of Lobbyists by *Samuel J. Buffone* and *Thomas M. Susman;* and for the National Association of Criminal Defense Lawyers by *Carter G. Phillips*, *Thomas C. Green*, *Mark D. Hopson*, and *Lisa B. Kemler*.

Solicitor General Waxman, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Malcolm L. Stewart* filed a brief for the United States Department of Justice as *amicus curiae*.

growers of raisins, figs, walnuts, prunes, and hazelnuts. Petitioner United States is represented by Independent Counsel Donald Smaltz, who, as a consequence of his investigation of former Secretary of Agriculture Michael Espy, charged respondent with, *inter alia*, making illegal gifts to Espy in violation of § 201(c)(1)(A). That statute provides, in relevant part, that anyone who

> "otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both."

Count One of the indictment charged Sun-Diamond with giving Espy approximately $5,900 in illegal gratuities: tickets to the 1993 U. S. Open Tennis Tournament (worth $2,295), luggage ($2,427), meals ($665), and a framed print and crystal bowl ($524). The indictment alluded to two matters in which respondent had an interest in favorable treatment from the Secretary at the time it bestowed the gratuities. First, respondent's member cooperatives participated in the Market Promotion Plan (MPP), a grant program administered by the Department of Agriculture to promote the sale of U. S. farm commodities in foreign countries. The cooperatives belonged to trade organizations, such as the California Prune Board and the Raisin Administrative Committee, which submitted overseas marketing plans for their respective commodities. If their plans were approved by the Secretary of Agriculture, the trade organizations received funds to be used in defraying the foreign marketing expenses of their constituents. Each of respondent's member cooperatives was the largest mem-

ber of its respective trade organization, and each received significant MPP funding. Respondent was understandably concerned, then, when Congress in 1993 instructed the Secretary to promulgate regulations giving small-sized entities preference in obtaining MPP funds. Omnibus Budget Reconciliation Act of 1993, Pub. L. 103–66, § 1302(b)(2)(A), 107 Stat. 330–331. If the Secretary did not deem respondent's member cooperatives to be small-sized entities, there was a good chance they would no longer receive MPP grants. Thus, respondent had an interest in persuading the Secretary to adopt a regulatory definition of "small-sized entity" that would include its member cooperatives.

Second, respondent had an interest in the Federal Government's regulation of methyl bromide, a low-cost pesticide used by many individual growers in respondent's member cooperatives. In 1992, the Environmental Protection Agency announced plans to promulgate a rule to phase out the use of methyl bromide in the United States. The indictment alleged that respondent sought the Department of Agriculture's assistance in persuading the EPA to abandon its proposed rule altogether, or at least to mitigate its impact. In the latter event, respondent wanted the Department to fund research efforts to develop reliable alternatives to methyl bromide.

Although describing these two matters before the Secretary in which respondent had an interest, the indictment did not allege a specific connection between either of them—or between any other action of the Secretary—and the gratuities conferred. The District Court denied respondent's motion to dismiss Count One because of this omission. 941 F. Supp. 1262 (DC 1996). The court stated:

> "[T]o sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the

> indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position." *Id.*, at 1265.

At trial, the District Court instructed the jury along these same lines. It read § 201(c)(1)(A) to the jury twice (along with the definition of "official act" from § 201(a)(3)), but then placed an expansive gloss on that statutory language, saying, among other things, that "[i]t is sufficient if Sun-Diamond provided Espy with unauthorized compensation simply because he held public office," and that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all." App. to Pet. for Cert. 85a, 87a. The jury convicted respondent on, *inter alia*, Count One (the only subject of this appeal), and the District Court sentenced respondent on this count to pay a fine of $400,000.*

The Court of Appeals reversed the conviction on Count One and remanded for a new trial, stating:

> "Given that the 'for or because of any official act' language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position." 138 F. 3d 961, 968 (CADC 1998).

In rejecting respondent's attack on the indictment, however, the court stated that the Government need not show that a gratuity was given "for or because of" any particular act or acts: "That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is re-

*Respondent was also sentenced to serve five years' probation on this and the other counts of which it stood convicted. Insofar as that element of the sentence was concerned, the Court of Appeals remanded for resentencing because the probation included impermissible reporting requirements. 138 F. 3d 961, 977 (CADC 1998). That issue is not before us.

quired to find the requisite intent to reward past favorable acts or to make future ones more likely." *Id.*, at 969.

We granted certiorari. 525 U. S. 961 (1998).

II

Initially, it will be helpful to place § 201(c)(1)(A) within the context of the statutory scheme. Subsection (a) of § 201 sets forth definitions applicable to the section—including a definition of "official act," § 201(a)(3). Subsections (b) and (c) then set forth, respectively, two separate crimes—or two pairs of crimes, if one counts the giving and receiving of unlawful gifts as separate crimes—with two different sets of elements and authorized punishments. The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia*, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official."

The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official

act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness: Bribery may be punished by up to 15 years' imprisonment, a fine of $250,000 ($500,000 for organizations) or triple the value of the bribe, whichever is greater, and disqualification from holding government office. See 18 U. S. C. §§ 201(b) and 3571. Violation of the illegal gratuity statute, on the other hand, may be punished by up to two years' imprisonment and a fine of $250,000 ($500,000 for organizations). See §§ 201(c) and 3571.

The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*. The point in controversy here is that the instructions went on to suggest that § 201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act. It would be satisfied, according to the instructions, merely by a showing that respondent gave Secretary Espy a gratuity because of his official position—perhaps, for example, to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future. The United States, represented by the Independent Counsel, and the Solicitor General as *amicus curiae*, contend that this instruction was correct. The Independent Counsel asserts that "section 201(c)(1)(A) reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be *in a position to act* favorably to the giver's interests." Brief for United States 22 (emphasis added). The Solicitor General contends that § 201(c)(1)(A) requires only a showing that a "gift was motivated, at least in part, by the recipient's *capacity to exercise governmental power or influence* in the donor's favor" with-

out necessarily showing that it was connected to a particular official act. Brief for United States Dept. of Justice as *Amicus Curiae* 17 (emphasis added).

In our view, this interpretation does not fit comfortably with the statutory text, which prohibits only gratuities given or received "for or because of *any official act* performed or to be performed" (emphasis added). It seems to us that this means "for or because of some particular official act of whatever identity"—just as the question "Do you like any composer?" normally means "Do you like some particular composer?" It is linguistically possible, of course, for the phrase to mean "for or because of official acts in general, without specification as to which one"—just as the question "Do you like any composer?" could mean "Do you like all composers, no matter what their names or music?" But the former seems to us the more natural meaning, especially given the complex structure of the provision before us here. Why go through the trouble of requiring that the gift be made "for or because of any official act performed or to be performed by such public official," and then defining "official act" (in § 201(a)(3)) to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity," when, if the Government's interpretation were correct, it would have sufficed to say "for or because of such official's ability to favor the donor in executing the functions of his office"? The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.

Besides thinking that this is the more natural meaning of § 201(c)(1)(A), we are inclined to believe it correct because of the peculiar results that the Government's alternative reading would produce. It would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica

jerseys given by championship sports teams each year during ceremonial White House visits, see, *e. g.*, Gibson, Masters of the Game, Lexington Herald-Leader, Nov. 10, 1998, p. A1. Similarly, it would criminalize a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school. That these examples are not fanciful is demonstrated by the fact that counsel for the United States maintained at oral argument that a group of farmers would violate § 201(c)(1)(A) by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers. Tr. of Oral Arg. 26–27. Of course the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools.

It might be said in reply to this that the more narrow interpretation of the statute can also produce some peculiar results. In fact, in the above-given examples, the gifts could easily be regarded as having been conferred, not only because of the official's position as President or Secretary, but also (and perhaps principally) "for or because of" the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy, respectively. The answer to this objection is that those actions—while they are assuredly "official acts" in some sense—are not "official acts" within the meaning of the statute, which, as we have noted, defines "official act" to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U. S. C. § 201(a)(3).

Thus, when the violation is linked to a particular "official act," it is possible to eliminate the absurdities *through the definition of that term.* When, however, no particular "official act" need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.

The Government insists that its interpretation is the only one that gives effect to all of the statutory language. Specifically, it claims that the "official position" construction is the only way to give effect to § 201(c)(1)(A)'s forward-looking prohibition on gratuities to persons who have been selected to be public officials but have not yet taken office. Because, it contends, such individuals would not know of specific matters that would come before them, the only way to give this provision effect is to interpret "official act" to mean "official position." But we have no trouble envisioning the application of § 201(c)(1)(A) to a selectee for federal office under the more narrow interpretation. If, for instance, a large computer company that has planned to merge with another large computer company makes a gift to a person who has been chosen to be Assistant Attorney General for the Antitrust Division of the Department of Justice and who has publicly indicated his approval of the merger, it would be quite possible for a jury to find that the gift was made "for or because of" the person's anticipated decision, once he is in office, not to challenge the merger. The uncertainty of future action seems to us, in principle, no more an impediment to prosecution of a selectee with respect to some future official act than it is to prosecution of an officeholder with respect to some future official act.

Our refusal to read § 201(c)(1)(A) as a prohibition of gifts given by reason of the donee's office is supported by the fact that when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion. For

example, another provision of Chapter 11 of Title 18, the chapter entitled "Bribery, Graft, and Conflicts of Interest," criminalizes the giving or receiving of any "supplementation" of an Executive official's salary, without regard to the purpose of the payment. See 18 U. S. C. § 209(a). Other provisions of the same chapter make it a crime for a bank employee to give a bank examiner, and for a bank examiner to receive from a bank employee, "any loan or gratuity," again without regard to the purpose for which it is given. See §§ 212–213. A provision of the Labor Management Relations Act makes it a felony for an employer to give to a union representative, and for a union representative to receive from an employer, anything of value. 29 U. S. C. § 186 (1994 ed. and Supp. III). With clearly framed and easily administrable provisions such as these on the books imposing gift-giving and gift-receiving prohibitions specifically based upon the holding of office, it seems to us most implausible that Congress intended the language of the gratuity statute—"for or because of any official act performed or to be performed"—to pertain to the office rather than (as the language more naturally suggests) to *particular* official acts.

Finally, a narrow, rather than a sweeping, prohibition is more compatible with the fact that § 201(c)(1)(A) is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials. For example, the provisions following § 201 in Chapter 11 of Title 18 make it a crime to give any compensation to a federal employee, or for the employee to receive compensation, in consideration of his representational assistance to anyone involved in a proceeding in which the United States has a direct and substantial interest, § 203; for a federal employee to act as "agent or attorney" for anyone prosecuting a claim against the United States, § 205(a)(1); for a federal employee to act as "agent or attorney" for anyone appearing before virtually any Government tribunal in connection with a matter in

which the United States has a direct and substantial interest, § 205(a)(2); for various types of federal employees to engage in various activities after completion of their federal service, § 207; for an Executive employee to participate in any decision or proceeding relating to a matter in which he has a financial interest, § 208; for an employee of the Executive Branch or an independent agency to receive "any contribution to or supplementation of salary . . . from any source other than the Government of the United States," § 209; and for a federal employee to accept a gift in connection with the "compromise, adjustment, or cancellation of any farm indebtedness," § 217. A provision of the Internal Revenue Code makes it criminal for a federal employee to accept a gift for the "compromise, adjustment, or settlement of any charge or complaint" for violation of the revenue laws. 26 U. S. C. § 7214(a)(9).

And the criminal statutes are merely the tip of the regulatory iceberg. In 5 U. S. C. § 7353, which announces broadly that no "employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties," § 7353(a)(2), Congress has authorized the promulgation of ethical rules for each branch of the Federal Government, § 7353(b)(1). Pursuant to that provision, each branch of Government regulates its employees' acceptance of gratuities in some fashion. See, *e. g.*, 5 CFR § 2635.202 *et seq.* (1999) (Executive employees); Rule XXXV of the Standing Rules of the Senate, Senate Manual, S. Doc. No. 104–1 (rev. July 18, 1995) (Senators and Senate Employees); Rule XXVI of the Rules of the House of Representatives, 106th Cong. (rev. Jan. 7, 1999) (Representatives and House employees); 1 Research Papers of the National Commission on Judicial Discipline & Removal, Code of Conduct for U. S. Judges, Canon 5(C)(4), pp. 925–927 (1993) (federal judges).

All of the regulations, and some of the statutes, described above contain exceptions for various kinds of gratuities given by various donors for various purposes. Many of those exceptions would be snares for the unwary, given that there are no exceptions to the broad prohibition that the Government claims is imposed by § 201(c)(1). In this regard it is interesting to consider the provisions of 5 CFR § 2635.202 (1999), issued by the Office of Government Ethics (OGE) and binding on all employees of the Executive Branch and independent agencies. The first subsection of that provision, entitled "General prohibitions," makes unlawful approximately (if not precisely) what the Government asserts § 201(c)(1)(B) makes unlawful: acceptance of a gift "[f]rom a prohibited source" (defined to include any person who "[h]as interests that may be substantially affected by performance or nonperformance of the employee's official duties," 5 CFR § 2635.203(d)(4) (1999)) or "[g]iven because of the employee's official position," § 2635.202(a)(2). The second subsection, entitled "Relationship to illegal gratuities statute," then provides:

> "Unless accepted in violation of paragraph (c)(1) of this section [banning acceptance of a gift 'in return for being influenced in the performance of an official act'], a gift accepted under the standards set forth in this subpart *shall not constitute an illegal gratuity otherwise prohibited by 18 U. S. C. § 201(c)(1)(B).*" § 2635.202(b) (emphasis added).

We are unaware of any law empowering OGE to decriminalize acts prohibited by Title 18 of the United States Code. Yet it is clear that many gifts "accepted under the standards set forth in [the relevant] subpart" *will* violate 18 U. S. C. § 201(c)(1)(B) if the interpretation that the Government urges upon us is accepted. The subpart includes, for example—as § 201(c)(1)(B) does not—exceptions for gifts of $20 or less, aggregating no more than $50 from a single

source in a calendar year, see 5 CFR § 2635.204(a) (1999), and for certain public-service or achievement awards and honorary degrees, see § 2635.204(d). We are frankly not sure that even our more narrow interpretation of 18 U. S. C. § 201(c)(1)(B) will cause OGE's assurance of nonviolation if the regulation is complied with to be entirely accurate; but the misdirection, if any, will be infinitely less.

More important for present purposes, however, this regulation, and the numerous other regulations and statutes littering this field, demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits. As discussed earlier, not only does the text here not require that result; its more natural reading forbids it.

III

As an alternative means of preserving the jury's verdict on Count One, the Government contends that the District Court's mistaken instruction concerning the scope of § 201(c)(1)(A) constituted harmless error. As described earlier, the District Court twice read the text of §§ 201(c)(1)(A) and 201(a)(3), but it then incorrectly explained the meaning of that statutory language by essentially substituting the term "official position" for "official act." More specifically, the court instructed the jury as follows:

> "The essence of the crime is the official's position [as] the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense

has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.

. . . . .

"It is sufficient if Sun-Diamond provided Espy with unauthorized compensation simply because he held public office.

. . . . .

"In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy for or because of Mr. Espy's official government position and not solely for reasons of friendship or social purpose.

. . . . .

"With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture.

. . . . .

"Now, the government must prove that the gratuity was knowingly and willingly given for or because of an official act performed or to be performed by the Secretary of Agriculture, Michael Espy. That means that the government must prove that Sun-Diamond Growers of California . . . knowingly and willingly gave the gratuities, at least in part, because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. The government need not prove that the alleged gratuity was linked to a specific or identifiable

official act or any act at all." App. to Pet. for Cert. 84a–86a, 87a–88a.

The Government contends that the jury's verdict rendered pursuant to these instructions necessarily included a finding that respondent's gratuities were given and received "for or because of" an official act or acts. Upon closer examination, however, this argument is revealed to be nothing more than a restatement of the same flawed premise that permeated the instructions themselves and that we have just rejected: "By returning a guilty verdict, the jury necessarily rejected respondent's theory of defense and found beyond a reasonable doubt that the gifts were motivated by the fact that the Secretary of Agriculture exercised regulatory authority over respondent's business." Brief for United States 44. The Court of Appeals tersely rejected this claim of harmless error, 138 F. 3d, at 968, and we do the same.

* * *

We hold that, in order to establish a violation of 18 U. S. C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given. We affirm the judgment of the Court of Appeals, which remanded the case to the District Court for a new trial on Count One. Our decision today casts doubt upon the lower courts' resolution of respondent's challenge to the sufficiency of the indictment on Count One—an issue on which certiorari was neither sought nor granted. We leave it to the District Court to determine whether that issue should be reopened on remand.

It is so ordered.

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* AGUIRRE-AGUIRRE

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

No. 97–1754. Argued March 3, 1999—Decided May 3, 1999

The Immigration and Nationality Act (INA) permits withholding of deportation to a country when "the Attorney General determines that [an] alien's life or freedom would be threatened in such country on account of . . . political opinion." 8 U. S. C. § 1253(h)(1). In general, withholding is mandatory if an alien establishes that he is more likely than not to "be subject to persecution on [that ground]," *INS* v. *Stevic*, 467 U. S. 407, 429–430. However, as relevant here, it is not available if the Attorney General finds that the alien committed a "serious nonpolitical crime" before arriving in the United States, § 1253(h)(2)(C). Respondent, a Guatemalan, requested, *inter alia*, withholding of his deportation by the Immigration and Naturalization Service. He testified at an administrative hearing that, in protesting various government policies and actions in Guatemala, he had burned buses, assaulted passengers, and vandalized and destroyed private property. The Immigration Judge granted his request, but the Board of Immigration Appeals (BIA) vacated the order, finding that his were "serious nonpolitical crime[s]." Applying the weighing test it had developed in an earlier decision, the BIA concluded that the common-law or criminal character of respondent's acts outweighed their political nature. The Ninth Circuit remanded the case, finding the BIA's analysis deficient in three respects: It should have balanced respondent's admitted offenses against the threat of persecution; it should have considered whether his acts were grossly disproportionate to their alleged objective and were atrocious, especially with reference to Circuit precedent; and it should have considered the political necessity and success of respondent's methods.

Held: In ruling that the BIA must supplement its weighing test by examining these additional factors, the Ninth Circuit failed to accord the BIA's interpretation the level of deference required under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. Pp. 423–433.

(a) Because the Ninth Circuit confronted questions implicating "an agency's construction of the statute which it administers," that court should have asked whether "the statute is silent or ambiguous with respect to the specific issue" before it, and, if so, "whether the agency's

answer is based on a permissible construction of the statute." *Chevron*, *supra*, at 843. It is clear that *Chevron* deference applies to this statutory scheme. The Attorney General is charged with the INA's administration and enforcement, and § 1253(h) expressly makes an alien's entitlement to withholding turn on the Attorney General's determination whether the statutory conditions for withholding have been met. Judicial deference to the Executive Branch is especially appropriate in the immigration context. *INS* v. *Abudu*, 485 U. S. 94, 110. The BIA, which is vested with the Attorney General's discretion and authority in cases before it, should be accorded *Chevron* deference when it gives ambiguous statutory terms meaning through a process of case-by-case adjudication. *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 448–449. Pp. 423–425.

(b) The Ninth Circuit's error is clearest with respect to its holding that the BIA must balance respondent's criminal acts against his risk of persecution in Guatemala. The BIA has rejected any such interpretation, and § 1253(h)'s text and structure are consistent with that conclusion. By its terms, the statute requires independent consideration of the persecution risk facing an alien before granting withholding. It is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is serious and nonpolitical. A United Nations handbook relied on by the Ninth Circuit is not binding on the Attorney General, the BIA, or the United States courts. Pp. 425–428.

(c) The Ninth Circuit erred in finding that the BIA should have considered whether respondent's acts were grossly disproportionate to their alleged objective and atrocious in light of Circuit precedent. The BIA does not dispute that such considerations may be important in applying the serious nonpolitical crime exception. However, the BIA's formulation does not purport to provide a comprehensive definition of the exception, and the standard's full elaboration should await further cases. The BIA's test identifies the general standard whether an offense's political aspect outweighs its common-law character and then provides two specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and whether the acts are atrocious. Although an offense involving atrocious acts will result in denial of withholding, an offense's criminal element may outweigh its political aspect even if none of the acts are atrocious. Thus, the BIA did not need to give express consideration to atrociousness before determining that respondent had committed serious nonpolitical crimes. This approach is consistent with the statute, which does not equate every serious nonpolitical crime with atro-

cious acts. Nor is there any reason to find such equivalence. In common usage, "atrocious" suggests a deed more culpable and aggravated than a serious one. In light of this conclusion, the Court rejects the Ninth Circuit's suggestion that the BIA was required to compare the facts of this case with Circuit precedent on atrociousness. Pp. 428–431.

(d) The Ninth Circuit also erred to the extent it believed the BIA had to give more express consideration to the necessity and success of respondent's actions than it did. Although the Attorney General has suggested that a crime will not be deemed political unless it has a causal link to the alleged political purpose and object, the BIA was required to do no more than find that respondent's acts were not political based on the lack of proportion with his objectives. Even with a clear causal connection, a lack of proportion may render crimes nonpolitical. Moreover, respondent had the burden of proving entitlement to withholding, yet he failed to submit a brief to the BIA and the Immigration Judge did not address this point. In these circumstances, the BIA's rather cursory discussion does not warrant reversal. Pp. 431–432.

(e) The Court does not address respondent's argument, raised at this late stage, that there are errors in the translation and transcription of his testimony. Should the BIA determine modification of the record is necessary, it can decide whether to consider the withholding issue further. Pp. 432–433.

121 F. 3d 521, reversed and remanded.

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

Patricia A. Millett argued the cause for petitioner. With her on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Alison R. Drucker*, and *M. Jocelyn Lopez Wright*.

Nadine K. Wettstein argued the cause for respondent. With her on the brief were *Ira J. Kurzban*, *Karen Musalo*, and *Carolyn Patty Blum*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Massachusetts Law Reform Institute et al. by *Iris Gomez;* for the Lawyers Committee for Human Rights by *Sheldon E. Hochberg;* and for the Office of the United Nations High Commissioner for Refugees by *Daniel Wolf*, *Regina Germain*, and *Andrew I. Schoenholtz*.

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to consider the analysis employed by the Court of Appeals in setting aside a determination of the Board of Immigration Appeals (BIA). The BIA ruled that respondent, a native and citizen of Guatemala, was not entitled to withholding of deportation based on his expressed fear of persecution for earlier political activities in Guatemala. The issue in the case is not whether the persecution is likely to occur, but whether, even assuming it is, respondent is ineligible for withholding because he "committed a serious nonpolitical crime" before his entry into the United States. 8 U. S. C. § 1253(h)(2)(C). The beginning point for the BIA's analysis was its determination that respondent, to protest certain governmental policies in Guatemala, had burned buses, assaulted passengers, and vandalized and destroyed property in private shops, after forcing customers out. These actions, the BIA concluded, were serious nonpolitical crimes. In reaching this conclusion, it relied on a statutory interpretation adopted in one of its earlier decisions, *Matter of McMullen*, 19 I. & N. Dec. 90 (BIA 1984), aff'd, 788 F. 2d 591 (CA9 1986).

On appeal, the Court of Appeals for the Ninth Circuit concluded the BIA had applied an incorrect interpretation of the serious nonpolitical crime provision, and it remanded for further proceedings. In the Court of Appeals' view, as we understand it, the BIA erred by misconstruing the controlling statute and by employing an analytical framework insufficient to take account of the Court of Appeals' own precedent on this subject. According to the court, the BIA erred in failing to consider certain factors, including "the political necessity and success of Aguirre's methods"; whether his acts were grossly out of proportion to their objective or were atrocious; and the persecution respondent might suffer upon return to Guatemala. 121 F. 3d 521, 524 (1997).

We granted certiorari. 525 U. S. 808 (1998). We disagree with the Court of Appeals and address each of the three specific areas in which it found the BIA's analysis deficient. We reverse the judgment of the court and remand for further proceedings.

I

The statutory provision for withholding of deportation that is applicable here provides that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. § 1253(h)(1). The provision was added to the Immigration and Nationality Act (INA), 66 Stat. 166, 8 U. S. C. § 1101 *et seq.* (1994 ed. and Supp. III), by the Refugee Act of 1980 (Refugee Act), Pub. L. 96–212, 94 Stat. 102. See *INS* v. *Stevic*, 467 U. S. 407, 414–416, 421–422 (1984). As a general rule, withholding is mandatory if an alien "establish[es] that it is more likely than not that [he] would be subject to persecution on one of the specified grounds," *id.*, at 429–430, but the statute has some specific exceptions. As is relevant here, withholding does not apply, and deportation to the place of risk is authorized, "if the Attorney General determines that"

> "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U. S. C. § 1253(h)(2)(C).

Under the immigration laws, withholding is distinct from asylum, although the two forms of relief serve similar purposes. Whereas withholding only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year. See *INS* v. *Cardoza-*

Fonseca, 480 U. S. 421, 428–429, n. 6 (1987). In addition, whereas withholding is mandatory unless the Attorney General determines one of the exceptions applies, the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion. *Ibid.* As a consequence, under the law then in force, respondent was able to seek asylum irrespective of his eligibility for withholding.

As an incidental point, we note that in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, 110 Stat. 3009–546, Congress revised the withholding and asylum provisions. The withholding provisions are now codified at 8 U. S. C. § 1231(b)(3) (1994 ed., Supp. III), and the asylum provisions at § 1158. Under current law, as enacted by IIRIRA, the Attorney General may not grant asylum if she determines "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." § 1158(b)(2)(A)(iii). The parties agree IIRIRA does not govern respondent's case. See IIRIRA, Tit. III–A, §§ 309(a), (c), 110 Stat. 3009–625; IIRIRA, Div. C, Tit. VI–A, § 604(c), 110 Stat. 3009–692. Prior to IIRIRA, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, Tit. IV–B, § 413(f), 110 Stat. 1269, Congress granted the Attorney General discretion to withhold deportation when necessary to ensure compliance with the international treaty upon which the Refugee Act was based, see *infra*, at 427–429. This provision was made applicable to "applications filed before, on, or after" April 24, 1996, "if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269–1270. The BIA's decision constituted final action when rendered on March 5, 1996, 8 CFR § 243.1 (1995), App. to Pet. for Cert. 12a, so AEDPA § 413(f) was not applicable to respondent's case.

We turn to the matter before us. In 1994, respondent was charged with deportability by the Immigration and Naturalization Service (INS) for illegal entry into the United States. Respondent conceded deportability but applied for asylum and withholding. At a hearing before an Immigration Judge respondent testified, through an interpreter, that he had been politically active in Guatemala from 1989 to 1992 with a student group called Estudeante Syndicado (ES) and with the National Central Union political party. App. 19–20, 36–37. He testified about threats due to his political activity. The threats, he believed, were from different quarters, including the Guatemalan Government, right-wing government support groups, and left-wing guerillas. App. to Pet. for Cert. 23a.

Respondent described activities he and other ES members engaged in to protest various government policies and actions, including the high cost of bus fares and the government's failure to investigate the disappearance or murder of students and others. App. 20–21; App. to Pet. for Cert. 22a–23a. For purposes of our review, we assume that the amount of bus fares is an important political and social issue in Guatemala. We are advised that bus fare represents a significant portion of many Guatemalans' annual living expense, and a rise in fares may impose substantial economic hardship. See Brief for Massachusetts Law Reform Institute et al. as *Amicus Curiae* 18–19. In addition, government involvement with fare increases, and other aspects of the transportation system, has been a focus of political discontent in that country. *Id.*, at 16–21.

According to the official hearing record, respondent testified that he and his fellow members would "strike" by "burning buses, breaking windows or just attacking the police, police cars." App. 20. Respondent estimated that he participated in setting about 10 buses on fire, after dousing them with gasoline. *Id.*, at 46. Before setting fire to the buses, he and his group would order passengers to leave

the bus. Passengers who refused were stoned, hit with sticks, or bound with ropes. *Id.*, at 46–47. In addition, respondent testified that he and his group "would break the windows of . . . stores," "t[ake] the people out of the stores that were there," and "throw everything on the floor." *Id.*, at 48.

The Immigration Judge granted respondent's applications for withholding of deportation and for asylum, finding a likelihood of persecution for his political opinions and activities if he was returned to Guatemala. App. to Pet. for Cert. 31a–32a. The INS appealed to the BIA. Respondent did not file a brief with the BIA, although his request for an extension of time to do so was granted. Brief for Petitioner 10, n. 6; Record 13–15. The BIA sustained the INS's appeal from this decision, vacated the Immigration Judge's order, and ordered respondent deported. App. to Pet. for Cert. 18a. With respect to withholding, the BIA did not decide whether respondent had established the requisite risk of persecution because it determined that, in any event, he had committed a serious nonpolitical crime within the meaning of § 1253(h)(2)(C).

In addressing the definition of a serious nonpolitical crime, the BIA applied the interpretation it first set forth in *Matter of McMullen*, 19 I. & N. Dec., at 97–98: "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." In the instant case, the BIA found, "the criminal nature of the respondent's acts outweigh their political nature." App. to Pet. for Cert. 18a. The BIA acknowledged respondent's dissatisfaction with the Guatemalan Government's "seeming inaction in the investigation of student deaths and in its raising of student bus fares." *Ibid.* It said, however: "The ire of the ES manifested itself disproportionately in the destruction of property and

assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes . . . ." *Ibid.* The BIA further concluded respondent should not be granted discretionary asylum relief in light of "the nature of his acts against innocent Guatemalans." *Id.*, at 17a.

A divided panel of the Court of Appeals granted respondent's petition for review and remanded to the BIA. 121 F. 3d 521 (CA9 1997). According to the majority, the BIA's analysis of the serious nonpolitical crime exception was legally deficient in three respects. First, the BIA should have "consider[ed] the persecution that Aguirre might suffer if returned to Guatemala" and "balance[d] his admitted offenses against the danger to him of death." *Id.*, at 524. Second, it should have "considered whether the acts committed were grossly out of proportion to the[ir] alleged objective" and were "of an atrocious nature," especially with reference to Ninth Circuit precedent in this area. *Ibid.* (internal quotation marks and citation omitted). Third, the BIA "should have considered the political necessity and success of Aguirre's methods." *Id.*, at 523–524.

Judge Kleinfeld dissented. In his view, "[t]he BIA correctly identified the legal question, whether 'the criminal nature of the respondent's acts outweigh their political nature.' " *Id.*, at 524 (quoting *McMullen* v. *INS*, 788 F. 2d 591, 592 (CA9 1986)). Given the violent nature of respondent's acts, and the fact the acts were in large part directed against innocent civilians, the BIA "reasonably conclude[d] that [his] crimes were disproportionate to his political objectives." 121 F. 3d, at 525.

II

As an initial matter, the Court of Appeals expressed no disagreement with the Attorney General or the BIA that the phrase "serious nonpolitical crime" in § 1253(h)(2)(C) should be applied by weighing "the political nature" of an act against its "common-law" or "criminal" character. See *Mat-*

ter of McMullen, *supra*, at 97–98; App. to Pet. for Cert. 18a; *Deportation Proceedings for Doherty*, 13 Op. Off. Legal Counsel 1, 23 (1989) (an act "'should be considered a serious nonpolitical crime if the act is disproportionate to the objective'") (quoting *McMullen* v. *INS*, *supra*, at 595), rev'd on other grounds, *Doherty* v. *INS*, 908 F. 2d 1108 (CA2 1990), rev'd, 502 U. S. 314 (1992). Nor does respondent take issue with this basic inquiry.

The Court of Appeals did conclude, however, that the BIA must supplement this weighing test by examining additional factors. In the course of its analysis, the Court of Appeals failed to accord the required level of deference to the interpretation of the serious nonpolitical crime exception adopted by the Attorney General and BIA. Because the Court of Appeals confronted questions implicating "an agency's construction of the statute which it administers," the court should have applied the principles of deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). Thus, the court should have asked whether "the statute is silent or ambiguous with respect to the specific issue" before it; if so, "the question for the court [was] whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843. See also *INS* v. *Cardoza-Fonseca*, 480 U. S., at 448–449.

It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that "[t]he Attorney General shall be charged with the administration and enforcement" of the statute and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U. S. C. § 1103(a)(1) (1994 ed., Supp. III). Section 1253(h), moreover, in express terms confers decisionmaking authority on the Attorney General, making an alien's entitlement to withholding turn on the Attorney General's "determin[ation]" whether the statutory conditions for withholding have been

met. 8 U. S. C. §§ 1253(h)(1), (2). In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U. S. 94, 110 (1988). A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.

The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the "discretion and authority conferred upon the Attorney General by law" in the course of "considering and determining cases before it." 8 CFR § 3.1(d)(1) (1998). Based on this allocation of authority, we recognized in *Cardoza-Fonseca*, *supra*, that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms "concrete meaning through a process of case-by-case adjudication" (though we ultimately concluded that the agency's interpretation in that case was not sustainable). 480 U. S., at 448–449. In the case before us, by failing to follow *Chevron* principles in its review of the BIA, the Court of Appeals erred.

A

The Court of Appeals' error is clearest with respect to its holding that the BIA was required to balance respondent's criminal acts against the risk of persecution he would face if returned to Guatemala. In *Matter of Rodriguez-Coto*, 19 I. & N. Dec. 208, 209–210 (1985), the BIA "reject[ed] any interpretation of the phras[e] . . . 'serious nonpolitical crime' in [§ 1253(h)(2)(C)] which would vary with the nature of evidence of persecution." The text and structure of § 1253(h) are consistent with this conclusion. Indeed, its

words suggest that the BIA's reading of the statute, not the interpretation adopted by the Court of Appeals, is the more appropriate one. As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country. See *ibid.* ("We find that the modifie[r] . . . 'serious' . . . relate[s] only to the nature of the crime itself").

It is important, too, as *Rodriguez-Coto* points out, *id.*, at 209–210, that for aliens to be eligible for withholding at all, the statute requires a finding that their "life or freedom would be threatened in [the country to which deportation is sought] on account of their race, religion, nationality, membership in a particular social group, or political opinion," *i. e.*, that the alien is at risk of persecution in that country. 8 U. S. C. § 1253(h)(1). By its terms, the statute thus requires independent consideration of the risk of persecution facing the alien before granting withholding. It is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime. Though the BIA in the instant case declined to make findings respecting the risk of persecution facing respondent, App. to Pet. for Cert. 18a, this was because it determined respondent was barred from withholding under the serious nonpolitical crime exception. *Ibid.* The BIA, in effect, found respondent ineligible for withholding even on the assumption he could establish a threat of persecution. This approach is consistent with the language and purposes of the statute.

In reaching the contrary conclusion and ruling that the risk of persecution should be balanced against the alien's criminal acts, the Court of Appeals relied on a passage from the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) (U. N. Handbook).

We agree the U. N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act. *INS* v. *Cardoza-Fonseca*, 480 U. S., at 438–439, and n. 22. As we explained in *Cardoza-Fonseca*, "one of Congress' primary purposes" in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U. S. T. 6224, T. I. A. S. No. 6577 (1968), to which the United States acceded in 1968. 480 U. S., at 436–437. The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U. N. T. S. 150 (July 28, 1951), reprinted in 19 U. S. T., at 6259, 6264–6276. The basic withholding provision of § 1253(h)(1) parallels Article 33, which provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.*, at 6276. The Convention, in a part incorporated by the Protocol, also places certain limits on the availability of this form of relief; as pertinent here, the Convention states that its provisions "shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Convention Art. I(F)(b), 19 U. S. T., at 6263–6264. Paragraph 156 of the U. N. Handbook, the portion relied upon by the Court of Appeals, states that in applying the serious non-political crime provision of Convention Art. I(F)(b), "it is . . . necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared . . . ."

The U. N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts. "Indeed, the Handbook itself dis-

claims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *INS* v. *Cardoza-Fonseca*, 480 U. S., at 439, n. 22 (quoting U. N. Handbook ¶ (ii), at 1). See also 480 U. S., at 439, n. 22 ("We do not suggest, of course, that the explanation in the U. N. Handbook has the force of law or in any way binds the INS . . ."). For the reasons given, *supra*, at 425–426, we think the BIA's determination that § 1253(h)(2)(C) requires no additional balancing of the risk of persecution rests on a fair and permissible reading of the statute. See also *T.* v. *Secretary of State for the Home Dept.*, 2 All E. R. 865, 882 (H. L. 1996) (Lord Mustill) ("[T]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned").

B

Also relying on the U. N. Handbook, the Court of Appeals held that the BIA "should have considered whether the acts committed were 'grossly out of proportion to the alleged objective.' . . . The political nature of the offenses would be 'more difficult to accept' if they involved 'acts of an atrocious nature.'" 121 F. 3d, at 524 (quoting U. N. Handbook ¶ 152, at 36). The court further suggested that the BIA should have considered prior Circuit case law that "cast[s] light on what under the law are acts of [an] atrocious nature." 121 F. 3d, at 524. Citing its own opinion affirming the BIA's decision in *Matter of McMullen*, see *McMullen* v. *INS*, 788 F. 2d 591 (CA9 1986), the Court of Appeals stated that "[a] comparison of what the *McMullen* court found atrocious with the acts committed by Aguirre suggests a startling degree of difference." 121 F. 3d, at 524. It reasoned that while *McMullen* had involved "indiscriminate bombing, murder, torture, [and] the maiming of innocent civilians," respondent's "only acts against innocent Guatemalans were

the disruption of some stores and his use of methods that we would all find objectionable if practiced upon us on a bus in the United States but which fall far short of the kind of atrocities attributed to McMullen and his associates." 121 F. 3d, at 524.

We do not understand the BIA to dispute that these considerations—gross disproportionality, atrociousness, and comparisons with previous decided cases—may be important in applying the serious nonpolitical crime exception. In fact, by the terms of the BIA's test (which is similar to the language quoted by the Court of Appeals from the U. N. Handbook), gross disproportion and atrociousness are relevant in the determination. According to the BIA: "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." *Matter of McMullen*, 19 I. & N. Dec., at 97–98. See also *Deportation Proceedings for Doherty*, 13 Op. Off. Legal Counsel, at 22–26, rev'd on other grounds, *Doherty* v. *INS*, 908 F. 2d 1108 (CA2 1990), rev'd, 502 U. S. 314 (1992). The BIA's formulation does not purport to provide a comprehensive definition of the § 1253(h)(2)(C) exception, and the full elaboration of that standard should await further cases, consistent with the instruction our legal system always takes from considering discrete factual circumstances over time. See also 13 Op. Off. Legal Counsel, at 23 ("[T]he statute recognizes that cases involving alleged political crimes arise in myriad circumstances, and that what constitutes a 'serious nonpolitical crime' is not susceptible of rigid definition"). Our decision takes into account that the BIA's test identifies a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and

ends, and whether atrocious acts are involved. Under this approach, atrocious acts provide a clear indication that an alien's offense is a serious nonpolitical crime. In the BIA's judgment, where an alien has sought to advance his agenda by atrocious means, the political aspect of his offense may not fairly be said to predominate over its criminal character. Commission of the acts, therefore, will result in a denial of withholding. The criminal element of an offense may outweigh its political aspect even if none of the acts are deemed atrocious, however. For this reason, the BIA need not give express consideration to the atrociousness of the alien's acts in every case before determining that an alien has committed a serious nonpolitical crime.

The BIA's approach is consistent with the statute, which does not equate every serious nonpolitical crime with atrocious acts. Cf. 8 U. S. C. § 1253(h)(2)(B) (establishing an exception to withholding for a dangerous alien who has been convicted of a "particularly serious crime," defined to include an "aggravated felony"). Nor is there any reason to find this equivalence under the statute. In common usage, the word "atrocious" suggests a deed more culpable and aggravated than a serious one. See Webster's Third New International Dictionary 139 (1971) (defining "atrocious" as, "marked by or given to extreme wickedness . . . [or] extreme brutality or cruelty"; "outrageous: violating the bounds of common decency"; "marked by extreme violence: savagely fierce: murderous"; "utterly revolting: abominable"). As a practical matter, if atrocious acts were deemed a necessary element of all serious nonpolitical crimes, the Attorney General would have severe restrictions upon her power to deport aliens who had engaged in serious, though not atrocious, forms of criminal activity. These restrictions cannot be discerned in the text of § 1253(h), and the Attorney General and BIA are not bound to impose the restrictions on themselves.

In the instant case, the BIA determined that "the criminal nature of the respondent's acts outweigh their political nature" because his group's political dissatisfaction "manifested itself disproportionately in the destruction of property and assaults on civilians" and its political goals "were outweighed by [the group's] criminal strategy of strikes." App. to Pet. for Cert. 18a. The BIA concluded respondent had committed serious nonpolitical crimes by applying the general standard established in its prior decision, so it had no need to consider whether his acts might also have been atrocious. The Court of Appeals erred in holding otherwise.

We further reject the Court of Appeals' suggestion that reversal was required due to the BIA's failure to compare the facts of this case with those of *McMullen.* The court thought doing so was necessary because of the guidance provided by *McMullen* on the meaning of atrociousness. In light of our holding that the BIA was not required expressly to consider the atrociousness of respondent's acts, the BIA's silence on this point does not provide a ground for reversal.

C

The third reason given by the Court of Appeals for reversing the BIA was what the court deemed to be the BIA's failure to consider respondent's "offenses in relation to [his] declared political objectives" and to consider "the political necessity and success of [his] methods." 121 F. 3d, at 523–524. As we have discussed, *supra,* at 422–423 and this page, the BIA did address the relationship between respondent's political goals and his criminal acts, concluding that the violence and destructiveness of the crimes, and their impact on civilians, were disproportionate to his acknowledged political objectives. To the extent the court believed the BIA was required to give more express consideration to the "necessity" and "success" of respondent's actions, it erred.

It is true the Attorney General has suggested that a crime will not be deemed political unless there is a "'close and direct causal link between the crime committed and its alleged political purpose and object.'" *Deportation Proceedings for Doherty,* 13 Op. Off. Legal Counsel, at 23 (quoting *McMullen* v. *INS,* 788 F. 2d 591 (CA9 1986)). The BIA's analysis, which was quite brief in all events, did not explore this causal link beyond noting the general disproportion between respondent's acts and his political objectives. Whatever independent relevance a causal link inquiry might have in another case, in this case the BIA determined respondent's acts were not political based on the lack of proportion with his objectives. It was not required to do more. Even in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical. Moreover, it was respondent who bore the burden of proving entitlement to withholding, see 8 CFR § 208.16(c)(3) (1995) ("If the evidence indicates that one or more of the grounds for denial of withholding of deportation . . . apply, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply"). He failed to submit a brief on the causal link or any other issue to the BIA, and the decision of the Immigration Judge does not address the point. In these circumstances, the rather cursory nature of the BIA's discussion does not warrant reversal.

III

Finally, respondent contends the record of his testimony before the Immigration Judge contains errors. He testified in Spanish and now contends there are errors in translation and transcription. Brief for Respondent 11–22. Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court, see Brief in Opposition 1–5, having failed to raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage.

Respondent has filed a motion in the BIA for a new hearing in light of the alleged errors. App. to Brief for Respondent 1a–6a. Should the BIA determine modification of the record is necessary, it can determine whether further consideration of the withholding issue is warranted.

* * *

The reasons given by the Court of Appeals for reversing the BIA do not withstand scrutiny. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION *v.* 203 NORTH LaSALLE STREET PARTNERSHIP

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

No. 97–1418. Argued November 2, 1998—Decided May 3, 1999

A loan by petitioner Bank of America National Trust and Savings Association (Bank) to respondent 203 North LaSalle Street Partnership (Debtor) was secured by a mortgage on the Debtor's interest in a Chicago office building, the value of which was less than the balance due the Bank. After the Debtor defaulted and the Bank began state-court foreclosure, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.* The Debtor proposed a reorganization plan under which, *inter alia*, certain of its former partners would contribute new capital in exchange for the Debtor's entire ownership of the reorganized entity. That condition was an exclusive eligibility provision: the old equity holders were the only ones who could contribute new capital. The Bank objected and, as sole member of an impaired class of creditors, thereby blocked confirmation of the plan on a consensual basis. See § 1129(a)(8). The Debtor, however, resorted to the alternate, judicial "cramdown" process for imposing a plan on a dissenting class. § 1129(b). Among the conditions for a cramdown is the requirement that the plan be "fair and equitable" with respect to each class of impaired unsecured claims that has not accepted it. § 1129(b)(1). A plan may be found to be fair and equitable if "the holder of any claim . . . junior to the claims of such class will not receive or retain under the plan on account of such junior claim . . . any property." § 1129(b)(2)(B)(ii). Under this "absolute priority rule," the Bank argued, the plan could not be confirmed as a cramdown because the Debtor's old equity holders would receive property even though the Bank's unsecured deficiency claim would not be paid in full. The Bankruptcy Court approved the plan nonetheless, and the District Court and the Court of Appeals affirmed. The Seventh Circuit found ambiguity in the absolute priority rule's language, and interpreted the phrase "on account of" to permit recognition of a "new value corollary" to the rule, under which the objection of an impaired senior class does not bar junior claim holders from receiving or retaining property interests in the debtor after reorganization, if they contribute new capital in money or money's worth, reasonably equivalent to the property's value, and

necessary for successful reorganization of the restructured enterprise. The court held that when an old equity holder retains an equity interest in the reorganized debtor by meeting the corollary's requirements, he is not receiving or retaining that interest "on account of" his prior equitable ownership, but, rather, "on account of" a new, substantial, necessary, and fair infusion of capital.

Held: A debtor's prebankruptcy equity holders may not, over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives. The old equity holders are disqualified from participating in such a "new value" transaction by § 1129(b)(2)(B)(ii), which in these circumstances bars a junior interest holder's receipt of any property on account of his prior interest. Pp. 444–458.

(a) The Court does not decide whether the statute includes a new value corollary or exception. The drafting history is equivocal, but does nothing to disparage the possibility apparent in the statutory text, that § 1129(b)(2)(B)(ii) may carry such a corollary. Although there is no literal reference to "new value" in the phrase "on account of such junior claim," the phrase could arguably carry such an implication in modifying the prohibition against receipt by junior claimants of any interest under a plan while a senior class of unconsenting creditors goes less than fully paid. Pp. 444–449.

(b) The Court adopts as the better reading of the "on account of" modifier the more common understanding that the phrase means "because of," since this is the usage meant for the phrase at other places in the statute, see *Cohen* v. *de la Cruz*, 523 U. S. 213, 219–220. Thus, a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule. As to the degree of causation that will disqualify a plan, the Government argues not only that any degree of causation between earlier interests and retained property will activate the bar to a plan providing for later property, but also that whenever the holders of equity in the Debtor end up with some property there will be some causation. A less absolute statutory prohibition would follow from reading the "on account of" language as intended to reconcile the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors, see *Toibb* v. *Radloff*, 501 U. S. 157, 163. Causation between the old equity's holdings and subsequent property substantial enough to disqualify a plan would presumably occur on this view whenever old equity's later prop-

erty would come at a price that failed to provide the greatest possible addition to the bankruptcy estate, *i. e.*, whenever the equity holders obtained or preserved an ownership interest for less than someone else would have paid. Pp. 449–451.

(c) Assuming a new value corollary, plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within § 1129(b)(2)(B)(ii)'s prohibition. In this case, the proposed plan is doomed by its provision for vesting equity in the reorganized business in the Debtor's partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan. The exclusiveness of the opportunity, with its protection against the market's scrutiny of the stated purchase price, renders the partners' right a property interest extended "on account of" the old equity position and therefore subject to an unpaid senior creditor class's objection. Under a plan granting old equity on exclusive right, any determination that the purchase price was top dollar would necessarily be made by the bankruptcy judge, whereas the best way to determine value is exposure to a market. In the interest of statutory coherence, the Bankruptcy Code's disfavor for decisions untested by competitive choice ought to extend to valuations in administering § 1129(b)(2)(B)(ii) when some form of market valuation may be available to test the adequacy of an old equity holder's proposed contribution. Pp. 454–458.

126 F. 3d 955, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 458. STEVENS, J., filed a dissenting opinion, *post*, p. 463.

Roy T. Englert, Jr., argued the cause for petitioner. With him on the briefs were *Thomas S. Kiriakos* and *James C. Schroeder.*

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman, Assistant Attorney General Hunger, Deputy Solicitor General Wallace, William Kanter,* and *Bruce G. Forrest.*

Richard M. Bendix, Jr., argued the cause for respondent. With him on the brief were *Malcolm M. Gaynor* and *Paul J. Gaynor.**

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this Chapter 11 reorganization case is whether a debtor's prebankruptcy equity holders may, over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives. We hold that old equity holders are disqualified from participating in such a "new value" transaction by the terms of 11 U. S. C. § 1129(b)(2)(B)(ii), which in such circumstances bars a junior interest holder's receipt of any property on account of his prior interest.

I

Petitioner, Bank of America National Trust and Savings Association (Bank),[1] is the major creditor of respondent, 203 North LaSalle Street Partnership (Debtor or Partnership),

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *John J. Gill III*, *Michael F. Crotty*, and *Christopher E. Chenoweth;* for the American College of Real Estate Lawyers by *Robert M. Zinman* and *Christopher F. Graham;* for the American Council of Life Insurance by *James A. Pardo, Jr.*, *David G. Epstein*, *Brian C. Walsh*, and *Phillip E. Stano;* and for Ronald Mann et al. by *Mr. Mann*, *pro se*, *Robert K. Rasmussen*, and *Alan Schwartz.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Credit Management by *Charles M. Tatelbaum* and *Elizabeth Warren;* for National Small Business United et al. by *Isaac M. Pachulski*, *K. John Shaffer*, and *Kenneth N. Klee;* and for Bruce A. Markell, *pro se.*

[1] Bank of America, Illinois, was the appellant in the case below. As a result of a merger, it is now known as Bank of America National Trust and Savings Association.

an Illinois real estate limited partnership.[2] The Bank lent the Debtor some $93 million, secured by a nonrecourse first mortgage[3] on the Debtor's principal asset, 15 floors of an office building in downtown Chicago. In January 1995, the Debtor defaulted, and the Bank began foreclosure in a state court.

In March, the Debtor responded with a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*, which automatically stayed the foreclosure proceedings, see § 362(a). *In re 203 N. LaSalle Street Partnership*, 126 F. 3d 955, 958 (CA7 1997); *Bank of America, Illinois* v. *203 N. LaSalle Street Partnership*, 195 B. R. 692, 696 (ND Ill. 1996). The Debtor's principal objective was to ensure that its partners retained title to the property so as to avoid roughly $20 million in personal tax liabilities, which would fall due if the Bank foreclosed. 126 F. 3d, at 958; 195 B. R., at 698. The Debtor proceeded to propose a reorganization plan during the 120-day period when it alone had the right to do so, see 11 U. S. C. § 1121(b); see also § 1121(c) (exclusivity period extends to 180 days if the debtor files plan within the initial 120 days).[4] The Bankruptcy Court rejected the Bank's motion to terminate the period of exclusivity to make way for a plan of its own to

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[2] The limited partners in this case are considered the Debtor's equity holders under the Bankruptcy Code, see 11 U. S. C. §§ 101(16), (17), and the Debtor Partnership's actions may be understood as taken on behalf of its equity holders.

[3] A nonrecourse loan requires the Bank to look only to the Debtor's collateral for payment. But see n. 6, *infra*.

[4] The Debtor filed an initial plan on April 13, 1995, and amended it on May 12, 1995. The Bank objected, and the Bankruptcy Court rejected the plan on the ground that it was not feasible. See § 1129(a)(11). The Debtor submitted a new plan on September 11, 1995. *In re 203 N. LaSalle*, 126 F. 3d 955, 958–959 (CA7 1997).

liquidate the property, and instead extended the exclusivity period for cause shown, under § 1121(d).[5]

The value of the mortgaged property was less than the balance due the Bank, which elected to divide its undersecured claim into secured and unsecured deficiency claims under § 506(a) and § 1111(b).[6] 126 F. 3d, at 958. Under the plan, the Debtor separately classified the Bank's secured claim, its unsecured deficiency claim, and unsecured trade debt owed to other creditors. See § 1122(a).[7] The Bankruptcy Court found that the Debtor's available assets were prepetition rents in a cash account of $3.1 million and the 15 floors of rental property worth $54.5 million. The secured claim was valued at the latter figure, leaving the Bank with an unsecured deficiency of $38.5 million.

So far as we need be concerned here, the Debtor's plan had these further features:

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[5] The Bank neither appealed the denial nor raised it as an issue in this appeal.

[6] Having agreed to waive recourse against any property of the Debtor other than the real estate, the Bank had no unsecured claim outside of Chapter 11. Section 1111(b), however, provides that nonrecourse secured creditors who are undersecured must be treated in Chapter 11 as if they had recourse.

[7] Indeed, the Seventh Circuit apparently requires separate classification of the deficiency claim of an undersecured creditor from other general unsecured claims. See *In re Woodbrook Associates*, 19 F. 3d 312, 319 (1994). Nonetheless, the Bank argued that if its deficiency claim had been included in the class of general unsecured creditors, its vote against confirmation would have resulted in the plan's rejection by that class. The Bankruptcy Court and the District Court rejected the contention that the classifications were gerrymandered to obtain requisite approval by a single class, *In re 203 N. LaSalle Street Limited Partnership*, 190 B. R. 567, 592–593 (Bkrtcy. Ct. ND Ill. 1995); *Bank of America, Illinois* v. *203 N. LaSalle Street Partnership*, 195 B. R. 692, 705 (ND Ill. 1996), and the Court of Appeals agreed, 126 F. 3d, at 968. The Bank sought no review of that issue, which is thus not before us.

(1) The Bank's $54.5 million secured claim would be paid in full between 7 and 10 years after the original 1995 repayment date.[8]

(2) The Bank's $38.5 million unsecured deficiency claim would be discharged for an estimated 16% of its present value.[9]

(3) The remaining unsecured claims of $90,000, held by the outside trade creditors, would be paid in full, without interest, on the effective date of the plan.[10]

(4) Certain former partners of the Debtor would contribute $6.125 million in new capital over the course of five years (the contribution being worth some $4.1 million in present value), in exchange for the Partnership's entire ownership of the reorganized debtor.

The last condition was an exclusive eligibility provision: the old equity holders were the only ones who could contribute new capital.[11]

The Bank objected and, being the sole member of an impaired class of creditors, thereby blocked confirmation of the

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[8] Payment consisted of a prompt cash payment of $1,149,500 and a secured, 7-year note, extendable at the Debtor's option. 126 F. 3d, at 959, n. 4; 195 B. R., at 698.

[9] This expected yield was based upon the Bankruptcy Court's projection that a sale or refinancing of the property on the 10th anniversary of the plan confirmation would produce a $19-million distribution to the Bank.

[10] The Debtor originally owed $160,000 in unsecured trade debt. After filing for bankruptcy, the general partners purchased some of the trade claims. Upon confirmation, the insiders would waive all general unsecured claims they held. 126 F. 3d, at 958, n. 2; 195 B. R., at 698.

[11] The plan eliminated the interests of noncontributing partners. More than 60% of the Partnership interests would change hands on confirmation of the plan. See Brief for Respondent 4, n. 7. The new Partnership, however, would consist solely of former partners, a feature critical to the preservation of the Partnership's tax shelter. Tr. of Oral Arg. 32.

plan on a consensual basis. See § 1129(a)(8).[12] The Debtor, however, took the alternate route to confirmation of a reorganization plan, forthrightly known as the judicial "cramdown" process for imposing a plan on a dissenting class. § 1129(b). See generally Klee, All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code, 53 Am. Bankr. L. J. 133 (1979).

There are two conditions for a cramdown. First, all requirements of § 1129(a) must be met (save for the plan's acceptance by each impaired class of claims or interests, see § 1129(a)(8)). Critical among them are the conditions that the plan be accepted by at least one class of impaired creditors, see § 1129(a)(10), and satisfy the "best-interest-of-creditors" test, see § 1129(a)(7).[13] Here, the class of trade creditors with impaired unsecured claims voted for the plan,[14] 126 F. 3d, at 959, and there was no issue of best interest. Second, the objection of an impaired creditor class may be overridden only if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." § 1129(b)(1). As to a dissenting class of impaired unsecured creditors, such a plan may be found to be "fair and equitable" only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative,

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[12] A class of creditors accepts if a majority of the creditors and those holding two-thirds of the total dollar amount of the claims within that class vote to approve the plan. § 1126(c).

[13] Section 1129(a)(7) provides that if the holder of a claim impaired under a plan of reorganization has not accepted the plan, then such holder must "receive . . . on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under chapter 7 . . . on such date." The "best interests" test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan.

[14] Claims are unimpaired if they retain all of their prepetition legal, equitable, and contractual rights against the debtor. § 1124.

if "the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property," § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the "absolute priority rule."

The absolute priority rule was the basis for the Bank's position that the plan could not be confirmed as a cramdown. As the Bank read the rule, the plan was open to objection simply because certain old equity holders in the Debtor Partnership would receive property even though the Bank's unsecured deficiency claim would not be paid in full. The Bankruptcy Court approved the plan nonetheless, and accordingly denied the Bank's pending motion to convert the case to Chapter 7 liquidation, or to dismiss the case. The District Court affirmed, 195 B. R. 692 (ND Ill. 1996), as did the Court of Appeals.

The majority of the Seventh Circuit's divided panel found ambiguity in the language of the statutory absolute priority rule, and looked beyond the text to interpret the phrase "on account of" as permitting recognition of a "new value corollary" to the rule. 126 F. 3d, at 964–965. According to the panel, the corollary, as stated by this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 118 (1939), provides that the objection of an impaired senior class does not bar junior claim holders from receiving or retaining property interests in the debtor after reorganization, if they contribute new capital in money or money's worth, reasonably equivalent to the property's value, and necessary for successful reorganization of the restructured enterprise. The panel majority held that

> "when an old equity holder retains an equity interest in the reorganized debtor by meeting the requirements of the new value corollary, he is not receiving or retaining that interest 'on account of' his prior equitable owner-

> ship of the debtor. Rather, he is allowed to participate in the reorganized entity 'on account of' a new, substantial, necessary and fair infusion of capital." 126 F. 3d, at 964.

In the dissent's contrary view, there is nothing ambiguous about the text: the "plain language of the absolute priority rule . . . does not include a new value exception." *Id.*, at 970 (opinion of Kanne, J.). Since "[t]he Plan in this case gives [the Debtor's] partners the exclusive right to retain their ownership interest in the indebted property *because of* their status as . . . prior interest holder[s]," *id.*, at 973, the dissent would have reversed confirmation of the plan.

We granted certiorari, 523 U. S. 1106 (1998), to resolve a Circuit split on the issue. The Seventh Circuit in this case joined the Ninth in relying on a new value corollary to the absolute priority rule to support confirmation of such plans. See *In re Bonner Mall Partnership*, 2 F. 3d 899, 910–916 (CA9 1993), cert. granted, 510 U. S. 1039, vacatur denied and appeal dism'd as moot, 513 U. S. 18 (1994). The Second and Fourth Circuits, by contrast, without explicitly rejecting the corollary, have disapproved plans similar to this one. See *In re Coltex Loop Central Three Partners, L. P.*, 138 F. 3d 39, 44–45 (CA2 1998); *In re Bryson Properties, XVIII*, 961 F. 2d 496, 504 (CA4), cert. denied, 506 U. S. 866 (1992).[15] We do not decide whether the statute includes a new value corollary or exception, but hold that on any reading respondent's proposed plan fails to satisfy the statute, and accordingly reverse.

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[15] All four of these cases arose in the single-asset real estate context, the typical one in which new value plans are proposed. See 7 Collier on Bankruptcy ¶ 1129.04[4][c][ii][B], p. 1129–113 (rev. 15th ed. 1998). See also Strub, Competition, Bargaining, and Exclusivity under the New Value Rule: Applying the Single-Asset Paradigm of *Bonner Mall*, 111 Banking L. J. 228, 231 (1994) ("Most of the cases discussing the new value issue have done so in connection with an attempt by a single-asset debtor to reorganize under chapter 11").

II

The terms "absolute priority rule" and "new value corollary" (or "exception") are creatures of law antedating the current Bankruptcy Code, and to understand both those terms and the related but inexact language of the Code some history is helpful. The Bankruptcy Act preceding the Code contained no such provision as subsection (b)(2)(B)(ii), its subject having been addressed by two interpretive rules. The first was a specific gloss on the requirement of § 77B (and its successor, Chapter X) of the old Act, that any reorganization plan be "fair and equitable." 11 U. S. C. § 205(e) (1934 ed., Supp. I) (repealed 1938) (§ 77B); 11 U. S. C. § 621(2) (1934 ed., Supp. IV) (repealed 1979) (Chapter X). The reason for such a limitation was the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners. See H. R. Doc. No. 93–137, pt. I, p. 255 (1973) (discussing concern with "the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage"); *ibid.* ("[I]t was believed that creditors, because of management's position of dominance, were not able to bargain effectively without a clear standard of fairness and judicial control"); Ayer, Rethinking Absolute Priority After *Ahlers*, 87 Mich. L. Rev. 963, 969–973 (1989). Hence the pre-Code judicial response known as the absolute priority rule, that fairness and equity required that "the creditors . . . be paid before the stockholders could retain [equity interests] for any purpose whatever." *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482, 508 (1913). See also *Louisville Trust Co.* v. *Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 684 (1899) (reciting "the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors," and concluding that "any arrangement of the parties by which the subordi-

nate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation").

The second interpretive rule addressed the first. Its classic formulation occurred in *Case* v. *Los Angeles Lumber Products Co.*, in which the Court spoke through Justice Douglas in this dictum:

> "It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. . . . Where th[e] necessity [for new capital] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made. . . .
>
> "[W]e believe that to accord 'the creditor his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder." 308 U. S., at 121–122.

Although counsel for one of the parties here has described the *Case* observation as "'black-letter' principle," Brief for Respondent 38, it never rose above the technical level of dictum in any opinion of this Court, which last addressed it in *Norwest Bank Worthington* v. *Ahlers*, 485 U. S. 197 (1988), holding that a contribution of "'labor, experience, and expertise'" by a junior interest holder was not in the "'money's worth'" that the *Case* observation required. 485 U. S., at 203–205. See also *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78, 85 (1942); *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 529, n. 27 (1941). Nor, prior to the enactment of the current Bankruptcy Code,

did any court rely on the *Case* dictum to approve a plan that gave old equity a property right after reorganization. See Ayer, *supra*, at 1016; Markell, Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 92 (1991). Hence the controversy over how weighty the *Case* dictum had become, as reflected in the alternative labels for the new value notion: some writers and courts (including this one, see *Ahlers*, *supra*, at 203–204, n. 3) have spoken of it as an exception to the absolute priority rule, see, *e. g.*, *In re Potter Material Service, Inc.*, 781 F. 2d 99, 101 (CA7 1986); Miller, Bankruptcy's New Value Exception: No Longer a Necessity, 77 B. U. L. Rev. 975 (1997); Georgakopoulos, New Value, Fresh Start, 3 Stan. J. L. Bus. & Fin. 125 (1997), while others have characterized it as a simple corollary to the rule, see, *e. g.*, *In re Bonner Mall Partnership*, 2 F. 3d, at 906; Ayer, *supra*, at 999.

Enactment of the Bankruptcy Code in place of the prior Act might have resolved the status of new value by a provision bearing its name or at least unmistakably couched in its terms, but the Congress chose not to avail itself of that opportunity. In 1973, Congress had considered proposals by the Bankruptcy Commission that included a recommendation to make the absolute priority rule more supple by allowing nonmonetary new value contributions. H. R. Doc. No. 93–137, pt. I, at 258–259; *id.*, pt. II, at 242, 252. Although Congress took no action on any of the ensuing bills containing language that would have enacted such an expanded new value concept,[16] each of them was reintroduced in the next congressional session. See H. R. 31, 94th Cong., 1st Sess.,

[16] See H. R. 10792, 93d Cong., 1st Sess., §§ 7–303(4), 7–310(d)(2)(B) (1973); H. R. 16643, 93d Cong., 2d Sess., §§ 7–301(4), 7–308(d)(2)(B) (1974); S. 2565, 93d Cong., 1st Sess., §§ 7–303(4), 7–310(d)(2)(B) (1973); S. 4046, 93d Cong., 2d Sess., §§ 7–301(4), 7–308(d)(2)(B) (1974).

§§ 7–303(4),[17] 7–310(d)(2)(B) (1975);[18] H. R. 32, 94th Cong., 1st Sess., §§ 7–301(4), 7–308(d)(2)(B) (1975); S. 235, 94th Cong., 1st Sess., §§ 7–301(4), 7–308(d)(2)(B) (1975); S. 236, 94th Cong., 1st Sess., §§ 7–303(4), 7–310(d)(2)(B) (1975). After extensive hearings, a substantially revised House bill emerged, but without any provision for nonmonetary new value contributions. See H. R. 6, 95th Cong., 1st Sess., §§ 1123, 1129(b) (1977).[19] After a lengthy markup session, the House produced H. R. 8200, 95th Cong., 1st Sess. (1977), which would eventually become the law, H. R. Rep. No. 95–595, p. 3 (1977). It had no explicit new value language, expansive or otherwise, but did codify the absolute priority rule in nearly its present form. See H. R. 8200, *supra,* § 1129(b)(2)(B)(iv) ("[T]he holders of claims or interests of any class of claims or interests, as the case may be, that is junior to such class will not receive or retain under

[17] Section 7–303(4) read: "[W]hen the equity security holders retain an interest under the plan, the individual debtor, certain partners or equity security holders will make a contribution which is important to the operation of the reorganized debtor or the successor under the plan, for participation by the individual debtor, such partners, or such holders under the plan on a basis which reasonably approximates the value, if any, of their interests, and the additional estimated value of such contribution."

[18] Section 7–310(d)(2)(B) read: "Subject to the provisions of section 7–303 (3) and (4) and the court's making any findings required thereby, there is a reasonable basis for the valuation on which the plan is based and the plan is fair and equitable in that there is a reasonable probability that the securities issued and other consideration distributed under the plan will fully compensate the respective classes of creditors and equity security holders of the debtor for their respective interests in the debtor or his property."

[19] Section 1129(b) of H. R. 6 read, in relevant part: "[T]he court, on request of the proponent of such plan, shall confirm such plan . . . if such plan is fair and equitable with respect to all classes except any class that has accepted the plan and that is comprised of claims or interests on account of which the holders of such claims or interests will receive or retain under the plan not more than would be so received or retained under a plan that is fair and equitable with respect to all classes."

the plan on account of such junior claims or interests any property").[20]

For the purpose of plumbing the meaning of subsection (b)(2)(B)(ii) in search of a possible statutory new value exception, the lesson of this drafting history is equivocal. Although hornbook law has it that "'Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded,'" *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 442–443 (1987), the phrase "on account of" is not *silentium*, and the language passed by in this instance had never been in the bill finally enacted, but only in predecessors that died on the vine. None of these contained an explicit codification of the absolute priority rule,[21] and even in these earlier bills the language in question stated an expansive new value concept, not the rule as limited in the *Case* dictum.[22]

The equivocal note of this drafting history is amplified by another feature of the legislative advance toward the current law. Any argument from drafting history has to account for the fact that the Code does not codify any authoritative pre-Code version of the absolute priority rule. Compare § 1129(b)(2)(B)(ii) ("[T]he holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property") with *Boyd*, 228 U. S., at 508 ("[T]he creditors were entitled to be paid before the stockholders could retain [a right of property] for any purpose whatever"), and *Case*, 308 U. S., at 116 ("'[C]reditors are entitled to priority over stockholders against all the property of an insolvent corporation'" (quoting *Kansas City Terminal R. Co.* v. *Central Union*

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[20] While the earlier proposed bills contained provisions requiring as a condition of confirmation that a plan be "fair and equitable," none of them contained language explicitly codifying the absolute priority rule. See, *e. g.*, nn. 17–19, *supra*.

[21] See n. 20, *supra*.

[22] See nn. 17–18, *supra*.

Trust Co. of N. Y., 271 U. S. 445, 455 (1926))). See H. R. Rep. No. 95–595, at 414 (characterizing § 1129(b)(2)(B)(ii) as a "partial codification of the absolute priority rule"); *ibid.* ("The elements of the [fair and equitable] test are new[,] departing from both the absolute priority rule and the best interests of creditors tests found under the Bankruptcy Act").

The upshot is that this history does nothing to disparage the possibility apparent in the statutory text, that the absolute priority rule now on the books as subsection (b)(2)(B)(ii) may carry a new value corollary. Although there is no literal reference to "new value" in the phrase "on account of such junior claim," the phrase could arguably carry such an implication in modifying the prohibition against receipt by junior claimants of any interest under a plan while a senior class of unconsenting creditors goes less than fully paid.

III

Three basic interpretations have been suggested for the "on account of" modifier. The first reading is proposed by the Partnership, that "on account of" harks back to accounting practice and means something like "in exchange for," or "in satisfaction of," Brief for Respondent 12–13, 15, n. 16. On this view, a plan would not violate the absolute priority rule unless the old equity holders received or retained property in exchange for the prior interest, without any significant new contribution; if substantial money passed from them as part of the deal, the prohibition of subsection (b)(2)(B)(ii) would not stand in the way, and whatever issues of fairness and equity there might otherwise be would not implicate the "on account of" modifier.

This position is beset with troubles, the first one being textual. Subsection (b)(2)(B)(ii) forbids not only receipt of property on account of the prior interest but its retention as well. See also §§ 1129(a)(7)(A)(ii), (a)(7)(B), (b)(2)(B)(i), (b)(2)(C)(i), (b)(2)(C)(ii). A common instance of the latter

would be a debtor's retention of an interest in the insolvent business reorganized under the plan. Yet it would be exceedingly odd to speak of "retain[ing]" property in exchange for the same property interest, and the eccentricity of such a reading is underscored by the fact that elsewhere in the Code the drafters chose to use the very phrase "in exchange for," § 1123(a)(5)(J) (a plan shall provide adequate means for implementation, including "issuance of securities of the debtor . . . for cash, for property, for existing securities, or in exchange for claims or interests"). It is unlikely that the drafters of legislation so long and minutely contemplated as the 1978 Bankruptcy Code would have used two distinctly different forms of words for the same purpose. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

The second difficulty is practical: the unlikelihood that Congress meant to impose a condition as manipulable as subsection (b)(2)(B)(ii) would be if "on account of" meant to prohibit merely an exchange unaccompanied by a substantial infusion of new funds but permit one whenever substantial funds changed hands. "Substantial" or "significant" or "considerable" or like characterizations of a monetary contribution would measure it by the Lord Chancellor's foot, and an absolute priority rule so variable would not be much of an absolute. Of course it is true (as already noted) that, even if old equity holders could displace the rule by adding some significant amount of cash to the deal, it would not follow that their plan would be entitled to adoption; a contested plan would still need to satisfy the overriding condition of fairness and equity. But that general fairness and equity criterion would apply in any event, and one comes back to the question why Congress would have bothered to add a separate priority rule without a sharper edge.

Since the "in exchange for" reading merits rejection, the way is open to recognize the more common understanding of "on account of" to mean "because of." This is certainly the usage meant for the phrase at other places in the stat-

ute, see § 1111(b)(1)(A) (treating certain claims as if the holder of the claim "had recourse against the debtor on account of such claim"); § 522(d)(10)(E) (permitting debtors to exempt payments under certain benefit plans and contracts "on account of illness, disability, death, age, or length of service"); § 547(b)(2) (authorizing trustee to avoid a transfer of an interest of the debtor in property "for or on account of an antecedent debt owed by the debtor"); § 547(c)(4)(B) (barring trustee from avoiding a transfer when a creditor gives new value to the debtor "on account of which new value the debtor did not make an otherwise unavoidable transfer to . . . such creditor"). So, under the commonsense rule that a given phrase is meant to carry a given concept in a single statute, see *Cohen* v. *de la Cruz*, 523 U. S. 213, 219–220 (1998), the better reading of subsection (b)(2)(B)(ii) recognizes that a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule.

The degree of causation is the final bone of contention. We understand the Government, as *amicus curiae*, to take the starchy position not only that any degree of causation between earlier interests and retained property will activate the bar to a plan providing for later property, Brief for United States as *Amicus Curiae* 11–15, but also that whenever the holders of equity in the Debtor end up with some property there will be some causation; when old equity, and not someone on the street, gets property the reason is *res ipsa loquitur*. An old equity holder simply cannot take property under a plan if creditors are not paid in full. *Id.*, at 10–11, 18. See also Tr. of Oral Arg. 28.[23]

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[23] Our interpretation of the Government's position in this respect is informed by its view as *amicus curiae* in the *Bonner Mall* case: "the language and structure of the Code prohibit in all circumstances confirmation of a plan that grants the prior owners an equity interest in the reorganized debtor over the objection of a class of unpaid unsecured claims." Brief for United States as *Amicus Curiae* in *United States*

There are, however, reasons counting against such a reading. If, as is likely, the drafters were treating junior claimants or interest holders as a class at this point (see *Ahlers*, 485 U. S., at 202),[24] then the simple way to have prohibited the old interest holders from receiving anything over objection would have been to omit the "on account of" phrase entirely from subsection (b)(2)(B)(ii). On this assumption, reading the provision as a blanket prohibition would leave "on account of" as a redundancy, contrary to the interpretive obligation to try to give meaning to all the statutory language. See, *e. g.*, *Moskal* v. *United States*, 498 U. S. 103, 109–110 (1990); *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).[25] One would also have to ask why Congress

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Bancorp Mortgage Co. v. *Bonner Mall Partnership*, O. T. 1993, No. 93–714, p. 14.

The Government conceded that, in the case before us, it had no need to press this more stringent view, since "whatever [the] definition of 'on account of,' a 100 percent certainty that junior equit[y] obtains property because they're junior equity will satisfy that." See Tr. of Oral Arg. 29 (internal quotation marks added).

[24] It is possible, on the contrary, to argue on the basis of the immediate text that the prohibition against receipt of an interest "on account of" a prior unsecured claim or interest was meant to indicate only that there is no *per se* bar to such receipt by a creditor holding both a senior secured claim and a junior unsecured one, when the senior secured claim accounts for the subsequent interest. This reading would of course eliminate the phrase "on account of" as an express source of a new value exception, but would leave open the possibility of interpreting the absolute priority rule itself as stopping short of prohibiting a new value transaction.

[25] Given our obligation to give meaning to the "on account of" modifier, we likewise do not rely on various statements in the House Report or by the bill's floor leaders, which, when read out of context, imply that Congress intended an emphatic, unconditional absolute priority rule. See, *e. g.*, H. R. Rep. No. 95–595, p. 224 (1977) ("[T]he bill requires that the plan pay any dissenting class in full before any class junior to the dissenter may be paid at all"); *id.*, at 413 ("[I]f [an impaired class is] paid less than in full, then no class junior may receive anything under the plan"); 124 Cong. Rec. 32408 (1978) (statement of Rep. Edwards) (cramdown plan con-

would have desired to exclude prior equity categorically from the class of potential owners following a cramdown. Although we have some doubt about the Court of Appeals's assumption (see 126 F. 3d, at 966, and n. 12) that prior equity is often the only source of significant capital for reorganizations, see, *e. g.*, Blum & Kaplan, The Absolute Priority Doctrine in Corporate Reorganizations, 41 U. Chi. L. Rev. 651, 672 (1974); Mann, Strategy and Force in the Liquidation of Secured Debt, 96 Mich. L. Rev. 159, 182–183, 192–194, 208–209 (1997), old equity may well be in the best position to make a go of the reorganized enterprise and so may be the party most likely to work out an equity-for-value reorganization.

A less absolute statutory prohibition would follow from reading the "on account of" language as intended to reconcile the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors, see *Toibb* v. *Radloff*, 501 U. S. 157, 163 (1991). Causation between the old equity's holdings and subsequent property substantial enough to disqualify a plan would presumably occur on this view of things whenever old equity's later property would come at a price that failed to provide the greatest possible addition to the bankruptcy estate, and it would always come at a price too low when the equity holders obtained or preserved an ownership interest for less than someone else would have paid.[26] A truly full

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firmable only "as long as no class junior to the dissenting class receives anything at all"); *id.*, at 34007 (statement of Sen. DeConcini) (same).

[26] Even when old equity would pay its top dollar and that figure was as high as anyone else would pay, the price might still be too low unless the old equity holders paid more than anyone else would pay, on the theory that the "necessity" required to justify old equity's participation in a new value plan is a necessity for the participation of old equity as such. On this interpretation, disproof of a bargain would not satisfy old equity's burden; it would need to show that no one else would pay as much. See,

value transaction, on the other hand, would pose no threat to the bankruptcy estate not posed by any reorganization, provided of course that the contribution be in cash or be realizable money's worth, just as *Ahlers* required for application of *Case*'s new value rule. Cf. *Ahlers*, *supra*, at 203–205; *Case*, 308 U. S., at 121.

IV

Which of these positions is ultimately entitled to prevail is not to be decided here, however, for even on the latter view the Bank's objection would require rejection of the plan at issue in this case. It is doomed, we can say without necessarily exhausting its flaws, by its provision for vesting equity in the reorganized business in the Debtor's partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan. Although the Debtor's exclusive opportunity to propose a plan under § 1121(b) is not itself "property" within the meaning of subsection (b)(2)(B)(ii), the respondent partnership in this case has taken advantage of this opportunity by proposing a plan under which the benefit of equity ownership may be obtained by no one but old equity partners. Upon the court's approval of that plan, the partners were in the same position that they would have enjoyed had they exercised an exclusive option under the plan to buy the equity in the reorganized entity, or contracted to purchase it from a seller who had first agreed to deal with no one else. It is quite true that the escrow of the partners' proposed investment eliminated any formal need to set out an express

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e. g., In re Coltex Loop Central Three Partners, L. P., 138 F. 3d 39, 45 (CA2 1998) ("[O]ld equity must be willing to contribute more money than any other source" (internal quotation marks and citation omitted)); Strub, 111 Banking L. J., at 243 (old equity must show that the reorganized entity "needs funds *from the prior owner-managers* because no other source of capital is available"). No such issue is before us, and we emphasize that our holding here does not suggest an exhaustive list of the requirements of a proposed new value plan.

option or exclusive dealing provision in the plan itself, since the court's approval that created the opportunity and the partners' action to obtain its advantage were simultaneous. But before the Debtor's plan was accepted no one else could propose an alternative one, and after its acceptance no one else could obtain equity in the reorganized entity. At the moment of the plan's approval the Debtor's partners necessarily enjoyed an exclusive opportunity that was in no economic sense distinguishable from the advantage of the exclusively entitled offeror or option holder. This opportunity should, first of all, be treated as an item of property in its own right. Cf. *In re Coltex Loop Central Three Partners, L. P.*, 138 F. 3d, at 43 (exclusive right to purchase postpetition equity is itself property); *In re Bryson Properties, XVIII*, 961 F. 2d, at 504; *Kham & Nate's Shoes No. 2, Inc.* v. *First Bank*, 908 F. 2d 1351, 1360 (CA7 1990); D. Baird, The Elements of Bankruptcy 261 (rev. ed. 1993) ("The right to get an equity interest for its fair market value is 'property' as the word is ordinarily used. Options to acquire an interest in a firm, even at its market value, trade for a positive price"). While it may be argued that the opportunity has no market value, being significant only to old equity holders owing to their potential tax liability, such an argument avails the Debtor nothing, for several reasons. It is to avoid just such arguments that the law is settled that any otherwise cognizable property interest must be treated as sufficiently valuable to be recognized under the Bankruptcy Code. See *Ahlers*, 485 U. S., at 207–208. Even aside from that rule, the assumption that no one but the Debtor's partners might pay for such an opportunity would obviously support no inference that it is valueless, let alone that it should not be treated as property. And, finally, the source in the tax law of the opportunity's value to the partners implies in no way that it lacks value to others. It might, indeed, be valuable to another precisely as a way to keep the Debtor from implementing a plan that would avoid a Chapter 7 liquidation.

Given that the opportunity is property of some value, the question arises why old equity alone should obtain it, not to mention at no cost whatever. The closest thing to an answer favorable to the Debtor is that the old equity partners would be given the opportunity in the expectation that in taking advantage of it they would add the stated purchase price to the estate. See Brief for Respondent 40–41. But this just begs the question why the opportunity should be exclusive to the old equity holders. If the price to be paid for the equity interest is the best obtainable, old equity does not need the protection of exclusiveness (unless to trump an equal offer from someone else); if it is not the best, there is no apparent reason for giving old equity a bargain. There is no reason, that is, unless the very purpose of the whole transaction is, at least in part, to do old equity a favor. And that, of course, is to say that old equity would obtain its opportunity, and the resulting benefit, because of old equity's prior interest within the meaning of subsection (b)(2)(B)(ii). Hence it is that the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended "on account of" the old equity position and therefore subject to an unpaid senior creditor class's objection.

It is no answer to this to say that the exclusive opportunity should be treated merely as a detail of the broader transaction that would follow its exercise, and that in this wider perspective no favoritism may be inferred, since the old equity partners would pay something, whereas no one else would pay anything. If this argument were to carry the day, of course, old equity could obtain a new property interest for a dime without being seen to receive anything on account of its old position. But even if we assume that old equity's plan would not be confirmed without satisfying the judge that the purchase price was top dollar, there is a further reason here not to treat property consisting of an exclusive opportunity as subsumed within the total trans-

action proposed. On the interpretation assumed here, it would, of course, be a fatal flaw if old equity acquired or retained the property interest without paying full value. It would thus be necessary for old equity to demonstrate its payment of top dollar, but this it could not satisfactorily do when it would receive or retain its property under a plan giving it exclusive rights and in the absence of a competing plan of any sort.[27] Under a plan granting an exclusive right, making no provision for competing bids or competing plans, any determination that the price was top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value is exposure to a market. See Baird, Elements of Bankruptcy, at 262; Bowers, Rehabilitation, Redistribution or Dissipation: The Evidence for Choosing Among Bankruptcy Hypotheses, 72 Wash. U. L. Q. 955, 959, 963, n. 34, 975 (1994); Markell, 44 Stan. L. Rev., at 73 ("Reorganization practice illustrates that the presence of competing bidders for a debtor, whether they are owners or not, tends to increase creditor dividends"). This is a point of some significance, since it was, after all, one of the Code's innovations to narrow the occasions for courts to make valuation judgments, as shown by its preference for the supramajoritarian class creditor voting scheme in § 1126(c), see *Ahlers*, *supra*, at 207 ("[T]he Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to provide them adequate protection or fails to honor the absolute priority rule").[28] In the interest of statutory coherence, a like dis-

[27] The dissent emphasizes the care taken by the Bankruptcy Judge in examining the valuation evidence here, in arguing that there is no occasion for us to consider the relationship between valuation process and top-dollar requirement. *Post*, at 467, n. 7. While we agree with the dissent as to the judge's conscientious handling of the matter, the ensuing text of this opinion sets out our reasons for thinking the Act calls for testing valuation by a required process that was not followed here.

[28] In *Ahlers*, we explained: "The Court of Appeals may well have believed that petitioners or other unsecured creditors would be better off if respondents' reorganization plan was confirmed. But that determi-

favor for decisions untested by competitive choice ought to extend to valuations in administering subsection (b)(2)(B)(ii) when some form of market valuation may be available to test the adequacy of an old equity holder's proposed contribution.

Whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity is a question we do not decide here. It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii).

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.

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

I agree with the majority's conclusion that the reorganization plan in this case could not be confirmed. However, I do

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nation is for the creditors to make in the manner specified by the Code. 11 U. S. C. § 1126(c). Here, the principal creditors entitled to vote in the class of unsecured creditors (*i. e.*, petitioners) objected to the proposed reorganization. This was their prerogative under the Code, and courts applying the Code must effectuate their decision." 485 U. S., at 207. The voting rules of Chapter 11 represent a stark departure from the requirements under the old Act. "Congress adopted the view that creditors and equity security holders are very often better judges of the debtor's economic viability and their own economic self-interest than courts, trustees, or the SEC. . . . Consistent with this new approach, the Chapter 11 process relies on creditors and equity holders to engage in negotiations toward resolution of their interests." Brunstad, Sigal, & Schorling, Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One, 53 Bus. Law. 1381, 1406, n. 136 (1998).

not see the need for its unnecessary speculations on certain issues and do not share its approach to interpretation of the Bankruptcy Code. I therefore concur only in the judgment.

I

Our precedents make clear that an analysis of any statute, including the Bankruptcy Code, must not begin with external sources, but with the text itself. See, *e. g.*, *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992); *Union Bank* v. *Wolas*, 502 U. S. 151, 154 (1991). The relevant Code provision in this case, 11 U. S. C. § 1129(b), does not expressly authorize prepetition equity holders to receive or retain property in a reorganized entity in exchange for an infusion of new capital.[1] Instead, it is cast in general terms and requires that, to be confirmed over the objections of an impaired class of creditors, a reorganization plan be "fair and equitable." § 1129(b)(1). With respect to an impaired class of unsecured creditors, a plan can be fair and equitable only if, at a minimum, it "provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim," § 1129(b)(2)(B)(i), or if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property," § 1129(b)(2)(B)(ii).

Neither condition is met here. The bank did not receive property under the reorganization plan equal to the amount of its unsecured deficiency claim. See *ante*, at 439–440. Therefore, the plan could not satisfy the first condition. With respect to the second condition, the prepetition equity holders

[1] In this respect, § 1129 differs from other provisions of the Code, which permit owners to retain property before senior creditors are paid. See, *e. g.*, 11 U. S. C. § 1225(b)(1)(B) (allowing a debtor to retain nondisposable income); § 1325(b)(1)(B) (same).

received at least two forms of property under the plan: the exclusive opportunity to obtain equity, *ante*, at 454–458, and an equity interest in the reorganized entity. The plan could not be confirmed if the prepetition equity holders received any of this property "on account of" their junior interest.

The meaning of the phrase "on account of" is the central interpretive question presented by this case. This phrase obviously denotes some type of causal relationship between the junior interest and the property received or retained—such an interpretation comports with common understandings of the phrase. See, *e. g.*, Random House Dictionary of the English Language 13 (2d ed. 1987) ("by reason of," "because of"); Webster's Third New International Dictionary 13 (1976) ("for the sake of," "by reason of," "because of"). It also tracks the use of the phrase elsewhere in the Code. See, *e. g.*, 11 U. S. C. §§ 365(f)(3), 510(b), 1111(b)(1)(A); see generally § 1129. Regardless of how direct the causal nexus must be, the prepetition equity holders here undoubtedly received at least one form of property—the exclusive opportunity—"on account of" their prepetition equity interest. *Ante*, at 454. Since § 1129(b)(2)(B)(ii) prohibits the prepetition equity holders from receiving "any" property under the plan on account of their junior interest, this plan was not "fair and equitable" and could not be confirmed. That conclusion, as the majority recognizes, *ibid.*, is sufficient to resolve this case. Thus, its comments on the Government's position taken in another case, *ante*, at 451–454, and its speculations about the desirability of a "market test," *ante*, at 457–458, are dicta binding neither this Court nor the lower federal courts.

II

The majority also underestimates the need for a clear method for interpreting the Bankruptcy Code. It extensively surveys pre-Code practice and legislative history, *ante*, at 444–449, but fails to explain the relevance of these sources to the interpretive question apart from the conclu-

sory assertion that the Code's language is "inexact" and the history is "helpful," *ante*, at 444. This sort of approach to interpretation of the Bankruptcy Code repeats a methodological error committed by this Court in *Dewsnup* v. *Timm*, 502 U. S. 410 (1992).

In *Dewsnup*, the Court held, based on pre-Code practice, that § 506(d) of the Code prevented a Chapter 7 debtor from stripping down a creditor's lien on real property to the judicially determined value of the collateral. *Id.*, at 419–420. The Court justified its reliance on such practice by finding the provision ambiguous. *Id.*, at 416. Section 506 was ambiguous, in the Court's view, simply because the litigants and *amici* had offered competing interpretations of the statute. *Ibid.* This is a remarkable and untenable methodology for interpreting any statute. If litigants' differing positions demonstrate statutory ambiguity, it is hard to imagine how any provision of the Code—or any other statute—would escape *Dewsnup*'s broad sweep. A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong. *Dewsnup*'s approach to statutory interpretation enables litigants to undermine the Code by creating "ambiguous" statutory language and then cramming into the Code any good idea that can be garnered from pre-Code practice or legislative history.

The risks of relying on such practice in interpreting the Bankruptcy Code, which seeks to bring an entire area of law under a single, coherent statutory umbrella, are especially weighty. As we previously have recognized, the Code "was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240 (1989) (citation omitted). The Code's overall scheme often reflects substantial departures from various pre-Code practices. Most relevant to this case, the Code created a system of creditor class ap-

proval of reorganization plans, unlike early pre-Code practice where plan confirmation depended on unanimous creditor approval and could be hijacked by a single holdout. See D. Baird, The Elements of Bankruptcy 262 (rev. ed. 1993). Hence it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.

Even assuming the relevance of pre-Code practice in those rare instances when the Code is truly ambiguous, see, *e. g.*, *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986), and assuming that the language here is ambiguous, surely the sparse history behind the new value exception cannot inform the interpretation of § 1129(b)(2)(B)(ii). No holding of this Court ever embraced the new value exception. As noted by the majority, *ante*, at 445, the leading decision suggesting this possibility, *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), did so in dictum. And, prior to the Code's enactment, no court ever relied on the *Case* dictum to approve a plan. Given its questionable pedigree prior to the Code's enactment, a concept developed in dictum and employed by lower federal courts only *after* the Code's enactment is simply not relevant to interpreting this provision of the Code.[2]

This danger inherent in excessive reliance on pre-Code practice did not escape the notice of the dissenting Justices in *Dewsnup* who expressed "the greatest sympathy for the Courts of Appeals who must predict which manner of statu-

[2] Nor do I think that the history of rejected legislative proposals bears on the proper interpretation of the phrase "on account of." As an initial matter, such history is irrelevant for the simple reason that Congress enacted the Code, not the legislative history predating it. See *United States* v. *Estate of Romani*, 523 U. S. 517, 535–537 (1998) (SCALIA, J., concurring in part and concurring in judgment). Even if this history had some relevance, it would not support the view that Congress intended to insert a new value exception into the phrase "on account of." On the contrary, Congress never acted on bills that would have allowed nonmonetary new value contributions. *Ante*, at 446–447.

tory construction we shall use for the next Bankruptcy Code case." *Dewsnup*, *supra*, at 435 (SCALIA, J., joined by SOUTER, J., dissenting). Regrettably, subsequent decisions in the lower courts have borne out the dissenters' fears. The methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and, even more tellingly, Bankruptcy Courts, which must interpret the Code on a daily basis.[3] In the wake of *Dewsnup*, the Fifth Circuit withdrew its decision on the new value exception, prompting the author of the original opinion to observe that *Dewsnup* had clouded "[h]ow one should approach issues of a statutory construction arising from the Bankruptcy Code." *In re Greystone III Joint Venture*, 995 F. 2d 1274, 1285 (CA5 1991) (Jones, J., dissenting). Unfortunately, the approach taken today only thickens the fog.

JUSTICE STEVENS, dissenting.

Prior to the enactment of the Bankruptcy Reform Act of 1978, this Court unequivocally stated that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor if their participation is based on a contribution in money, or in money's worth, reasonably equivalent in view of all the circumstances

[3] See, *e. g.*, *In re Southeast Banking Corp.*, 156 F. 3d 1114, 1123, n. 16 (CA11 1998); *In re Greystone III Joint Venture*, 995 F. 2d 1274 (CA5 1991) *(per curiam)* (vacating prior panel decision regarding new value exception apparently in light of *Dewsnup*); 995 F. 2d, at 1285 (Jones, J., dissenting); *In re Kirchner*, 216 B. R. 417, 418 (Bkrtcy. Ct. WD Wis. 1997); *In re Bowen*, 174 B. R. 840, 852–853 (Bkrtcy. Ct. SD Ga. 1994); *In re Dever*, 164 B. R. 132, 138 (Bkrtcy. Ct. CD Cal. 1994); *In re Mr. Gatti's, Inc.*, 162 B. R. 1004, 1010 (Bkrtcy. Ct. WD Tex. 1994); *In re Taffi*, 144 B. R. 105, 112–113 (Bkrtcy. Ct. CD Cal. 1992), rev'd, 72 A. F. T. R. 2d ¶ 93–5408, p. 93–6607 (CD Cal. 1993), aff'd in part and rev'd in part, 68 F. 3d 306 (CA9 1995), aff'd as modified, 96 F. 3d 1190 (CA9 1996) (en banc), cert. denied, 521 U. S. 1103 (1997); *In re A. V. B. I., Inc.*, 143 B. R. 738, 744–745 (Bkrtcy. Ct. CD Cal. 1992), holding rejected by *In re Bonner Mall Partnership*, 2 F. 3d 899, 912–913 (CA9 1993), cert. granted, 510 U. S. 1039, vacatur denied and appeal dism'd as moot, 513 U. S. 18 (1994).

to their participation.[1] As we have on two prior occasions,[2] we granted certiorari in this case to decide whether 11 U. S. C. § 1129(b)(2)(B)(ii) of the 1978 Act preserved or repealed this "new value" component of the absolute priority rule. I believe the Court should now definitively resolve the question and state that a holder of a junior claim or interest does not receive property "on account of" such a claim when its participation in the plan is based on adequate new value.

The Court today wisely rejects the Government's "starchy" position that an old equity holder can never receive an interest in a reorganized venture as a result of a cramdown unless the creditors are first paid in full. *Ante*, at 451.[3] Nevertheless, I find the Court's objections to the plan

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[1] As Justice Douglas explained in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 121–122 (1939) (footnote omitted):

"It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. This Court, as we have seen, indicated as much in *Northern Pacific Ry. Co.* v. *Boyd*[, 228 U. S. 482 (1913),] and *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*[, 271 U. S. 445 (1926)]. Especially in the latter case did this Court stress the necessity, at times, of seeking new money 'essential to the success of the undertaking' from the old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made. . . .

"In view of these considerations we believe that to accord 'the creditor his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."

[2] See *Norwest Bank Worthington* v. *Ahlers*, 485 U. S. 197, 203, n. 3 (1988); *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18 (1994).

[3] As I noted earlier, see n. 1, *supra*, Justice Douglas made this proposition clear in *Case* v. *Los Angeles*, *supra*. Justice Douglas was a preeminent bankruptcy scholar, well known for his views on the dangers posed by management-controlled corporate reorganizations. Both his work on the Protective Committee Study for the Securities and Exchange Commis-

before us unsupported by either the text of § 1129(b)(2)(B)(ii) or the record in this case. I would, therefore, affirm the judgment of the Court of Appeals.

I

Section 1129 of Chapter 11 sets forth in detail the substantive requirements that a reorganization plan must satisfy in order to qualify for confirmation.[4] In the case of dissenting creditor classes, a plan must conform to the dictates of § 1129(b). With only one exception, the requirements of §§ 1129(a) and 1129(b) are identical for plans submitted by stockholders or junior creditors and plans submitted by other parties. That exception is the requirement in § 1129(b)(2)(B)(ii) that no holder of a junior claim or interest may receive or retain any property "on account of such junior claim or interest."

When read in the light of Justice Douglas' opinion in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), the meaning of this provision is perfectly clear. Whenever a junior claimant receives or retains an interest for a bargain price, it does so "on account of" its prior claim. On the other

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sion and on Chapter X of the Bankruptcy Act sought to "restore the integrity of the reorganization process" which "too often [was] masterminded from behind the scenes by reorganization managers allied with the corporation's management or its bankers." Jennings, Mr. Justice Douglas: His Influence on Corporate and Securities Regulation, 73 Yale L. J. 920, 935–937 (1964). To this end, Douglas placed special emphasis on the protection of creditors' rights in reorganizations. Hopkirk, William O. Douglas—His Work in Policing Bankruptcy Proceedings, 18 Vand. L. Rev. 663, 685 (1965). I find it implausible that Congress, in enacting the Bankruptcy Code, intended to be even more strict than Justice Douglas in limiting the ability of debtors to participate in reorganizations.

[4] "Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case. Section 1129 provides the requirements for such confirmation, containing Congress' minimum requirements for allowing an entity to discharge its unpaid debts and continue its operations." 7 Collier on Bankruptcy ¶ 1129.01, p. 1129–10 (rev. 15th ed. 1998).

hand, if the new capital that it invests has an equivalent or greater value than its interest in the reorganized venture, it should be equally clear that its participation is based on the fair price being paid and that it is not "on account of" its old claim or equity.

Of course, the fact that the proponents of a plan offer to pay a fair price for the interest they seek to acquire or retain does not necessarily mean that the bankruptcy judge should approve their plan. Any proposed cramdown must satisfy all of the requirements of § 1129 including, most notably, the requirement that the plan be "fair and equitable" to all creditors whose claims are impaired. See § 1129(b)(1). Moreover, even if the old stockholders propose to buy the debtor for a fair price, presumably their plan should not be approved if a third party, perhaps motivated by unique tax or competitive considerations, is willing to pay an even higher price. Cf. § 1129(c).

In every reorganization case, serious questions concerning the value of the debtor's assets must be resolved.[5] Nevertheless, for the purpose of answering the legal question presented by the parties to this case, I believe that we should assume that all valuation questions have been correctly answered. If, for example, there had been a widely advertised auction in which numerous bidders participated, and if the plan proposed by respondents had been more favorable by a wide margin than any competing proposal, would § 1129(b)(2)(B)(ii) require rejection of their plan simply because it provides that they shall retain 100% of the equity?

Petitioner and the Government would reply "yes" because they think § 1129(b)(2)(B)(ii) imposes an absolute ban on participation by junior claimants without the consent of all senior creditors. The Court correctly rejects this extreme position because it would make the words "on account of"

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[5] See Warren, A Theory of Absolute Priority, 1991 Ann. Survey Am. L. 9, 13 ("In practice, no problem in bankruptcy is more vexing than the problem of valuation").

superfluous, and because there is no plausible reason why Congress would have desired such a categorical exclusion, given that in some cases old equity may be the most likely source of new capital. See *ante*, at 452–453. Indeed, the dissenting judge in the Court of Appeals thought "such a result would border on the absurd."[6] Thus, neither the dissenting judge in the Court of Appeals nor the Court appears to be in doubt about the proper answer to my hypothetical question. Instead, the decision is apparently driven by doubts concerning the procedures followed by the Bankruptcy Judge in making his value determinations, implicitly suggesting that the statute should be construed to require some form of competitive bidding in cases like this.[7] See *ante*, at 456–458.

Perhaps such a procedural requirement would be a wise addition to the statute, but it is surely not contained in the

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[6] Judge Kanne wrote in dissent: "Perhaps the majority's reasoning is driven by the fear that a 'but for' interpretation would prevent old equity from ever participating in a reorganized entity—something Congress could never have intended. Indeed, such a result would border on the absurd, but a simpler, 'but for' causation requirement would not preclude junior interests from participating in a reorganized entity. If prior equity holders earn their shares in an open auction, for example, their received interests would not be 'on account of' their junior interests but 'on account of' their capital contributions." *In re 203 N. LaSalle Street Partnership*, 126 F. 3d 955, 972 (CA7 1997).

It would seem logical for adherents of this view also to find participation by junior interests in the new entity not "on account of" their prior interest, if it were stipulated that old equity's capital contributions exceeded the amount attainable in an auction, or if findings to that effect were not challenged.

[7] This doubt is unwarranted in this case. The bank does not challenge the Bankruptcy Court's finding that the 15 floors of office space had a market value of $55.8 million. The bank's original expert testimony on the value of the property differed from the Bankruptcy Judge's finding by only 2.8%. *In re 203 N. LaSalle Street Partnership*, 190 B. R. 567, 573–576 (Bkrtcy. Ct. ND Ill. 1995). Therefore, although the bank argues that the policy implications of the "new value debate" revolve around judicial determinations of the valuation of the relevant collateral, Brief for Petitioner 5, n. 2, this concern was neither squarely presented in this case nor preserved for our review.

present text of § 1129(b)(2)(B)(ii). Indeed, that subsection is not a procedural provision at all. Section 1129 defines the substantive elements that must be met to render plans eligible for confirmation by the bankruptcy judge after all required statutory procedures have been completed. Cf. § 1121 (Who may file a plan); § 1122 (Classification of claims or interests); § 1125 (Postpetition disclosure and solicitation); § 1126 (Acceptance of plan); § 1127 (Modification of plan). Because, as I discuss below, petitioner does not now challenge either the procedures followed by the Bankruptcy Judge or any of his value determinations, neither the record nor the text of § 1129(b)(2)(B)(ii) provides any support for the Court's disposition of this case.

II

As I understand the Court's opinion, it relies on two reasons for refusing to approve the plan at this stage of the proceedings: one based on the plan itself and the other on the confirmation procedures followed before the plan was adopted. In the Court's view, the fatal flaw in the plan proposed by respondent was that it vested complete ownership in the former partners immediately upon confirmation, *ante,* at 454, and the defect in the process was that no other party had an opportunity to propose a competing plan.

These requirements are neither explicitly nor implicitly dictated by the text of the statute. As for the first objection, if we assume that the partners paid a fair price for what the Court characterizes as their "exclusive opportunity," I do not understand why the retention of a 100% interest in assets is any more "on account of" their prior position than retaining a lesser percentage might have been. Surely there is no legal significance to the fact that immediately after the confirmation of the plan "the partners were in the same position that they would have enjoyed had they exercised an exclusive option under the plan to buy the equity

in the reorganized entity, or contracted to purchase it from a seller who had first agreed to deal with no one else." *Ibid.*

As to the second objection, petitioner does not challenge the Bankruptcy Judge's valuation of the property or any of his other findings under § 1129 (other than the plan's compliance with § 1129(b)(2)(B)(ii)). Since there is no remaining question as to value, both the former partners (and the creditors, for that matter) are in the same position that they would have enjoyed if the Bankruptcy Court had held an auction in which this plan had been determined to be the best available. That the court did not hold such an auction should not doom this plan, because no such auction was requested by any of the parties, and the statute does not require that an auction be held. As with all the provisions of § 1129, the question of compliance with § 1129(b)(2)(B)(ii) turns on the substantive content of the plan, not on speculation about the procedures that might have preceded its confirmation.

In this case, the partners had the exclusive right to propose a reorganization plan during the first 120 days after filing for bankruptcy. See § 1121(b). No one contends that that exclusive right is a form of property that is retained by the debtor "on account of" its prior status.[8] The partners did indeed propose a plan which provided for an infusion of $6.125 million in new capital in exchange for ownership of the reorganized debtor. Since the tax value of the partnership depended on their exclusive participation, it is unsurprising that the partners' plan did not propose that unidentified outsiders should also be able to own an unspecified portion of the reorganized partnership. It seems both practically and economically puzzling to assume that Congress would have expected old equity to provide for the participa-

[8] Indeed, as the Court acknowledges, *ante*, at 454, it is not "property" within the meaning of the Act.

tion of unknown third parties, who would have interests different from (and perhaps incompatible with) the partners', in order to comply with § 1129(b)(2)(B)(ii).[9]

Nevertheless, even after proposing their plan, the partners had no vested right to purchase an equity interest in the postreorganization enterprise until the Bankruptcy Judge confirmed the plan. They also had no assurance that the court would refuse to truncate the exclusivity period and allow other interested parties to file competing plans. As it turned out, the Bankruptcy Judge did not allow respondent to file its proposed plan, but the bank did not appeal that issue, and the question is not before us.[10]

The moment the judge did confirm the partners' plan, the old equity holders were required by law to implement the terms of the plan.[11] It was then, and only then, that what

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[9] It goes without saying that Congress could not have expected the partners' plan to include a provision that would allow for the Bankruptcy Judge to entertain competing plans, since that is a discretionary decision exclusively within the province of the court. See § 1121(d).

[10] Apparently, the bank's plan called for liquidation of the property. In order to flesh out all facts bearing on value, perhaps the Bankruptcy Judge should have terminated the exclusivity period and allowed the bank to file its plan. That the bank's plan called for liquidation of the property in a single-asset context does not necessarily contravene the purposes of Chapter 11. See, *e. g.*, *In re River Village Associates*, 181 B. R. 795, 805 (ED Pa. 1995).

[11] Section 1141(a) states: "Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan."

See 8 Collier on Bankruptcy ¶ 1141.02, at 1141–4 to 1141–5. ("Section 1141(a) of the Code provides that a plan is binding upon all parties once it is confirmed. Under this provision, subject to compliance with the requirements of due process under the Fifth Amendment, a confirmed plan

the Court characterizes as the critical "exclusive opportunity" came into existence. What the Court refuses to recognize, however, is that this "exclusive opportunity" is the function of the procedural features of this case: the statutory exclusivity period, the Bankruptcy Judge's refusal to allow the bank to file a competing plan, and the inescapable fact that the judge could confirm only one plan.

The Court's repeated references to the partners' "opportunity," see *ante*, at 454, 455, 456, is potentially misleading because it ignores the fact that a plan is binding upon all parties once it is confirmed. One can, of course, refer to contractual rights and duties as "opportunities," but they are not separate property interests comparable to an option that gives its holder a legal right either to enter into a contract or not to do so. They are simply a part of the bundle of contractual terms that have legal significance when a plan is confirmed.

When the court approved the plan, it accepted an offer by old equity. If the value of the debtor's assets has been accurately determined, the fairness of such an offer should be judged by the same standard as offers made by newcomers. Of course, its offer should not receive more favorable consideration "on account of" their prior ownership. But if the debtor's plan would be entitled to approval if it had been submitted by a third party, it should not be disqualified simply because it did not include a unique provision that would

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of reorganization is binding upon every entity that holds a claim or interest . . ."); see also § 1142(a).

In this case, the plan provided: "The general partners and limited partners of the Reorganized Debtor shall contribute or cause to be contributed $6.125 million of new capital (the 'New Capital') to the Reorganized Debtor as follows: $3.0 million in cash ('Initial Capital') on the first business banking day after the Effective Date, and $625,000 on each of the next five anniversaries of the Effective Date." App. 38–39. The "Effective Date" of the plan was defined as "[t]he first business day after the Confirmation Order is entered on the docket sheet maintained for the Case." *Id.*, at 24.

not be required in an offer made by any other party, including the creditors.

Since the Court of Appeals correctly interpreted § 1129(b)(2)(B)(ii), its judgment should be affirmed.

Accordingly, I respectfully dissent.

Syllabus

EL PASO NATURAL GAS CO. ET AL. *v.* NEZTSOSIE ET AL.

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

No. 98–6. Argued March 2, 1999—Decided May 3, 1999

As relevant here, the Price-Anderson Act provides certain federal licensees with limited liability for claims of "public liability" arising out of or resulting from a nuclear incident, converts such actions into federal claims, grants federal district courts removal jurisdiction over such actions, and provides the mechanics for consolidating the actions and for managing them once consolidated. Respondents filed separate lawsuits in Navajo Tribal Courts, claiming damages for injuries suffered as a result of uranium mining operations. Petitioners, defendants in those suits, each filed suit in Federal District Court, seeking to enjoin respondents from pursuing their tribal-court claims. Citing the tribal-court exhaustion doctrine of *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, the District Court denied preliminary injunctions except to the extent that respondents sought relief in the Tribal Courts under the Price-Anderson Act. The practical consequences of the injunctions were left in the air, however, since the District Court left the determinations whether the Act applied to respondents' claims to the Tribal Courts. On petitioners' consolidated appeals, the Ninth Circuit affirmed the District Court's decisions not to enjoin respondents from pursuing non-Price-Anderson Act claims and to allow the Tribal Courts to decide whether respondents' claims fell under that Act. Although respondents had not appealed the partial injunctions, the Ninth Circuit, citing important comity considerations, *sua sponte* reversed them.

Held:

1. Because the partial injunctions were not properly before the Court of Appeals, it erred in addressing them. Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, but may not attack the decree with a view either to enlarging his own rights thereunder or lessening his adversary's rights. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435. The Ninth Circuit acknowledged the rule, but took up the unappealed portions of the orders *sua sponte* because it believed that the prohibition on modifying judgments in favor of a nonappealing party is a "rule of practice" subject to exceptions rather than an unqualified bound on the jurisdiction of appellate courts. This Court need not decide the theoretical status of the rule, for even if it is not strictly jurisdictional, the "comity

considerations" the Ninth Circuit invoked are clearly inadequate to defeat the institutional interests the rule advances. Indeed, not a single one of this Court's holdings has ever recognized an exception to the rule. Respondents misconceive the nature of the cross-appeal requirement when they argue that they should not be penalized for failing to cross-appeal from preliminary injunctions because they could raise the same issue on appeal from the final judgment. The requirement is meant not to penalize parties who fail to assert their rights, but to protect institutional interests in the orderly functioning of the judicial system by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not. Fairness of notice does not turn on the interlocutory character of the orders at issue here, and the interest in repose, though somewhat diminished when a final appeal may yet raise the issue, is still considerable owing to the indefinite duration of the injunctions. Pp. 479–482.

2. The doctrine of tribal-court exhaustion does not apply in this case, which if brought in a state court would be subject to removal. Pp. 482–488.

(a) This case differs markedly from those in which tribal-court exhaustion is appropriate. By the Price-Anderson Act's unusual preemption provision, 42 U. S. C. § 2014(hh), Congress expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under the Act when removal is contested. Petitioners seek the benefit of what is in effect the same scheme of preference for a federal forum when they ask for an injunction against further litigation in the tribal courts. The issue, then, is whether Congress would have chosen to postpone federal resolution of the enjoinable character of this tribal-court litigation, when it would not have postponed federal resolution of the functionally identical issue pending in a state court. Pp. 482–485.

(b) The apparent reasons for the congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation. The Act provides clear indications of the congressional aims of speed and efficiency in the provisions addressing consolidation and management of cases, *e. g.*, 42 U. S. C. § 2210(n)(3)(A). The Act's terms are underscored by its legislative history, which expressly refers to the multitude of separate cases brought in the aftermath of the Three Mile Island accident and adverts to the expectation that the consolidation provisions would avoid inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions. Applying tribal exhaustion would invite precisely the mischief of duplicative determina-

tions and consequent inefficiencies that the Act sought to avoid, and the force of the congressional concerns deprives arguable justifications for applying tribal exhaustion of any plausibility in these circumstances. Pp. 485–488.

136 F. 3d 610, vacated and remanded.

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

James R. Atwood argued the cause for petitioners. With him on the briefs were *Richard A. Meserve*, *Lynn H. Slade*, and *Walter E. Stern.*

Jonathan E. Nuechterlein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Martin W. Matzen*, *John D. Leshy*, *Mary Anne Sullivan*, and *John F. Cordes.*

H. Bartow Farr III argued the cause for respondents. With him on the brief were *Seth Richard Lesser*, *Max W. Berger*, *Louis C. Paul*, *Richard G. Taranto*, *Moshe Maimon*, and *Steven J. Phillips.**

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*Briefs of *amici curiae* urging reversal were filed for the State of South Dakota et al. by *Mark W. Barnett*, Attorney General of South Dakota, and *John Patrick Guhin*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Daniel E. Lungren* of California, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Jan Graham* of Utah, and *Gay Woodhouse* of Wyoming; for Lewis County, Idaho, by *Kimron R. Torgerson*, *Marc A. Lyons*, and *Tom D. Tobin;* for the Association of American Railroads by *Betty Jo Christian*, *Charles G. Cole*, *Sara E. Hauptfuehrer*, and *Daniel Saphire;* for the Interstate Natural Gas Association of America by *James W. McCartney* and *Richard H. Page;* for Kerr-McGee Corp. by *John Townsend Rich*, *Richard T. Conway*, *Michael R. Comeau*, and *Jon J. Indall;* and for the National Mining Association by *James B. Hamlin*, *Anthony J. Thompson*, and *Harold P. Quinn, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Fallon Paiute-Shoshone Tribe by *Melody L. McCoy* and *Kim Jerome Gottschalk;*

JUSTICE SOUTER delivered the opinion of the Court.

The issue is whether the judicially created doctrine of tribal-court exhaustion, requiring a district court to stay its hand while a tribal court determines its own jurisdiction, should apply in this case, which if brought in a state court would be subject to removal. We think the exhaustion doctrine should not extend so far.

I

With the object of "encourag[ing] the private sector to become involved in the development of atomic energy for peaceful purposes," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 63 (1978), Congress passed the Atomic Energy Act of 1954 (AEA), 68 Stat. 919, a broad scheme of federal regulation and licensing. Because it "soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial," *Duke Power*, *supra*, at 63, in 1957 Congress amended the AEA with the Price-Anderson Act, 71 Stat. 576. Price-Anderson provided certain federal licensees with a system of private insurance, Government indemnification, and limited liability for claims of "public liability," now defined generally as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . ." 42 U. S. C. § 2014(w). The Act defines "nuclear incident" as "any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explo-

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and for Bertram Roberts et al. by *Brian Wolfman*, *Alan B. Morrison*, and *Ervin A. Gonzalez*.

Briefs of *amici curiae* were filed for American Nuclear Insurers by *Donald E. Jose* and *David Wiedis;* and for the Navajo Nation by *Terence M. Gurley* and *Steven J. Bloxham*.

sive, or other hazardous properties of source, special nuclear, or byproduct material . . . ." § 2014(q).[1]

In the wake of the 1979 accident at the Three Mile Island nuclear power plant, suits proliferated in state and federal courts, but because the accident was not an "extraordinary nuclear occurrence," within the meaning of the Act, see § 2014(j), there was no mechanism for consolidating the claims in federal court. See S. Rep. No. 100–218, p. 13 (1987). Congress responded in 1988 by amending the Act to grant United States district courts original and removal jurisdiction over all "public liability actions," 102 Stat. 1076, 42 U. S. C. § 2210(n)(2), defined as suits "asserting public liability," § 2014(hh), which "shall be deemed to be . . . action[s] arising under" § 2210. The Act now provides the mechanics for consolidating such actions, § 2210(n)(2), for managing them once consolidated, § 2210(n)(3), and for distributing limited compensatory funds, § 2210(*o*).

In 1995, respondents Laura and Arlinda Neztsosie, two members of the Navajo Nation, filed suit in the District Court of the Navajo Nation, Tuba City District, against petitioner El Paso Natural Gas Company and one of its subsidiaries, Rare Metals Corporation. The Neztsosies alleged that on the Navajo Nation Reservation, from 1950 to 1965, El Paso and Rare Metals operated open pit uranium mines, which collected water then used by the Neztsosies for a number of things, including drinking. The Neztsosies claimed that, as a result, they suffered severe injuries from exposure to radioactive and other hazardous materials, for which they sought compensatory and punitive damages under Navajo tort law. App. 18a–27a. In 1996, respondent Zonnie Richards, also a member of the Navajo Nation, brought suit for herself and her husband's estate in the District Court of the

[1] "Source material" includes uranium and uranium ore. 42 U. S. C. § 2014(z). "Byproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." § 2014(e).

Navajo Nation, Kayenta District, against defendants including the Vanadium Corporation of America (VCA), predecessor by merger of petitioner Cyprus Foote Mineral Company. Richards raised Navajo tort law claims for wrongful death and loss of consortium arising from uranium mining and processing on the Navajo Nation Reservation by VCA and other defendants from the 1940's through the 1960's. 136 F. 3d 610, 613 (CA9 1998); App. 39a–60a.

El Paso and Cyprus Foote each filed suit in the United States District Court for the District of Arizona, seeking to enjoin the Neztsosies and Richards from pursuing their claims in the Tribal Courts. The District Court, citing the tribal-court exhaustion doctrine of *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985), denied preliminary injunctions "except to the extent" that the Neztsosies and Richards sought relief in the Tribal Courts under the Price-Anderson Act. App. 71a, 73a. The practical consequences of those injunctions were left in the air, however, since the District Court declined to decide whether the Act applied to the claims brought by the Neztsosies and Richards, leaving those determinations to the Tribal Courts in the first instance. *Id.*, at 71a, 73a. Both El Paso and Cyprus Foote appealed.

On the companies' consolidated appeals, the Ninth Circuit affirmed the District Court's decisions declining to enjoin the Neztsosies and Richards from pursuing non-Price-Anderson Act claims, as well as the decisions to allow the Tribal Courts to decide in the first instance whether the Neztsosies' and Richards's tribal claims fell within the ambit of the Price-Anderson Act. 136 F. 3d, at 617, n. 4, 620. But the Court of Appeals did not rest there. Although neither the Neztsosies nor Richards had appealed the partial injunctions against them, the Ninth Circuit *sua sponte* addressed those District Court rulings, citing "important comity considerations involved." *Id.*, at 615. The court reversed as to the injunctions, holding that the Act contains no "express juris-

dictional prohibition" barring the tribal court from determining its jurisdiction over Price-Anderson Act claims. *Id.*, at 617–620. Judge Kleinfeld dissented, concluding that the unappealed partial injunctions against litigating Price-Anderson Act claims in tribal court should be treated as law of the case, that all of the tribal-law claims were actually Price-Anderson Act claims, and that exhaustion was not required. *Id.*, at 620–622. We granted certiorari, 525 U. S. 928 (1998), and now vacate and remand.

II

There is one matter preliminary to the principal issue. Because respondents did not appeal those portions of the District Court's orders enjoining them from pursuing Price-Anderson Act claims in Tribal Court, those injunctions were not properly before the Court of Appeals, which consequently erred in addressing them. We have repeatedly affirmed two linked principles governing the consequences of an appellee's failure to cross-appeal. Absent a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court," but may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924); see also *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 111 (1922). We recognized the latter limitation as early as 1796, see *McDonough* v. *Dannery*, 3 Dall. 188, 198, and more than 60 years ago we spoke of it as "inveterate and certain," *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191 (1937).

The Court of Appeals acknowledged the rule, but, in light of the natural temptation to dispose of the related questions of jurisdiction and exhaustion at one blow, still thought it could take up the unappealed portions of the District Court's orders *sua sponte* because "important comity considera-

tions" were involved. 136 F. 3d, at 615. The Court of Appeals apparently took the view, shared by a number of courts over the years, that the prohibition on modifying judgments in favor of a nonappealing party is a "rule of practice," subject to exceptions, not an unqualified limit on the power of appellate courts. Petitioners and the Government say the Court of Appeals was mistaken, seeing the rule as an unqualified bound on the jurisdiction of the courts of appeals. We need not decide the theoretical status of such a firmly entrenched rule,[2] however, for even if it is not strictly jurisdictional (a point we do not resolve) the "comity considerations" invoked by the Court of Appeals to justify relaxing it are clearly inadequate to defeat the institutional interests in fair notice and repose that the rule advances. Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule.[3]

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[2] The issue has caused much disagreement among the Courts of Appeals and even inconsistency within particular Circuits for more than 50 years. For a survey of many of the cases, see *Marts* v. *Hines*, 117 F. 3d 1504, 1507–1511 (CA5 1997) (Garwood, J., dissenting), cert. denied, 522 U. S. 1058 (1998). For recent cases taking opposing positions, compare, *e. g.*, *Young Radiator Co.* v. *Celotex Corp.*, 881 F. 2d 1408, 1416 (CA7 1989) (jurisdictional), with *United States* v. *Tabor Court Realty Corp.*, 943 F. 2d 335, 342–344 (CA3 1991) (rule of practice), cert. denied *sub nom. Linde* v. *Carrier Coal Enterprises, Inc.*, 502 U. S. 1093 (1992). For a discussion of the issue among the members of a distinguished panel of the Second Circuit, though without any reference to *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937), see *In re Barnett*, 124 F. 2d 1005, 1008–1013 (CA2 1942) (Frank, J., joined by Clark, J.); *id.*, at 1013–1014 (L. Hand, J., dissenting).

[3] On three occasions since *Morley Constr. Co.*, we have made statements in dictum that might be taken to suggest the possibility of exceptions to the rule. Only one of those statements concerned the power of the courts of appeals. See *Bowen* v. *Postal Service*, 459 U. S. 212, 217–218, n. 7 (1983); *id.*, at 244 (White, J., concurring in judgment in part and dissenting in part); *id.*, at 246–247 (REHNQUIST, J., dissenting). In *Strunk* v. *United States*, 412 U. S. 434, 437 (1973), we suggested in passing that there might be occasions when, in a criminal case, the Court might address a constitu-

On the assumption that comity is not enough, respondents offer one additional justification for an exception to the cross-appeal requirement here. They point out that the District Court orders appealed from were preliminary injunctions and thus interlocutory, not final, decrees. Respondents contend that because they knew they could challenge the substance of those orders on appeal from a final judgment, they should not be penalized for failing to cross-appeal at this preliminary stage of the suit. But this argument misconceives the nature of the cross-appeal requirement. It is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly

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tional issue resolved in favor of a petitioner and not raised in a cross-petition for certiorari. In *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 226, n. 2 (1975), we suggested that the cross-petition requirement might be a "matter of practice and control of our docket" rather than of "our power." Although some might see *Berkemer* v. *McCarty*, 468 U. S. 420, 435, n. 23 (1984), as countenancing exceptions to the cross-petition requirement, see R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 364 (7th ed. 1993); see also *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 485–486 (1989), we have made clear that such a view of *Berkemer* is mistaken. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 365, n. 8 (1994).

We have repeatedly expressed the rule in emphatic terms, see, *e. g.*, *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250–251 (1937) ("[A]n appellee cannot without a cross-appeal attack a judgment entered below"), though admittedly we have normally had occasion to do so in reference to our own certiorari jurisdiction rather than to the appellate jurisdiction of the courts of appeals, see, *e. g.*, *LeTulle* v. *Scofield*, 308 U. S. 415, 421–422 (1940) ("[W]e cannot afford [the nonpetitioning party] relief"); *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 431–432 (1941) ("[O]ur review is limited"; "that question is not open here"); *Alaska Industrial Bd.* v. *Chugach Elec. Assn., Inc.*, 356 U. S. 320, 325 (1958) (those questions are "not open"); *NLRB* v. *International Van Lines*, 409 U. S. 48, 52, n. 4 (1972) ("not before us"); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 119, n. 14 (1985) ("An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed"). Cf. *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 398–402 (1981) (res judicata bars nonappealing parties from gaining the benefit of coparties' victory on appeal).

functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not. Fairness of notice does not turn on the interlocutory character of the orders at issue here, and while the interest in repose is somewhat diminished when a final appeal may yet raise the issue, it is still considerable owing to the indefinite duration of the injunctions. Preliminary injunctions are, after all, appealable as of right, see 28 U. S. C. § 1292(a)(1), and the timely filing requirements of Federal Rules of Appellate Procedure 4 and 26(b) squarely cover such appeals. Neither those Rules nor the interests animating the cross-appeal requirement offer any leeway for such an exception.

III

Before the District Court, petitioners asserted simply that the Tribal Court lacked subject-matter jurisdiction over Price-Anderson Act claims in respondents' tribal-court suits, see App. 14a, 15a, 37a, and sought injunctive relief.[4] The District Court responded by enjoining respondents from pursuing any Price-Anderson claims in Tribal Court, and because they did not appeal the injunction, we have no occasion

[4] At oral argument before the Court of Appeals, petitioners introduced for the first time the essence of the theory on which they now rely, that the Tribal Courts somehow lacked jurisdiction over Price-Anderson claims because under *Strate* v. *A–1 Contractors,* 520 U. S. 438 (1997), a tribal court has jurisdiction over a nonmember only where the tribe has regulatory jurisdiction with respect to the matter at issue, and Congress has completely occupied the field of nuclear regulation. See 136 F. 3d 610, 618, n. 5 (CA9 1998); Brief for Petitioners 29–33. But *Strate* dealt with claims against nonmembers arising on state highways, and "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Strate, supra,* at 442. By contrast, the events in question here occurred on tribal lands. 136 F. 3d, at 618, n. 5.

to consider its merits.[5] Yet the injunction has no practical significance without a determination whether respondents' causes of action are as a matter of law Price-Anderson claims under the terms of 42 U. S. C. §§ 2210(n)(2) and 2014(hh). This question the District Court declined to answer, thinking that the doctrine of tribal-court exhaustion required it to abstain from deciding a question of tribal-court jurisdiction until the Tribal Courts themselves had addressed the matter. The Court of Appeals approved the abstention on the theory that the comity rationale underlying the tribal exhaustion doctrine applied. See 136 F. 3d, at 613–615, 620. We think, however, that it does not.

National Farmers Union Ins. Cos. v. *Crow Tribe*, 471 U. S. 845 (1985), was a suit involving the federal-question jurisdiction of a United States District Court under 28 U. S. C. § 1331, brought to determine "whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians," 471 U. S., at 855. We held, initially, that federal courts have authority to determine, as a matter "arising under" federal law, see 28 U. S. C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction. See 471 U. S., at 852–853. After concluding that federal courts have subject-matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.*, at 857. In justification of a prudential requirement of tribal exhaustion, we stated that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been

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[5] Although we do not reach the merits of the injunction, candor requires acknowledging that our view of the inappropriateness of applying tribal exhaustion, adumbrated *infra*, at 485–487, suggests that, notwithstanding the silence of the Price-Anderson Act with respect to tribal courts, the exercise of tribal jurisdiction over claims found to fall within the Act once a defendant has sought a federal forum would be anomalous at best.

altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," *id.*, at 855–856 (footnote omitted). The same "considerations of comity," *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, 15 (1987), provided the rationale for extending the doctrine to cases where a defendant in tribal court asserts federal-diversity jurisdiction in a related action in district court. *Id.*, at 16. Exhaustion was appropriate in each of those cases because "Congress is committed to a policy of supporting tribal self-government . . . [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers Union Ins. Cos.*, *supra*, at 856.

This case differs markedly. By its unusual preemption provision, see 42 U. S. C. § 2014(hh),[6] the Price-Anderson Act transforms into a federal action "any public liability action arising out of or resulting from a nuclear incident," § 2210(n)(2). The Act not only gives a district court original jurisdiction over such a claim, see *ibid.*, but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court, see *ibid.* Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for

[6] This structure, in which a public liability action becomes a federal action, but one decided under substantive state-law rules of decision that do not conflict with the Price-Anderson Act, see 42 U. S. C. § 2014(hh), resembles what we have spoken of as "'complete pre-emption' doctrine," see *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 393 (1987), under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'" *ibid.* (quoting *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 65 (1987)). We have found complete preemption to exist under the Labor Management Relations Act, 1947, see *Caterpillar Inc.*, *supra*, at 393–394, and the Employee Retirement Income Security Act of 1974, see *Metropolitan Life*, *supra*, at 65–66.

litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

Petitioners seek the benefit of what in effect is the same scheme of preference for a federal forum when they ask for an injunction against further litigation in the tribal courts. To be sure, their complaints claimed that the tribal courts (unlike state courts) had no jurisdiction over these actions, on the ground that they were Price-Anderson claims. But petitioners unmistakably seek to enjoin litigation of these claims in the tribal courts, whether or not those courts would have jurisdiction to exercise in the absence of objection. Injunction against further litigation in tribal courts would in practical terms give the same result as a removal held to be justified on the ground that the actions removed fell under the Price-Anderson definitions of claims of public liability: if respondents then should wish to proceed they would be forced to refile their claims in federal court (or a state court from which the claims would be removed). The issue, then, is whether Congress would have chosen to postpone federal resolution of the enjoinable character of this tribal-court litigation, when it would not have postponed federal resolution of the functionally identical issue pending in a state court.

We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference.[7] The apparent reasons for this congressional

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[7] This is not to say that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 65 (1978) (tribal courts available to vindicate federal rights). The situation here is the rare one in which statutory provisions

policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation.

The Act provides clear indications of the congressional aims of speed and efficiency. Section 2210(n)(3)(A) empowers the chief judge of a district court to appoint a special caseload management panel to oversee cases arising from a nuclear incident. The functions of such panels include case consolidation, § 2210(n)(3)(C)(i); setting of priorities, § 2210(n)(3)(C)(ii); "promulgat[ion] [of] special rules of court . . . to expedite cases or allow more equitable consideration of claims," § 2210(n)(3)(C)(v); and implementation of such measures "as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident," § 2210(n)(3)(C)(vi).

The terms of the Act are underscored by its legislative history, which expressly refers to the multitude of separate cases brought "in various state and Federal courts" in the aftermath of the Three Mile Island accident. See S. Rep. No. 100–218, at 13. This history adverts to the expectation that "the provisions for consolidation of claims in the event of any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation." *Ibid.*

Applying tribal exhaustion would invite precisely the mischief of "duplicative determinations" and consequent "inefficiencies" that the Act sought to avoid, and the force of the congressional concerns saps the two arguable justifications for applying tribal exhaustion of any plausibility in these circumstances. The first possible justification might be that tribal exhaustion is less troubling than state-court exhaustion, because in the former situation the district court may review jurisdiction after recourse to tribal court has been exhausted, see *National Farmers Union Ins. Cos.*, 471 U. S.,

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for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

at 857, whereas a state court's determination of its jurisdiction is final except for the possibility of our review on certiorari. But the likelihood of effective review says nothing to the Act's insistence on efficient disposition of public liability claims, which would of course be curtailed by an exhaustion requirement. It is not credible that Congress would have uniquely countenanced, let alone chosen, such a delay when public liability claims are brought in tribal court.

The second possible justification is that the absence of any statutory provision for removal from tribal court running parallel to the terms authorizing state-court removal might ground a negative inference against any intent to govern Price-Anderson actions in tribal courts, in accordance with the usual policy of letting a plaintiff choose the forum. But only the most zealous application of the maxim *expressio unius est exclusio alterius* could answer the implausibility that Congress would have intended to force defendants to remain in tribal courts. The congressional reasoning sketched above is no less forceful when plaintiffs choose tribal courts; leaving such claims in these courts would just as effectively thwart the Act's policy of getting such cases into a federal forum for consolidation, as leaving them in state forums would do.

Why, then, the congressional silence on tribal courts? If "*expressio unius* . . ." fails to explain the Congress's failure to provide for tribal-court removal, what is the explanation? After all we have said, inadvertence seems the most likely. We have not been told of any nuclear testing laboratories or reactors on reservation lands, and if none was brought to the attention of Congress either, Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these. Now and then silence is not pregnant.

Because the comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act, the District

Court should have decided whether respondents' claims constituted "public liability action[s] arising out of or resulting from a nuclear incident," 42 U. S. C. § 2210(n)(2). We accordingly vacate the judgment of the Court of Appeals and remand with instructions to remand the case to the District Court for proceedings consistent with this opinion.

So ordered.

Syllabus

SAENZ, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* ROE ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

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

No. 98–97. Argued January 13, 1999—Decided May 17, 1999

California, which has the sixth highest welfare benefit levels in the country, sought to amend its Aid to Families with Dependent Children (AFDC) program in 1992 by limiting new residents, for the first year they live in the State, to the benefits they would have received in the State of their prior residence. Cal. Welf. & Inst. Code Ann. § 11450.03. Although the Secretary of Health and Human Services approved the change—a requirement for it to go into effect—the Federal District Court enjoined its implementation, finding that, under *Shapiro* v. *Thompson*, 394 U. S. 618, and *Zobel* v. *Williams*, 457 U. S. 55, it penalized "the decision of new residents to migrate to [California] and be treated [equally] with existing residents," *Green* v. *Anderson*, 811 F. Supp. 516, 521. After the Ninth Circuit invalidated the Secretary's approval of § 11450.03 in a separate proceeding, this Court ordered *Green* to be dismissed. The provision thus remained inoperative until after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which replaced AFDC with Temporary Assistance to Needy Families (TANF). PRWORA expressly authorizes any State receiving a TANF grant to pay the benefit amount of another State's TANF program to residents who have lived in the State for less than 12 months. Since the Secretary no longer needed to approve § 11450.03, California announced that enforcement would begin on April 1, 1997. On that date, respondents filed this class action, challenging the constitutionality of § 11450.03's durational residency requirement and PRWORA's approval of that requirement. In issuing a preliminary injunction, the District Court found that PRWORA's existence did not affect its analysis in *Green*. Without reaching the merits, the Ninth Circuit affirmed the injunction.

Held:

1. Section 11450.03 violates § 1 of the Fourteenth Amendment. Pp. 498–507.

Syllabus

(a) In assessing laws denying welfare benefits to newly arrived residents, this Court held in *Shapiro* that a State cannot enact durational residency requirements in order to inhibit the migration of needy persons into the State, and that a classification that has the effect of imposing a penalty on the right to travel violates the Equal Protection Clause absent a compelling governmental interest. Pp. 498–500.

(b) The right to travel embraces three different components: the right to enter and leave another State; the right to be treated as a welcome visitor while temporarily present in another State; and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. Pp. 500–502.

(c) The right of newly arrived citizens to the same privileges and immunities enjoyed by other citizens of their new State—the third aspect of the right to travel—is at issue here. That right is protected by the new arrival's status as both a state citizen and a United States citizen, and it is plainly identified in the Fourteenth Amendment's Privileges or Immunities Clause, see *Slaughter-House Cases*, 16 Wall. 36, 80. That newly arrived citizens have both state and federal capacities adds special force to their claim that they have the same rights as others who share their citizenship. Pp. 502–504.

(d) Since the right to travel embraces a citizen's right to be treated equally in her new State of residence, a discriminatory classification is itself a penalty. California's classifications are defined entirely by the period of residency and the location of the disfavored class members' prior residences. Within the category of new residents, those who lived in another country or in a State that had higher benefits than California are treated like lifetime residents; and within the broad subcategory of new arrivals who are treated less favorably, there are 45 smaller classes whose benefit levels are determined by the law of their former States. California's legitimate interest in saving money does not justify this discriminatory scheme. The Fourteenth Amendment's Citizenship Clause expressly equates citizenship with residence, *Zobel*, 457 U. S., at 69, and does not tolerate a hierarchy of subclasses of similarly situated citizens based on the location of their prior residences. Pp. 504–507.

2. PRWORA's approval of durational residency requirements does not resuscitate § 11450.03. This Court has consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to a citizen by that Amendment's Citizenship Clause limits the powers of the National Government as well as the States. Congress' Article I powers to legislate are limited not only by the scope of the Framers' affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates

Syllabus

other specific provisions of the Constitution. See *Williams* v. *Rhodes*, 393 U. S. 23, 29. Pp. 507–511.

134 F. 3d 1400, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 511. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 521.

Theodore Garelis, Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren*, Attorney General, *Charlton G. Holland III*, Senior Assistant Attorney General, *Frank S. Furtek*, Supervising Deputy Attorney General, and *Janie L. Daigle*, Deputy Attorney General.

Solicitor General Waxman argued the cause for the United States as *amicus curiae* in support of petitioners in part and respondents in part. With him on the brief were *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Edward C. DuMont*, *Mark B. Stern*, *Kathleen Moriarty Mueller*, and *Peter J. Smith.*

Mark D. Rosenbaum argued the cause for respondents. With him on the brief were *David S. Schwartz*, *Daniel P. Tokaji*, *Evan H. Caminker*, *Laurence H. Tribe*, *Martha F. Davis*, *Karl Manheim*, *Steven R. Shapiro*, *Alan L. Schlosser*, *Richard Rothschild*, *Clare Pastore*, and *Jordan C. Budd.**

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Pennsylvania et al. by *D. Michael Fisher*, Attorney General, *John G. Knorr III*, Chief Deputy Attorney General, *Betty D. Montgomery*, Attorney General of Ohio, and *Jeffrey S. Sutton*, State Solicitor, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Jeffrey B. Pine* of Rhode Island, and *Christine O. Gregoire* of Washington; for the Institute for Justice by *Douglas W.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1992, California enacted a statute limiting the maximum welfare benefits available to newly arrived residents. The scheme limits the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence. The questions presented by this case are whether the 1992 statute was constitutional when it was enacted and, if not, whether an amendment to the Social Security Act enacted by Congress in 1996 affects that determination.

I

California is not only one of the largest, most populated, and most beautiful States in the Nation; it is also one of the most generous. Like all other States, California has participated in several welfare programs authorized by the Social Security Act and partially funded by the Federal Government. Its programs, however, provide a higher level of benefits and serve more needy citizens than those of most other States. In one year the most expensive of those programs, Aid to Families with Dependent Children (AFDC), which was replaced in 1996 with Temporary Assistance to

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Kmiec, *William H. Mellor*, and *Clint Bolick;* for the National Governors' Association et al. by *Richard Ruda* and *James I. Crowley;* for the Pacific Legal Foundation by *Sharon L. Browne* and *Deborah J. La Fetra;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for ACORN et al. by *Paul M. Dodyk* and *Henry A. Freedman;* for the American Bar Association by *Philip S. Anderson* and *Paul M. Smith;* for the Brennan Center for Justice at New York University School of Law et al. by *Burt Neuborne* and *Deborah Goldberg;* for Catholic Charities USA et al. by *Louis R. Cohen;* for the National Law Center on Homelessness and Poverty by *Ann E. Bushmiller;* for Sixty-six Organizations Serving Domestic Violence Survivors by *Susan Frietsche;* for Social Scientists by *Lawrence S. Lustberg;* and for William Cohen et al. by *Roderick M. Hills, Jr.*, and *Charles S. Sims.*

Needy Families (TANF), provided benefits for an average of 2,645,814 persons per month at an annual cost to the State of $2.9 billion. In California the cash benefit for a family of two—a mother and one child—is $456 a month, but in the neighboring State of Arizona, for example, it is only $275.

In 1992, in order to make a relatively modest reduction in its vast welfare budget, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section sought to change the California AFDC program by limiting new residents, for the first year they live in California, to the benefits they would have received in the State of their prior residence.[1] Because in 1992 a state program either had to conform to federal specifications or receive a waiver from the Secretary of Health and Human Services in order to qualify for federal reimbursement, § 11450.03 required approval by the Secretary to take effect. In October 1992, the Secretary issued a waiver purporting to grant such approval.

On December 21, 1992, three California residents who were eligible for AFDC benefits filed an action in the Eastern District of California challenging the constitutionality

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[1] California Welf. & Inst. Code Ann. § 11450.03 (West Supp. 1999) provides:

"(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

"(b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:

"(1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).

"(2) Title IX *[sic]* of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code)."

of the durational residency requirement in § 11450.03. Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances. One returned to California after living in Louisiana for seven years, the second had been living in Oklahoma for six weeks and the third came from Colorado. Each alleged that her monthly AFDC grant for the ensuing 12 months would be substantially lower under § 11450.03 than if the statute were not in effect. Thus, the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two.

The District Court issued a temporary restraining order and, after a hearing, preliminarily enjoined implementation of the statute. District Judge Levi found that the statute "produces substantial disparities in benefit levels and makes no accommodation for the different costs of living that exist in different states."[2] Relying primarily on our decisions in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Zobel* v. *Williams*, 457 U. S. 55 (1982), he concluded that the statute placed "a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." *Green* v. *Anderson*, 811 F. Supp. 516, 521 (ED Cal. 1993). In his view, if the purpose of the measure was to deter migration by poor people into the State, it would be unconstitutional for that reason. And even if the purpose was only to conserve limited funds, the State had failed to explain why the entire burden of the saving should be imposed on new residents. The Court of Appeals sum-

[2] The District Court referred to an official table of fair market rents indicating that California's housing costs are higher than any other State except Massachusetts. See *Green* v. *Anderson*, 811 F. Supp. 516, 521, n. 13 (ED Cal. 1993); see also Declaration of Robert Greenstein, App. 91–94.

marily affirmed for the reasons stated by the District Judge. *Green* v. *Anderson*, 26 F. 3d 95 (CA9 1994).

We granted the State's petition for certiorari. 513 U. S. 922 (1994). We were, however, unable to reach the merits because the Secretary's approval of § 11450.03 had been invalidated in a separate proceeding,[3] and the State had acknowledged that the Act would not be implemented without further action by the Secretary. We vacated the judgment and directed that the case be dismissed. *Anderson* v. *Green*, 513 U. S. 557 (1995) *(per curiam)*.[4] Accordingly, § 11450.03 remained inoperative until after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 110 Stat. 2105.

PRWORA replaced the AFDC program with TANF. The new statute expressly authorizes any State that receives a block grant under TANF to "apply to a family the rules (including benefit amounts) of the [TANF] program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 110 Stat. 2124, 42 U. S. C. § 604(c) (1994 ed., Supp. II). With this federal statutory provision in effect, California no longer needed specific approval from the Secretary to implement § 11450.03. The California Department of Social Services therefore issued an "All County Letter" announcing that the enforcement of § 11450.03 would commence on April 1, 1997.

The All County Letter clarifies certain aspects of the statute. Even if members of an eligible family had lived in California all of their lives, but left the State "on January 29th, intending to reside in another state, and returned on April 15th," their benefits are determined by the law of their State of residence from January 29 to April 15, assuming

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[3] *Beno* v. *Shalala*, 30 F. 3d 1057 (CA9 1994).

[4] In February 1996, the Secretary granted waivers for certain changes in California's welfare program, but she declined to authorize any distinction between old and new residents. App. to Pet. for Cert. 46–52.

that that level was lower than California's.[5] Moreover, the lower level of benefits applies regardless of whether the family was on welfare in the State of prior residence and regardless of the family's motive for moving to California. The instructions also explain that the residency requirement is inapplicable to families that recently arrived from another country.

II

On April 1, 1997, the two respondents filed this action in the Eastern District of California making essentially the same claims asserted by the plaintiffs in *Anderson* v. *Green*,[6] but also challenging the constitutionality of PRWORA's approval of the durational residency requirement. As in *Green*, the District Court issued a temporary restraining order and certified the case as a class action.[7] The court also advised the Attorney General of the United States that the constitutionality of a federal statute had been drawn into question, but she did not seek to intervene or to file an *amicus* brief. Reasoning that PRWORA permitted, but did not require, States to impose durational residency requirements, Judge Levi concluded that the existence of the federal statute did not affect the legal analysis in his prior opinion in *Green*.

He did, however, make certain additional comments on the parties' factual contentions. He noted that the State did not challenge plaintiffs' evidence indicating that, although

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[5] Record 30 (Plaintiffs' Exh. 3, Attachment 1).

[6] One of the respondents is a former resident of Oklahoma and the other moved to California from the District of Columbia. In both of those jurisdictions the benefit levels are substantially lower than in California.

[7] On the stipulation of the parties, the court certified a class of plaintiffs defined as "'all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid.'" App. to Pet. for Cert. 20.

California benefit levels were the sixth highest in the Nation in absolute terms,[8] when housing costs are factored in, they rank 18th; that new residents coming from 43 States would face higher costs of living in California; and that welfare benefit levels actually have little, if any, impact on the residential choices made by poor people. On the other hand, he noted that the availability of other programs such as homeless assistance and an additional food stamp allowance of $1 in stamps for every $3 in reduced welfare benefits partially offset the disparity between the benefits for new and old residents. Notwithstanding those ameliorating facts, the State did not disagree with plaintiffs' contention that § 11450.03 would create significant disparities between newcomers and welfare recipients who have resided in the State for over one year.

The State relied squarely on the undisputed fact that the statute would save some $10.9 million in annual welfare costs—an amount that is surely significant even though only a relatively small part of its annual expenditures of approximately $2.9 billion for the entire program. It contended that this cost saving was an appropriate exercise of budgetary authority as long as the residency requirement did not penalize the right to travel. The State reasoned that the payment of the same benefits that would have been received in the State of prior residency eliminated any potentially punitive aspects of the measure. Judge Levi concluded, however, that the relevant comparison was not between new residents of California and the residents of their former States, but rather between the new residents and longer term residents of California. He therefore again enjoined the implementation of the statute.

Without finally deciding the merits, the Court of Appeals affirmed his issuance of a preliminary injunction. *Roe* v. *Anderson*, 134 F. 3d 1400 (CA9 1998). It agreed with the

[8] Forty-four States and the District of Columbia have lower benefit levels than California. *Id.*, at 22, n. 10.

District Court's view that the passage of PRWORA did not affect the constitutional analysis, that respondents had established a probability of success on the merits, and that class members might suffer irreparable harm if § 11450.03 became operative. Although the decision of the Court of Appeals is consistent with the views of other federal courts that have addressed the issue,[9] we granted certiorari because of the importance of the case. *Anderson* v. *Roe*, 524 U. S. 982 (1998).[10] We now affirm.

III

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. *United States* v. *Guest*, 383 U. S. 745, 757 (1966). Indeed, as Justice Stewart reminded us in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.*, at 643 (concurring opinion).

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[9] See *Maldonado* v. *Houston*, 157 F. 3d 179 (CA3 1998) (finding two-tier durational residency requirement an unconstitutional infringement on the right to travel); *Anderson* v. *Green*, 26 F. 3d 95 (CA9 1994), vacated as unripe, 513 U. S. 557 (1995) *(per curiam); Hicks* v. *Peters*, 10 F. Supp. 2d 1003 (ND Ill. 1998) (granting injunction against enforcement of durational residency requirement); *Westenfelder* v. *Ferguson*, 998 F. Supp. 146 (RI 1998) (holding durational residency requirement a penalty on right to travel incapable of surviving rational-basis review). Two state courts have reached the same conclusion. See *Mitchell* v. *Steffen*, 504 N. W. 2d 198 (Minn. 1993), cert. denied, 510 U. S. 1081 (1994) (striking down a similar provision in Minnesota law); *Sanchez* v. *Department of Human Services*, 314 N. J. Super. 11, 713 A. 2d 1056 (1998) (striking down two-tier welfare system); cf. *Jones* v. *Milwaukee County*, 168 Wis. 2d 892, 485 N. W. 2d 21 (1992) (holding that a 60-day waiting period for applicant for general relief is not a penalty and therefore not unconstitutional).

[10] After this case was argued, petitioner Rita L. Saenz replaced Eloise Anderson as Director, California Department of Social Services.

In *Shapiro*, we reviewed the constitutionality of three statutory provisions that denied welfare assistance to residents of Connecticut, the District of Columbia, and Pennsylvania, who had resided within those respective jurisdictions less than one year immediately preceding their applications for assistance. Without pausing to identify the specific source of the right, we began by noting that the Court had long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.*, at 629. We squarely held that it was "constitutionally impermissible" for a State to enact durational residency requirements for the purpose of inhibiting the migration by needy persons into the State.[11] We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause "unless shown to be necessary to promote a *compelling* governmental interest," *id.*, at 634, and that no such showing had been made.

In this case California argues that § 11450.03 was not enacted for the impermissible purpose of inhibiting migration by needy persons and that, unlike the legislation reviewed in *Shapiro*, it does not penalize the right to travel because new arrivals are not ineligible for benefits during their first year of residence. California submits that, in-

[11] "We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. . . . But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." 394 U. S., at 629.

"Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period . . . . If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States* v. *Jackson*, 390 U. S. 570, 581 (1968)." *Id.*, at 631.

stead of being subjected to the strictest scrutiny, the statute should be upheld if it is supported by a rational basis and that the State's legitimate interest in saving over $10 million a year satisfies that test. Although the United States did not elect to participate in the proceedings in the District Court or the Court of Appeals, it has participated as *amicus curiae* in this Court. It has advanced the novel argument that the enactment of PRWORA allows the States to adopt a "specialized choice-of-law-type provision" that "should be subject to an intermediate level of constitutional review," merely requiring that durational residency requirements be "substantially related to an important governmental objective."[12] The debate about the appropriate standard of review, together with the potential relevance of the federal statute, persuades us that it will be useful to focus on the source of the constitutional right on which respondents rely.

IV

The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

It was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated in *Edwards* v. *California*, 314 U. S. 160 (1941), which invalidated a state law that impeded the free interstate passage of the indigent. We reaffirmed that right in *United States* v. *Guest*, 383 U. S. 745 (1966), which afforded protection to the "'right to travel freely to and from the State of Georgia and to use highway facilities and other

[12] Brief for United States as *Amicus Curiae* 8, 10.

instrumentalities of interstate commerce within the State of Georgia.'" *Id.*, at 757. Given that § 11450.03 imposed no obstacle to respondents' entry into California, we think the State is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement. For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution. The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation,[13] may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.*, at 758.

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits.[14] This provision removes "from the citizens of each State the disabilities of alienage in the other States." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869) ("[W]ithout some

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[13] "The 4th article, respecting the *[sic]* extending the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 Records of the Federal Convention of 1787, p. 112 (M. Farrand ed. 1966). Article IV of the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State."

[14] *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1823) (Washington, J., on circuit) ("fundamental" rights protected by the Privileges and Immunities Clause include "the right of a citizen of one state to pass through, or to reside in any other state").

provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), to procure medical services, *Doe* v. *Bolton*, 410 U. S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer* v. *Witsell*, 334 U. S. 385 (1948). Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.*, at 396. There may be a substantial reason for requiring the nonresident to pay more than the resident for a hunting license, see *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U. S. 371, 390–391 (1978), or to enroll in the state university, see *Vlandis* v. *Kline*, 412 U. S. 441, 445 (1973), but our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for "the 'citizen of State A who ventures into State B' to settle there and establish a home." *Zobel*, 457 U. S., at 74 (O'Connor, J., concurring in judgment). Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States.[15] That additional source

[15] The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV. Cong. Globe, 39th Cong., 1st Sess., 1033–1034 (1866) (statement of Rep. Bingham). In

of protection is plainly identified in the opening words of the Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . ."[16]

Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, 16 Wall. 36 (1873), it has always been common ground that this Clause protects the third component of the right to travel. Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Id.*, at 80. Justice Bradley, in dissent, used even stronger language to make the same point:

> "The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional

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Dred Scott v. *Sandford*, 19 How. 393 (1857), this Court had limited the protection of Article IV to rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

[16] U. S. Const., Amdt. 14, § 1. The remainder of the section provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

> right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens." *Id.*, at 112–113.

That newly arrived citizens "have two political capacities, one state and one federal," adds special force to their claim that they have the same rights as others who share their citizenship.[17] Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, see *supra*, at 499, but it is surely no less strict.

V

Because this case involves discrimination against citizens who have completed their interstate travel, the State's argument that its welfare scheme affects the right to travel only "incidentally" is beside the point. Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. See *Dunn* v. *Blumstein*, 405 U. S. 330, 339 (1972).

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[17] "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing 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." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring).

But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

It is undisputed that respondents and the members of the class that they represent are citizens of California and that their need for welfare benefits is unrelated to the length of time that they have resided in California. We thus have no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of her claim to state citizenship were questioned. Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Vlandis* v. *Kline*, 412 U. S. 441 (1973).

The classifications challenged in this case—and there are many—are defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members. The favored class of beneficiaries includes all eligible California citizens who have resided there for at least one year, plus those new arrivals who last resided in another country or in a State that provides benefits at least as generous as California's. Thus, within the broad category of citizens who resided in California for less than a year, there are many who are treated like lifetime residents. And within the broad subcategory of new arrivals who are treated less favorably, there are many smaller classes whose benefit levels are determined by the law of the States from whence they came. To justify § 11450.03, California must therefore explain not only why it is sound fiscal policy to discriminate against those who have been citizens for less than a year, but also why it is permissible to apply such a variety of rules within that class.

These classifications may not be justified by a purpose to deter welfare applicants from migrating to California for three reasons. First, although it is reasonable to assume that some persons may be motivated to move for the purpose of obtaining higher benefits, the empirical evidence reviewed by the District Judge, which takes into account the high cost of living in California, indicates that the number of such persons is quite small—surely not large enough to justify a burden on those who had no such motive.[18] Second, California has represented to the Court that the legislation was not enacted for any such reason.[19] Third, even if it were, as we squarely held in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), such a purpose would be unequivocally impermissible.

Disavowing any desire to fence out the indigent, California has instead advanced an entirely fiscal justification for its multitiered scheme. The enforcement of § 11450.03 will save the State approximately $10.9 million a year. The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen. An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result. But our negative answer to the question does not rest on the weakness of the State's purported fiscal justification. It rests on the fact that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: "That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." *Zobel*, 457 U. S., at 69. It is equally clear that the Clause does not tolerate a hierarchy of 45 subclasses of similarly situated

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[18] App. 21–26.

[19] The District Court and the Court of Appeals concluded, however, that the "apparent purpose of § 11450.03 was to deter migration of poor people to California." *Roe* v. *Anderson*, 134 F. 3d 1400, 1404 (CA9 1998).

citizens based on the location of their prior residence.[20] Thus § 11450.03 is doubly vulnerable: Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens. As in *Shapiro*, we reject any contributory rationale for the denial of benefits to new residents:

> "But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens." 394 U. S., at 632–633.

See also *Zobel*, 457 U. S., at 64. In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.

VI

The question that remains is whether congressional approval of durational residency requirements in the 1996 amendment to the Social Security Act somehow resuscitates the constitutionality of § 11450.03. That question is readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment.[21] Moreover, the protection afforded to the citizen by

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[20] See Cohen, Discrimination Against New State Citizens: An Update, 11 Const. Comm. 73, 79 (1994) ("[J]ust as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states").

[21] "'Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.' *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969)." *Townsend* v. *Swank*, 404 U. S. 282, 291 (1971).

the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.

Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination." *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968) (footnote omitted). Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.

> "Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the amendment and 'to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion. . . .' *Ex parte Virginia*, 100 U. S. 339, 346 (1880). Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.' *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, *e. g.*, *Califano* v. *Goldfarb*, 430 U. S. 199, 210 (1977); *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968)." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 732–733 (1982).

The Solicitor General does not unequivocally defend the constitutionality of § 11450.03. But he has argued that two features of PRWORA may provide a sufficient justification for state durational requirements to warrant further inquiry before finally passing on the section's validity, or perhaps that it is only invalid insofar as it applies to new arrivals who were not on welfare before they arrived in California.[22]

He first points out that because the TANF program gives the States broader discretion than did AFDC, there will be significant differences among the States which may provide new incentives for welfare recipients to change their residences. He does not, however, persuade us that the disparities under the new program will necessarily be any greater than the differences under AFDC, which included such examples as the disparity between California's monthly benefit of $673 for a family of four with Mississippi's benefit of $144 for a comparable family. Moreover, we are not convinced that a policy of eliminating incentives to move to California provides a more permissible justification for classifying California citizens than a policy of imposing special burdens on new arrivals to deter them from moving into the State. Nor is the discriminatory impact of § 11450.03 abated by repeatedly characterizing it as "a sort of specialized choice-of-law rule."[23] California law alone discriminates among its own citizens on the basis of their prior residence.

The Solicitor General also suggests that we should recognize the congressional concern addressed in the legislative history of PRWORA that the "States might engage in a 'race to the bottom' in setting the benefit levels in their TANF

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[22] Brief for United States as *Amicus Curiae* 29, n. 10.

[23] *Id.*, at 9; see also *id.*, at 3, 8, 14, 15, 20, 22, 23, 24, 27, 28, 28–29.

programs."[24] Again, it is difficult to see why that concern should be any greater under TANF than under AFDC. The evidence reviewed by the District Court indicates that the savings resulting from the discriminatory policy, if spread equitably throughout the entire program, would have only a miniscule impact on benefit levels. Indeed, as one of the legislators apparently interpreted this concern, it would logically prompt the States to reduce benefit levels sufficiently "to encourage emigration of benefit recipients."[25] But speculation about such an unlikely eventuality provides no basis for upholding § 11450.03.

Finally, the Solicitor General suggests that the State's discrimination might be acceptable if California had limited the disfavored subcategories of new citizens to those who had received aid in their prior State of residence at any time within the year before their arrival in California. The suggestion is ironic for at least three reasons: It would impose the most severe burdens on the neediest members of the disfavored classes; it would significantly reduce the savings that the State would obtain, thus making the State's claimed justification even less tenable; and, it would confine the effect of the statute to what the Solicitor General correctly characterizes as "the invidious purpose of discouraging poor people generally from settling in the State."[26]

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Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they

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[24] *Id.,* at 8. See H. R. Rep. No. 104–651, p. 1337 (1996) ("States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States").

[25] Brief for United States as *Amicus Curiae* 16. See States' Perspective on Welfare Reform: Hearing before the Senate Committee on Finance, 104th Cong., 1st Sess., 9 (1995).

[26] Brief for United States as *Amicus Curiae* 30, n. 11.

reside." U. S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens.[27] The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, dissenting.

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, *Colgate* v. *Harvey*, 296 U. S. 404 (1935), overruled five years later by *Madden* v. *Kentucky*, 309 U. S. 83 (1940). It uses this Clause to strike down what I believe is a reasonable measure falling under the head of a "good-faith residency requirement." Because I do not think any provision of the Constitution—and surely not a provision relied upon for only the second time since its enactment 130 years ago—requires this result, I dissent.

I

Much of the Court's opinion is unremarkable and sound. The right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the

[27] As Justice Jackson observed: "[I]t is a privilege of citizenship of the United States, protected from state abridgment, to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing." *Edwards* v. *California*, 314 U. S. 160, 183 (1941) (concurring opinion).

free interstate passage of citizens. The state law in *Edwards* v. *California*, 314 U. S. 160 (1941), which prohibited the transport of any indigent person into California, was a classic barrier to travel or migration and the Court rightly struck it down. Indeed, for most of this country's history, what the Court today calls the first "component" of the right to travel, *ante*, at 500, was the entirety of this right. As Chief Justice Taney stated in his dissent in the *Passenger Cases*, 7 How. 283 (1849):

> "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbours is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." *Id.*, at 492.

See also *Crandall* v. *Nevada*, 6 Wall. 35, 44 (1868); *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 280–283 (1974) (REHNQUIST, J., dissenting) (collecting and discussing cases). The Court wisely holds that because Cal. Welf. & Inst. Code Ann. § 11450.03 (West Supp. 1999) imposes no obstacle to respondents' entry into California, the statute does not infringe upon the right to travel. See *ante*, at 501. Thus, the traditional conception of the right to travel is simply not an issue in this case.

I also have no difficulty with aligning the right to travel with the protections afforded by the Privileges and Immunities Clause of Article IV, § 2, to nonresidents who enter other States "intending to return home at the end of [their] journey." See *ante*, at 501. Nonresident visitors of other

States should not be subject to discrimination solely because they live out of State. See *Paul* v. *Virginia*, 8 Wall. 168 (1869); *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978). Like the traditional right-to-travel guarantees discussed above, however, this Clause has no application here, because respondents expressed a desire to stay in California and become citizens of that State. Respondents therefore plainly fall outside the protections of Article IV, § 2.

Finally, I agree with the proposition that a "citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 16 Wall. 36, 80 (1873).

But I cannot see how the right to become a citizen of another State is a necessary "component" of the right to travel, or why the Court tries to marry these separate and distinct rights. A person is no longer "traveling" in any sense of the word when he finishes his journey to a State which he plans to make his home. Indeed, under the Court's logic, the protections of the Privileges or Immunities Clause recognized in this case come into play only when an individual *stops* traveling with the intent to remain and become a citizen of a new State. The right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a "component" of the other. Indeed, the same dicta from the *Slaughter-House Cases* quoted by the Court actually treat the right to become a citizen and the right to travel as separate and distinct rights under the Privileges or Immunities Clause of the Fourteenth Amendment. See *id.*, at 79–80.[1] At most, restrictions on an indi-

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[1] The Court's decision in the *Slaughter-House Cases* only confirms my view that state infringement on the right to travel is limited to the kind of barrier established in *Edwards* v. *California*, 314 U. S. 160 (1941), and its discussion is worth quoting in full:

"But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture

vidual's right to become a citizen indirectly affect his calculus in deciding whether to exercise his right to travel in the first place, but such an attenuated and uncertain relationship is no ground for folding one right into the other.

No doubt the Court has, in the past 30 years, essentially conflated the right to travel with the right to equal state citizenship in striking down durational residence requirements similar to the one challenged here. See, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (striking down 1-year residence before receiving any welfare benefit); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972) (striking down 1-year residence before receiving the right to vote in state elections); *Maricopa County*, 415 U. S., at 280–283 (striking down 1-year county residence before receiving entitlement to nonemergency hospitalization or emergency care). These cases marked a sharp departure from the Court's prior right-to-travel cases because in none of them was travel itself prohibited. See *id.*, at 254–255 ("Whatever its ultimate scope . . . the right to travel was involved in only a limited sense in *Shapiro*"); *Shapiro*, *supra*, at 671–672 (Harlan, J., dissenting).

Instead, the Court in these cases held that restricting the provision of welfare benefits, votes, or certain medical bene-

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to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

"One of these is well described in the case of *Crandall* v. *Nevada*[, 6 Wall. 35 (1868)]. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*' and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada.*" 16 Wall., at 79 (footnote omitted).

fits to new citizens for a limited time impermissibly "penalized" them under the Equal Protection Clause of the Fourteenth Amendment for having exercised their right to travel. See *Maricopa County*, *supra*, at 257. The Court thus settled for deciding what restrictions amounted to "deprivations of very important benefits and rights" that operated to indirectly "penalize" the right to travel. See *Attorney General of N. Y.* v. *Soto-Lopez*, 476 U. S. 898, 907 (1986) (plurality opinion). In other cases, the Court recognized that laws dividing new and old residents had little to do with the right to travel and merely triggered an inquiry into whether the resulting classification rationally furthered a legitimate government purpose. See *Zobel* v. *Williams*, 457 U. S. 55, 60, n. 6 (1982); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985).[2] While *Zobel* and *Hooper* reached the wrong result in my view, they at least put the Court on the proper track in identifying exactly what interests it was protecting; namely, the right of individuals not to be subject to unjustifiable classifications as opposed to infringements on the right to travel.

The Court today tries to clear much of the underbrush created by these prior right-to-travel cases, abandoning its effort to define what residence requirements deprive individuals of "important rights and benefits" or "penalize" the right to travel. See *ante*, at 504–507. Under its new analytical framework, a State, outside certain ill-defined circumstances, cannot classify its citizens by the length of their residence in the State without offending the Privileges or Immunities Clause of the Fourteenth Amendment. The Court thus departs from *Shapiro* and its progeny, and, while paying lipservice to the right to travel, the Court does

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[2] As Chief Justice Burger aptly stated in *Zobel:* "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." 457 U. S., at 60, n. 6.

little to explain how the right to travel is involved at all. Instead, as the Court's analysis clearly demonstrates, see *ante*, at 504–507, this case is only about respondents' right to immediately enjoy all the privileges of being a California citizen in relation to that State's ability to test the good-faith assertion of this right. The Court has thus come full circle by effectively disavowing the analysis of *Shapiro*, segregating the right to travel and the rights secured by Article IV from the right to become a citizen under the Privileges or Immunities Clause, and then testing the residence requirement here against this latter right. For all its misplaced efforts to fold the right to become a citizen into the right to travel, the Court has essentially returned to its original understanding of the right to travel.

II

In unearthing from its tomb the right to become a state citizen and to be treated equally in the new State of residence, however, the Court ignores a State's need to assure that only persons who establish a bona fide residence receive the benefits provided to current residents of the State. The *Slaughter-House* dicta at the core of the Court's analysis specifically condition a United States citizen's right to "become a citizen of any state of the Union" and to enjoy the "same rights as other citizens of that State" on the establishment of a "*bonâ fide residence therein.*" 16 Wall., at 80 (emphasis added). Even when redefining the right to travel in *Shapiro* and its progeny, the Court has "always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State." *Soto-Lopez*, *supra*, at 903, n. 3 (citing cases).

Thus, the Court has consistently recognized that while new citizens must have the same opportunity to enjoy the privileges of being a citizen of a State, the States retain the ability to use bona fide residence requirements to ferret out those who intend to take the privileges and run. As this Court explained in *Martinez* v. *Bynum*, 461 U. S. 321, 328–329 (1983): "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. . . . A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents." The *Martinez* Court explained that "residence" requires "both physical presence and an intention to remain," see *id.*, at 330, and approved a Texas law that restricted eligibility for tuition-free education to families who met this minimum definition of residence, *id.*, at 332–333.

While the physical presence element of a bona fide residence is easy to police, the subjective intent element is not. It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain. Hence, States employ objective criteria such as durational residence requirements to test a new resident's resolve to remain before these new citizens can enjoy certain in-state benefits. Recognizing the practical appeal of such criteria, this Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities. *Starns* v. *Malkerson*, 401 U. S. 985 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (upholding 1-year residence requirement for in-state tuition); *Sturgis* v. *Washington*, 414 U. S. 1057, summarily aff'g 368 F. Supp. 38 (WD Wash. 1973) (same). The Court has declared: "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State,

but have come there solely for educational purposes, cannot take advantage of the in-state rates." *Vlandis* v. *Kline*, 412 U. S. 441, 453–454 (1973). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts, see *Sosna* v. *Iowa*, 419 U. S. 393, 406–409 (1975), and in upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, see *Rosario* v. *Rockefeller*, 410 U. S. 752, 760–762 (1973).

If States can require individuals to reside in-state for a year before exercising the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections that all other state citizens enjoy, then States may surely do the same for welfare benefits. Indeed, there is no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university. The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California's standard of living and higher education system make both subsidies quite attractive. Durational residence requirements were upheld when used to regulate the provision of higher education subsidies, and the same deference should be given in the case of welfare payments. See *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

The Court today recognizes that States retain the ability to determine the bona fides of an individual's claim to residence, see *ante*, at 505, but then tries to avoid the issue. It asserts that because respondents' need for welfare benefits is unrelated to the length of time they have resided in California, it has "no occasion to consider what weight might be given to a citizen's length of residence if the bona fides of

her claim to state citizenship were questioned." See *ibid.* But I do not understand how the absence of a link between need and length of residency bears on the State's ability to objectively test respondents' resolve to stay in California. There is no link between the need for an education or for a divorce and the length of residence, and yet States may use length of residence as an objective yardstick to channel their benefits to those whose intent to stay is legitimate.

In one respect, the State has a greater need to require a durational residence for welfare benefits than for college eligibility. The impact of a large number of new residents who immediately seek welfare payments will have a far greater impact on a State's operating budget than the impact of new residents seeking to attend a state university. In the case of the welfare recipients, a modest durational residence requirement to allow for the completion of an annual legislative budget cycle gives the State time to decide how to finance the increased obligations.

The Court tries to distinguish education and divorce benefits by contending that the welfare payment here will be consumed in California, while a college education or a divorce produces benefits that are "portable" and can be enjoyed after individuals return to their original domicile. *Ibid.* But this "you can't take it with you" distinction is more apparent than real, and offers little guidance to lower courts who must apply this rationale in the future. Welfare payments are a form of insurance, giving impoverished individuals and their families the means to meet the demands of daily life while they receive the necessary training, education, and time to look for a job. The cash itself will no doubt be spent in California, but the benefits from receiving this income and having the opportunity to become employed or employable will stick with the welfare recipients if they stay in California or go back to their true domicile. Similarly, tuition subsidies are "consumed" in-state but the recipient takes the benefits of a college education with him wherever

he goes. A welfare subsidy is thus as much an investment in human capital as is a tuition subsidy, and their attendant benefits are just as "portable."[3] More importantly, this foray into social economics demonstrates that the line drawn by the Court borders on the metaphysical, and requires lower courts to plumb the policies animating certain benefits like welfare to define their "essence" and hence their "portability." As this Court wisely recognized almost 30 years ago, "[t]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge*, *supra*, at 487.

I therefore believe that the durational residence requirement challenged here is a permissible exercise of the State's power to "assur[e] that services provided for its residents are enjoyed only by residents." *Martinez*, 461 U. S., at 328. The 1-year period established in § 11450.03 is the same period this Court approved in *Starns* and *Sosa*. The requirement does not deprive welfare recipients of all benefits; indeed, the limitation has no effect whatsoever on a recipient's ability to enjoy the full 5-year period of welfare eligibility; to enjoy the full range of employment, training, and accompanying supportive services; or to take full advantage of health care benefits under Medicaid. See Brief for Petitioners 7–8, 27. This waiting period does not preclude new residents from all cash payments, but merely limits them to what they received in their prior State of residence. Moreover, as the Court recognizes, see *ante*, at 497, any pinch resulting from this limitation during the 1-year period is mitigated by other programs such as homeless assistance and an increase in food stamp allowance. The 1-year period thus permissibly balances the new resident's needs for subsistence with the State's need to ensure the bona fides of their claim to residence.

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[3] The same analysis applies to divorce.

Finally, Congress' express approval in 42 U. S. C. § 604(c) of durational residence requirements for welfare recipients like the one established by California only goes to show the reasonableness of a law like § 11450.03. The National Legislature, where people from Mississippi as well as California are represented, has recognized the need to protect state resources in a time of experimentation and welfare reform. As States like California revamp their total welfare packages, see Brief for Petitioners 5–6, they should have the authority and flexibility to ensure that their new programs are not exploited. Congress has decided that it makes good welfare policy to give the States this power. California has reasonably exercised it through an objective, narrowly tailored residence requirement. I see nothing in the Constitution that should prevent the enforcement of that requirement.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

I join THE CHIEF JUSTICE's dissent. I write separately to address the majority's conclusion that California has violated "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Ante,* at 502. In my view, the majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U. S. Const., Amdt. 14, § 1. Unlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases,* 16 Wall. 36 (1873). There, the Court held that the State of Louisiana had not abridged

the Privileges or Immunities Clause by granting a partial monopoly of the slaughtering business to one company. *Id.*, at 59–63, 66. The Court reasoned that the Privileges or Immunities Clause was not intended "as a protection to the citizen of a State against the legislative power of his own State." *Id.*, at 74. Rather the "privileges or immunities of citizens" guaranteed by the Fourteenth Amendment were limited to those "belonging to a citizen of the United States as such." *Id.*, at 75. The Court declined to specify the privileges or immunities that fell into this latter category, but it made clear that few did. See *id.*, at 76 (stating that "nearly every civil right for the establishment and protection of which organized government is instituted," including "those rights which are fundamental," are not protected by the Clause).

Unlike the majority, I would look to history to ascertain the original meaning of the Clause.[1] At least in American law, the phrase (or its close approximation) appears to stem

[1] Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873. See, *e. g.*, Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1418 (1992) (Clause is an antidiscrimination provision); D. Currie, The Constitution in the Supreme Court 341–351 (1985) (same); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089–1095 (1953) (Clause incorporates first eight Amendments of the Bill of Rights); M. Curtis, No State Shall Abridge 100 (1986) (Clause protects the rights included in the Bill of Rights as well as other fundamental rights); B. Siegan, Supreme Court's Constitution 46–71 (1987) (Clause guarantees Lockean conception of natural rights); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L. J. 453, 521–536 (1989) (same); J. Ely, Democracy and Distrust 28 (1980) (Clause "was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists . . . or in any specific way gives directions for finding"); R. Berger, Government by Judiciary 30 (2d ed. 1997) (Clause forbids race discrimination with respect to rights listed in the Civil Rights Act of 1866); R. Bork, The Tempting of America 166 (1990) (Clause is inscrutable and should be treated as if it had been obliterated by an ink blot).

from the 1606 Charter of Virginia, which provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England*." 7 Federal and State Constitutions, Colonial Charters and Other Organic Laws 3788 (F. Thorpe ed. 1909). Other colonial charters contained similar guarantees.[2] Years later, as tensions between England and the American Colonies increased, the colonists adopted resolutions reasserting their entitlement to the privileges or immunities of English citizenship.[3]

[2] See 1620 Charter of New England, in 3 Thorpe, at 1839 (guaranteeing "[l]iberties, and ffranchizes, and Immunities of free Denizens and naturall Subjects"); 1622 Charter of Connecticut, reprinted in 1 *id.*, at 553 (guaranteeing "[l]iberties and Immunities of free and natural Subjects"); 1629 Charter of the Massachusetts Bay Colony, in 3 *id.*, at 1857 (guaranteeing the "liberties and Immunities of free and naturall subjects"); 1632 Charter of Maine, in 3 *id.*, at 1635 (guaranteeing "[l]iberties[,] Francheses and Immunityes of or belonging to any of the naturall borne subjects"); 1632 Charter of Maryland, in 3 *id.*, at 1682 (guaranteeing "Privileges, Franchises and Liberties"); 1663 Charter of Carolina, in 5 *id.*, at 2747 (holding "liberties, franchises, and privileges" inviolate); 1663 Charter of the Rhode Island and Providence Plantations, in 6 *id.*, at 3220 (guaranteeing "libertyes and immunityes of ffree and naturall subjects"); 1732 Charter of Georgia, in 2 *id.*, at 773 (guaranteeing "liberties, franchises and immunities of free denizens and natural born subjects").

[3] See, *e. g.*, The Massachusetts Resolves, in Prologue to Revolution: Sources and Documents on the Stamp Act Crisis 56 (E. Morgan ed. 1959) ("*Resolved*, That there are certain essential Rights of the *British* Constitution of Government, which are founded in the Law of God and Nature, and are the common Rights of Mankind—Therefore, . . . *Resolved* that no Man can justly take the Property of another without his Consent . . . this inherent Right, together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by *Magna Charta*"); The Virginia Resolves, *id.*, at 47–48 ("[T]he Colonists aforesaid are declared entitled to all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*"); 1774 Statement of Violation of Rights, 1 Journals of the

The colonists' repeated assertions that they maintained the rights, privileges, and immunities of persons "born within the realm of England" and "natural born" persons suggests that, at the time of the founding, the terms "privileges" and "immunities" (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons. Presumably members of the Second Continental Congress so understood these terms when they employed them in the Articles of Confederation, which guaranteed that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." Art. IV. The Constitution, which superceded the Articles of Confederation, similarly guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, § 2, cl. 1.

Justice Bushrod Washington's landmark opinion in *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), reflects this historical understanding. In *Corfield*, a citizen of Pennsylvania challenged a New Jersey law that prohibited any person who was not an "actual inhabitant and resident" of New Jersey from harvesting oysters from New Jersey waters. *Id.*, at 550. Justice Washington, sitting as Circuit Justice, rejected the argument that the New Jersey law violated Article IV's Privileges and Immunities Clause. He reasoned, "we cannot accede to the proposition . . . that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights

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Continental Congress 68 (1904) ("[O]ur ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England . . . Resolved . . . [t]hat by such emigration they by no means forfeited, surrendered or lost any of those rights").

which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens." *Id.*, at 552. Instead, Washington concluded:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; . . . and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities." *Id.*, at 551–552.

Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he

endorsed the colonial-era conception of the terms "privileges" and "immunities," concluding that Article IV encompassed only *fundamental* rights that belong to all citizens of the United States.[4] *Id.*, at 552.

Justice Washington's opinion in *Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment. When Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion. See Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1418 (1992) (referring to a Member's "obligatory quotation from *Corfield*"). For just one example, in a speech introducing the Amendment to the Senate, Senator Howard explained the Privileges or Immunities Clause by quoting at length from *Corfield*.[5] Cong. Globe, 39th Cong., 1st Sess., 2765 (1866). Furthermore, it appears that no Member of Congress refuted the notion that Washington's analysis in *Corfield* undergirded the meaning of the Privileges or Immunities Clause.[6]

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[4] During the first half of the 19th century, a number of legal scholars and state courts endorsed Washington's conclusion that the Clause protected only fundamental rights. See, *e. g., Campbell* v. *Morris*, 3 H. & McH. 535, 554 (Md. 1797) (Chase, J.) (Clause protects property and personal rights); *Douglass* v. *Stephens*, 1 Del. Ch. 465, 470 (1821) (Clause protects the "absolute rights" that "all men by nature have"); 2 J. Kent, Commentaries on American Law 71–72 (1836) (Clause "confined to those [rights] which were, in their nature, fundamental"). See generally Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 Wm. & Mary L. Rev. 1, 18–21 (1967) (collecting sources).

[5] He also observed that, while the Supreme Court had not "undertaken to define either the nature or extent of the privileges and immunities," Washington's opinion gave "some intimation of what probably will be the opinion of the judiciary." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866).

[6] During debates on the Civil Rights Act of 1866, Members of Congress also repeatedly invoked *Corfield* to support the legislation. See generally Siegan, Supreme Court's Constitution, at 46–56. The Act's sponsor,

That Members of the 39th Congress appear to have endorsed the wisdom of Justice Washington's opinion does not, standing alone, provide dispositive insight into their understanding of the Fourteenth Amendment's Privileges or Immunities Clause. Nevertheless, their repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits—appears contrary to the original understanding and is dubious at best.

As THE CHIEF JUSTICE points out, *ante*, at 511, it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because, as I have explained *supra*, at 521–522, the *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Four-

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Senator Trumbull, quoting from *Corfield*, explained that the legislation protected the "fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in." Cong. Globe, *supra*, at 476. The Civil Rights Act is widely regarded as the precursor to the Fourteenth Amendment. See, *e. g.*, J. tenBroek, Equal Under Law 201 (rev. ed. 1965) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt").

teenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court." *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977).

I respectfully dissent.

Syllabus

CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. *v.* GOLDSMITH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 98–347. Argued March 22, 1999—Decided May 17, 1999

After respondent Goldsmith, an Air Force major, defied an order by a superior officer to inform his sex partners that he was infected with HIV and to take measures to block any transfer of bodily fluids during sexual relations, he was convicted by general court-martial of willful disobedience of an order and other offenses under the Uniform Code of Military Justice and sentenced to six years' confinement and partial forfeiture of pay. The Air Force Court of Criminal Appeals affirmed, and when Goldsmith sought no review of that decision in the Court of Appeals for the Armed Forces (CAAF), his conviction became final. Subsequently, in reliance on a newly enacted statute empowering the President to drop from the rolls of the Armed Forces any officer who had both been sentenced by a court-martial to more than six months' confinement and served at least six months, the Air Force notified Goldsmith that it was taking action to drop him from the rolls. Goldsmith did not immediately contest that proposal, but rather petitioned the Court of Criminal Appeals for extraordinary relief to redress the unrelated alleged interruption of his HIV medication during his incarceration. The court ruled that it lacked jurisdiction to act, and it was in Goldsmith's appeal from that determination that he first asserted the claim that the Air Force's action to drop him violated the *Ex Post Facto* and Double Jeopardy Clauses. The CAAF granted his petition for extraordinary relief and relied on the All Writs Act in enjoining the President and other officials from dropping Goldsmith from the Air Force rolls.

Held: Because the CAAF's process was neither "in aid of" its strictly circumscribed jurisdiction to review court-martial findings and sentences nor "necessary" or "appropriate" in light of a servicemember's alternative opportunities to seek relief, that court lacked jurisdiction to issue an injunction against dropping respondent from the Air Force rolls. Pp. 533–540.

(a) The All Writs Act authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U. S. C. § 1651(a). Although military appellate courts are among those so empowered to issue extraordinary writs, see *Noyd* v. *Bond*, 395 U. S. 683, 695, n. 7, the All Writs Act

does not enlarge those courts' power to issue process "in aid of" their existing statutory jurisdiction, see, *e. g.*, *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 41. The CAAF is accorded jurisdiction by statute to "review the record in [specified] cases reviewed by" the service courts of criminal appeals, 10 U. S. C. §§ 867(a)(2), (3), which in turn have jurisdiction to "revie[w] court-martial cases," § 866(a). Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Goldsmith's claim that the CAAF has satisfied the "aid" requirement because it protected and effectuated the sentence meted out by the court-martial is beside the point, for two related reasons. First, his court-martial sentence has not been changed; another military agency has simply taken independent action. Second, the CAAF is not given authority, by the All Writs Act or any other source, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. The CAAF spoke too expansively when it asserted that Congress intended it to have such broad responsibility. Pp. 533–537.

(b) Even if the CAAF had some seriously arguable basis for jurisdiction in these circumstances, resort to the All Writs Act would still be out of bounds, being unjustifiable either as "necessary" or as "appropriate" in light of alternative remedies available to a servicemember demanding to be kept on the rolls. The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law. See, *e. g.*, *Carlisle* v. *United States*, 517 U. S. 416, 429. This limitation operates here, since the Air Force Board for Correction of Military Records (BCMR) has authority to provide administrative review of the action challenged by respondent, and a servicemember claiming something other than monetary relief may challenge the BCMR's decision to sustain a decision to drop him from the rolls (or otherwise dismiss him) as final agency action under the Administrative Procedure Act. Moreover, in instances in which a claim for monetary relief may be framed, a servicemember may enter the Court of Federal Claims with a challenge to dropping from the rolls (or other discharge) under the Tucker Act, or he may enter a district court under the "Little Tucker Act." Pp. 537–540.

48 M. J. 84, reversed.

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

Deputy Solicitor General Dreeben argued the cause for petitioners. With him on the briefs were *Solicitor General Waxman*, *James A. Feldman*, *Lisa Schiavo Blatt*, and *Judith A. Miller*.

John M. Economidy argued the cause for respondent. With him on the brief were *Carol L. Hubbard*, *Karen L. Hecker*, and *Douglas H. Kohrt*.

JUSTICE SOUTER delivered the opinion of the Court.

The challenge here is to the use of the All Writs Act, 28 U. S. C. § 1651(a), by the Court of Appeals for the Armed Forces, to enjoin the President and various military officials from dropping respondent from the rolls of the Air Force. Because that court's process was neither "in aid of" its strictly circumscribed jurisdiction to review court-martial findings and sentences under 10 U. S. C. § 867 nor "necessary or appropriate" in light of a servicemember's alternative opportunities to seek relief, we hold that the Court of Appeals for the Armed Forces lacked jurisdiction to issue the injunction.

I

Respondent James Goldsmith, a major in the United States Air Force, was ordered by a superior officer to inform his sex partners that he was HIV-positive and to take measures to block any transfer of bodily fluids during sexual relations. Contrary to this order, on two occasions Goldsmith had unprotected intercourse, once with a fellow officer and once with a civilian, without informing either that he was carrying HIV.

As a consequence of his defiance, Goldsmith was convicted by general court-martial of willful disobedience of an order from a superior commissioned officer, aggravated assault with means likely to produce death or grievous bodily harm, and assault consummated by battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §§ 890, 928(b)(1), (a). In 1994, he was sentenced to six years' confinement and forfeiture of $2,500 of his pay

each month for six years. The Air Force Court of Criminal Appeals affirmed his conviction and sentence in 1995, and when he sought no review of that decision in the United States Court of Appeals for the Armed Forces (CAAF), his conviction became final, see § 871(c)(1)(A).

In 1996, Congress expanded the President's authority by empowering him to drop from the rolls of the Armed Forces any officer who had both been sentenced by a court-martial to more than six months' confinement and served at least six months.[1] See National Defense Authorization Act for Fiscal Year 1996, 110 Stat. 325, 10 U. S. C. §§ 1161(b)(2), 1167 (1994 ed., Supp. III).[2] In reliance on this statutory authorization, the Air Force notified Goldsmith in 1996 that it was taking action to drop him from the rolls.

Goldsmith did not immediately contest the proposal to drop him, but rather petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U. S. C. § 1651(a), to redress the unrelated alleged inter-

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[1] When a servicemember is dropped from the rolls, he forfeits his military pay. See 37 U. S. C. § 803. The drop-from-the-rolls remedy targets a narrow category of servicemembers who are absent without leave (AWOL) or else have been convicted of serious crimes. Since 1870, the President has had authority to drop from the rolls of the Army any officer who has been AWOL for at least three months. See Act of July 15, 1870, § 17, 16 Stat. 319. The power was subsequently extended to officers confined in prison after final conviction by a civil court, see Act of Jan. 19, 1911, ch. 22, 36 Stat. 894, and then to "any armed force" officer AWOL for at least three months or else finally sentenced to confinement in a federal or state penitentiary or correctional institution, see Act of May 5, 1950, § 10, 64 Stat. 146.

[2] Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer . . . who may be separated under Section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial." Section 1167 provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final . . . and the member has served in confinement for a period of six months."

ruption of his HIV medication during his incarceration. The Court of Criminal Appeals ruled that it lacked jurisdiction to act, and it was in Goldsmith's appeal from that determination that he took the first steps to raise the issue now before us, an entirely new claim that the Air Force's action to drop him from the rolls was unconstitutional. He did not challenge his underlying court-martial conviction (the appeal period for which had expired, see Rule 19(a)(1), CAAF Rules of Practice and Procedure). But he charged that the proposed action violated the *Ex Post Facto* Clause, U. S. Const., Art. I, § 9, cl. 3 (arguing that the statute authorizing it had been enacted after the date of his conviction), and the Double Jeopardy Clause, U. S. Const., Amdt. 5 (arguing that the action would inflict successive punishment based on the same conduct underlying his first conviction). 48 M. J. 84, 89–90 (CAAF 1998). The CAAF, on a division of 3 to 2, granted the petition for extraordinary relief and relied on the All Writs Act, 28 U. S. C. § 1651(a), in enjoining the President and various other Executive Branch officials from dropping respondent from the rolls of the Air Force.[3] We granted certiorari, 525 U. S. 961 (1998), and now reverse.[4]

II

When Congress exercised its power to govern and regulate the Armed Forces by establishing the CAAF, see U. S. Const., Art. I, § 8, cl. 14; 10 U. S. C. § 941; see generally *Weiss*

[3] Because respondent had been released from confinement, the CAAF denied respondent's writ-appeal petition concerning his medical treatment claim as moot. See 48 M. J. 84, 87–88 (1998).

As a result of the CAAF's order, respondent has not been dropped from the rolls, and has returned to active duty status. The Air Force initiated an administrative separation proceeding against respondent, see 10 U. S. C. § 1181, which has been deferred pending resolution of this case. See Brief for Petitioners 8, n. 2.

[4] In light of our holding that the CAAF lacked jurisdiction in this case, we do not reach the merits of respondent's double jeopardy and *ex post facto* claims.

v. *United States*, 510 U. S. 163, 166–169 (1994), it confined the court's jurisdiction to the review of specified sentences imposed by courts-martial: the CAAF has the power to act "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U. S. C. § 867(c).[5] Cf. *Parisi* v. *Davidson*, 405 U. S. 34, 44 (1972) (Court of Military Appeals lacked express authority over claim for discharge based on conscientious objector status). Despite these limitations, the CAAF asserted jurisdiction and purported to justify reliance on the All Writs Act in this case on the view that "Congress intended [it] to have broad responsibility with respect to administration of military justice," 48 M. J., at 86–87,[6] a position that Goldsmith urges us to adopt. This we cannot do.

While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process "in aid of" the issuing court's jurisdiction. 28 U. S. C. § 1651(a) ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). Thus, although military appellate courts are among those empowered to issue extraordinary writs under the Act, see *Noyd* v. *Bond*, 395 U. S. 683, 695, n. 7 (1969), the express terms of the Act confine the power of the CAAF to issuing process "in aid of" its existing statu-

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[5] When Congress established the Court of Military Appeals (the CAAF's predecessor), it similarly confined its jurisdiction to the review of specified sentences imposed by courts-martial. See Act of May 5, 1950, ch. 169, Art. 67(d), 64 Stat. 130. See also H. R. Rep. No. 491, 81st Cong., 1st Sess., 32 (1949); S. Rep. No. 486, 81st Cong., 1st Sess., 3, 28–29 (1949).

[6] One judge was even more emphatic: "We should use our broad jurisdiction under the [UCMJ] to correct injustices like this and we need not wait for another court to perhaps act. . . . Our Court has the responsibility of protecting the rights of all servicemembers in court-martial matters." 48 M. J., at 91 (Sullivan, J., concurring).

tory jurisdiction; the Act does not enlarge that jurisdiction, see, *e. g.*, *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 41 (1985). See also 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3932, p. 470 (2d ed. 1996) ("The All Writs Act . . . is not an independent grant of appellate jurisdiction"); 19 J. Moore & G. Pratt, Moore's Federal Practice § 204.02[4] (3d ed. 1998) ("The All Writs Act cannot enlarge a court's jurisdiction").

We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed. To be more specific, the CAAF is accorded jurisdiction by statute (so far as it concerns us here) to "review the record in [specified] cases reviewed by" the service courts of criminal appeals, 10 U. S. C. §§ 867(a)(2), (3), which in turn have jurisdiction to "revie[w] court-martial cases," § 866(a). Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding,[7] the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it.

Goldsmith nonetheless claims that the CAAF has satisfied the "aid" requirement of the Act because it protected and effectuated the sentence meted out by the court-martial. Goldsmith emphasizes that the court-martial could have dis-

[7] A court-martial is specifically barred from dismissing or discharging an officer except as in accordance with the UCMJ, which gives it no authority to drop a servicemember from the rolls. See Rules for Courts-Martial 1003(b)(9)(A)–(C); Rule 1003(b)(9) ("A court-martial may not adjudge an administrative separation from the service"). Moreover, respondent brought the petition against the President, the Secretary of Defense, and military officials who were not even parties to the court-martial.

missed him from service, but instead chose to impose only confinement and forfeitures.[8] Hence, he says the CAAF merely preserved that sentence as the court-martial imposed it, by precluding additional punishment, which would incidentally violate the *Ex Post Facto* and Double Jeopardy Clauses. But this is beside the point, for two related reasons. First, Goldsmith's court-martial sentence has not been changed; another military agency has simply taken independent action.[9] It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ, and it certainly would be a different matter when such a judgment had been affirmed by an appellate court. In such a case, as the Government concedes, see Tr. of Oral Arg. 15, 19, 52, the All Writs power would allow the appellate court to compel adherence to its own judgment. See, *e. g.*, *United States* v. *United States Dist. Court for Southern Dist. of N. Y.*, 334 U. S. 258, 263–264 (1948). Second, the CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. Simply stated, there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review. Thus the CAAF spoke too expansively when it held itself to be "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an

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[8] At the court-martial, respondent faced a maximum punishment of dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine.

[9] Indeed, the approved findings and sentence in Goldsmith's case had become final over one year before the Air Force initiated its action to drop him from the rolls.

adequate basis for direct review in [the CAAF] after review in the intermediate court," 48 M. J., at 87.[10]

III

Even if the CAAF had some seriously arguable basis for jurisdiction in these circumstances, resort to the All Writs Act would still be out of bounds, being unjustifiable either as "necessary" or as "appropriate" in light of alternative remedies available to a servicemember demanding to be kept on the rolls.[11] The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law. See, *e. g.*, *Carlisle* v. *United States*, 517 U. S. 416, 429 (1996) ("'The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute'" (quoting *Pennsylvania Bureau of Correction*, 474 U. S., at 43)). See also 19 Moore's Federal Practice § 201.40 ("[A] writ may not be used . . . when another method of review will suffice"). This limitation operates here, since other ad-

[10] The court, moreover, was simply wrong when it treated itself as a court of original jurisdiction, see *supra*, at 535.

[11] These remedies are in addition to the review as of right by the military department's Court of Criminal Appeals of any court-martial sentence that includes punitive dismissal or discharge. See 10 U. S. C. § 866(b)(1); § 867(a) (decisions of the Court of Criminal Appeals subject to discretionary review by the CAAF). And of course, once a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided under the UCMJ to seek relief from his conviction, see *Noyd* v. *Bond*, 395 U. S. 683, 693–699 (1969), he is entitled to bring a habeas corpus petition, see 28 U. S. C. § 2241(c), claiming that his conviction is affected by a fundamental defect that requires that it be set aside. See, *e. g.*, *Burns* v. *Wilson*, 346 U. S. 137, 142 (1953) (opinion of Vinson, C. J.). See also *Calley* v. *Callaway*, 519 F. 2d 184, 199 (CA5 1975); *Gorko* v. *Commanding Officer, Second Air Force*, 314 F. 2d 858, 859 (CA10 1963). In this case, however, respondent chose not to challenge his underlying conviction. See *supra*, at 533.

ministrative bodies in the military, and the federal courts, have authority to provide administrative or judicial review of the action challenged by respondent.

In response to the notice Goldsmith received that action was being considered to drop him from the rolls, he presented his claim to the Secretary of the Air Force. See Tr. of Oral Arg. 4–5. If the Secretary takes final action to drop him from the rolls (as he has not yet done), Goldsmith will (as the Government concedes) be entitled to present his claim to the Air Force Board for Correction of Military Records (BCMR). This is a civilian body within the military service, with broad-ranging authority to review a servicemember's "discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial)," 10 U. S. C. § 1553(a), or "to correct an error or remove an injustice" in a military record, § 1552(a)(1).[12]

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[12] Respondent argues nonetheless that seeking BCMR review in his case would have been futile (especially in light of his life-threatening illness) since BCMR's lack authority to declare statutes unconstitutional, cannot consider records of courts-martial and related administrative records (with two inapplicable exceptions), and are generally "'unresponsive, bureaucratic extensions of the uniformed services,'" Brief for Respondent 16 (quoting H. R. Conf. Rep. No. 104–450, p. 798 (1996)).

In light of the fact that respondent chose to circumvent BCMR review, we need not address whether the Air Force BCMR has the power to correct a record that is erroneous as a result of a constitutional violation. Cf. *Guerra* v. *Scruggs*, 942 F. 2d 270, 273 (CA4 1991) ("The [Army BCMR] has authority to consider claims of constitutional, statutory, and regulatory violations"); *Bois* v. *Marsh*, 801 F. 2d 462, 467 (CADC 1986) ("[Appellant's] claims based on [the] Constitution, executive orders and Army regulations 'could readily have been made within the framework of this intramilitary procedure'" (quoting *Chappell* v. *Wallace*, 462 U. S. 296, 303 (1983))). And while it is true that unless specifically authorized a BCMR may not correct a court-martial record, see 10 U. S. C. § 1552(f), it may still consider the record, especially where, as here, the court-martial record is relevant in determining the validity of the subsequent dropping from the rolls. Finally, the alleged unresponsive nature of the BCMR's, if true, would in

Respondent may also have recourse to the federal trial courts. We have previously held, for example, that "[BCMR] decisions are subject to judicial review [by federal courts] and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U. S. 296, 303 (1983). A servicemember claiming something other than monetary relief may challenge a BCMR's decision to sustain a decision to drop him from the rolls (or otherwise dismissing him) as final agency action under the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.;* see §§ 704, 706. For examples of such challenges entertained in the district courts or courts of appeals, see *Roelofs* v. *Secretary of Air Force*, 628 F. 2d 594, 599–601 (CADC 1980) (proceeding in District Court under APA raising due process challenge to administrative discharge based on conviction of civilian offense); *Walker* v. *Shannon*, 848 F. Supp. 250, 251, 254–255 (DC 1994) (suit under APA for review of Army BCMR decision upholding involuntary separation). In the instances in which a claim for monetary relief may be framed, a servicemember may enter the Court of Federal Claims with a challenge to dropping from the rolls (or other discharge) under the Tucker Act, 28 U. S. C. § 1491.[13] See, *e. g., Doe* v. *United States*, 132 F. 3d 1430, 1433–1434 (CA Fed. 1997) (suit for backpay and correction of military records following administrative discharge); *Mitchell* v. *United States*, 930 F. 2d 893, 896–897 (CA Fed. 1991) (suit for back-

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no way alter the fact that BCMR's are legislatively authorized to provide the relief sought by respondent.

In any event, it is clear as noted in the text that follows that respondent's constitutional objections could have been addressed by the federal courts.

[13] Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government for greater than $10,000. See 28 U. S. C. § 1491. Determinations of the Court of Federal Claims may be appealed to the Federal Circuit.

pay, reinstatement, and correction of records). Or he may enter a district court under the "Little Tucker Act," 28 U. S. C. § 1346(a)(2).[14] See, *e. g.*, *Thomas* v. *Cheney*, 925 F. 2d 1407, 1411, 1416 (CA Fed. 1991) (reviewing challenge to action to drop plaintiff from the rolls); *Sibley* v. *Ball*, 924 F. 2d 25, 29 (CA1 1991) (transferring to Federal Circuit case for backpay because within purview of "Little Tucker Act").

In sum, executive action to drop respondent from the rolls falls outside of the CAAF's express statutory jurisdiction, and alternative statutory avenues of relief are available. The CAAF's injunction against dropping respondent from the rolls of the Air Force was neither "in aid of [its] jurisdictio[n]" nor "necessary or appropriate." Accordingly, we reverse the court's judgment.

It is so ordered.

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[14] The "Little Tucker Act," 28 U. S. C. § 1346(a)(2), confers jurisdiction on district courts for claims of $10,000 or less. Appeals are taken to the Federal Circuit.

Syllabus

HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL.

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

No. 98–85. Argued January 20, 1999—Decided May 17, 1999

After this Court decided, in *Shaw* v. *Hunt*, 517 U. S. 899, that North Carolina's Twelfth Congressional District was the product of unconstitutional racial gerrymandering, the State enacted a new districting plan in 1997. Believing that the new District 12 was also unconstitutional, appellees filed suit against several state officials to enjoin elections under the new plan. Before discovery and without an evidentiary hearing, the three-judge District Court granted appellees summary judgment and entered the injunction. From "uncontroverted material facts," the court concluded that the General Assembly in drawing District 12 had violated the Fourteenth Amendment's Equal Protection Clause.

Held: Because the General Assembly's motivation was in dispute, this case was not suitable for summary disposition. Laws classifying citizens based on race are constitutionally suspect and must be strictly scrutinized. A facially neutral law warrants such scrutiny if it can be proved that the law was motivated by a racial purpose or object, *Miller* v. *Johnson*, 515 U. S. 900, 913, or is unexplainable on grounds other than race, *Shaw* v. *Reno*, 509 U. S. 630, 644. Assessing a jurisdiction's motivation in drawing district lines is a complex endeavor requiring a court to inquire into all available circumstantial and direct evidence. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266. Appellees here sought to prove their claim through circumstantial evidence. Viewed *in toto*, that evidence—*e. g.*, maps showing the district's size, shape, and alleged lack of continuity; and statistical and demographic evidence—tends to support an inference that the State drew district lines with an impermissible racial motive. Summary judgment, however, is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The legislature's motivation is a factual question, and was in dispute. Appellants asserted that the legislature intended to make a strong Democratic district. They supported that contention with affidavits of two state legislators and, more important, of an expert who testified that the relevant data supported a political explanation at least as well as, and somewhat better than, a racial explanation for the district's lines.

Syllabus

Accepting the political explanation as true, as the District Court was required to do in ruling on appellees' summary judgment motion, appellees were not entitled to judgment as a matter of law for a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if those responsible for drawing the district are *conscious* of that fact. See *Bush* v. *Vera*, 517 U. S. 952, 968. In concluding that the State enacted its districting plan with an impermissible racial motivation, the District Court either credited appellees' asserted inferences over appellants' or did not give appellants the inference they were due. In any event, it was error to resolve the disputed fact of intent at the summary judgment stage. Summary judgment in a plaintiff's favor in a racial gerrymandering case may be awarded even where the claim is sought to be proved by circumstantial evidence. But it is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. Pp. 546–554.

34 F. Supp. 2d 1029, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 555.

Walter E. Dellinger argued the cause for appellants. With him on the briefs were *Michael F. Easley*, Attorney General of North Carolina, *Edwin M. Speas, Jr.*, Chief Deputy Attorney General, *Tiare B. Smiley*, Special Deputy Attorney General, and *Melissa L. Saunders*. *Todd A. Cox*, *Adam Stein*, *Elaine R. Jones*, *Theodore M. Shaw*, *Norman J. Chachkin*, *Jacqueline A. Berrien*, and *Victor A. Bolden* filed briefs for appellants-intervenors Smallwood et al.

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Yeomans*, *Deputy Solicitor General Underwood*, *David K. Flynn*, and *Louis E. Peraertz*.

Robinson O. Everett argued the cause for appellees. With him on the brief was *Martin G. McGee*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Laughlin McDonald*, *Neil Bradley*, *Cristina Correia*, and *Steven R. Shapiro;* for the Brennan Center for Justice at

JUSTICE THOMAS delivered the opinion of the Court.

In this appeal, we must decide whether appellees were entitled to summary judgment on their claim that North Carolina's Twelfth Congressional District, as established by the State's 1997 congressional redistricting plan, constituted an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

I

This is the third time in six years that litigation over North Carolina's Twelfth Congressional District has come before this Court. The first time around, we held that plaintiffs whose complaint alleged that the State had deliberately segregated voters into districts on the basis of race without compelling justification stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. *Shaw* v. *Reno*, 509 U. S. 630, 658 (1993) *(Shaw I)*. After remand, we affirmed the District Court's finding that North Carolina's District 12 classified voters by race and further held that the State's reapportionment scheme was not narrowly tailored to serve a compelling interest. *Shaw* v. *Hunt*, 517 U. S. 899 (1996) *(Shaw II)*.

In response to our decision in *Shaw II*, the State enacted a new districting plan. See 1997 N. C. Sess. Laws, ch. 11. A map of the unconstitutional District 12 was set forth in the Appendix to the opinion of the Court in *Shaw I*, *supra*, and we described it as follows:

> "The second majority-black district, District 12, is . . . unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the [In-

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New York University School of Law et al. by *Burt Neuborne* and *Deborah Goldberg;* for Congresswoman Corrine Brown et al. by *Paul M. Smith*, *Donald B. Verrilli, Jr.*, and *J. Gerald Hebert;* and for the Lawyers' Committee for Civil Rights Under Law by *Matthew J. Zinn*, *David A. Stein*, *James U. Blacksher*, *Jack W. Londen*, *Daniel F. Kolb*, *Norman Redlich*, *Barbara R. Arnwine*, *Thomas J. Henderson*, and *Edward Still*.

> terstate]–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' Northbound and southbound drivers on [Interstate]–85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them." 509 U. S., at 635–636 (citations omitted).

The State's 1997 plan altered District 12 in several respects. By any measure, blacks no longer constitute a majority of District 12: Blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. App. to Juris. Statement 67a, 99a. The new District 12 splits 6 counties as opposed to 10; beginning with Guilford County, the district runs in a southwestern direction through parts of Forsyth, Davidson, Rowan, Iredell, and Mecklenburg Counties, picking up concentrations of urban populations in Greensboro and High Point (both in Guilford), Winston-Salem (Forsyth), and Charlotte (Mecklenburg). (The old District 12 went through the same six counties but also included portions of Durham, Orange, and Alamance Counties east of Guilford, and parts of Gaston County west of Mecklenburg.) With these changes, the district retains only 41.6% of its previous area, *id.*, at 153a, and the distance between its farthest points has been reduced to approximately 95 miles, *id.*, at 105a. But while District 12 is wider and shorter than it was before, it retains its basic "snakelike" shape and continues to track Interstate 85. See generally Appendix, *infra.*

Appellees believed the new District 12, like the old one, to be the product of an unconstitutional racial gerrymander.

They filed suit in the United States District Court for the Eastern District of North Carolina against several state officials in their official capacities seeking to enjoin elections under the State's 1997 plan. The parties filed competing motions for summary judgment and supporting materials, and the three-judge District Court heard argument on the pending motions, but before either party had conducted discovery and without an evidentiary hearing. Over one judge's dissent, the District Court granted appellees' motion and entered the injunction they sought. 34 F. Supp. 2d 1029 (EDNC 1998). The majority of the court explained that "the uncontroverted material facts" showed that "District 12 was drawn to collect precincts with high racial identification rather than political identification," that "more heavily Democratic precincts . . . were bypassed in the drawing of District 12 and included in the surrounding congressional districts," and that "[t]he legislature disregarded traditional districting criteria." No. 4:96–CV–104–BO(3) (EDNC, Apr. 14, 1998), App. to Juris. Statement 21a. From these "uncontroverted material facts," the District Court concluded "the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven," *ibid.*, and thereby violated the Equal Protection Clause of the Fourteenth Amendment, *id.*, at 22a. (Apparently because the issue was not litigated, the District Court did not consider whether District 12 was narrowly tailored to serve a compelling interest.)[1]

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[1] In response to the District Court's decision and order, the State enacted yet another districting plan, 1998 N. C. Sess. Laws, ch. 2 (codified at N. C. Gen. Stat. § 163–201(a) (Supp. 1998)), which revised Districts 5, 6, 9, 10, and 12. Under the State's 1998 plan, no part of Guilford County is located within District 12 and all of Rowan County falls within the district's borders. The 1998 plan also modified District 12's boundaries in Forsyth, Davidson, and Iredell Counties. See *ibid.;* see also *Cromartie* v. *Hunt*, No. 4:96–CV–104–BO(3) (EDNC, June 22, 1998), App. to Juris. Statement 178a–179a. The State's 1998 congressional elections were conducted pursuant to the 1998 plan with the District Court's approval. Brief for

The state officials filed a notice of appeal. We noted probable jurisdiction, 524 U. S. 980 (1998), and now reverse.

II

Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized. *Shaw II*, 517 U. S., at 904; *Miller* v. *Johnson*, 515 U. S. 900, 904–905 (1995); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). When racial classifications are explicit, no inquiry into legislative purpose is necessary. See *Shaw I*, 509 U. S., at 642. A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was "motivated by a racial purpose or object," *Miller*, *supra*, at 913, or if it is "'unexplainable on grounds other than race,'" *Shaw I*, *supra*, at 644 (quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)); see also *Miller*, *supra*, at 905, 913. The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, *supra*, at 266; see also *Miller*, *supra*, at 905, 914 (citing *Arlington Heights*); *Shaw I*, *supra*, at 644 (same).[2]

Appellees 6, n. 13; App. to Juris. Statement 179a. Because the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court, see 1998 N. C. Sess. Laws, ch. 2, § 1.1, this case is not moot, see *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 288–289, and n. 11 (1982); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978); *Bullock* v. *Carter*, 405 U. S. 134, 141–142, n. 17 (1972).

[2] Cf. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 488 (1997) (holding that, in cases brought under § 5 of the Voting Rights Act of 1965, the *Arlington Heights* framework should guide a court's inquiry into whether a jurisdiction had a discriminatory purpose in enacting a voting change); *Rogers* v. *Lodge*, 458 U. S. 613, 618 (1982) (same framework is to be used in evaluating vote dilution claims brought under the Equal Protection Clause).

Districting legislation ordinarily, if not always, classifies tracts of land, precincts, or census blocks, and is race neutral on its face. North Carolina's 1997 plan was not atypical; appellees, therefore, were required to prove that District 12 was drawn with an impermissible racial motive—in this context, strict scrutiny applies if race was the "predominant factor" motivating the legislature's districting decision. To carry their burden, appellees were obliged to show—using direct or circumstantial evidence, or a combination of both, see *Shaw II*, *supra*, at 905; *Miller*, 515 U. S., at 916—that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations," *ibid.*

Appellees offered only circumstantial evidence in support of their claim. Their evidence included maps of District 12, showing its size, shape,[3] and alleged lack of continuity. See Appendix, *infra*. They also submitted evidence of the district's low scores with respect to traditional measures of compactness and expert affidavit testimony explaining that this statistical evidence proved the State had ignored traditional districting criteria in crafting the new Twelfth Congressional District. See App. 221–251. Appellees further claimed that the State had disrespected political subdivisions and communities of interest. In support, they pointed out that under the 1997 plan, District 12 was the only one state-

[3] JUSTICE STEVENS asserts that proof of a district's "bizarre configuration" gives rise equally to an inference that its architects were motivated by politics or race. *Post*, at 555. We do not necessarily quarrel with the proposition that a district's unusual shape can give rise to an inference of political motivation. But we doubt that a bizarre shape *equally* supports a political inference and a racial one. Some districts, we have said, are "so highly irregular that [they] rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw I*, 509 U. S. 630, 646–647 (1993) (quoting *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960)).

wide to contain no undivided county and offered figures showing that District 12 gathered almost 75% of its population from Mecklenburg County, at the southern tip of the district, and from Forsyth and Guilford Counties at the northernmost part of the district. *Id.*, at 176, 208–209.

Appellees also presented statistical and demographic evidence with respect to the precincts that were included within District 12 and those that were placed in neighboring districts. For the six subdivided counties included within District 12, the proportion of black residents was higher in the portion of the county within District 12 than the portion of the county in a neighboring district.[4] Other maps and supporting data submitted by appellees compared the demographics of several so-called "boundary segments."[5] This evidence tended to show that, in several instances, the State had excluded precincts that had a lower percentage of black population but were as Democratic (in terms of registered voters) as the precinct inside District 12. *Id.*, at 253–290; 3 Record, Doc. No. 61.

Viewed *in toto*, appellees' evidence tends to support an inference that the State drew its district lines with an im-

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[4] In the portion of Guilford County in District 12, black residents constituted 51.5% of the population, while in the District 6 portion, only 10.2% of the population was black. App. 179. Appellees' evidence as to the other counties showed: Forsyth District 12 was 72.9% black while Forsyth District 5 was 11.1% black; Davidson District 12 was 14.8% black while Davidson District 6 was 4.1% black; Rowan District 12 was 35.6% black and Rowan District 6 was 7.7% black; Iredell District 12 was 24.3% black while Iredell District 10 was 10.1% black; Mecklenburg District 12 was 51.9% black but Mecklenburg District 9 was only 7.2% black. *Id.*, at 179–181.

[5] Boundary segments, we are told, are those sections along the district's perimeter that separate outside precincts from inside precincts. In other words, the boundary segment is the district borderline itself; for each segment, the relevant comparison is between the inside precinct that touches the segment and the corresponding outside precinct. See App. to Juris. Statement 92a; Brief for United States as *Amicus Curiae* 20, n. 7.

permissible racial motive—even though they presented no direct evidence of intent. Summary judgment, however, is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242 (1986). To be sure, appellants did not contest the evidence of District 12's shape (which hardly could be contested), nor did they claim that appellees' statistical and demographic evidence, most if not all of which appears to have been obtained from the State's own data banks, was untrue.

The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question. See *Shaw II*, 517 U. S., at 905; *Miller*, *supra*, at 910. Appellants asserted that the General Assembly drew its district lines with the intent to make District 12 a strong Democratic district. In support, they presented the after-the-fact affidavit testimony of the two members of the General Assembly responsible for developing the State's 1997 plan. See App. to Juris. Statement 69a–84a. Those legislators further stated that, in crafting their districting law, they attempted to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State's congressional delegation, which in 1997 was composed of six Republicans and six Democrats. *Ibid.*

More important, we think, was the affidavit of an expert, Dr. David W. Peterson. *Id.*, at 85a–100a. He reviewed racial demographics, party registration, and election result data (the number of people voting for Democratic candidates) gleaned from the State's 1998 Court of Appeals election, 1998 Lieutenant Governor election, and 1990 United States Senate election for the precincts included within District 12 and those surrounding it. Unlike appellees' evidence, which highlighted select boundary segments, appellants' expert

examined the district's entire border—all 234 boundary segments. See *id.*, at 92a. He recognized "a strong correlation between racial composition and party preference" so that "in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party" but that "[i]n precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower." *Id.*, at 91a. Because of this significant correlation, the data tended to support both a political and racial hypothesis. Therefore, Peterson focused on "divergent boundary segments," those where blacks were greater inside District 12 but Democrats were greater outside and those where blacks were greater outside the district but Democrats were greater inside. He concluded that the State included the more heavily Democratic precinct much more often than the more heavily black precinct, and therefore, that the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation. *Id.*, at 98a; see also *id.*, at 87a ("[T]here is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification").

Peterson's analysis of District 12's divergent boundary segments and his affidavit testimony that District 12 displays a high correlation between race and partisanship support an inference that the General Assembly did no more than create a district of strong partisan Democrats. His affidavit is also significant in that it weakens the probative value of appellees' boundary segment evidence, which the District Court appeared to give significant weight. See *id.*, at 20a–21a. Appellees' evidence was limited to a few select precincts, see App. 253–276, whereas Peterson analyzed all 234 boundary segments. Moreover, appellees' maps reported only party registration figures. Peterson again was more thorough, looking also at actual voting re-

sults. Peterson's more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond.[6]

Accepting appellants' political motivation explanation as true, as the District Court was required to do in ruling on appellees' motion for summary judgment, see *Anderson*, 477 U. S., at 255, appellees were not entitled to judgment as a matter of law. Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact. See *Bush* v. *Vera*, 517 U. S. 952, 968 (1996); *id.*, at 1001 (THOMAS, J., concurring in judgment); *Shaw II*, *supra*, at 905; *Miller*, 515 U. S., at 916; *Shaw I*, 509 U. S., at 646.[7] Evidence that blacks constitute even a supermajority in one congressional district while amount-

[6] In addition to the evidence that appellants presented to the District Court, they have submitted with their reply brief maps showing that in almost all of the majority-Democrat registered precincts surrounding those portions of District 12 in Guilford, Forsyth, and Mecklenburg Counties, Republican candidates were elected in at least one of the three elections considered by the state defendants' expert. Reply Brief for State Appellants 4–8; App. to Reply Brief for State Appellants 1a–10a. Appellants apparently did not put this additional evidence before the District Court prior to the court's decision on the competing motions for summary judgment. They claim excuse in that appellees filed their maps showing partisan registration at the "eleventh hour." Brief for State Appellants 10, n. 13. We are not sure why appellants believe the timing of appellees' filing to be an excuse. The District Court set an advance deadline for filings in support of the competing motions for summary judgment, so appellants could not have been caught by surprise. And given that appellants not only had to respond to appellees' evidence, but also had their own motion for summary judgment to support, one would think that the District Court would not have needed to afford them "an adequate opportunity to respond." *Ibid.*

[7] This Court has recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we were not in agreement as to the standards that would govern such a claim. See *Davis* v. *Bandemer*, 478 U. S. 109, 127 (1986).

ing to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Of course, neither appellees nor the District Court relied exclusively on appellees' boundary segment evidence, and appellees submitted other evidence tending to show that the General Assembly was motivated by racial considerations in drawing District 12—most notably, District 12's shape and its lack of compactness. But in ruling on a motion for summary judgment, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." *Anderson*, 477 U. S., at 255. While appellees' evidence might *allow* the District Court to find that the State acted with an impermissible racial motivation, despite the State's explanation as supported by the Peterson affidavit, it does not *require* that the court do so. All that can be said on the record before us is that motivation was in dispute. Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding. The District Court nevertheless concluded that race was the "predominant factor" in the drawing of the district. In doing so, it either credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due. In any event, it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage. Cf. *ibid.* ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions").[8]

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[8] We note that *Bush* v. *Vera*, 517 U. S. 952 (1996), *Shaw II*, 517 U. S. 899 (1996), and *Miller* v. *Johnson*, 515 U. S. 900 (1995), each came to us on a developed record and after the respective District Courts had made findings of fact. *Bush* v. *Vera*, *supra*, at 959; *Vera* v.

Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.[9] That is not to say that summary judgment in a plaintiff's favor will never be appropriate in a racial gerrymandering case sought to be proved exclusively by circumstantial evidence. We can imagine an instance where the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be "significantly probative" so as to create a genuine issue of fact for trial. *Id.*, at 249–250. But this is not that case. And even if the question whether appellants had created a material dispute of fact were a close one, we think that "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," *Miller*, 515 U. S., at 916, would tip the balance in favor of the District Court making findings of fact. See also *id.*, at 916–917 ("[C]ourts must also recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed").

In reaching our decision, we are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the Gen-

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Richards, 861 F. Supp. 1304, 1311–1331, 1336–1344 (SD Tex. 1994); *Shaw II*, *supra*, at 903; *Shaw* v. *Hunt*, 861 F. Supp. 408, 456–473 (EDNC 1994); *Miller* v. *Johnson*, *supra*, at 910; *Johnson* v. *Miller*, 864 F. Supp. 1354, 1360–1369 (SD Ga. 1994).

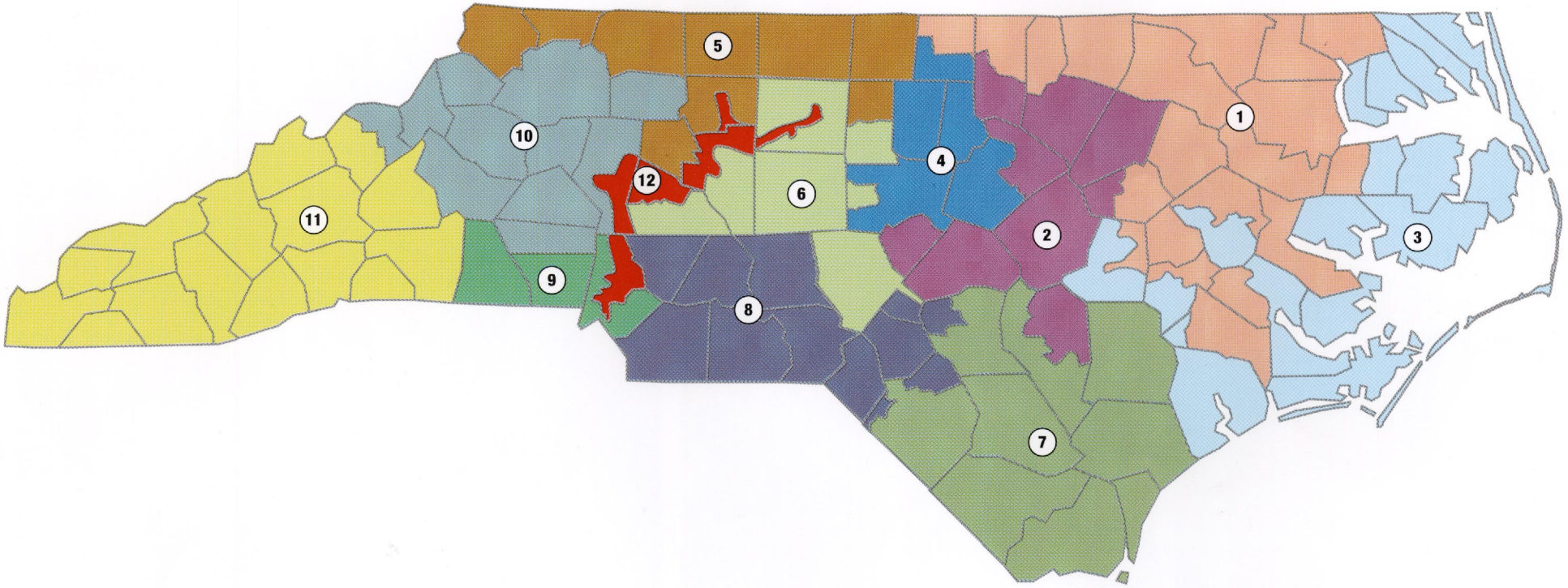
[9] Just as summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation, such as disparate treatment suits under Title VII or racial discrimination claims under 42 U. S. C. § 1981, the same holds true for racial gerrymandering claims of the sort brought here. See generally 10B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 2730, 2732.2 (1998).

eral Assembly's motivations. Perhaps, after trial, the evidence will support a finding that race was the State's predominant motive, but we express no position as to that question. We decide only that this case was not suited for summary disposition. The judgment of the District Court is reversed.

It is so ordered.

[Appendix containing North Carolina Congressional District map follows this page.]

APPENDIX TO OPINION OF THE COURT



JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in the judgment.

The disputed issue of fact in this case is whether political considerations or racial considerations provide the "primary" explanation for the seemingly irregular configuration of North Carolina's Twelfth Congressional District. The Court concludes that evidence submitted to the District Court on behalf of the State made it inappropriate for that Court to grant appellees' motion for summary judgment. I agree with that conclusion, but write separately to emphasize the importance of two undisputed matters of fact that are firmly established by the historical record and confirmed by the record in this case.

First, bizarre configuration is the traditional hallmark of the political gerrymander. This obvious proposition is supported by the work product of Elbridge Gerry, by the "swan" designed by New Jersey Republicans in 1982, see *Karcher* v. *Daggett*, 462 U. S. 725, 744, 762–763 (1983), and by the Indiana plan reviewed in *Davis* v. *Bandemer*, 478 U. S. 109, 183, 185 (1986). As we learned in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), a racial gerrymander may have an equally "uncouth" shape. See *id.*, at 340, 348. Thus, the shape of the congressional district at issue in this case provides strong evidence that either political or racial factors motivated its architects, but sheds no light on the question of which set of factors was more responsible for subordinating any of the State's "traditional" districting principles.[1]

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[1] I include the last phrase because the Court has held that a state legislature may make race-based districting decisions so long as those decisions do not subordinate (to some uncertain degree) "'traditional . . . districting principles.'" See *Shaw* v. *Hunt*, 517 U. S. 899, 907 (1996); *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995) (holding that racial considerations are subject to strict scrutiny when they subordinate "traditional race-neutral districting principles"); *id.*, at 928 (O'CONNOR, J., concurring) ("To invoke strict

Second, as the Presidential campaigns conducted by Strom Thurmond in 1948 and by George Wallace in 1968, and the Senate campaigns conducted more recently by Jesse Helms, have demonstrated, a great many registered Democrats in the South do not always vote for Democratic candidates in federal elections. The Congressional Quarterly recently recorded the fact that in North Carolina "Democratic voter registration edges . . . no longer translat[e] into success in statewide or national races. In recent years, conservative white Democrats have gravitated toward Republican candidates." See Congressional Quarterly Inc., Congressional Districts in the 1990s, p. 549 (1993).[2] This voting pattern

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scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"). In this regard, I note that neither the Court's opinion nor the District Court's opinion analyzes the question whether the "traditional districting principle" of joining communities of interest is subordinated in the present Twelfth District. A district may lack compactness or contiguity—due, for example, to geographic or demographic reasons—yet still serve the traditional districting goal of joining communities of interest.

[2] The Congressional Quarterly's publication, which is largely seen as the authoritative source regarding the political and demographic makeup of the congressional districts resulting from each decennial census, is even more revealing when one examines its district-by-district analysis of North Carolina's partisan voting patterns. With regard to the original First District, which was just over 50 percent black, the book remarks: "The white voters of the 1st claim the Democratic roots of their forefathers, but often support GOP candidates at the state and national level. A fair number are 'Jessecrats,' conservative Democratic supporters of GOP Sen. Jesse Helms." Congressional Quarterly, at 550. The book shows that while the Second and Third Districts have "significant Democratic voter registration edges," Republican candidates actually won substantial victories in four of five recent elections. See *id.*, at 549, 552–553. Statistics also demonstrate that a majority of voters in the Eleventh District consistently vote for Republicans "despite a wide Democratic registration advantage." *Id.*, at 565. Although the book exhaustively analyzes the statistical demographics of each congressional district, listing even the number of cable television subscribers in each district, it does not provide voter registration statistics.

has proved to be particularly pronounced in voting districts that contain more than about one-third African-American residents. See Pildes, The Politics of Race, 108 Harv. L. Rev. 1359, 1382–1386 (1995). There was no need for expert testimony to establish the proposition that "in North Carolina, party registration and party preference do not always correspond." *Ante*, at 551.

Indeed, for me the most remarkable feature of the District Court's erroneous decision is that it relied entirely on data concerning the location of registered Democrats and ignored the more probative evidence of how the people who live near the borders of District 12 actually voted in recent elections. That evidence not only undermines and rebuts the inferences the District Court drew from the party registration data, but also provides strong affirmative evidence that is thoroughly consistent with the sworn testimony of the two members of the state legislature who were most active in drawing the boundaries of District 12. The affidavits of those members, stating that district lines were drawn according to election results, not voter registration, are uncontradicted.[3] And almost all of the majority-Democrat registered precincts that the state legislature excluded from District 12 in favor of precincts with higher black populations produced significantly less dependable Democratic results and actually voted for one or more Republicans in recent elections.

The record supports the conclusion that the most loyal Democrats living near the borders of District 12 "happen to be black Democrats," see *ibid.*, and I have no doubt that the legislature was conscious of that fact when it enacted this apportionment plan. But everyone agrees that that fact is not sufficient to invalidate the district. Cf. *ante*, at 551–552. That fact would not even be enough, under this Court's decisions, to invalidate a governmental action, that, unlike the

[3] See App. to Juris. Statement 73a (affidavit of Sen. Roy A. Cooper III, Chairman of Senate Redistricting Committee); *id.*, at 81a–82a (affidavit of Rep. W. Edwin McMahan, Chairman of House Redistricting Committee).

action at issue here, actually has an adverse impact on a particular racial group. See, *e. g.*, *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (holding that the Equal Protection Clause is implicated only when "a state legislatur[e] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); *Washington* v. *Davis*, 426 U. S. 229 (1976); *Hernandez* v. *New York*, 500 U. S. 352, 375 (1991) (O'CONNOR, J., concurring in judgment) ("No matter how closely tied or significantly correlated to race the explanation for [a governmental action] may be, the [action] does not implicate the Equal Protection Clause unless it is based on race").

Accordingly, appellees' evidence may include nothing more than (i) a bizarre shape, which is equally consistent with either political or racial motivation, (ii) registration data, which are virtually irrelevant when actual voting results were available and which point in a different direction, and (iii) knowledge of the racial composition of the district. Because we do not have before us the question whether the District Court erred in denying the State's motion for summary judgment, I need not decide whether that circumstantial evidence even raises an inference of improper motive. It is sufficient at this stage of the proceedings to join in the Court's judgment of reversal, which I do.

Syllabus

FLORIDA *v.* WHITE

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 98–223. Argued March 23, 1999—Decided May 17, 1999

Two months after officers observed respondent using his car to deliver cocaine, he was arrested at his workplace on unrelated charges. At that time, the arresting officers seized his car without securing a warrant because they believed that it was subject to forfeiture under the Florida Contraband Forfeiture Act (Act). During a subsequent inventory search, the police discovered cocaine in the car. Respondent was then charged with a state drug violation. At his trial on the drug charge, he moved to suppress the evidence discovered during the search, arguing that the car's warrantless seizure violated the Fourth Amendment, thereby making the cocaine the "fruit of the poisonous tree." After the jury returned a guilty verdict, the court denied the motion, and the Florida First District Court of Appeal affirmed. It also certified to the Florida Supreme Court the question whether, absent exigent circumstances, a warrantless seizure of an automobile under the Act violated the Fourth Amendment. The latter court answered the question in the affirmative, quashed the lower court opinion, and remanded.

Held: The Fourth Amendment does not require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. In deciding whether a challenged governmental action violates the Amendment, this Court inquires whether the action was regarded as an unlawful search and seizure when the Amendment was framed. See, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132, 149. This Court has held that when federal officers have probable cause to believe that an automobile contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching the car for and seizing the contraband. *Id.*, at 150–151. Although the police here lacked probable cause to believe that respondent's car contained contraband, they had probable cause to believe that the vehicle *itself* was contraband under Florida law. A recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure. In addition, this Court's Fourth Amendment jurisprudence has consistently accorded officers greater latitude in exercising their duties in public places. Here, because the police seized respondent's

Syllabus

vehicle from a public area, the warrantless seizure is virtually indistinguishable from the seizure upheld in *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 351. Pp. 563–566.

710 So. 2d 949, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 566. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 567.

Carolyn Snurkowski, Assistant Deputy Attorney General of Florida, argued the cause for petitioner. With her on the briefs were *Robert A. Butterworth*, Attorney General, and *Daniel A. David*, Assistant Attorney General.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Kathleen A. Felton*.

David P. Gauldin argued the cause for respondent. With him on the brief were *David A. Davis* and *Michael J. Minerva*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Arkansas et al. by *Winston Bryant*, Attorney General of Arkansas, *David R. Raupp*, Senior Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mike Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *Mark L. Earley*

JUSTICE THOMAS delivered the opinion of the Court.

The Florida Contraband Forfeiture Act provides that certain forms of contraband, including motor vehicles used in violation of the Act's provisions, may be seized and potentially forfeited. In this case, we must decide whether the Fourth Amendment requires the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. We hold that it does not.

I

On three occasions in July and August 1993, police officers observed respondent Tyvessel Tyvorus White using his car to deliver cocaine, and thereby developed probable cause to believe that his car was subject to forfeiture under the Florida Contraband Forfeiture Act (Act), Fla. Stat. § 932.701 *et seq.* (1997).[1] Several months later, the police arrested respondent at his place of employment on charges unrelated to the drug transactions observed in July and August 1993. At the same time, the arresting officers, without securing a warrant, seized respondent's automobile in accordance with the provisions of the Act. See § 932.703(2)(a).[2] They seized the

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of Virginia, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming.

Richard J. Troberman and *Lisa B. Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

[1] That Act provides, in relevant part: "Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited." Fla. Stat. § 932.703(1)(a) (1997).

[2] Nothing in the Act requires the police to obtain a warrant prior to seizing a vehicle. See *State* v. *Pomerance*, 434 So. 2d 329, 330 (Fla. App. 1983). Rather, the Act simply provides that "[p]ersonal property

vehicle solely because they believed that it was forfeitable under the Act. During a subsequent inventory search, the police found two pieces of crack cocaine in the ashtray. Based on the discovery of the cocaine, respondent was charged with possession of a controlled substance in violation of Florida law.

At his trial on the possession charge, respondent filed a motion to suppress the evidence discovered during the inventory search. He argued that the warrantless seizure of his car violated the Fourth Amendment, thereby making the cocaine the "fruit of the poisonous tree." The trial court initially reserved ruling on respondent's motion, but later denied it after the jury returned a guilty verdict. On appeal, the Florida First District Court of Appeal affirmed. 680 So. 2d 550 (1996). Adopting the position of a majority of state and federal courts to have considered the question, the court rejected respondent's argument that the Fourth Amendment required the police to secure a warrant prior to seizing his vehicle. *Id.*, at 554. Because the Florida Supreme Court and this Court had not directly addressed the issue, the court certified to the Florida Supreme Court the question whether, absent exigent circumstances, the warrantless seizure of an automobile under the Act violated the Fourth Amendment. *Id.*, at 555.

In a divided opinion, the Florida Supreme Court answered the certified question in the affirmative, quashed the First District Court of Appeal's opinion, and remanded. 710 So. 2d 949, 955 (1998). The majority of the court concluded that, absent exigent circumstances, the Fourth Amendment requires the police to obtain a warrant prior to seizing prop-

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may be seized at the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure . . . that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act." § 932.703(2)(a).

erty that has been used in violation of the Act. *Ibid.* According to the court, the fact that the police develop probable cause to believe that such a violation occurred does not, standing alone, justify a warrantless seizure. The court expressly rejected the holding of the Eleventh Circuit, see *United States* v. *Valdes*, 876 F. 2d 1554 (1989), and the majority of other Federal Circuits to have addressed the same issue in the context of the federal civil forfeiture law, 21 U. S. C. § 881, which is similar to Florida's. See *United States* v. *Decker*, 19 F. 3d 287 (CA6 1994) *(per curiam); United States* v. *Pace*, 898 F. 2d 1218, 1241 (CA7 1990); *United States* v. *One 1978 Mercedes Benz*, 711 F. 2d 1297 (CA5 1983); *United States* v. *Kemp*, 690 F. 2d 397 (CA4 1982); *United States* v. *Bush*, 647 F. 2d 357 (CA3 1981). But see *United States* v. *Dixon*, 1 F. 3d 1080 (CA10 1993); *United States* v. *Lasanta*, 978 F. 2d 1300 (CA2 1992); *United States* v. *Linn*, 880 F. 2d 209 (CA9 1989). We granted certiorari, 525 U. S. 1000 (1998), and now reverse.

II

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and further provides that "no Warrants shall issue, but upon probable cause." U. S. Const., Amdt. 4. In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed. See *Wyoming* v. *Houghton*, *ante*, at 299; *Carroll* v. *United States*, 267 U. S. 132, 149 (1925) ("The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens").

In *Carroll*, we held that when federal officers have probable cause to believe that an automobile contains contraband,

the Fourth Amendment does not require them to obtain a warrant prior to searching the car for and seizing the contraband. Our holding was rooted in federal law enforcement practice at the time of the adoption of the Fourth Amendment. Specifically, we looked to laws of the First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties. *Id.*, at 150–151 (citing Act of July 31, 1789, §§ 24, 29, 1 Stat. 43; Act of Aug. 4, 1790, § 50, 1 Stat. 170; Act of Feb. 18, 1793, § 27, 1 Stat. 315; Act of Mar. 2, 1799, §§ 68–70, 1 Stat. 677, 678). These enactments led us to conclude that "contemporaneously with the adoption of the Fourth Amendment," Congress distinguished "the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." 267 U. S., at 151.

The Florida Supreme Court recognized that under *Carroll*, the police could search respondent's car, without obtaining a warrant, if they had probable cause to believe that it contained contraband. The court, however, rejected the argument that the warrantless seizure of respondent's vehicle *itself* also was appropriate under *Carroll* and its progeny. It reasoned that "[t]here is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband [and] the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity." 710 So. 2d, at 953. We disagree.

The principles underlying the rule in *Carroll* and the founding-era statutes upon which they are based fully support the conclusion that the warrantless seizure of respondent's car did not violate the Fourth Amendment. Although, as the Florida Supreme Court observed, the police lacked

probable cause to believe that respondent's car contained contraband, see 710 So. 2d, at 953, they certainly had probable cause to believe that the vehicle *itself* was contraband under Florida law.[3] Recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. See 267 U. S., at 150–152; see also *California* v. *Carney*, 471 U. S. 386, 390 (1985); *South Dakota* v. *Opperman*, 428 U. S. 364, 367 (1976). This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure.[4] Furthermore, the early federal statutes that we looked to in *Carroll*, like the Florida Contraband Forfeiture Act, authorized the warrantless seizure of *both* goods subject to duties *and* the ships upon which those goods were concealed. See, *e. g.*, 1 Stat. 43, 46; 1 Stat. 170, 174; 1 Stat. 677, 678, 692.

In addition to the special considerations recognized in the context of movable items, our Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places. For example, although a warrant presumptively is required for a felony arrest in a suspect's home, the Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred. See *United States* v. *Watson*, 423 U. S. 411, 416–424 (1976). In explaining this rule, we have drawn upon the es-

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[3] The Act defines "contraband" to include any "vehicle of any kind, . . . which was used . . . as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony." § 932.701(2)(a)(5).

[4] At oral argument, respondent contended that the delay between the time that the police developed probable cause to seize the vehicle and when the seizure actually occurred undercuts the argument that the warrantless seizure was necessary to prevent respondent from removing the car out of the jurisdiction. We express no opinion about whether excessive delay prior to a seizure could render probable cause stale, and the seizure therefore unreasonable under the Fourth Amendment.

tablished "distinction between a warrantless seizure in an open area and such a seizure on private premises." *Payton* v. *New York*, 445 U. S. 573, 587 (1980); see also *id.*, at 586–587 ("It is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant"). The principle that underlies *Watson* extends to the seizure at issue in this case. Indeed, the facts of this case are nearly indistinguishable from those in *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338 (1977). There, we considered whether federal agents violated the Fourth Amendment by failing to secure a warrant prior to seizing automobiles in partial satisfaction of income tax assessments. *Id.*, at 351. We concluded that they did not, reasoning that "[t]he seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy." *Ibid.* Here, because the police seized respondent's vehicle from a public area—respondent's employer's parking lot—the warrantless seizure also did not involve any invasion of respondent's privacy. Based on the relevant history and our prior precedent, we therefore conclude that the Fourth Amendment did not require a warrant to seize respondent's automobile in these circumstances.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call "contraband," whether or not the property happens to be in public when seized. The Fourth Amendment does not concede any talis-

manic significance to use of the term "contraband" whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing, cf., *e. g.*, *Bennis* v. *Michigan*, 516 U. S. 442, 443–446 (1996); *id.*, at 458 (STEVENS, J., dissenting); *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 81–82, and n. 1 (1993) (THOMAS, J., concurring in part and dissenting in part) (expressing concern about the breadth of new forfeiture statutes). Moreover, *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338 (1977) (upon which we rely today), endorsed the public character of a warrantless seizure scheme by reference to traditional enforcement of government revenue laws, *id.*, at 351–352, and n. 18 (citing, *e. g.*, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856)), and the legality of seizing abandoned contraband in public view, 429 U. S., at 352 (citing *Hester* v. *United States*, 265 U. S. 57 (1924)).

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

During the summer of 1993, Florida police obtained evidence that Tyvessel White was engaged in the sale and delivery of narcotics, and that he was using his car to facilitate the enterprise. For reasons unexplained, the police neither arrested White at that point nor seized his automobile as an instrumentality of his alleged narcotics offenses. Most important to the resolution of this case, the police did not seek to obtain a warrant before seizing White's car that fall—over two months after the last event that justified the seizure. Instead, after arresting White at work on an unrelated matter and obtaining his car keys, the officers seized White's automobile without a warrant from his employer's parking lot and performed an inventory search. The Florida Supreme Court concluded that the seizure, which took place absent exigent circumstances or probable cause to be-

lieve that narcotics were present, was invalid. 710 So. 2d 949 (1998).[1]

In 1971, after advising us that "we must not lose sight of the Fourth Amendment's fundamental guarantee," Justice Stewart made this comment on what was then settled law:

> "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" *Coolidge* v. *New Hampshire*, 403 U. S. 443, 453, 454–455 (footnotes omitted).

Because the Fourth Amendment plainly "protects property as well as privacy" and seizures as well as searches, *Soldal* v. *Cook County*, 506 U. S. 56, 62–64 (1992), I would apply to the present case our longstanding warrant presumption.[2]

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[1] The Florida Supreme Court's opinion could be read to suggest that due process protections in the Florida Constitution might independently require a warrant or other judicial process before seizure under the Florida Contraband Forfeiture Act. See 710 So. 2d, at 952 (discussing *Department of Law Enforcement* v. *Real Property*, 588 So. 2d 957 (1991)). However, the certified question put to that court referred only to the Fourth Amendment to the United States Constitution. 710 So. 2d, at 950. Thus, a viable federal question was presented for us to decide on certiorari, but of course we have no authority to determine the limits of state constitutional or statutory safeguards.

[2] *E. g.*, *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 315–318 (1972) ("Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause"); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Johnson* v. *United*

In the context of property seizures by law enforcement authorities, the presumption might be overcome more easily in the absence of an accompanying privacy or liberty interest. Nevertheless, I would look to the warrant clause as a measure of reasonableness in such cases, *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 315 (1972), and the circumstances of this case do not convince me that the role of a neutral magistrate was dispensable.

The Court does not expressly disavow the warrant presumption urged by White and followed by the Florida Supreme Court, but its decision suggests that the exceptions have all but swallowed the general rule. To defend the officers' warrantless seizure, the State points to cases establishing an "automobile exception" to our ordinary demand for a warrant before a lawful search may be conducted. Each of those cases, however, involved searches of automobiles for contraband or temporary seizures of automobiles to effect such searches.[3] Such intrusions comport with the practice

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States, 333 U. S. 10, 13–14 (1948); *Harris* v. *United States*, 331 U. S. 145, 162 (1947) (Frankfurter, J., dissenting) ("[W]ith minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant"), overruled in part by *Chimel* v. *California*, 395 U. S. 752 (1969); see also *Shadwick* v. *Tampa*, 407 U. S. 345, 348 (1972) (noting "the now accepted fact that someone independent of the police and prosecution must determine probable cause"); *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963).

[3] See, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132, 153 (1925) (where the police have probable cause, "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant"); *United States* v. *Ross*, 456 U. S. 798, 820, n. 26, 825 (1982) ("During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search"); *Wyoming* v. *Houghton*, *ante*, at 300–301; *Pennsylvania* v. *Labron*, 518 U. S. 938, 940 (1996) *(per curiam)* ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more").

of federal customs officers during the Nation's early history on which the majority relies, as well as the practicalities of modern life. But those traditions and realities are weak support for a warrantless seizure of the vehicle itself, months after the property was proverbially tainted by its physical proximity to the drug trade, and while the owner is safely in police custody.

The stated purposes for allowing warrantless vehicle searches are likewise insufficient to validate the seizure at issue, whether one emphasizes the ready mobility of automobiles or the pervasive regulation that diminishes the owner's privacy interests in such property. No one seriously suggests that the State's regulatory regime for road safety makes acceptable such unchecked and potentially permanent seizures of automobiles under the State's criminal laws. And, as the Florida Supreme Court cogently explained, an exigent circumstance rationale is not available when the seizure is based upon a belief that the automobile may have been used at some time in the past to assist in illegal activity and the owner is already in custody.[4] Moreover, the state court's conclusion that the warrant process is a sensible protection from abuse of government power is bolstered by the inherent risks of hindsight at postseizure hearings and law enforcement agencies' pecuniary interest in the seizure of such property. See Fla. Stat. § 932.704(1) (1997); cf. *United States* v. *James Daniel Good Real Property,* 510 U. S. 43, 55–56 (1993).

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[4] 710 So. 2d 949, 953–954 (Fla. 1998) ("There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately"). The majority notes, *ante,* at 565, n. 4, but does not confront, the argument that the mobility of White's vehicle was not a substantial governmental concern in light of the delay between establishing probable cause and seizure.

Were we confronted with property that Florida deemed unlawful for private citizens to possess regardless of purpose, and had the State relied on the plain-view doctrine, perhaps a warrantless seizure would have been defensible. See *Horton* v. *California*, 496 U. S. 128 (1990); *Arizona* v. *Hicks*, 480 U. S. 321, 327 (1987) (citing *Payton* v. *New York*, 445 U. S. 573 (1980)). But "'[t]here is nothing even remotely criminal in possessing an automobile,'" *Austin* v. *United States*, 509 U. S. 602, 621 (1993) (quoting *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 699 (1965)); no serious fear for officer safety or loss of evidence can be asserted in this case considering the delay and circumstances of the seizure; and only the automobile exception is at issue, 710 So. 2d, at 952; Brief for Petitioner 6, 28.[5]

In any event, it seems to me that the State's treatment of certain vehicles as "contraband" based on past use provides an added reason for insisting on an appraisal of the evidence by a neutral magistrate, rather than a justification for expanding the discretionary authority of the police. Unlike a search that is contemporaneous with an officer's probable-cause determination, *Horton*, 496 U. S., at 130–131, a belated seizure may involve a serious intrusion on the rights of innocent persons with no connection to the earlier offense. Cf. *Bennis* v. *Michigan*, 516 U. S. 442 (1996). And a seizure supported only by the officer's conclusion that at some time in the past there was probable cause to believe that the car was then being used illegally is especially intrusive when followed by a routine and predictable inventory search—

[5] There is some force to the majority's reliance on *United States* v. *Watson*, 423 U. S. 411 (1976), which held that no warrant is required for felony arrests made in public. *Ante*, at 565–566. With respect to the seizures at issue in *Watson*, however, I consider the law enforcement and public safety interests far more substantial, and the historical and legal traditions more specific and engrained, than those present on the facts of this case. See 423 U. S., at 415–424; *id.*, at 429 (Powell, J., concurring) ("[L]ogic sometimes must defer to history and experience").

even though there may be no basis for believing the car then contains any contraband or other evidence of wrongdoing.[6]

Of course, requiring police officers to obtain warrants in cases such as the one before us will not allay every concern private property owners might have regarding government discretion and potentially permanent seizures of private property under the authority of a State's criminal laws. Had the officers in this case obtained a warrant in July or August, perhaps they nevertheless could or would have executed that warrant months later; and, as the Court suggests, *ante*, at 565, n. 4, delay between the basis for a seizure and its effectuation might support a Fourth Amendment objection whether or not a warrant was obtained. That said, a warrant application interjects the judgment of a neutral decisionmaker, one with no pecuniary interest in the matter, see *Connally* v. *Georgia*, 429 U. S. 245, 250–251 (1977) *(per curiam)*, before the burden of obtaining possession of the property shifts to the individual. Knowing that a neutral party

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[6] The Court's reliance on *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338 (1977), is misplaced. The seizure in that case was supported by an earlier tax assessment that was "given the force of a judgment." *Id.*, at 352, n. 18 (internal quotation marks omitted). We emphasized that the owner of the automobiles in question lacked a privacy interest, but he had also lost any possessory interest in the property by way of the prior judgment. In this case, despite plenty of time to obtain a warrant that would provide similar preseizure authority for the police, they acted entirely on their own assessment of the probative force of evidence relating to earlier events. In addition, White's property interests in his car were apparently not extinguished until, at the earliest, the seizure took place. See Fla. Stat. §§ 932.703(1)(c)–(d) (1997) (the State acquires rights, interest, and title in contraband articles at the time of seizure, and the seizing agency may not use the seized property until such rights, interest, and title are "perfected" in accordance with the statute); § 932.704(8); *Soldal* v. *Cook County*, 506 U. S. 56, 63–64 (1992). This statutory scheme and its aims, see Fla. Stat. § 932.704(1) (1997), also distinguish more mundane and temporary vehicle seizures performed for regulatory purposes and immediate public needs, such as a tow from a no-parking zone. No one contends that a warrant is necessary in that case.

will be involved before private property is seized can only help ensure that law enforcement officers will initiate forfeiture proceedings only when they are truly justified. A warrant requirement might not prevent delay and the attendant opportunity for official mischief through discretionary timing, but it surely makes delay more tolerable.

Without a legitimate exception, the presumption should prevail. Indeed, the particularly troubling aspect of this case is not that the State provides a weak excuse for failing to obtain a warrant either before or after White's arrest, but that it offers us no reason at all. The justification cannot be that the authorities feared their narcotics investigation would be exposed and hindered if a warrant had been obtained. *Ex parte* warrant applications provide neutral review of police determinations of probable cause, but such procedures are by no means public. And the officers had months to take advantage of them. On this record, one must assume that the officers who seized White's car simply preferred to avoid the hassle of seeking approval from a judicial officer. I would not permit bare convenience to overcome our established preference for the warrant process as a check against arbitrary intrusions by law enforcement agencies "engaged in the often competitive"—and, here, potentially lucrative—"enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14–15 (1948).

Because I agree with the Florida Supreme Court's judgment that this seizure was not reasonable without a warrant, I respectfully dissent.

Syllabus

RUHRGAS AG *v.* MARATHON OIL CO. ET AL.

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

No. 98–470. Argued March 22, 1999—Decided May 17, 1999

The underlying controversy stems from a venture to produce gas in the North Sea's Heimdal Field. In 1976, respondents Marathon Oil Company and Marathon International Oil Company acquired respondent Marathon Petroleum Norge (Norge) and Marathon Petroleum Company (Norway) (MPCN). Following the acquisition, Norge assigned its license to produce gas in the Heimdal Field to MPCN, which then contracted to sell 70% of its share of the Heimdal gas production to a group of European buyers, including petitioner Ruhrgas AG. MPCN's sales agreement with Ruhrgas and the other European buyers provided that disputes would be settled by arbitration in Sweden. In 1995, Marathon Oil Company, Marathon International Oil Company, and Norge (collectively Marathon) sued Ruhrgas in Texas state court, asserting state-law claims of fraud, tortious interference with prospective business relations, participation in breach of fiduciary duty, and civil conspiracy. Marathon alleged that Ruhrgas had defrauded it into financing MPCN's development of the Heimdal Field and that Ruhrgas had diminished the value of the license Norge had assigned to MPCN. Ruhrgas removed the case to the District Court, asserting three bases for federal jurisdiction: diversity of citizenship, see 28 U. S. C. § 1332, on the theory that Norge, the only nondiverse plaintiff, had been fraudulently joined; federal question, see § 1331, because Marathon's claims raised questions of international relations; and 9 U. S. C. § 205, which authorizes removal of cases relating to international arbitration agreements. Ruhrgas moved to dismiss the complaint for lack of personal jurisdiction. Marathon moved to remand the case to the state court for lack of federal subject-matter jurisdiction. The District Court granted Ruhrgas' motion. Noting that Texas' long-arm statute authorizes personal jurisdiction to the extent allowed by the Due Process Clause of the Federal Constitution, the court addressed the constitutional question and concluded that Ruhrgas' contacts with Texas were insufficient to support personal jurisdiction. The en banc Fifth Circuit vacated and remanded, holding that, in removed cases, district courts must decide issues of subject-matter jurisdiction first, reaching issues of personal jurisdiction only if subject-matter jurisdiction is found to exist. The court derived "counsel against" recognizing judicial discretion to proceed directly to per-

sonal jurisdiction from *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, in which this Court held that Article III generally requires a federal court to satisfy itself of its subject-matter jurisdiction before it considers the merits of a case. The Fifth Circuit limited its holding to removed cases, perceiving in them the most grave threat that federal courts would usurp state courts' residual jurisdiction.

Held: In cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy requiring the federal court to adjudicate subject-matter jurisdiction before considering a challenge to personal jurisdiction. Pp. 583–588.

(a) The Fifth Circuit erred in according absolute priority to the subject-matter jurisdiction requirement on the ground that it is nonwaivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. Although the character of the two jurisdictional bedrocks unquestionably differs, the distinctions do not mean that subject-matter jurisdiction is ever and always the more "fundamental." Personal jurisdiction, too, is an essential element of district court jurisdiction, without which the court is powerless to proceed to an adjudication. *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 382. In this case, indeed, the impediment to subject-matter jurisdiction on which Marathon relies—lack of complete diversity—rests on statutory interpretation, not constitutional command. Marathon joined an alien plaintiff (Norge) as well as an alien defendant (Ruhrgas). If the joinder of Norge is legitimate, the complete diversity required by § 1332, but not by Article III of the Constitution, see *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531, is absent. In contrast, Ruhrgas relies on the constitutional due process safeguard to stop the court from proceeding to the merits of the case. See *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702. The *Steel Co.* jurisdiction-before-merits principle does not dictate a sequencing of jurisdictional issues. A court that dismisses for want of personal jurisdiction, without first ruling on subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying *Steel Co.* Pp. 583–585.

(b) The Court rejects Marathon's assertion that it is particularly offensive in removed cases to rule on personal jurisdiction without first deciding subject-matter jurisdiction, because the federal court's personal jurisdiction determination may preclude the parties from relitigating the very same issue in state court. See *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 524–527. Issue preclusion in subsequent state-court litigation may also attend a federal court's subject-

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matter determination. For example, if a federal court concludes that state law does not allow damages sufficient to meet the amount in controversy for diversity jurisdiction, see 28 U. S. C. § 1332(a), and remands to the state court on that basis, the federal court's ruling on permissible state-law damages may bind the parties in state court. Most essentially, federal and state courts are complementary systems for administering justice. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order. If personal jurisdiction raises difficult questions of state law, and subject-matter jurisdiction is resolved as easily as personal jurisdiction, a district court will ordinarily conclude that federalism concerns tip the scales in favor of initially ruling on the motion to remand. In other cases, however, the district court may find that overriding concerns of judicial economy and restraint warrant immediate dismissal for lack of personal jurisdiction. The federal design allows leeway for sensitive judgments of this sort. See *Younger* v. *Harris*, 401 U. S. 37, 44. Pp. 585–587.

(c) In most instances, subject-matter jurisdiction will involve no arduous inquiry, and both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first. Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex state-law question, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction. Pp. 587–588.

145 F. 3d 211, reversed and remanded.

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

Charles Alan Wright argued the cause for petitioner. With him on the briefs were *Ben H. Sheppard, Jr.*, *Harry M. Reasoner*, *Guy S. Lipe*, and *Arthur R. Miller.*

Clifton T. Hutchinson argued the cause for respondents. With him on the brief were *J. Gregory Taylor*, *David J. Schenck*, and *David L. Shapiro.**

**Brian J. Serr* filed a brief for the Conference of Chief Justices as *amicus curiae* urging affirmance.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of the federal courts to adjudicate controversies. Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them. In *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83 (1998), this Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. *Steel Co.* rejected a doctrine, once approved by several Courts of Appeals, that allowed federal tribunals to pretermit jurisdictional objections "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.*, at 93. Recalling "a long and venerable line of our cases," *id.*, at 94, *Steel Co.* reiterated: "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,'" *id.*, at 94–95 (quoting *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884)); for "[j]urisdiction is power to declare the law," and "'[w]ithout jurisdiction the court cannot proceed at all in any cause,'" 523 U. S., at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869)). The Court, in *Steel Co.*, acknowledged that "the absolute purity" of the jurisdiction-first rule had been diluted in a few extraordinary cases, 523 U. S., at 101, and JUSTICE O'CONNOR, joined by JUSTICE KENNEDY, joined the majority on the understanding that the Court's opinion did not catalog "an exhaustive list of circumstances" in which exceptions to the solid rule were appropriate, *id.*, at 110.

Steel Co. is the backdrop for the issue now before us: If, as *Steel Co.* held, jurisdiction generally must precede merits in dispositional order, must subject-matter jurisdiction precede personal jurisdiction on the decisional line? Or, do federal district courts have discretion to avoid a difficult question

of subject-matter jurisdiction when the absence of personal jurisdiction is the surer ground? The particular civil action we confront was commenced in state court and removed to federal court. The specific question on which we granted certiorari asks "[w]hether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction." Pet. for Cert. i.

We hold that in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry. The proceeding before us is such a case.

I

The underlying controversy stems from a venture to produce gas in the Heimdal Field of the Norwegian North Sea. In 1976, respondents Marathon Oil Company and Marathon International Oil Company acquired Marathon Petroleum Company (Norway) (MPCN) and respondent Marathon Petroleum Norge (Norge). See App. 26.[1] Before the acquisition, Norge held a license to produce gas in the Heimdal Field; following the transaction, Norge assigned the license to MPCN. See Record, Exhs. 61 and 62 to Document 64. In 1981, MPCN contracted to sell 70% of its share of the Heimdal gas production to a group of European buyers, including petitioner Ruhrgas AG. See Record, Exh. 1 to Document 63, pp. 90, 280. The parties' agreement was incor-

[1] Ruhrgas is a German corporation; Norge is a Norwegian corporation. See App. 21, 22. Marathon Oil Company, an Ohio corporation, and Marathon International Oil Company, a Delaware corporation, moved their principal places of business from Ohio to Texas while the venture underlying this case was in formation. See *id.*, at 21, 239, and n. 11.

porated into the Heimdal Gas Sales Agreement (Heimdal Agreement), which is "governed by and construed in accordance with Norwegian Law," Record, Exh. B, Tab 1 to Pet. for Removal, Heimdal Agreement, p. 102; disputes thereunder are to be "exclusively and finally . . . settled by arbitration in Stockholm, Sweden, in accordance with" International Chamber of Commerce rules, *id.*, at 100.

II

Marathon Oil Company, Marathon International Oil Company, and Norge (collectively, Marathon) filed this lawsuit against Ruhrgas in Texas state court on July 6, 1995, asserting state-law claims of fraud, tortious interference with prospective business relations, participation in breach of fiduciary duty, and civil conspiracy. See App. 33–40. Marathon Oil Company and Marathon International Oil Company alleged that Ruhrgas and the other European buyers induced them with false promises of "premium prices" and guaranteed pipeline tariffs to invest over $300 million in MPCN for the development of the Heimdal Field and the erection of a pipeline to Ruhrgas' plant in Germany. See *id.*, at 26–28; Brief for Respondents 1–2. Norge alleged that Ruhrgas' effective monopolization of the Heimdal gas diminished the value of the license Norge had assigned to MPCN. See App. 31, 33, 357; Brief for Respondents 2. Marathon asserted that Ruhrgas had furthered its plans at three meetings in Houston, Texas, and through a stream of correspondence directed to Marathon in Texas. See App. 229, 233.

Ruhrgas removed the case to the District Court for the Southern District of Texas. See 145 F. 3d 211, 214 (CA5 1998). In its notice of removal, Ruhrgas asserted three bases for federal jurisdiction: diversity of citizenship, see 28 U. S. C. § 1332 (1994 ed. and Supp. III), on the theory that Norge, the only nondiverse plaintiff, had been fraudulently

joined;[2] federal question, see § 1331, because Marathon's claims "raise[d] substantial questions of foreign and international relations, which are incorporated into and form part of the federal common law," App. 274; and 9 U. S. C. § 205, which authorizes removal of cases "relat[ing] to" international arbitration agreements.[3] See 145 F. 3d, at 214–215; 115 F. 3d 315, 319–321 (CA5), vacated and rehearing en banc granted, 129 F. 3d 746 (1997). Ruhrgas moved to dismiss the complaint for lack of personal jurisdiction. Marathon moved to remand the case to the state court for lack of federal subject-matter jurisdiction. See 145 F. 3d, at 215.

After permitting jurisdictional discovery, the District Court dismissed the case for lack of personal jurisdiction. See App. 455. In so ruling, the District Court relied on Fifth Circuit precedent allowing district courts to adjudicate personal jurisdiction without first establishing subject-matter jurisdiction. See *id.*, at 445. Texas' long-arm statute, see Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (1997), authorizes personal jurisdiction to the extent allowed by the Due Process Clause of the Federal Constitution. See App. 446; *Kawasaki Steel Corp.* v. *Middleton*, 699 S. W. 2d 199, 200 (Tex. 1985). The District Court addressed the constitutional question and concluded that Ruhrgas' contacts with Texas were insufficient to support personal jurisdiction.

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[2] A suit between "citizens of a State and citizens or subjects of a foreign state" lies within federal diversity jurisdiction. 28 U. S. C. § 1332(a)(2). Section 1332 has been interpreted to require "complete diversity." See *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806); R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1528–1531 (4th ed. 1996). The foreign citizenship of defendant Ruhrgas, a German corporation, and plaintiff Norge, a Norwegian corporation, rendered diversity incomplete.

[3] Title 9 U. S. C. § 205 allows removal "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958]."

See App. 445–454. Finding "no evidence that Ruhrgas engaged in any tortious conduct in Texas," *id.*, at 450, the court determined that Marathon's complaint did not present circumstances adequately affiliating Ruhrgas with Texas, see *id.*, at 448.[4]

A panel of the Court of Appeals for the Fifth Circuit concluded that "respec[t]" for "the proper balance of federalism" impelled it to turn first to "the formidable subject matter jurisdiction issue presented." 115 F. 3d, at 318. After examining and rejecting each of Ruhrgas' asserted bases of federal jurisdiction, see *id.*, at 319–321,[5] the Court of Appeals vacated the judgment of the District Court and ordered the case remanded to the state court, see *id.*, at 321. This Court denied Ruhrgas' petition for a writ of certiorari, which was

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[4] Respecting the three meetings Ruhrgas attended in Houston, Texas, see *supra*, at 579, the District Court concluded that Marathon had not shown that Ruhrgas pursued the alleged pattern of fraud and misrepresentation during the Houston meetings. See App. 449. The court further found that Ruhrgas attended those meetings "due to the [Heimdal Agreement] with MPCN." *Id.*, at 450. As the Heimdal Agreement provides for arbitration in Sweden, the court reasoned, "Ruhrgas could not have expected to be haled into Texas courts based on these meetings." *Ibid.* The court also determined that Ruhrgas did not have "systematic and continuous contacts with Texas" of the kind that would "subject it to general jurisdiction in Texas." *Id.*, at 453 (citing *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408 (1984)).

[5] The Court of Appeals concluded that whether Norge had a legal interest in the Heimdal license notwithstanding its assignment to MPCN likely turned on difficult questions of Norwegian law; Ruhrgas therefore could not show, at the outset, that Norge had been fraudulently joined as a plaintiff to defeat diversity. See 115 F. 3d 315, 319–320 (CA5), vacated and rehearing en banc granted, 129 F. 3d 746 (1997). The appeals court also determined that Marathon's claims did not "strike at the sovereignty of a foreign nation," so as to raise a federal question on that account. 115 F. 3d, at 320. Finally, the court concluded that Marathon asserted claims independent of the Heimdal Agreement and that the case therefore did not "relat[e] to" an international arbitration agreement under 9 U. S. C. § 205. See 115 F. 3d, at 320–321.

limited to the question whether subject-matter jurisdiction existed under 9 U. S. C. § 205. See 522 U. S. 967 (1997).

The Fifth Circuit, on its own motion, granted rehearing en banc, thereby vacating the panel decision. See 129 F. 3d 746 (1997). In a 9-to-7 decision, the en banc court held that, in removed cases, district courts must decide issues of subject-matter jurisdiction first, reaching issues of personal jurisdiction "only if subject-matter jurisdiction is found to exist." 145 F. 3d, at 214. Noting *Steel Co.*'s instruction that subject-matter jurisdiction must be "'established as a threshold matter,'" 145 F. 3d, at 217 (quoting 523 U. S., at 94), the Court of Appeals derived from that decision "counsel against" recognition of judicial discretion to proceed directly to personal jurisdiction. 145 F. 3d, at 218. The court limited its holding to removed cases; it perceived in those cases the most grave threat that federal courts would "usur[p] . . . state courts' residual jurisdiction." *Id.*, at 219.[6]

Writing for the seven dissenters, Judge Higginbotham agreed that subject-matter jurisdiction ordinarily should be considered first. See *id.*, at 231. If the challenge to personal jurisdiction involves no complex state-law questions, however, and is more readily resolved than the challenge to subject-matter jurisdiction, the District Court, in the dissenters' view, should take the easier route. See *ibid.* Judge Higginbotham regarded the District Court's decision dismissing Marathon's case as illustrative and appropriate: While Ruhrgas' argument under 9 U. S. C. § 205 presented a difficult issue of first impression, its personal jurisdiction challenge raised "[n]o substantial questions of purely state law," and "could be resolved relatively easily in [Ruhrgas'] favor." 145 F. 3d, at 232–233.

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[6] The Fifth Circuit remanded the case to the District Court for it to consider the "nove[l]" subject-matter jurisdiction issues presented. 145 F. 3d 211, 225 (CA5 1998). The appeals court "express[ed] no opinion" on the vacated panel decision which had held that the District Court lacked subject-matter jurisdiction. *Id.*, at 225, n. 23.

We granted certiorari, 525 U. S. 1039 (1998), to resolve a conflict between the Circuits[7] and now reverse.

III

Steel Co. held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. "For a court to pronounce upon [the merits] when it has no jurisdiction to do so," *Steel Co.* declared, "is . . . for a court to act ultra vires." 523 U. S., at 101–102. The Fifth Circuit incorrectly read *Steel Co.* to teach that subject-matter jurisdiction must be found to exist, not only before a federal court reaches the merits, but also before personal jurisdiction is addressed. See 145 F. 3d, at 218.

A

The Court of Appeals accorded priority to the requirement of subject-matter jurisdiction because it is nonwaivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. See *id.*, at 217–218. The character of the two jurisdictional bedrocks unquestionably differs. Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level. See *Steel Co.*, 523 U. S., at 94–95; Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); 28 U. S. C. § 1447(c) (1994 ed., Supp. III) ("If at any time before final judgment [in a removed case] it appears that the

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[7] The Court of Appeals for the Second Circuit has concluded that district courts have discretion to dismiss a removed case for want of personal jurisdiction without reaching the issue of subject-matter jurisdiction. See *Cantor Fitzgerald, L. P.* v. *Peaslee*, 88 F. 3d 152, 155 (1996).

district court lacks subject matter jurisdiction, the case shall be remanded.").

Personal jurisdiction, on the other hand, "represents a restriction on judicial power . . . as a matter of individual liberty." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982). Therefore, a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority. See Fed. Rule Civ. Proc. 12(h)(1) (defense of lack of jurisdiction over the person waivable); *Insurance Corp. of Ireland*, 456 U. S., at 703 (same).

These distinctions do not mean that subject-matter jurisdiction is ever and always the more "fundamental." Personal jurisdiction, too, is "an essential element of the jurisdiction of a district . . . court," without which the court is "powerless to proceed to an adjudication." *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 382 (1937). In this case, indeed, the impediment to subject-matter jurisdiction on which Marathon relies—lack of complete diversity—rests on statutory interpretation, not constitutional command. Marathon joined an alien plaintiff (Norge) as well as an alien defendant (Ruhrgas). If the joinder of Norge is legitimate, the complete diversity required by 28 U. S. C. § 1332 (1994 ed. and Supp. III), but not by Article III, see *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967), is absent. In contrast, Ruhrgas relies on the constitutional safeguard of due process to stop the court from proceeding to the merits of the case. See *Insurance Corp. of Ireland*, 456 U. S., at 702 ("The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause.").

While *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues. "[A] court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power

that violates the separation of powers principles underlying *Mansfield* and *Steel Company.*" *In re Papandreou*, 139 F. 3d 247, 255 (CADC 1998). It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, as the Court observed in *Steel Co.*, district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, see *Moor* v. *County of Alameda*, 411 U. S. 693, 715–716 (1973), or abstain under *Younger* v. *Harris*, 401 U. S. 37 (1971), without deciding whether the parties present a case or controversy, see *Ellis* v. *Dyson*, 421 U. S. 426, 433–434 (1975). See *Steel Co.*, 523 U. S., at 100–101, n. 3; cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 66–67 (1997) (pretermitting challenge to appellants' standing and dismissing on mootness grounds).

B

Maintaining that subject-matter jurisdiction must be decided first even when the litigation originates in federal court, see Tr. of Oral Arg. 21; Brief for Respondents 13, Marathon sees removal as the more offensive case, on the ground that the dignity of state courts is immediately at stake. If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court. See *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 524–527 (1931) (personal jurisdiction ruling has issue-preclusive effect).

Issue preclusion in subsequent state-court litigation, however, may also attend a federal court's subject-matter determination. Ruhrgas hypothesizes, for example, a defendant who removes on diversity grounds a state-court suit seeking $50,000 in compensatory and $1 million in punitive damages for breach of contract. See Tr. of Oral Arg. 10–11. If the district court determines that state law does not allow puni-

tive damages for breach of contract and therefore remands the removed action for failure to satisfy the amount in controversy, see 28 U. S. C. § 1332(a) (1994 ed., Supp. III) ($75,000), the federal court's conclusion will travel back with the case. Assuming a fair airing of the issue in federal court, that court's ruling on permissible state-law damages may bind the parties in state court, although it will set no precedent otherwise governing state-court adjudications. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 376 (1940) ("[Federal courts'] determinations of [whether they have jurisdiction to entertain a case] may not be assailed collaterally."); Restatement (Second) of Judgments § 12, p. 115 (1980) ("When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation."). Similarly, as Judge Higginbotham observed, our "dualistic . . . system of federal and state courts" allows federal courts to make issue-preclusive rulings about state law in the exercise of supplemental jurisdiction under 28 U. S. C. § 1367. 145 F. 3d, at 231, and n. 7.

Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order. If personal jurisdiction raises "difficult questions of [state] law," and subject-matter jurisdiction is resolved "as eas[ily]" as personal jurisdiction, a district court will ordinarily conclude that "federalism concerns tip the scales in favor of initially ruling on the motion to remand." *Allen* v. *Ferguson*, 791 F. 2d 611, 616 (CA7 1986). In other cases, however, the district court may find that concerns of judicial economy and restraint are overriding. See, *e. g.*, *Asociacion Nacional de Pescadores* v. *Dow Quimica*, 988 F. 2d 559, 566–567 (CA5 1993) (if removal is nonfrivolous and

personal jurisdiction turns on federal constitutional issues, "federal intrusion into state courts' authority . . . is minimized"). The federal design allows leeway for sensitive judgments of this sort. "'Our Federalism'"

> "does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments." *Younger*, 401 U. S., at 44.

The Fifth Circuit and Marathon posit that state-court defendants will abuse the federal system with opportunistic removals. A discretionary rule, they suggest, will encourage manufactured, convoluted federal subject-matter theories designed to wrench cases from state court. See 145 F. 3d, at 219; Brief for Respondents 28–29. This specter of unwarranted removal, we have recently observed, "rests on an assumption we do not indulge—that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. . . . The well-advised defendant . . . will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, see 28 U. S. C. §§ 1447(c), (d), attended by the displeasure of a district court whose authority has been improperly invoked." *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 77–78 (1996).

C

In accord with Judge Higginbotham, we recognize that in most instances subject-matter jurisdiction will involve no arduous inquiry. See 145 F. 3d, at 229 ("engag[ing]" subject-matter jurisdiction "at the outset of a case . . . [is] often . . . the most efficient way of going"). In such cases, both expedition and sensitivity to state courts' coequal stature should

impel the federal court to dispose of that issue first. See *Cantor Fitzgerald, L. P.* v. *Peaslee*, 88 F. 3d 152, 155 (CA2 1996) (a court disposing of a case on personal jurisdiction grounds "should be convinced that the challenge to the court's subject-matter jurisdiction is not easily resolved"). Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.[8]

* * *

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.

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[8] Ruhrgas suggests that it would be appropriate simply to affirm the District Court's holding that it lacked personal jurisdiction over Ruhrgas. See Brief for Petitioner 38–39, and n. 20. That issue is not within the question presented and is properly considered by the Fifth Circuit on remand.

NEW JERSEY *v.* NEW YORK

ON BILL OF COMPLAINT

No. 120, Orig. Decided May 21, 1998—Decree entered May 17, 1999

Decree entered.

Opinion reported: 523 U. S. 767.

DECREE

The Court having exercised original jurisdiction over this controversy between two sovereign States; the issues raised having been heard in an evidentiary proceeding before the Special Master appointed by the Court; the Court having heard argument on the Final Report of the Special Master and the exceptions filed by the state parties; the Court having issued its opinion on the issues raised in the exceptions, which is reported at 523 U. S. 767 (1998); and the Special Master having submitted his Report Upon Recommittal;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

I

The State of New Jersey's prayer that she be declared to be sovereign over the landfilled portions of Ellis Island added by the Federal Government after 1834 is granted and the State of New York is enjoined from enforcing her laws or asserting sovereignty over the portions of Ellis Island that lie within the State of New Jersey's sovereign boundary as set forth in paragraph 4 of this decree.

II

The sovereign boundary between the State of New Jersey and the State of New York is as set forth in Article First of the Compact of 1834, enacted into law in both States and approved by Congress.

III

The State of New York remains sovereign under Article Second of the Compact of 1834 of and over the original Ellis Island, to the low-water mark, and the pier area built on landfill, as the Island and pier were structured in 1834, as more particularly depicted on the 1857 United States Coast Survey of New York Harbor.

IV

The boundary between the two States on Ellis Island is as depicted on the map of Ellis Island, Showing Boundary Between States of New Jersey and New York, dated December 1, 1998, which is appended hereto, *infra.* The boundary between the two States, as depicted on the appended map, lies along the line described as follows:

Beginning at a point with North American Datum of 1983 (NAD83) metric coordinates of North 207 180.7849 (latitude North 40 degrees 41 minutes 54.92285 seconds) and East 188 879.9657 (longitude West 74 degrees 02 minutes 23.75137 seconds), said point being (a) South 45 degrees 42 minutes 50 seconds East along the northeasterly granite block wall of the Ferry Slip about 502 feet from the northwesterly terminus of said wall and thence being (b) North 46 degrees 39 minutes 35.7 seconds East about 10 feet to said point of beginning; thence the following courses and distances:

(1) N 42 degrees 10 minutes 59.1 seconds W, a distance of 61.150 feet to a point; thence

(2) N 45 degrees 24 minutes 54.6 seconds W, a distance of 60.990 feet to a point; thence

(3) N 46 degrees 23 minutes 49.9 seconds W, a distance of 1.813 feet to a point; thence

(4) N 45 degrees 33 minutes 03.3 seconds E, a distance of 9.193 feet to a point; thence

(5) N 45 degrees 42 minutes 35.4 seconds E, a distance of 24.972 feet to a point; thence

(6) S 42 degrees 23 minutes 50.8 seconds E, a distance of 1.947 feet to a point; thence

(7) N 45 degrees 15 minutes 54.9 seconds E, a distance of 19.092 feet to a point; thence

(8) S 46 degrees 25 minutes 55.5 seconds E, a distance of 14.147 feet to a point; thence

(9) S 69 degrees 37 minutes 24.8 seconds E, a distance of 4.667 feet to a point; thence

(10) S 67 degrees 54 minutes 46.2 seconds E, a distance of 4.654 feet to a point; thence

(11) S 70 degrees 49 minutes 58.4 seconds E, a distance of 12.373 feet to a point; thence

(12) S 79 degrees 45 minutes 36.8 seconds E, a distance of 9.844 feet to a point; thence

(13) N 86 degrees 16 minutes 07.0 seconds E, a distance of 11.526 feet to a point; thence

(14) N 72 degrees 30 minutes 15.3 seconds E, a distance of 12.058 feet to a point; thence

(15) N 61 degrees 34 minutes 34.0 seconds E, a distance of 13.787 feet to a point; thence

(16) N 37 degrees 42 minutes 57.5 seconds E, a distance of 11.851 feet to a point; thence

(17) N 01 degrees 43 minutes 14.9 seconds E, a distance of 14.569 feet to a point; thence

(18) N 22 degrees 53 minutes 06.4 seconds W, a distance of 13.500 feet to a point; thence

(19) N 48 degrees 57 minutes 00.8 seconds W, a distance of 17.321 feet to a point; thence

(20) N 48 degrees 15 minutes 36.6 seconds W, a distance of 13.988 feet to a point; thence

(21) N 51 degrees 26 minutes 12.9 seconds W, a distance of 17.345 feet to a point; thence

(22) N 43 degrees 49 minutes 22.3 seconds W, a distance of 12.907 feet to a point; thence

(23) N 54 degrees 54 minutes 43.1 seconds W, a distance of 30.552 feet to a point; thence

(24) N 70 degrees 20 minutes 46.2 seconds W, a distance of 26.016 feet to a point; thence
(25) N 49 degrees 23 minutes 55.3 seconds W, a distance of 10.372 feet to a point; thence
(26) N 05 degrees 34 minutes 48.6 seconds W, a distance of 10.927 feet to a point; thence
(27) N 00 degrees 17 minutes 59.9 seconds W, a distance of 11.938 feet to a point; thence
(28) N 23 degrees 17 minutes 40.4 seconds W, a distance of 14.698 feet to a point; thence
(29) N 53 degrees 00 minutes 04.3 seconds W, a distance of 11.113 feet to a point; thence
(30) N 57 degrees 55 minutes 46.1 seconds W, a distance of 11.654 feet to a point; thence
(31) N 63 degrees 34 minutes 20.5 seconds W, a distance of 11.655 feet to a point; thence
(32) N 70 degrees 09 minutes 45.4 seconds W, a distance of 10.498 feet to a point; thence
(33) N 64 degrees 39 minutes 53.0 seconds W, a distance of 15.628 feet to a point; thence
(34) N 42 degrees 57 minutes 16.5 seconds W, a distance of 9.906 feet to a point; thence
(35) N 20 degrees 46 minutes 20.1 seconds W, a distance of 9.693 feet to a point; thence
(36) N 24 degrees 35 minutes 59.2 seconds W, a distance of 11.411 feet to a point; thence
(37) N 18 degrees 46 minutes 40.9 seconds W, a distance of 9.902 feet to a point; thence
(38) N 00 degrees 00 minutes 00.0 seconds E, a distance of 12.938 feet to a point; thence
(39) N 05 degrees 54 minutes 22.1 seconds W, a distance of 10.933 feet to a point; thence
(40) N 16 degrees 33 minutes 01.3 seconds W, a distance of 13.823 feet to a point; thence
(41) N 33 degrees 24 minutes 44.2 seconds W, a distance of 14.301 feet to a point; thence

(42) N 25 degrees 46 minutes 09.6 seconds W, a distance of 12.076 feet to a point; thence
(43) N 37 degrees 08 minutes 48.1 seconds W, a distance of 10.350 feet to a point; thence
(44) N 32 degrees 03 minutes 52.4 seconds W, a distance of 12.833 feet to a point; thence
(45) N 31 degrees 19 minutes 03.9 seconds W, a distance of 12.144 feet to a point; thence
(46) N 17 degrees 53 minutes 21.4 seconds W, a distance of 10.377 feet to a point; thence
(47) N 06 degrees 53 minutes 43.1 seconds W, a distance of 13.535 feet to a point; thence
(48) N 03 degrees 03 minutes 10.4 seconds E, a distance of 9.388 feet to a point; thence
(49) N 11 degrees 29 minutes 11.7 seconds W, a distance of 11.926 feet to a point; thence
(50) N 34 degrees 52 minutes 31.2 seconds W, a distance of 10.056 feet to a point; thence
(51) N 30 degrees 47 minutes 02.9 seconds W, a distance of 10.258 feet to a point; thence
(52) N 17 degrees 53 minutes 21.4 seconds W, a distance of 10.377 feet to a point; thence
(53) N 00 degrees 21 minutes 53.8 seconds W, a distance of 9.813 feet to a point; thence
(54) N 18 degrees 34 minutes 20.5 seconds W, a distance of 8.242 feet to a point; thence
(55) N 06 degrees 10 minutes 47.7 seconds W, a distance of 9.870 feet to a point; thence
(56) N 04 degrees 25 minutes 03.0 seconds W, a distance of 14.606 feet to a point; thence
(57) N 21 degrees 57 minutes 38.0 seconds W, a distance of 8.356 feet to a point; thence
(58) N 28 degrees 19 minutes 29.9 seconds W, a distance of 10.011 feet to a point; thence
(59) N 23 degrees 19 minutes 03.8 seconds W, a distance of 3.947 feet to a point; thence

(60) N 24 degrees 12 minutes 42.3 seconds W, a distance of 10.211 feet to a point; thence

(61) N 09 degrees 17 minutes 00.8 seconds W, a distance of 13.173 feet to a point; thence

(62) N 26 degrees 15 minutes 31.2 seconds E, a distance of 10.454 feet to a point; thence

(63) N 48 degrees 14 minutes 50.4 seconds E, a distance of 12.483 feet to a point; thence

(64) S 87 degrees 53 minutes 19.2 seconds E, a distance of 13.572 feet to a point; thence

(65) S 64 degrees 54 minutes 13.5 seconds E, a distance of 10.905 feet to a point; thence

(66) S 68 degrees 55 minutes 21.0 seconds E, a distance of 12.861 feet to a point; thence

(67) S 70 degrees 10 minutes 04.3 seconds E, a distance of 12.159 feet to a point; thence

(68) S 59 degrees 59 minutes 42.3 seconds E, a distance of 10.248 feet to a point; thence

(69) S 65 degrees 02 minutes 32.3 seconds E, a distance of 10.961 feet to a point; thence

(70) S 56 degrees 22 minutes 33.9 seconds E, a distance of 15.011 feet to a point; thence

(71) S 65 degrees 01 minutes 07.5 seconds E, a distance of 12.135 feet to a point; thence

(72) S 72 degrees 23 minutes 43.3 seconds E, a distance of 13.639 feet to a point; thence

(73) N 72 degrees 50 minutes 17.1 seconds E, a distance of 13.344 feet to a point; thence

(74) N 77 degrees 08 minutes 45.2 seconds E, a distance of 9.552 feet to a point; thence

(75) S 86 degrees 40 minutes 12.7 seconds E, a distance of 17.217 feet to a point; thence

(76) S 66 degrees 15 minutes 01.8 seconds E, a distance of 10.242 feet to a point; thence

(77) S 71 degrees 54 minutes 34.2 seconds E, a distance of 9.863 feet to a point; thence

(78) S 87 degrees 15 minutes 26.6 seconds E, a distance of 10.449 feet to a point; thence
(79) S 54 degrees 29 minutes 54.5 seconds E, a distance of 11.516 feet to a point; thence
(80) S 57 degrees 20 minutes 20.7 seconds E, a distance of 8.686 feet to a point; thence
(81) S 47 degrees 36 minutes 48.0 seconds E, a distance of 10.662 feet to a point; thence
(82) S 43 degrees 13 minutes 26.2 seconds E, a distance of 11.407 feet to a point; thence
(83) S 45 degrees 24 minutes 22.8 seconds E, a distance of 12.463 feet to a point; thence
(84) S 63 degrees 26 minutes 05.8 seconds E, a distance of 10.482 feet to a point; thence
(85) S 63 degrees 56 minutes 07.2 seconds E, a distance of 12.802 feet to a point; thence
(86) S 68 degrees 51 minutes 36.6 seconds E, a distance of 10.051 feet to a point; thence
(87) S 83 degrees 55 minutes 39.2 seconds E, a distance of 11.816 feet to a point; thence
(88) S 87 degrees 14 minutes 27.2 seconds E, a distance of 10.387 feet to a point; thence
(89) S 47 degrees 05 minutes 24.6 seconds E, a distance of 12.117 feet to a point; thence
(90) S 33 degrees 17 minutes 23.9 seconds E, a distance of 12.412 feet to a point; thence
(91) S 36 degrees 11 minutes 13.6 seconds E, a distance of 11.538 feet to a point; thence
(92) S 62 degrees 43 minutes 23.7 seconds E, a distance of 13.501 feet to a point; thence
(93) S 84 degrees 13 minutes 03.4 seconds E, a distance of 9.926 feet to a point; thence
(94) S 71 degrees 39 minutes 48.0 seconds E, a distance of 11.523 feet to a point; thence
(95) S 45 degrees 21 minutes 45.5 seconds E, a distance of 13.966 feet to a point; thence

(96) S 37 degrees 11 minutes 27.6 seconds E, a distance of 15.613 feet to a point; thence

(97) S 63 degrees 45 minutes 09.6 seconds E, a distance of 15.122 feet to a point; thence

(98) S 70 degrees 24 minutes 57.6 seconds E, a distance of 13.798 feet to a point; thence

(99) S 59 degrees 24 minutes 14.4 seconds E, a distance of 16.700 feet to a point; thence

(100) S 60 degrees 38 minutes 32.1 seconds E, a distance of 13.768 feet to a point; thence

(101) S 48 degrees 52 minutes 16.5 seconds E, a distance of 11.782 feet to a point; thence

(102) S 80 degrees 54 minutes 35.0 seconds E, a distance of 12.659 feet to a point; thence

(103) S 83 degrees 25 minutes 05.0 seconds E, a distance of 13.086 feet to a point; thence

(104) S 79 degrees 49 minutes 56.0 seconds E, a distance of 11.683 feet to a point; thence

(105) S 85 degrees 36 minutes 04.7 seconds E, a distance of 13.038 feet to a point; thence

(106) S 81 degrees 54 minutes 20.0 seconds E, a distance of 14.204 feet to a point; thence

(107) N 90 degrees 00 minutes 00.0 seconds E, a distance of 9.375 feet to a point; thence

(108) S 80 degrees 20 minutes 42.1 seconds E, a distance of 15.279 feet to a point; thence

(109) S 47 degrees 58 minutes 47.4 seconds E, a distance of 16.153 feet to a point; thence

(110) S 23 degrees 55 minutes 21.0 seconds E, a distance of 9.094 feet to a point; thence

(111) S 38 degrees 34 minutes 09.6 seconds E, a distance of 18.546 feet to a point; thence

(112) S 30 degrees 17 minutes 47.2 seconds E, a distance of 12.885 feet to a point; thence

(113) S 13 degrees 08 minutes 27.9 seconds E, a distance of 16.494 feet to a point; thence

(114) S 05 degrees 16 minutes 03.7 seconds E, a distance of 17.700 feet to a point; thence

(115) S 17 degrees 09 minutes 57.4 seconds E, a distance of 12.494 feet to a point; thence

(116) S 45 degrees 00 minutes 00.0 seconds E, a distance of 4.419 feet to a point; thence

(117) S 18 degrees 43 minutes 50.9 seconds E, a distance of 11.483 feet to a point; thence

(118) S 15 degrees 34 minutes 21.2 seconds E, a distance of 11.873 feet to a point; thence

(119) S 28 degrees 42 minutes 40.4 seconds E, a distance of 14.181 feet to a point; thence

(120) S 41 degrees 33 minutes 09.4 seconds E, a distance of 11.024 feet to a point; thence

(121) S 56 degrees 56 minutes 54.8 seconds E, a distance of 10.887 feet to a point; thence

(122) S 45 degrees 24 minutes 12.5 seconds E, a distance of 12.551 feet to a point; thence

(123) S 42 degrees 16 minutes 25.3 seconds E, a distance of 13.937 feet to a point; thence

(124) S 59 degrees 20 minutes 23.7 seconds E, a distance of 12.134 feet to a point; thence

(125) S 46 degrees 10 minutes 08.9 seconds E, a distance of 10.830 feet to a point; thence

(126) S 34 degrees 45 minutes 21.3 seconds E, a distance of 11.183 feet to a point; thence

(127) S 21 degrees 48 minutes 05.1 seconds E, a distance of 12.453 feet to a point; thence

(128) S 04 degrees 31 minutes 35.3 seconds W, a distance of 15.047 feet to a point; thence

(129) S 23 degrees 00 minutes 39.1 seconds E, a distance of 22.544 feet to a point; thence

(130) S 09 degrees 43 minutes 39.3 seconds E, a distance of 13.317 feet to a point; thence

(131) S 02 degrees 45 minutes 32.8 seconds W, a distance of 20.774 feet to a point; thence

(132) S 02 degrees 54 minutes 27.9 seconds W, a distance of 19.713 feet to a point; thence

(133) S 11 degrees 36 minutes 10.4 seconds E, a distance of 16.780 feet to a point; thence

(134) S 24 degrees 37 minutes 24.8 seconds E, a distance of 13.200 feet to a point; thence

(135) S 27 degrees 06 minutes 38.6 seconds E, a distance of 14.675 feet to a point; thence

(136) S 23 degrees 53 minutes 42.6 seconds E, a distance of 10.801 feet to a point; thence

(137) S 39 degrees 13 minutes 03.4 seconds E, a distance of 7.018 feet to a point; thence

(138) S 18 degrees 39 minutes 13.1 seconds E, a distance of 10.357 feet to a point; thence

(139) S 09 degrees 11 minutes 48.0 seconds W, a distance of 6.648 feet to a point; thence

(140) S 78 degrees 18 minutes 38.3 seconds W, a distance of 5.553 feet to a point; thence

(141) S 89 degrees 32 minutes 03.1 seconds W, a distance of 7.688 feet to a point; thence

(142) N 58 degrees 58 minutes 45.6 seconds W, a distance of 10.794 feet to a point; thence

(143) N 61 degrees 57 minutes 19.1 seconds W, a distance of 7.577 feet to a point; thence

(144) N 62 degrees 20 minutes 12.3 seconds W, a distance of 8.750 feet to a point; thence

(145) N 60 degrees 15 minutes 18.4 seconds W, a distance of 7.054 feet to a point; thence

(146) N 60 degrees 42 minutes 51.3 seconds W, a distance of 13.544 feet to a point; thence

(147) S 65 degrees 42 minutes 51.0 seconds W, a distance of 11.245 feet to a point; thence

(148) S 32 degrees 24 minutes 24.0 seconds W, a distance of 8.513 feet to a point; thence

(149) S 36 degrees 24 minutes 59.0 seconds E, a distance of 9.475 feet to a point; thence

(150) S 67 degrees 50 minutes 01.2 seconds W, a distance of 5.467 feet to a point; thence
(151) S 66 degrees 40 minutes 56.2 seconds W, a distance of 3.947 feet to a point; thence
(152) S 73 degrees 02 minutes 40.9 seconds W, a distance of 5.358 feet to a point; thence
(153) S 82 degrees 11 minutes 37.0 seconds W, a distance of 7.822 feet to a point; thence
(154) S 75 degrees 34 minutes 45.2 seconds W, a distance of 9.035 feet to a point; thence
(155) S 54 degrees 44 minutes 03.2 seconds W, a distance of 10.717 feet to a point; thence
(156) S 87 degrees 27 minutes 47.7 seconds W, a distance of 9.885 feet to a point; thence
(157) S 71 degrees 24 minutes 08.2 seconds W, a distance of 13.914 feet to a point; thence
(158) S 71 degrees 06 minutes 50.1 seconds W, a distance of 15.061 feet to a point; thence
(159) S 83 degrees 21 minutes 17.0 seconds W, a distance of 12.962 feet to a point; thence
(160) S 65 degrees 16 minutes 21.7 seconds W, a distance of 10.459 feet to a point; thence
(161) S 87 degrees 31 minutes 20.6 seconds W, a distance of 13.012 feet to a point; thence
(162) N 86 degrees 13 minutes 02.5 seconds W, a distance of 15.158 feet to a point; thence
(163) S 83 degrees 50 minutes 33.1 seconds W, a distance of 15.150 feet to a point; thence
(164) N 86 degrees 04 minutes 18.1 seconds W, a distance of 14.597 feet to a point; thence
(165) N 73 degrees 38 minutes 51.4 seconds W, a distance of 10.878 feet to a point; thence
(166) N 71 degrees 39 minutes 48.0 seconds W, a distance of 11.523 feet to a point; thence
(167) N 60 degrees 04 minutes 59.0 seconds W, a distance of 12.907 feet to a point; thence

(168) N 36 degrees 49 minutes 18.7 seconds W, a distance of 14.912 feet to a point; thence

(169) N 44 degrees 13 minutes 20.2 seconds W, a distance of 9.768 feet to a point; thence

(170) N 36 degrees 01 minutes 38.5 seconds W, a distance of 11.051 feet to a point; thence

(171) N 21 degrees 30 minutes 05.2 seconds W, a distance of 8.867 feet to a point; thence

(172) N 77 degrees 42 minutes 17.0 seconds W, a distance of 9.979 feet to a point; thence

(173) N 84 degrees 45 minutes 45.1 seconds W, a distance of 7.531 feet to a point; thence

(174) N 61 degrees 55 minutes 39.0 seconds W, a distance of 9.563 feet to a point; thence

(175) N 29 degrees 24 minutes 45.0 seconds W, a distance of 10.690 feet to a point; thence

(176) N 80 degrees 08 minutes 03.1 seconds W, a distance of 5.836 feet to a point; thence

(177) N 72 degrees 52 minutes 01.2 seconds W, a distance of 8.698 feet to a point; thence

(178) N 85 degrees 37 minutes 20.1 seconds W, a distance of 13.101 feet to a point; thence

(179) S 88 degrees 52 minutes 55.8 seconds W, a distance of 12.815 feet to a point; thence

(180) N 90 degrees 00 minutes 00.0 seconds W, a distance of 4.313 feet to a point; thence

(181) S 49 degrees 21 minutes 03.9 seconds W, a distance of 8.155 feet to a point; thence

(182) S 46 degrees 39 minutes 35.7 seconds W, a distance of 99.169 feet to the point and place of beginning.

V

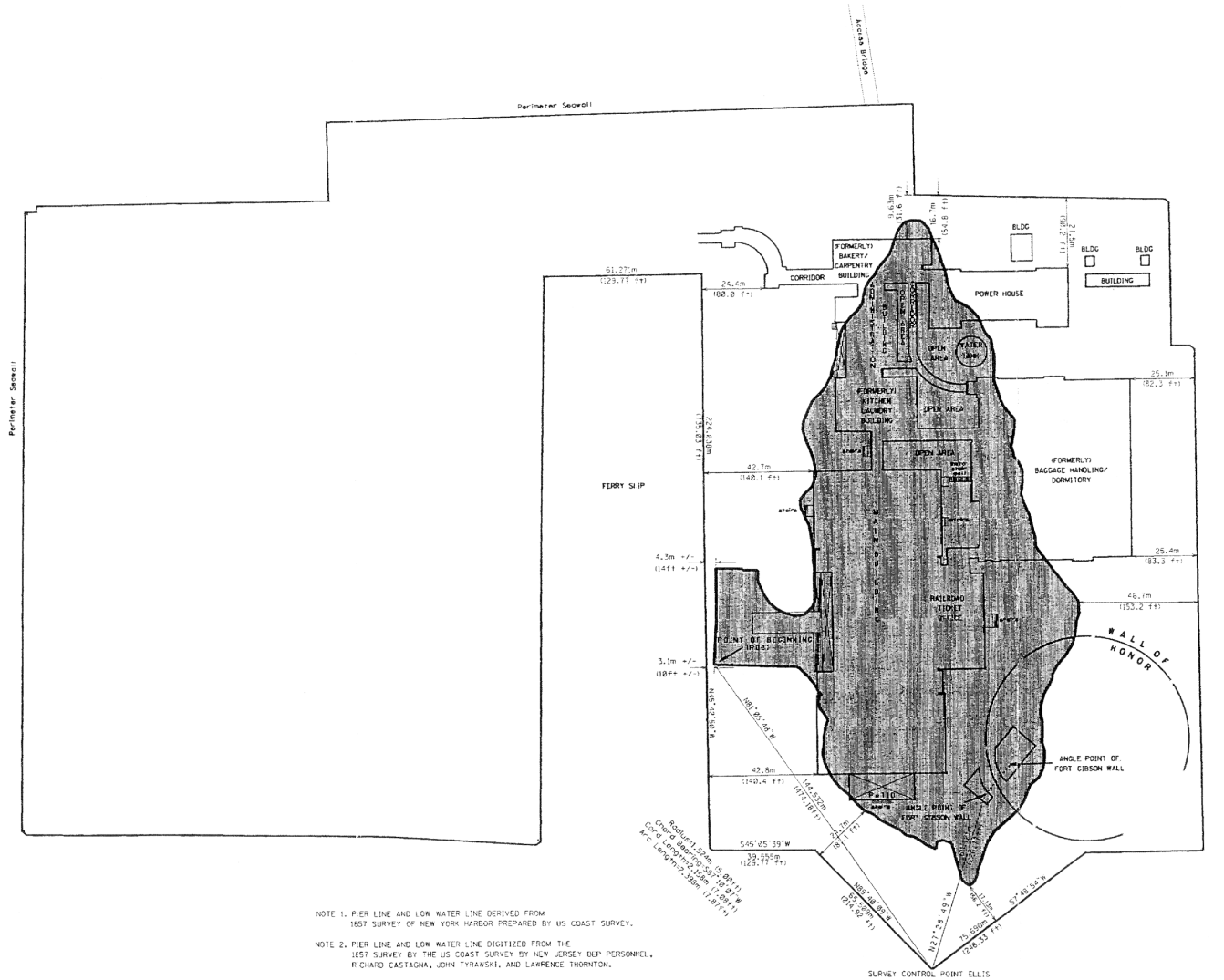
The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be considered necessary or desirable to

give proper force and effect to this Decree or to effectuate the rights of the parties.

VI

The States of New Jersey and New York shall share equally in the compensation for the Special Master and his assistants, and for expenses of this litigation incurred by the Special Master in this controversy.

[Ellis Island Boundary map follows this page.]



NOTE 1. PIER LINE AND LOW WATER LINE DERIVED FROM 1857 SURVEY OF NEW YORK HARBOR PREPARED BY US COAST SURVEY.

NOTE 2. PIER LINE AND LOW WATER LINE DIGITIZED FROM THE 1857 SURVEY BY THE US COAST SURVEY BY NEW JERSEY DEP PERSONNEL, RICHARD CASTAGNA, JOHN TYRAWSKI, AND LAWRENCE THORNTON.

NOTE 3. PIER LINE AND LOW WATER LINE ADDED TO THE PLAN ON JULY 21, 1998. UPDATED SEPTEMBER 8,1998.

NOTE 4. THE SURVEY TRAVERSE WAS PERFORMED ACCORDING TO SECOND ORDER, CLASS II PROCEDURES. ALL CLOSURES EXCEEDED THE REQUIREMENTS OF SECOND ORDER, CLASS I SURVEYS.

SURVEY CONTROL POINT ELLIS
LATITUDE N 40° 41' 54.17335" (NAD 83)
LONGITUDE W 74° 02' 17.67392"
CONVERGENCE ANGLE = +0°18' 04"
REFERENCE CENTRAL MERIDIAN = 74° 30' 00" (NAD83)

SCALE
60 30 0 60 120
1 Inch = 60ft (1:720)

HORIZONTAL DATUM : NAD83 (1986)
N.J. STATE PLANE COORDINATES BASED ON HORIZONTAL CONTROL STATION *ELLIS* (AB3200)
N:207,158.416
E:189,022.756
AS EXTRACTED FROM THE NATIONAL SPATIAL REFERENCE SYSTEM (NSRS) INCLUDED IN THE NATIONAL GEODETIC SURVEY DATABASE

SURVEY PERSONNEL

LOUIS J. MARCHUK, P.E. & L.S.
RON KUZMA, P.L.S.
FRED CZEMIGA, P.L.S.
ED BERCHTOLD
JIM SCHILLING
CHARLES LESKO

GEOMETRICS CADD PERSONNEL

EDWARD ROGACKI
ROBERT SWAIN
SUE GRESAVAGE

ORIGINAL AREA LOCATION SURVEY OF ELLIS ISLAND PREPARED ON SEPTEMBER 28 & 29, 1995 BY NEW JERSEY GEODETIC SURVEY

TOTAL AREA OF ELLIS ISLAND AS DETERMINED BY THE SEPTEMBER 28 & 29, 1995 SURVEY IS 27.485 ACRES (11.123 HECTARES)

TOTAL AREA OF ELLIS ISLAND = 27.485 ACRES
NEW YORK STATE AREA = 4.683 ACRES
NEW JERSEY STATE AREA = 22.802 ACRES

LEGEND
NEW JERSEY
NEW YORK

NEW JERSEY DEPARTMENT OF TRANSPORTATION
NEW JERSEY GEODETIC SURVEY

ELLIS ISLAND

SHOWING BOUNDARY BETWEEN STATES OF NEW JERSEY AND NEW YORK

SURVEY DATE: APRIL 30, 1997 REVISED: DECEMBER 1, 1998 (DATE) SCALE: 1:720

Louis J. Marchuk N.J. P.E. & L.S. 24054

DATE:

Developed and Drafted by the Geometrics CADD Unit of NJDOT

Syllabus

WILSON ET AL. *v.* LAYNE, DEPUTY UNITED STATES MARSHAL, ET AL.

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

No. 98–83. Argued March 24, 1999—Decided May 24, 1999

While executing a warrant to arrest petitioners' son in their home, respondents, deputy federal marshals and local sheriff's deputies, invited a newspaper reporter and a photographer to accompany them. The warrant made no mention of such a "media ride-along." The officers' early morning entry into the home prompted a confrontation with petitioners, and a protective sweep revealed that the son was not in the house. The reporters observed and photographed the incident but were not involved in the execution of the warrant. Their newspaper never published the photographs they took of the incident. Petitioners sued the officers in their personal capacities for money damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (the federal marshals), and 42 U. S. C. § 1983 (the sheriff's deputies), contending that the officers' actions in bringing the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights. The District Court denied respondents' motion for summary judgment on the basis of qualified immunity. In reversing, the Court of Appeals declined to decide whether the officers' actions violated the Fourth Amendment, but concluded that because no court had held at the time of the search that media presence during a police entry into a residence constituted such a violation, the right allegedly violated was not "clearly established" and thus respondents were entitled to qualified immunity.

Held: A "media ride-along" in a home violates the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers are entitled to qualified immunity. Pp. 609–618.

(a) The qualified immunity analysis is identical in suits under § 1983 and *Bivens*. See, *e. g.*, *Graham* v. *Connor*, 490 U. S. 386, 394, n. 9. A court evaluating a qualified immunity claim must first determine whether the plaintiff has alleged the deprivation of a constitutional right, and, if so, proceed to determine whether that right was clearly established at the time of the violation. *Conn* v. *Gabbert*, *ante*, at 290. P. 609.

Syllabus

(b) It violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution. The Amendment embodies centuries-old principles of respect for the privacy of the home, which apply where, as here, police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant, *Payton* v. *New York*, 445 U. S. 573, 602–604. It does not necessarily follow from the fact that the officers were entitled to enter petitioners' home that they were entitled to bring a reporter and a photographer with them. The Fourth Amendment requires that police actions in execution of a warrant be related to the objectives of the authorized intrusion. See, *e. g.*, *Arizona* v. *Hicks*, 480 U. S. 321, 325. Certainly the presence of the reporters, who did not engage in the execution of the warrant or assist the police in their task, was not related to the objective of the authorized intrusion, the apprehension of petitioners' son. Taken in their entirety, the reasons advanced by respondents to support the reporters' presence—publicizing the government's efforts to combat crime, facilitating accurate reporting on law enforcement activities, minimizing police abuses, and protecting suspects and the officers—fall short of justifying media ride-alongs. Although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible, the presence of *these* third parties was not. Pp. 609–614.

(c) Petitioners' Fourth Amendment right was not clearly established at the time of the search. "Clearly established" for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. His very action need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be apparent. *E. g.*, *Anderson* v. *Creighton*, 483 U. S. 635, 640. It was not unreasonable for a police officer at the time at issue to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful. First, the constitutional question presented by this case is by no means open and shut. Accurate media coverage of police activities serves an important public purpose, and it is not obvious from the Fourth Amendment's general principles that the officers' conduct in this case violated the Amendment. Second, petitioners have not cited any cases of controlling authority in their jurisdiction at the time in question which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. Finally, the federal marshals in this case relied

on a Marshals Service ride-along policy which explicitly contemplated media entry into private homes, and the sheriff's deputies had a ride-along program that did not expressly prohibit such entries. The state of the law was at best undeveloped at the relevant time, and the officers cannot have been expected to predict the future course of constitutional law. *E. g., Procunier* v. *Navarette*, 434 U. S. 555, 561. Pp. 614–618.

141 F. 3d 111, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 618.

Richard K. Willard argued the cause for petitioners. With him on the briefs were *David H. Coburn*, *James S. Felt*, *Richard Seligman*, *Steven R. Shapiro*, *Arthur B. Spitzer*, and *Dwight H. Sullivan*.

Lawrence P. Fletcher-Hill, Assistant Attorney General of Maryland, argued the cause for the state respondents. With him on the brief were *J. Joseph Curran, Jr.*, Attorney General, *Carmen M. Shepard*, Deputy Attorney General, and *Andrew H. Baida* and *John B. Howard, Jr.*, Assistant Attorneys General. *Richard A. Cordray* filed a brief for the federal respondents.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

While executing an arrest warrant in a private home, police officers invited representatives of the media to accompany them. We hold that such a "media ride-along" does violate the Fourth Amendment, but that because the state

*A brief of *amici curiae* urging affirmance was filed for ABC, Inc., et al. by *Lee Levine*, *James E. Grossberg*, *Jay Ward Brown*, *Henry S. Hoberman*, *Richard M. Schmidt, Jr.*, *Susanna M. Lowy*, *Harold W. Fuson, Jr.*, *Barbara Wartelle Wall*, *Ralph E. Goldberg*, *Karlene W. Goller*, *Jerry S. Birenz*, *Slade R. Metcalf*, *Jack N. Goodman*, *David S. J. Brown*, *René P. Milam*, *George Freeman*, and *Jane E. Kirtley*.

of the law was not clearly established at the time the search in this case took place, the officers are entitled to the defense of qualified immunity.

I

In early 1992, the Attorney General of the United States approved "Operation Gunsmoke," a special national fugitive apprehension program in which United States Marshals worked with state and local police to apprehend dangerous criminals. The "Operation Gunsmoke" policy statement explained that the operation was to concentrate on "armed individuals wanted on federal and/or state and local warrants for serious drug and other violent felonies." App. 15. This effective program ultimately resulted in over 3,000 arrests in 40 metropolitan areas. Brief for Federal Respondents Layne et al. 2.

One of the dangerous fugitives identified as a target of "Operation Gunsmoke" was Dominic Wilson, the son of petitioners Charles and Geraldine Wilson. Dominic Wilson had violated his probation on previous felony charges of robbery, theft, and assault with intent to rob, and the police computer listed "caution indicators" that he was likely to be armed, to resist arrest, and to "assaul[t] police." App. 40. The computer also listed his address as 909 North StoneStreet Avenue in Rockville, Maryland. Unknown to the police, this was actually the home of petitioners, Dominic Wilson's parents. Thus, in April 1992, the Circuit Court for Montgomery County issued three arrest warrants for Dominic Wilson, one for each of his probation violations. The warrants were each addressed to "any duly authorized peace officer," and commanded such officers to arrest him and bring him "immediately" before the Circuit Court to answer an indictment as to his probation violation. The warrants made no mention of media presence or assistance.[1]

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[1] The warrants were identical in all relevant respects. By way of example, one of them read as follows:

In the early morning hours of April 16, 1992, a Gunsmoke team of Deputy United States Marshals and Montgomery County Police officers assembled to execute the Dominic Wilson warrants. The team was accompanied by a reporter and a photographer from the Washington Post, who had been invited by the Marshals to accompany them on their mission as part of a Marshals Service ride-along policy.

At around 6:45 a.m., the officers, with media representatives in tow, entered the dwelling at 909 North StoneStreet Avenue in the Lincoln Park neighborhood of Rockville. Petitioners Charles and Geraldine Wilson were still in bed when they heard the officers enter the home. Petitioner Charles Wilson, dressed only in a pair of briefs, ran into the living room to investigate. Discovering at least five men in street clothes with guns in his living room, he angrily demanded that they state their business, and repeatedly cursed the officers. Believing him to be an angry Dominic Wilson, the officers quickly subdued him on the floor. Geraldine Wilson next entered the living room to investigate, wearing only a nightgown. She observed her husband being restrained by the armed officers.

When their protective sweep was completed, the officers learned that Dominic Wilson was not in the house, and they departed. During the time that the officers were in the home, the Washington Post photographer took numerous pictures. The print reporter was also apparently in the living room observing the confrontation between the police and

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"The State of Maryland, to any duly authorized peace officer, greeting: you are hereby commanded to take Dominic Jerome Wilson if he/she shall be found in your bailiwick, and have him immediately before the Circuit Court for Montgomery County, now in session, at the Judicial Center, in Rockville, to answer an indictment, or information, or criminal appeals unto the State of Maryland, of and concerning a certain charge of Robbery [Violation of Probation] by him committed, as hath been presented, and so forth. Hereof fail not at your peril, and have you then and there this writ. Witness." App. 36–37.

Charles Wilson. At no time, however, were the reporters involved in the execution of the arrest warrant. Brief for Federal Respondents Layne et al. 4. The Washington Post never published its photographs of the incident.

Petitioners sued the law enforcement officials in their personal capacities for money damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) (the U. S. Marshals Service respondents), and Rev. Stat. § 1979, 42 U. S. C. § 1983 (the Montgomery County Sheriff's Department respondents). They contended that the officers' actions in bringing members of the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights. The District Court denied respondents' motion for summary judgment on the basis of qualified immunity.

On interlocutory appeal to the Court of Appeals, a divided panel reversed and held that respondents were entitled to qualified immunity. The case was twice reheard en banc, where a divided Court of Appeals again upheld the defense of qualified immunity. The Court of Appeals declined to decide whether the actions of the police violated the Fourth Amendment. It concluded instead that because no court had held (at the time of the search) that media presence during a police entry into a residence violated the Fourth Amendment, the right allegedly violated by respondents was not "clearly established" and thus qualified immunity was proper. 141 F. 3d 111 (CA4 1998). Five judges dissented, arguing that the officers' actions did violate the Fourth Amendment, and that the clearly established protections of the Fourth Amendment were violated in this case. *Id.*, at 119 (opinion of Murnaghan, J.)

Recognizing a split among the Circuits on this issue, we granted certiorari in this case and another raising the same question, *Hanlon* v. *Berger*, 525 U. S. 981 (1998), and now affirm the Court of Appeals, although by different reasoning.

II

Petitioners sued the federal officials under *Bivens* and the state officials under § 1983. Both *Bivens* and § 1983 allow a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights. See § 1983; *Bivens*, *supra*, at 397. But government officials performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982).

Although this case involves suits under both § 1983 and *Bivens*, the qualified immunity analysis is identical under either cause of action. See, *e. g.*, *Graham* v. *Connor*, 490 U. S. 386, 394, n. 9 (1989); *Malley* v. *Briggs*, 475 U. S. 335, 340, n. 2 (1986). A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn* v. *Gabbert*, *ante*, at 290. This order of procedure is designed to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert* v. *Gilley*, 500 U. S. 226, 232 (1991). Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 840–842, n. 5 (1998). We now turn to the Fourth Amendment question.

In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77

Eng. Rep. 194, 195 (K. B.). In his Commentaries on the Laws of England, William Blackstone noted that

> "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of antient Rome . . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765–1769).

The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const., Amdt. 4 (emphasis added). See also *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

Our decisions have applied these basic principles of the Fourth Amendment to situations, like the one in this case, in which police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant. In *Payton* v. *New York*, 445 U. S. 573, 602 (1980), we noted that although clear in its protection of the home, the common-law tradition at the time of the drafting of the Fourth Amendment was ambivalent on the question whether police could enter a home without a warrant. We were ultimately persuaded that the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic" meant that absent a warrant or exigent circumstances, police could not

enter a home to make an arrest. *Id.*, at 601, 603–604. We decided that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.*, at 603.

Here, of course, the officers had such a warrant, and they were undoubtedly entitled to enter the Wilson home in order to execute the arrest warrant for Dominic Wilson. But it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them. In *Horton* v. *California*, 496 U. S. 128, 140 (1990), we held "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." While this does not mean that every police action while inside a home must be explicitly authorized by the text of the warrant, see *Michigan* v. *Summers*, 452 U. S. 692, 705 (1981) (Fourth Amendment allows temporary detainer of homeowner while police search the home pursuant to warrant), the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion, see *Arizona* v. *Hicks*, 480 U. S. 321, 325 (1987). See also *Maryland* v. *Garrison*, 480 U. S. 79, 87 (1987) ("[T]he purposes justifying a police search strictly limit the permissible extent of the search").

Certainly the presence of reporters inside the home was not related to the objectives of the authorized intrusion. Respondents concede that the reporters did not engage in the execution of the warrant, and did not assist the police in their task. The reporters therefore were not present for any reason related to the justification for police entry into the home—the apprehension of Dominic Wilson.

This is not a case in which the presence of the third parties directly aided in the execution of the warrant. Where the police enter a home under the authority of a warrant to

search for stolen property, the presence of third parties for the purpose of identifying the stolen property has long been approved by this Court and our common-law tradition. See, *e. g.*, *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067 (K. B. 1765) (in search for stolen goods case, "'[t]he owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description") (quoted with approval in *Boyd* v. *United States*, 116 U. S. 616, 628 (1886)).

Respondents argue that the presence of the Washington Post reporters in the Wilsons' home nonetheless served a number of legitimate law enforcement purposes. They first assert that officers should be able to exercise reasonable discretion about when it would "further their law enforcement mission to permit members of the news media to accompany them in executing a warrant." Brief for Federal Respondents Layne et al. 15. But this claim ignores the importance of the right of residential privacy at the core of the Fourth Amendment. It may well be that media ride-alongs further the law enforcement objectives of the police in a general sense, but that is not the same as furthering the purposes of the search. Were such generalized "law enforcement objectives" themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down.

Respondents next argue that the presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities. There is certainly language in our opinions interpreting the First Amendment which points to the importance of "the press" in informing the general public about the administration of criminal justice. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491–492 (1975), for example, we said "in a society in which each individual has but limited time and resources with which to

observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." See also *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 572–573 (1980). No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgment by the government. But the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged.

Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.

Finally, respondents argue that the presence of third parties could serve in some situations to minimize police abuses and protect suspects, and also to protect the safety of the officers. While it might be reasonable for police officers to themselves videotape home entries as part of a "quality control" effort to ensure that the rights of homeowners are being respected, or even to preserve evidence, cf. *Ohio* v. *Robinette*, 519 U. S. 33, 35 (1996) (noting the use of a "mounted video camera" to record the details of a routine traffic stop), such a situation is significantly different from the media presence in this case. The Washington Post reporters in the Wilsons' home were working on a story for their own purposes. They were not present for the purpose of protecting the officers, much less the Wilsons. A private photographer was acting for private purposes, as evidenced in part by the fact that the newspaper and not the police retained the photographs. Thus, although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible, see *supra*, at 611–612, the presence of *these* third parties was not.

The reasons advanced by respondents, taken in their entirety, fall short of justifying the presence of media inside a home. We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.[2]

III

Since the police action in this case violated petitioners' Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search. See *Siegert*, 500 U. S., at 232–233. As noted above, Part II, *supra*, government officials performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S., at 818. What this means in practice is that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) (citing *Harlow*, *supra*, at 819); see also *Graham* v. *Connor*, 490 U. S., at 397.

In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U. S., at 639. "[C]learly established" for purposes of

[2] Even though such actions might violate the Fourth Amendment, if the police are lawfully present, the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home. We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives.

qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640 (citations omitted); see also *United States* v. *Lanier*, 520 U. S. 259, 270 (1997).

It could plausibly be asserted that any violation of the Fourth Amendment is "clearly established," since it is clearly established that the protections of the Fourth Amendment apply to the actions of police. Some variation of this theory of qualified immunity is urged upon us by petitioners, Brief for Petitioners 37, and seems to have been at the core of the dissenting opinion in the Court of Appeals, see 141 F. 3d, at 123. However, as we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established. 483 U. S., at 641. In this case, the appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed. Cf. *ibid.*

We hold that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful. First, the constitutional question presented by this case is by no means open and shut. The Fourth Amendment protects the rights of homeowners from entry without a warrant, but there was a warrant here. The question is whether the invitation to the media exceeded the scope of the search authorized by the warrant. Accurate media coverage of police activities serves an important public purpose, and it is not obvious from the general principles

of the Fourth Amendment that the conduct of the officers in this case violated the Amendment.

Second, although media ride-alongs of one sort or another had apparently become a common police practice,[3] in 1992 there were no judicial opinions holding that this practice became unlawful when it entered a home. The only published decision directly on point was a state intermediate court decision which, though it did not engage in an extensive Fourth Amendment analysis, nonetheless held that such conduct was not unreasonable. *Prahl* v. *Brosamle*, 98 Wis. 2d 130, 154–155, 295 N. W. 2d 768, 782 (App. 1980). From the federal courts, the parties have only identified two unpublished District Court decisions dealing with media entry into homes, each of which upheld the search on unorthodox non-Fourth Amendment right to privacy theories. *Moncrief* v. *Hanton*, 10 Media L. Rptr. 1620 (ND Ohio 1984); *Higbee* v. *Times-Advocate*, 5 Media L. Rptr. 2372 (SD Cal. 1980). These cases, of course, cannot "clearly establish" that media entry into homes during a police ride-along violates the Fourth Amendment.

At a slightly higher level of generality, petitioners point to *Bills* v. *Aseltine*, 958 F. 2d 697 (CA6 1992), in which the Court of Appeals for the Sixth Circuit held that there were material issues of fact precluding summary judgment on the question whether police exceeded the scope of a search warrant by allowing a private security guard to participate in the search to identify stolen property other than that described in the warrant. *Id.*, at 709. *Bills*, which was decided a mere five weeks before the events of this case, did anticipate today's holding that police may not bring along third parties during an entry into a private home pursuant

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[3] See, *e. g.*, *Florida Publishing Co.* v. *Fletcher*, 340 So. 2d 914, 919 (1976) (it "'is a widespread practice of long-standing'" for media to accompany officers into homes), cert. denied, 431 U. S. 930 (1977); Zoglin, Live on the Vice Beat, Time, Dec. 22, 1986, p. 60 (noting "the increasingly common practice of letting TV crews tag along on drug raids").

to a warrant for purposes unrelated to those justifying the warrant. *Id.*, at 706. However, we cannot say that even in light of *Bills*, the law on third-party entry into homes was clearly established in April 1992. Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

Finally, important to our conclusion was the reliance by the United States marshals in this case on a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests.[4] The Montgomery County Sheriff's Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes. Deposition of Sheriff Raymond M. Kight, in No. PJM–94–1718, p. 8. Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies.

Given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law." *Procunier* v. *Navarette*, 434

[4] A booklet distributed to marshals recommended that "fugitive apprehension cases . . . normally offer the best possibilities for ride-alongs." App. 4–5. In its discussion of the best way to make ride-alongs useful to the media and portray the Marshals Service in a favorable light, the booklet noted that reporters were likely to want to be able to shoot "good action footage, not just a mop-up scene." It advised agents that "[i]f the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." *Id.*, at 7.

U. S. 555, 562 (1978). See also *Wood* v. *Strickland*, 420 U. S. 308, 321 (1975); *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967). Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. See 141 F. 3d, at 118–119; *Ayeni* v. *Mottola*, 35 F. 3d 680 (CA2 1994), cert. denied, 514 U. S. 1062 (1995); *Parker* v. *Boyer*, 93 F. 3d 445 (CA8 1996), cert. denied, 519 U. S. 1148 (1997); *Berger* v. *Hanlon*, 129 F. 3d 505 (CA9 1997), cert. granted, 525 U. S. 981 (1998). If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

Like every other federal appellate judge who has addressed the question, I share the Court's opinion that it violates the Fourth Amendment for police to bring members of the media or other third parties into a private dwelling during the execution of a warrant unless the homeowner has consented or the presence of the third parties is in aid of the execution of the warrant. I therefore join Parts I and II of the Court's opinion.

In my view, however, the homeowner's right to protection against this type of trespass was clearly established long before April 16, 1992. My sincere respect for the competence of the typical member of the law enforcement profession precludes my assent to the suggestion that "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful." *Ante*, at 615. I therefore disagree with the Court's

resolution of the conflict in the Circuits on the qualified immunity issue.[1] The clarity of the constitutional rule, a federal statute (18 U. S. C. § 3105), common-law decisions, and the testimony of the senior law enforcement officer all support my position that it has long been clearly established that officers may not bring third parties into private homes to witness the execution of a warrant. By contrast, the Court's opposing view finds support in the following sources: its bare assertion that the constitutional question "is by no means open and shut," *ante,* at 615; three judicial opinions that did not directly address the constitutional question, *ante,* at 616; and a public relations booklet prepared by someone in the United States Marshals Service that never mentions allowing representatives of the media to enter private property without the owner's consent, *ante,* at 617.

I

In its decision today the Court has not announced a new rule of constitutional law. Rather, it has refused to recognize an entirely unprecedented request for an exception to a well-established principle. Police action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion. That principle, like the broader protection provided by the Fourth Amendment itself, represents the confluence of two important sources: our English forefathers' traditional respect for the sanctity of the private

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[1] It is important to emphasize that there is no split in Circuit authority on the merits of the constitutional issue. Nor, as I explain *infra,* at 622–624, do I believe that any District Court had reached a conclusion at odds with the Court's Fourth Amendment holding. Any conflict was limited to the qualified immunity issue. Three Circuits rejected the defense whereas the Fourth and the Eighth accepted it. See *Ayeni* v. *Mottola,* 35 F. 3d 680, 686 (CA2 1994); *Bills* v. *Aseltine,* 958 F. 2d 697 (CA6 1992); *Berger* v. *Hanlon,* 129 F. 3d 505 (CA9 1997); 141 F. 3d 111 (CA4 1998) (en banc); *Parker* v. *Boyer,* 93 F. 3d 445 (CA8 1996).

home and the American colonists' hatred of the general warrant.

The contours of the rule are fairly described by the Court, *ante*, at 609–611 of its opinion, and in the cases that it cites on those pages. All of those cases were decided before 1992. None of those cases—nor, indeed, any other of which I am aware—identified any exception to the rule of law that the Court repeats today. In fact, the Court's opinion fails to identify a colorable rationale for any such exception. Respondents' position on the merits consisted entirely of their unpersuasive factual submission that the presence of representatives of the news media served various legitimate—albeit nebulous—law enforcement purposes. The Court's cogent rejection of those *post hoc* rationalizations cannot be characterized as the announcement of a new rule of law.

During my service on the Court, I have heard lawyers argue scores of cases raising Fourth Amendment issues. Generally speaking, the Members of the Court have been sensitive to the needs of the law enforcement community. In virtually all of them at least one Justice thought that the police conduct was reasonable. In fact, in only a handful did the Court unanimously find a Fourth Amendment violation. That the Court today speaks with a single voice on the merits of the constitutional question is unusual and certainly lends support to the notion that the question is indeed "open and shut." *Ante*, at 615.

But the more important basis for my opinion is that it should have been perfectly obvious to the officers that their "invitation to the media exceeded the scope of the search authorized by the warrant." *Ibid.* Despite reaffirming that clear rule, the Court nonetheless finds that the mere presence of a warrant rendered the officers' conduct reasonable. The Court fails to cite a single case that even arguably supports the proposition that using official power to enable news photographers and reporters to enter a private home for purposes unrelated to the execution of a warrant could

be regarded as a "reasonable" invasion of either property or privacy.

II

The absence of judicial opinions expressly holding that police violate the Fourth Amendment if they bring media representatives into private homes provides scant support for the conclusion that in 1992 a competent officer could reasonably believe that it would be lawful to do so. Prior to our decision in *United States* v. *Lanier*, 520 U. S. 259 (1997), no judicial opinion specifically held that it was unconstitutional for a state judge to use his official power to extort sexual favors from a potential litigant. Yet, we unanimously concluded that the defendant had fair warning that he was violating his victim's constitutional rights. *Id.*, at 271 ("The easiest cases don't even arise" (citations and internal quotation marks omitted)).

Nor am I persuaded that the absence of rulings on the precise Fourth Amendment issue presented in this case can plausibly be explained by the assumption that the police practice was common. I assume that the practice of allowing media personnel to "ride along" with police officers was common, but that does not mean that the officers routinely allowed the media to enter homes without the consent of the owners. As the Florida Supreme Court noted in *Florida Publishing Co.* v. *Fletcher*, 340 So. 2d 914, 918 (1976), there has long been a widespread practice for firefighters to allow photographers to enter disaster areas to take pictures, for example, of the interior of buildings severely damaged by fire. But its conclusion that such media personnel were not trespassers rested on a doctrine of implied consent[2]—a the-

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[2] The Florida Supreme Court held:

"The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursu-

ory wholly inapplicable to forcible entries in connection with the execution of a warrant.[3]

In addition to this case, the Court points to three lower court opinions—none of which addresses the Fourth Amendment—as the ostensible basis for a reasonable officer's belief that the rule in *Semayne's Case*[4] was ripe for reevaluation.[5] See *ante*, at 616. Two of the cases were decided in 1980 and the third in 1984. In view of the clear restatement of the rule in the later opinions of this Court, cited *ante*, at 611, those three earlier decisions could not possibly provide a

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ant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*

. . . . .

"'The fire was a disaster of great public interest . . . . [I]t has been a longstanding custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred.'" 340 So. 2d, at 917–918.

The Court's reference to this case, *ante*, at 616, n. 3, misleadingly suggests that the "widespread practice" referred to in the Florida court's opinion was police practice; it was not.

[3] Indeed, the Wisconsin state-court decision, cited by the Court as contrary authority, took pains to distinguish this case:

"We will not imply a consent as a matter of law. It is of course well known that news representatives want to enter a private building after or even during a newsworthy event within the building. That knowledge is no basis for an implied consent by the possessor of the building to the entry. . . . We conclude that custom and usage have not been shown in fact or law to confer an implied consent upon news representatives to enter a building under the circumstances presented by this case." *Prahl* v. *Brosamle*, 98 Wis. 2d 130, 149–150, 295 N. W. 2d 768, 780 (App. 1980).

[4] 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1604).

[5] As the Court notes, the only Federal Court of Appeals authority on the subject, *Bills* v. *Aseltine*, 958 F. 2d 697 (CA6 1992), "anticipate[d] today's holding that police may not bring along third parties during an entry into a private home pursuant to a warrant for purposes unrelated to those justifying the warrant." *Ante*, at 616–617.

basis for a claim by the police that they reasonably relied on judicial recognition of an exception to the basic rule that the purposes of the police intrusion strictly limit its scope.

That the two federal decisions were not officially reported makes such theoretical reliance especially anomalous.[6] Moreover, as the Court acknowledges, the claim rejected in each of those cases was predicated on the media's alleged violation of the plaintiffs' "unorthodox non-Fourth Amendment right to privacy theories," *ante*, at 616, rather than a claim that the officers violated the Fourth Amendment by allowing the press to observe the execution of the warrant. *Moncrief* v. *Hanton*, 10 Media L. Rptr. 1620 (ND Ohio 1984); *Higbee* v. *Times-Advocate*, 5 Media L. Rptr. 2372 (SD Cal. 1980). As for the other case, *Prahl* v. *Brosamle*, 98 Wis. 2d 130, 295 N. W. 2d 768 (App. 1980)—cited by the Court, *ante*, at 616, for the proposition that the officer's conduct was "not unreasonable"—it actually held that the defendants' motion to dismiss should have been denied because the allegations supported the conclusion that the officer committed a trespass when he allowed a third party to enter the plaintiff's property.[7] Since that conclusion was fully consistent with a

[6] In the Fourth Circuit, unreported opinions may not be considered in the course of determining qualified immunity. *Hogan* v. *Carter*, 85 F. 3d 1113, 1118 (1996).

[7] *Prahl* v. *Brosamle*, 98 Wis. 2d, at 154–155, 295 N. W. 2d, at 782 ("A new trial must be had with respect to the plaintiffs' claims for trespass against Lieutenant Kuenning and Dane Country . . . . Lieutenant Kuenning had no authority to extend a consent to [the press] to enter the land of another. Although entry by Lieutenant Kuenning was privileged, he committed a trespass by participating in the trespass by [the press]").

The Court is correct that the Wisconsin Court of Appeals upheld dismissal of the plaintiff's 42 U. S. C. § 1983 claim *against the newscaster* because he was not acting under color of state law. As the basis for rejecting the § 1983 action "for invasion of privacy based on disclosure of the incident," the court further held that "[w]e are unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." 98 Wis. 2d, at

number of common-law cases holding that similar conduct constituted a trespass,[8] it surely does not provide any support for an officer's assumption that a similar trespass would be lawful.

Far better evidence of an officer's reasonable understanding of the relevant law is provided by the testimony of the Sheriff of Montgomery County, the commanding officer of three of the respondents: " 'We would never let a civilian into a home. . . . That's just not allowed.' " Brief for Petitioners 41.

III

The most disturbing aspect of the Court's ruling on the qualified immunity issue is its reliance on a document discussing "ride-alongs" apparently prepared by an employee in the public relations office of the United States Marshals Service. The text of the document, portions of which are set out in an appendix, makes it quite clear that its author was not a lawyer, but rather a person concerned with developing the proper public image of the Service, with a special interest in creating a favorable impression with the Congress. Although the document occupies 14 pages in the joint

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138, 295 N. W. 2d, at 774. Important to its conclusion was its observation that, unlike the unnecessary male participation in body searches of schoolgirls in *Doe* v. *Duter*, 407 F. Supp. 922 (WD Wis. 1976), "[n]either the search of Dr. Prahl and his premises nor the film or its broadcast has been shown to include intimate, offensive or vulgar aspects." 98 Wis. 2d, at 138, 295 N. W. 2d, at 774. The reporter in question was stationed in the entryway of the building and was able to film into the plaintiff's office during the police interview.

[8] See, *e. g.*, *Daingerfield* v. *Thompson*, 74 Va. 136, 151 (1880) ("There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: that all persons who wrongfully contribute in any manner to the commission of a trespass, are responsible as principals, and each one is liable to the extent of the injury done"); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 13, p. 72 (5th ed. 1984).

appendix and suggests handing out free Marshals Service T-shirts and caps to "grease the skids," it contains no discussion of the conditions which must be satisfied before a newsperson may be authorized to enter private property during the execution of a warrant. App. 12. There are guidelines about how officers should act and speak in front of the camera, and the document does indicate that "the camera" should not enter a private home until a "signal" is given. *Id.*, at 7. It does not, however, purport to give any guidance to the marshals regarding when such a signal should be given, whether it should ever be given without the consent of the homeowner, or indeed on how to carry out any part of their law enforcement mission. The notion that any member of that well-trained cadre of professionals would rely on such a document for guidance in the performance of dangerous law enforcement assignments is too farfetched to merit serious consideration.

* * *

The defense of qualified immunity exists to protect reasonable officers from personal liability for official actions later found to be in violation of constitutional rights that were not clearly established. The conduct in this case, as the Court itself reminds us, contravened the Fourth Amendment's core protection of the home. In shielding this conduct as if it implicated only the unsettled margins of our jurisprudence, the Court today authorizes one free violation of the well-established rule it reaffirms.

I respectfully dissent.

APPENDIX TO OPINION OF STEVENS, J.

"MEDIA RIDE-ALONGS

"The U. S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public

when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.

"Media 'ride-alongs' are one effective method to promote an accurate picture of Deputy Marshals at work. Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens. The result is usually a very graphic and dynamic look at the operational activities of the Marshals Service, which is subsequently aired on TV or printed in a newspaper, magazine, or book.

"However, successful ride-alongs don't just 'happen' in a spontaneous fashion. They require careful planning and attention to detail to ensure that all goes smoothly and that the media receive an accurate picture of how the Marshals Service operates. This booklet describes considerations that are important in nearly every ride-along." App. 4.

"Establish Ground Rules

"Another good idea—actually, it's an essential one—is to establish ground rules at the start and convey them to the reporter and camera person. Address such things as what can be covered with cameras and when, any privacy restrictions that may be encountered, and interview guidelines.

"Emphasize the need for safety considerations and explain any dangers that might be involved. Make the ground rules realistic but balanced—remember, the media will want good action footage, not just a mop-up scene. If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." *Id.*, at 7.

"The very best planning won't result in a good ride-along if the Marshals Service personnel involved do not do their part. It's a case of actions speaking as loudly as words, and both

are important in getting the best media exposure possible." *Id.*, at 9.

"'Waving the Flag'

"One action of special consequence is 'waving the flag' of the Marshals Service. This is accomplished when Deputies can easily be recognized as USMS Deputies because they are wearing raid jackets, prominently displaying their badges, or exhibiting other easily identifiable marks of the Service. We want the public to know who you are and what kind of job you do. That is one of the goals of the ride-along. So having Deputy Marshals easily identified as such on camera is not just a whim—it's important to the overall success of the ride-along.

"Of course, how the Deputies act and what they say is also crucial. During the ride-along virtually any statement made by Deputies just might end up as a quote, attributed to the person who made it. Sometimes that could prove embarrassing. A Deputy must try to visualize what his or her words will look like in a newspaper or sound like on TV. Being pleasant and professional at all times is key, and that includes not being drawn into statements of personal opinion or inappropriate comments. Using common sense is the rule." *Id.*, at 9–10.

"You also need to find out when the coverage will air or end up in print. Ask the reporter if he or she can keep you informed on that matter. You might 'grease the skids' for this by offering the reporter, camera person, or other media representatives involved a memento of the Marshals Service. Marshals Service caps, mugs, T-shirts, and the like can help establish a rapport with a reporter that can benefit you in the future." *Id.*, at 12.

"Getting to the Final Product

"Naturally, it's important to see the final product of the ride-along when it airs on TV or appears in the newspaper. You

should arrange to videotape any TV news coverage or clip the resulting newspaper stories and send a copy of the videotape or news clipping to the Office of Congressional and Public Affairs." *Id.*, at 13.

Syllabus

DAVIS, AS NEXT FRIEND OF LaSHONDA D. *v.* MONROE COUNTY BOARD OF EDUCATION ET AL.

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

No. 97–843. Argued January 12, 1999—Decided May 24, 1999

Petitioner filed suit against respondents, a county school board (Board) and school officials, seeking damages for the sexual harassment of her daughter LaShonda by G. F., a fifth-grade classmate at a public elementary school. Among other things, petitioner alleged that respondents' deliberate indifference to G. F.'s persistent sexual advances toward LaShonda created an intimidating, hostile, offensive, and abusive school environment that violated Title IX of the Education Amendments of 1972, which, in relevant part, prohibits a student from being "excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U. S. C. § 1681(a). In granting respondents' motion to dismiss, the Federal District Court found that "student-on-student," or peer, harassment provides no ground for a Title IX private cause of action for damages. The en banc Eleventh Circuit affirmed.

Held:

1. A private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. Pp. 638–653.

(a) An implied private right of action for money damages exists under Title IX, *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, where funding recipients had adequate notice that they could be liable for the conduct at issue, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17, but a recipient is liable only for its own misconduct. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. The standard set out in *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274—that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment—also applies in cases

of student-on-student harassment. Initially, in *Gebser*, this Court expressly rejected the use of agency principles to impute liability to the district for the acts of its teachers. *Id.*, at 283. Additionally, Title IX's regulatory scheme has long provided funding recipients with notice that they may be liable for their failure to respond to nonagents' discriminatory acts. The common law has also put schools on notice that they may be held responsible under state law for failing to protect students from third parties' tortious acts. Of course, the harasser's identity is not irrelevant. Deliberate indifference makes sense as a direct liability theory only where the recipient has the authority to take remedial action, and Title IX's language itself narrowly circumscribes the circumstances giving rise to damages liability under the statute. If a recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment, *i. e.*, at a minimum, causes students to undergo harassment or makes them liable or vulnerable to it. Moreover, because the harassment must occur "under" "the operations of" a recipient, 20 U. S. C. §§ 1681(a), 1687, the harassment must take place in a context subject to the school district's control. These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Where, as here, the misconduct occurs during school hours on school grounds, misconduct is taking place "under" an "operation" of the recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, in this setting, the Board exercises significant control over the harasser, for it has disciplinary authority over its students. At the time of the events here, a publication for school attorneys and administrators indicated that student-on-student harassment could trigger Title IX liability, and subsequent Department of Education policy guidelines provide that such harassment falls within Title IX's scope. Contrary to contentions of respondents and the dissent, school administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. Pp. 639–649.

(b) The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in a private damages action. Title IX proscribes sexual harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action. See *Gebser*, *supra*, at 281. Having previously held that such harassment is "discrimination" in the

school context under Title IX, this Court is constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of "discrimination" actionable under the statute. The statute's other prohibitions help to give content to "discrimination" in this context. The statute not only protects students from discrimination but also shields them from being "excluded from participation in" or "denied the benefits of" a recipient's "education program or activity" on the basis of gender. 20 U. S. C. § 1681(a). It is not necessary to show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67. Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 82, including, but not limited to, the harasser's and victim's ages and the number of persons involved. Courts must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur "under any education program or activity" suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so. The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. Peer harassment is less likely to satisfy the requirements that the misconduct breach Title IX's guarantee of equal access to educational benefits and have a systemic effect on a program or activity. Pp. 649–653.

2. Applying this standard to the facts at issue, the Eleventh Circuit erred in dismissing petitioner's complaint. This Court cannot say beyond doubt that she can prove no set of facts that would entitle her to relief. She alleges that LaShonda was the victim of repeated acts of harassment by G. F. over a 5-month period, and allegations support the conclusion that his misconduct was severe, pervasive, and objectively offensive. Moreover, the complaint alleges that multiple victims of G. F.'s misconduct sought an audience with the school principal and that the harassment had a concrete, negative effect on LaShonda's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference

on the part of the Board, which made no effort either to investigate or to put an end to the harassment. Pp. 653–654.

120 F. 3d 1390, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 654.

Verna L. Williams argued the cause for petitioner. With her on the briefs were *Marcia D. Greenberger*, *Leslie T. Annexstein*, *Nancy Perkins*, and *Stevenson Munro*.

Deputy Solicitor General Underwood argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Lee*, *Beth S. Brinkmann*, *Dennis J. Dimsey*, and *Linda F. Thome*.

W. Warren Plowden, Jr., argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner brought suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class. Among petitioner's claims was a claim for monetary and injunctive relief under Title IX of

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Sara L. Mandelbaum* and *Steven R. Shapiro;* for the National Education Association et al. by *Judith L. Lichtman* and *Donna R. Lenhoff;* for the NOW Legal Defense and Education Fund et al. by *Martha F. Davis*, *Julie Goldscheid*, *Yolanda S. Wu*, *David S. Ettinger*, and *Mary-Christine Sungaila;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden*.

Briefs of *amici curiae* urging affirmance were filed for the National School Boards Association et al. by *Lisa A. Brown*, *Jennifer Jacobs*, and *Julie Underwood;* and for Students for Individual Liberty et al. by *James A. Moody*.

Richard P. Ward and *Anita K. Blair* filed a brief for the Independent Women's Forum as *amicus curiae*.

the Education Amendments of 1972 (Title IX), 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* The District Court dismissed petitioner's Title IX claim on the ground that "student-on-student," or peer, harassment provides no ground for a private cause of action under the statute. The Court of Appeals for the Eleventh Circuit, sitting en banc, affirmed. We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

I

Petitioner's Title IX claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Accordingly, in reviewing the legal sufficiency of petitioner's cause of action, "we must assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd.* v. *Pinhas*, 500 U. S. 322, 325 (1991).

A

Petitioner's minor daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates at Hubbard Elementary School, a public school in Monroe County, Georgia. According to petitioner's complaint, the harassment began in December 1992, when the classmate, G. F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "'I want to get in bed with you'" and "'I want to feel your boobs.'" Complaint ¶ 7. Similar conduct allegedly occurred on or about January 4 and January 20, 1993. *Ibid.* LaShonda reported each of these incidents to her

mother and to her classroom teacher, Diane Fort. *Ibid.* Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents. *Ibid.* Petitioner contends that, notwithstanding these reports, no disciplinary action was taken against G. F. *Id.*, ¶ 16.

G. F.'s conduct allegedly continued for many months. In early February, G. F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class. *Id.*, ¶ 8. LaShonda reported G. F.'s behavior to her physical education teacher, Whit Maples. *Ibid.* Approximately one week later, G. F. again allegedly engaged in harassing behavior, this time while under the supervision of another classroom teacher, Joyce Pippin. *Id.*, ¶ 9. Again, LaShonda allegedly reported the incident to the teacher, and again petitioner contacted the teacher to follow up. *Ibid.*

Petitioner alleges that G. F. once more directed sexually harassing conduct toward LaShonda in physical education class in early March, and that LaShonda reported the incident to both Maples and Pippen. *Id.*, ¶ 10. In mid-April 1993, G. F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner, and LaShonda again reported the matter to Fort. *Id.*, ¶ 11.

The string of incidents finally ended in mid-May, when G. F. was charged with, and pleaded guilty to, sexual battery for his misconduct. *Id.*, ¶ 14. The complaint alleges that LaShonda had suffered during the months of harassment, however; specifically, her previously high grades allegedly dropped as she became unable to concentrate on her studies, *id.*, ¶ 15, and, in April 1993, her father discovered that she had written a suicide note, *ibid.* The complaint further alleges that, at one point, LaShonda told petitioner that she "'didn't know how much longer she could keep [G. F.] off her.'" *Id.*, ¶ 12.

Nor was LaShonda G. F.'s only victim; it is alleged that other girls in the class fell prey to G. F.'s conduct. *Id.*, ¶ 16. At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Querry about G. F.'s behavior. *Id.*, ¶ 10. According to the complaint, however, a teacher denied the students' request with the statement, "'If [Querry] wants you, he'll call you.'" *Ibid.*

Petitioner alleges that no disciplinary action was taken in response to G. F.'s behavior toward LaShonda. *Id.*, ¶ 16. In addition to her conversations with Fort and Pippen, petitioner alleges that she spoke with Principal Querry in mid-May 1993. When petitioner inquired as to what action the school intended to take against G. F., Querry simply stated, "'I guess I'll have to threaten him a little bit harder.'" *Id.*, ¶ 12. Yet, petitioner alleges, at no point during the many months of his reported misconduct was G. F. disciplined for harassment. *Id.*, ¶ 16. Indeed, Querry allegedly asked petitioner why LaShonda "'was the only one complaining.'" *Id.*, ¶ 12.

Nor, according to the complaint, was any effort made to separate G. F. and LaShonda. *Id.*, ¶ 16. On the contrary, notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G. F. *Id.*, ¶ 13. Moreover, petitioner alleges that, at the time of the events in question, the Monroe County Board of Education (Board) had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue. *Id.*, ¶ 17.

B

On May 4, 1994, petitioner filed suit in the United States District Court for the Middle District of Georgia against the Board, Charles Dumas, the school district's superintendent, and Principal Querry. The complaint alleged that the Board

is a recipient of federal funding for purposes of Title IX, that "[t]he persistent sexual advances and harassment by the student G. F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities," and that "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Id.*, ¶¶ 27, 28. The complaint sought compensatory and punitive damages, attorney's fees, and injunctive relief. *Id.*, ¶ 32.

The defendants (all respondents here) moved to dismiss petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and the District Court granted respondents' motion. See 862 F. Supp. 363, 368 (MD Ga. 1994). With regard to petitioner's claims under Title IX, the court dismissed the claims against individual defendants on the ground that only federally funded educational institutions are subject to liability in private causes of action under Title IX. *Id.*, at 367. As for the Board, the court concluded that Title IX provided no basis for liability absent an allegation "that the Board or an employee of the Board had any role in the harassment." *Ibid.*

Petitioner appealed the District Court's decision dismissing her Title IX claim against the Board, and a panel of the Court of Appeals for the Eleventh Circuit reversed. 74 F. 3d 1186, 1195 (1996). Borrowing from Title VII law, a majority of the panel determined that student-on-student harassment stated a cause of action against the Board under Title IX: "[W]e conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.*, at 1193. The

Eleventh Circuit panel recognized that petitioner sought to state a claim based on school "officials' failure to take action to stop the offensive acts of those over whom the officials exercised control," *ibid.*, and the court concluded that petitioner had alleged facts sufficient to support a claim for hostile environment sexual harassment on this theory, *id.*, at 1195.

The Eleventh Circuit granted the Board's motion for rehearing en banc, 91 F. 3d 1418 (1996), and affirmed the District Court's decision to dismiss petitioner's Title IX claim against the Board, 120 F. 3d 1390 (1998). The en banc court relied, primarily, on the theory that Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause, U. S. Const., Art. I, § 8, cl. 1, and that the statute therefore must provide potential recipients of federal education funding with "unambiguous notice of the conditions they are assuming when they accept" it. 120 F. 3d, at 1399. Title IX, the court reasoned, provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, but the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment. *Id.*, at 1401.

Writing in dissent, four judges urged that the statute, by declining to identify the perpetrator of discrimination, encompasses misconduct by third parties: "The identity of the perpetrator is simply irrelevant under the language" of the statute. *Id.*, at 1412 (Barkett, J., dissenting). The plain language, the dissenters reasoned, also provides recipients with sufficient notice that a failure to respond to student-on-student harassment could trigger liability for the district. *Id.*, at 1414.

We granted certiorari, 524 U. S. 980 (1998), in order to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment, compare 120 F. 3d 1390 (CA11

1998) (case below), and *Rowinsky* v. *Bryan Independent School Dist.*, 80 F. 3d 1006, 1008 (CA5) (holding that private damages action for student-on-student harassment is available under Title IX only where funding recipient responds to these claims differently based on gender of victim), cert. denied, 519 U. S. 861 (1996), with *Doe* v. *University of Illinois*, 138 F. 3d 653, 668 (CA7 1998) (upholding private damages action under Title IX for funding recipient's inadequate response to known student-on-student harassment), vacated and remanded, *post*, p. 1142, *Brzonkala* v. *Virginia Polytechnic Institute and State University*, 132 F. 3d 949, 960–961 (CA4 1997) (same), vacated and District Court decision affirmed en banc, 169 F. 3d 820 (CA4 1999) (not addressing merits of Title IX hostile environment sexual harassment claim and directing District Court to hold this claim in abeyance pending this Court's decision in the instant case), and *Oona, R.-S.*- v. *McCaffrey*, 143 F. 3d 473, 478 (CA9 1998) (rejecting qualified immunity claim and concluding that Title IX duty to respond to student-on-student harassment was clearly established by 1992–1993), cert. denied, *post*, p. 1154. We now reverse.

II

Title IX provides, with certain exceptions not at issue here, that

> "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681, see § 1682, and these departments or agencies may rely on "any . . . means authorized by law," including

the termination of funding, *ibid.*, to give effect to the statute's restrictions.

There is no dispute here that the Board is a recipient of federal education funding for Title IX purposes. 74 F. 3d, at 1189. Nor do respondents support an argument that student-on-student harassment cannot rise to the level of "discrimination" for purposes of Title IX. Rather, at issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.

A

Petitioner urges that Title IX's plain language compels the conclusion that the statute is intended to bar recipients of federal funding from permitting this form of discrimination in their programs or activities. She emphasizes that the statute prohibits a student from being "*subjected to discrimination* under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a) (emphasis added). It is Title IX's "unmistakable focus on the benefited class," *Cannon* v. *University of Chicago*, 441 U. S. 677, 691 (1979), rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers.

Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages. See *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 283 (1998) ("In this case, . . . petitioners seek not just to establish a Title IX violation but to recover *damages* . . ."). This Court has indeed recognized an implied private right of action under Title IX, see *Cannon* v. *University of Chicago*, *supra*, and we have held that money damages are available in such suits, *Franklin* v.

Gwinnett County Public Schools, 503 U. S. 60 (1992). Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, see, *e. g., Gebser* v. *Lago Vista Independent School Dist., supra,* at 287 (Title IX); *Franklin* v. *Gwinnett County Public Schools, supra,* at 74–75, and n. 8 (Title IX); see also *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582, 598–599 (1983) (opinion of White, J.) (Title VI), private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 17 (1981). In interpreting language in spending legislation, we thus "insis[t] that Congress speak with a clear voice," recognizing that "[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." *Ibid.;* see also *id.,* at 24–25.

Invoking *Pennhurst,* respondents urge that Title IX provides no notice that recipients of federal educational funds could be liable in damages for harm arising from student-on-student harassment. Respondents contend, specifically, that the statute only proscribes misconduct by grant recipients, not third parties. Respondents argue, moreover, that it would be contrary to the very purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties, over whom recipients exercise little control. See also *Rowinsky* v. *Bryan Independent School Dist.,* 80 F. 3d, at 1013.

We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct. The recipient itself must "exclud[e] [per-

sons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under" its "program[s] or activit[ies]" in order to be liable under Title IX. The Government's enforcement power may only be exercised against the funding recipient, see § 1682, and we have not extended damages liability under Title IX to parties outside the scope of this power. See *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 467, n. 5 (1999) (rejecting suggestion "that the private right of action available under . . . § 1681(a) is potentially broader than the Government's enforcement authority"); cf. *Gebser* v. *Lago Vista Independent School Dist.*, *supra*, at 289 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice").

We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for *G. F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. In *Gebser*, we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher. In that case, a teacher had entered into a sexual relationship with an eighth-grade student, and the student sought damages under Title IX for the teacher's misconduct. We recognized that the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst*'s requirement that funding recipients have notice of their potential liability. 524 U. S., at 287–288. Invoking *Pennhurst*, *Guardians Assn.*, and *Franklin*, in *Gebser* we once again required "that 'the receiving entity of federal funds [have] notice that it will be liable for a mone-

tary award'" before subjecting it to damages liability. 524 U. S., at 287 (quoting *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 74). We also recognized, however, that this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute. *Id.*, at 74–75; see also *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, *supra*, at 597–598 (opinion of White, J.) (same with respect to Title VI). In particular, we concluded that *Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.

Accordingly, we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. 524 U. S., at 283. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. *Ibid.* Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge. *Id.*, at 290. Contrary to the dissent's suggestion, the misconduct of the teacher in *Gebser* was not "treated as the grant recipient's actions." *Post*, at 661 (opinion of KENNEDY, J.). Liability arose, rather, from "an official decision by the recipient not to remedy the violation." *Gebser* v. *Lago Vista Independent School Dist.*, *supra*, at 290. By employing the "deliberate indifference" theory already used to establish municipal liability under Rev. Stat. § 1979, 42 U. S. C. § 1983, see *Gebser* v. *Lago Vista Independent School Dist.*, *supra*, at 290–291 (citing *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397 (1997), and *Canton* v. *Harris*, 489 U. S. 378 (1989)), we concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively

"cause[d]" the discrimination, 524 U. S., at 291; see also *Canton* v. *Harris*, *supra*, at 385 (recognizing that a municipality will be liable under § 1983 only if "the municipality *itself* causes the constitutional violation at issue" (emphasis in original)). The high standard imposed in *Gebser* sought to eliminate any "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." 524 U. S., at 290–291.

Gebser thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination. Indeed, whether viewed as "discrimination" or "subject[ing]" students to discrimination, Title IX "[u]nquestionably . . . placed on [the Board] the duty not" to permit teacher-student harassment in its schools, *Franklin* v. *Gwinnett County Public Schools*, *supra*, at 75, and recipients violate Title IX's plain terms when they remain deliberately indifferent to this form of misconduct.

We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does. As an initial matter, in *Gebser* we expressly rejected the use of agency principles in the Title IX context, noting the textual differences between Title IX and Title VII. 524 U. S., at 283; cf. *Faragher* v. *Boca Raton*, 524 U. S. 775, 791–792 (1998) (invoking agency principles on ground that definition of "employer" in Title VII includes agents of employer); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 72 (1986) (same). Additionally, the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents. The Department of Education re-

quires recipients to monitor third parties for discrimination in specified circumstances and to refrain from particular forms of interaction with outside entities that are known to discriminate. See, *e. g.*, 34 CFR §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998).

The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. See Restatement (Second) of Torts § 320, and Comment *a* (1965). In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers. See, *e. g.*, *Rupp* v. *Bryant*, 417 So. 2d 658, 666–667 (Fla. 1982); *Brahatcek* v. *Millard School Dist.*, 202 Neb. 86, 99–100, 273 N. W. 2d 680, 688 (1979); *McLeod* v. *Grant County School Dist. No. 128*, 42 Wash. 2d 316, 320, 255 P. 2d 360, 362–363 (1953).

This is not to say that the identity of the harasser is irrelevant. On the contrary, both the "deliberate indifference" standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients. Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harass-

ment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it. Random House Dictionary of the English Language 1415 (1966) (defining "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE"). Moreover, because the harassment must occur "under" "the operations of" a funding recipient, see 20 U. S. C. § 1681(a); § 1687 (defining "program or activity"), the harassment must take place in a context subject to the school district's control, Webster's Third New International Dictionary, *supra*, at 2487 (defining "under" as "in or into a condition of subjection, regulation, or subordination"; "subject to the guidance and instruction of"); Random House Dictionary, *supra*, at 1543 (defining "under" as "subject to the authority, direction, or supervision of").

These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs. We agree with the dissent that these conditions are satisfied most easily and most obviously when the offender is an agent of the recipient. *Post*, at 661. We rejected the use of agency analysis in *Gebser*, however, and we disagree that the term "under" somehow imports an agency requirement into Title IX. See *post*, at 660–661. As noted above, the theory in *Gebser* was that the recipient was *directly* liable for its deliberate indifference to discrimination. See *supra*, at 642–643. Liability in that case did not arise because the "teacher's actions [were] treated" as those of the funding recipient, *post*, at 661; the district was directly liable for its

own failure to act. The terms "subjec[t]" and "under" impose limits, but nothing about these terms requires the use of agency principles.

Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G. F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place "under" an "operation" of the funding recipient. See *Doe* v. *University of Illinois*, 138 F. 3d, at 661 (finding liability where school fails to respond properly to "student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees"). In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser. We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655 (1995). On more than one occasion, this Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 507 (1969); see also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities"); 74 F. 3d, at 1193 ("The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace . . ."). The common law, too, recognizes the school's disciplinary authority. See Restatement (Second) of Torts § 152 (1965). We thus conclude that recipients of federal funding may be liable for "subject[ing]" their students

to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.

At the time of the events in question here, in fact, school attorneys and administrators were being told that student-on-student harassment could trigger liability under Title IX. In March 1993, even as the events alleged in petitioner's complaint were unfolding, the National School Boards Association issued a publication, for use by "school attorneys and administrators in understanding the law regarding sexual harassment of employees and students," which observed that districts could be liable under Title IX for their failure to respond to student-on-student harassment. See National School Boards Association Council of School Attorneys, Sexual Harassment in the Schools: Preventing and Defending Against Claims v, 45 (rev. ed.). Drawing on Equal Employment Opportunity Commission guidelines interpreting Title VII, the publication informed districts that, "if [a] school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a [T]itle IX claim." *Ibid.* The publication even correctly anticipated a form of *Gebser*'s actual notice requirement: "It is unlikely that courts will hold a school district liable for sexual harassment by students against students in the absence of actual knowledge or notice to district employees." Sexual Harassment in the Schools, *supra*, at 45. Although we do not rely on this publication as an "indicium of congressional notice," see *post*, at 671, we do find support for our reading of Title IX in the fact that school attorneys have rendered an analogous interpretation.

Likewise, although they were promulgated too late to contribute to the Board's notice of proscribed misconduct, the Department of Education's Office for Civil Rights (OCR) has recently adopted policy guidelines providing that student-on-student harassment falls within the scope of Title IX's proscriptions. See Department of Education, Office of Civil

Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039–12040 (1997) (OCR Title IX Guidelines); see also Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448, 11449 (1994).

We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages." See Brief for Respondents 16; see also 120 F. 3d, at 1402 (Tjoflat, J.) ("[A] school must immediately suspend or expel a student accused of sexual harassment"). Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. See *post,* at 686 (contemplating that victim could demand new desk assignment). In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators. *New Jersey* v. *T. L. O.*, *supra,* at 342–343, n. 9.

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. The dissent consistently mischaracterizes this standard to require funding recipients to "remedy" peer harassment, *post,* at 658, 662, 668, 683, and to "ensur[e] that . . . students conform their conduct to" certain rules, *post,* at 666. Title IX imposes no such requirements. On the contrary,

the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere "reasonableness" standard, as the dissent assumes. See *post*, at 679. In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not "clearly unreasonable" as a matter of law.

Like the dissent, see *post*, at 664–668, we acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority. To the extent that these restrictions arise from federal statutes, Congress can review these burdens with attention to the difficult position in which such legislation may place our Nation's schools. We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action. A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, see *post*, at 666–668, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.

While it remains to be seen whether petitioner can show that the Board's response to reports of G. F.'s misconduct was clearly unreasonable in light of the known circumstances, petitioner may be able to show that the Board "subject[ed]" LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G. F.'s in-school misconduct from LaShonda and other female students.

B

The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in the context of a private damages action. We have elsewhere concluded that sexual harassment is a

form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action. See *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S., at 281; *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 74–75. Having previously determined that "sexual harassment" is "discrimination" in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute. See *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 665–666 (1985) (rejecting claim of insufficient notice under *Pennhurst* where statute made clear that there were some conditions placed on receipt of federal funds, and noting that Congress need not "specifically identif[y] and proscrib[e]" each condition in the legislation). The statute's other prohibitions, moreover, help give content to the term "discrimination" in this context. Students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving Federal financial assistance." § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every

day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S., at 67.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 82 (1998), including, but not limited to, the ages of the harasser and the victim and the number of individuals involved, see OCR Title IX Guidelines 12041–12042. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. See, *e. g.*, Brief for National School Boards Association et al. as *Amici Curiae* 11 (describing "dizzying array of immature . . . behaviors by students"). Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students

subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX. It is not enough to show, as the dissent would read this opinion to provide, that a student has been "teased," *post,* at 678, or "called . . . offensive names," *post,* at 680. Comparisons to an "overweight child who skips gym class because the other children tease her about her size," the student who "refuses to wear glasses to avoid the taunts of 'four-eyes,' " and "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess," *post,* at 678, are inapposite and misleading. Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. *Post,* at 677. The dropoff in LaShonda's grades provides necessary evidence of a potential link between her education and G. F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G. F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.

Moreover, the provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would

have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a "widespread level" among students. *Post,* at 683.

The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.

C

Applying this standard to the facts at issue here, we conclude that the Eleventh Circuit erred in dismissing petitioner's complaint. Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G. F.'s misconduct to seek an audience with the school prin-

cipal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). See also *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, 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 Court has held that Congress' power "'to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.'" *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987) (quoting *United States* v. *Butler*, 297 U. S. 1, 66 (1936)). As a consequence, Congress can use its Spending Clause power to pursue objectives outside of "Article I's 'enumerated legislative fields'" by attaching conditions to the grant of federal funds. 483 U. S., at 207. So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set pol-

icy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.

A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). As the majority acknowledges, "legislation enacted pursuant to the spending power is much in the nature of a contract," and the legitimacy of Congress' exercise of its power to condition funding on state compliance with congressional conditions "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.;* see *ante*, at 640. "'There can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Ibid.* (quoting *Pennhurst*, 451 U. S., at 17).

Our insistence that "Congress speak with a clear voice" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," *ibid.*, is not based upon some abstract notion of contractual fairness. Rather, it is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power. Cf. *Dole*, *supra*, at 217 (O'CONNOR, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed'" (quoting *Butler*, *supra*, at 78)). While the majority purports to give effect to these principles, it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence.

Title IX provides:

> "No person in the United States shall, on the basis of sex, be [1] excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

To read the provision in full is to understand what is most striking about its application in this case: Title IX does not by its terms create any private cause of action whatsoever, much less define the circumstances in which money damages are available. The only private cause of action under Title IX is judicially implied. See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

The Court has encountered great difficulty in establishing standards for deciding when to imply a private cause of action under a federal statute which is silent on the subject. We try to conform the judicial judgment to the bounds of likely congressional purpose but, as we observed in *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274 (1998), defining the scope of the private cause of action in general, and the damages remedy in particular, "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." *Id.*, at 284.

When the statute at issue is a Spending Clause statute, this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds. Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State,

when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.

Today the Court fails to heed, or even to acknowledge, these limitations on its authority. The remedial scheme the majority creates today is neither sensible nor faithful to Spending Clause principles. In order to make its case for school liability for peer sexual harassment, the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students. The majority must also demonstrate that the statute gives schools clear notice that one child's harassment of another constitutes "discrimination" on the basis of sex within the meaning of Title IX, and that—as applied to individual cases—the standard for liability will enable the grant recipient to distinguish inappropriate childish behavior from actionable gender discrimination. The majority does not carry these burdens.

Instead, the majority finds statutory clarity where there is none and discovers indicia of congressional notice to the States in the most unusual of places. It treats the issue as one of routine statutory construction alone, and it errs even in this regard. In the end, the majority not only imposes on States liability that was unexpected and unknown, but the contours of which are, as yet, unknowable. The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion. The potential costs to our schools of today's decision are difficult to estimate, but they are so great that it is most unlikely Congress intended to inflict them.

The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Ed-

ucation sees fit to impose upon them. The Nation's schoolchildren will learn their first lessons about federalism in classrooms where the Federal Government is the ever-present regulator. The Federal Government will have insinuated itself not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs. This federal control of the discipline of our Nation's schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools. Because Title IX did not give States unambiguous notice that accepting federal funds meant ceding to the Federal Government power over the day-to-day disciplinary decisions of schools, I dissent.

I

I turn to the first difficulty with the majority's decision. Schools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students. As the majority acknowledges, Title IX prohibits only misconduct by grant recipients, not misconduct by third parties. *Ante,* at 640–641 ("The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX"). The majority argues, nevertheless, that a school "subjects" its students to discrimination when it knows of peer harassment and fails to respond appropriately.

The mere word "subjected" cannot bear the weight of the majority's argument. As we recognized in *Gebser,* the primary purpose of Title IX is "to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." 524 U. S., at 292. We stressed in *Gebser* that Title IX prevents discrimination by the grant recipient, whether through the acts of its principals or the acts of its agents. See *id.,* at 286 (explaining that Title IX and Title VI

"operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds"). "[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.*, at 287. The majority does not even attempt to argue that the school's failure to respond to discriminatory acts by students is discrimination by the school itself.

A

In any event, a plaintiff cannot establish a Title IX violation merely by showing that she has been "subjected to discrimination." Rather, a violation of Title IX occurs only if she is "subjected to discrimination under any education program or activity," 20 U. S. C. § 1681(a), where "program or activity" is defined as "all of the operations of" a grant recipient, § 1687.

Under the most natural reading of this provision, discrimination violates Title IX only if it is authorized by, or in accordance with, the actions, activities, or policies of the grant recipient. See Webster's Third New International Dictionary 2487 (1981) (defining "under" as "required by: in accordance with: bound by"); American Heritage Dictionary 1395 (New College ed. 1981) (defining "under" as "[w]ith the authorization of; attested by; by virtue of"); Random House Dictionary of the English Language 2059 (2d ed. 1987) (defining "under" as "authorized, warranted, or attested by" or "in accordance with"); see also 43 Words and Phrases 149–152 (1969) (citing cases defining "under" as, *inter alia*, "'in accordance with' and 'in conformity with'"; "indicating subjection, guidance or control, and meaning 'by authority of'"; "'by,' 'by reason of,' or 'by means of'"; and "'by virtue of,' which is defined . . . as meaning 'by or through the authority of'"). This reading reflects the common legal usage of the

term "under" to mean pursuant to, in accordance with, or as authorized or provided by. See, *e. g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452, 469 (1991) ("Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so"); *ante*, at 632 ("Among petitioner's claims was a claim for monetary and injunctive relief under Title IX . . .").

It is not enough, then, that the alleged discrimination occur in a "context subject to the school district's control." *Ante*, at 645. The discrimination must actually be "controlled by"—that is, be authorized by, pursuant to, or in accordance with, school policy or actions. Compare *ante*, at 645 (defining "under" as "*in* or into *a condition of* subjection, regulation, or subordination" (emphasis added)), with *ibid.* (defining "under" as "*subject to* the guidance and instruction of" (emphasis added)).

This reading is also consistent with the fact that the discrimination must be "under" the "operations" of the grant recipient. The term "operations" connotes active and affirmative participation by the grant recipient, not merely inaction or failure to respond. See Black's Law Dictionary 1092 (6th ed. 1990) (defining "operation" as an "[e]xertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity").

Teacher sexual harassment of students is "under" the school's program or activity in certain circumstances, but student harassment is not. Our decision in *Gebser* recognizes that a grant recipient acts through its agents and thus, under certain limited circumstances, even tortious acts by teachers may be attributable to the school. We noted in *Gebser* that, in contrast to Title VII, which defines "employer" to include "any agent"—Title IX "contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles." 524 U. S., at 283. As a result, we declined to incor-

porate principles of agency liability, such as a strict application of vicarious liability, that would conflict with the Spending Clause's notice requirement and Title IX's express administrative enforcement scheme.

Contrary to the majority's assertion, *ante,* at 643, however, we did not abandon agency principles altogether. Rather, we sought in *Gebser* to identify those employee actions which could fairly be attributed to the grant recipient by superimposing additional Spending Clause notice requirements on traditional agency principles. 524 U. S., at 288 ("Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice"). We concluded that, because of the Spending Clause overlay, a teacher's discrimination is attributable to the school only when the school has actual notice of that harassment and is "deliberately indifferent." The agency relation between the school and the teacher is thus a necessary, but not sufficient, condition of school liability. Where the heightened requirements for attribution are met, the teacher's actions are treated as the grant recipient's actions. In those circumstances, then, the teacher sexual harassment is "under" the operations of the school.

I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and, indeed, the majority does not argue that the school acts through its students. See *ante,* at 641 ("We disagree with respondents' assertion . . . that petitioner seeks to hold the Board liable for *G. F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools"). Discrimination by one student against another therefore cannot be "under" the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's "under a program

or activity" limitation on school liability. At the very least, my reading undermines the majority's implicit claim that Title IX imposes an unambiguous duty on schools to remedy peer sexual harassment.

B

1

Quite aside from its disregard for the "under the program" limitation of Title IX, the majority's reading is flawed in other respects. The majority contends that a school's deliberate indifference to known student harassment "subjects" students to harassment—that is, "cause[s] [students] to undergo" harassment. *Ante*, at 645. The majority recognizes, however, that there must be some limitation on the third-party conduct that the school can fairly be said to cause. In search of a principle, the majority asserts, without much elaboration, that one causes discrimination when one has some "degree of control" over the discrimination and fails to remedy it. *Ante*, at 644.

To state the majority's test is to understand that it is little more than an exercise in arbitrary line-drawing. The majority does not explain how we are to determine what degree of control is sufficient—or, more to the point, how the States were on clear notice that the Court would draw the line to encompass students.

Agency principles usually mark the outer limits of an entity's liability for the actions of an individual over whom it exercises some control. Cf. *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998) (applying agency principles to delimit Title VII employer liability); *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998) (same). The Court, for example, has not recognized liability for the actions of nonagents under Title VII, which contains an express private right of action and is not Spending Clause legislation. The majority nonetheless rejects out-of-hand an agency limitation on Title IX liability based on its cramped reading of *Gebser*. As

noted above, the *Gebser* Court rejected the wholesale importation of federal common-law agency principles into Title IX to expand liability beyond that which the statute clearly prohibited; it did not, as the majority would have it, reject the proposition that school liability is limited by agency principles. Indeed, to suppose that Congress would have rejected well-established principles of agency law in favor of the majority's vague control principle turns *Gebser* on its head. *Gebser* contemplated that Title IX liability would be less expansive than Title VII liability, not more so. See *Gebser*, *supra*, at 286–287.

One would think that the majority would at least limit its control principle by reference to the long-established practice of the Department of Education (DOE). For the first 25 years after the passage of Title IX—until 1997—the DOE's regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions. See 34 CFR §106.51(a)(3) (1998) ("A [grant] recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient"). It is perhaps reasonable to suppose that grant recipients were on notice that they could not hire third parties to do for them what they could not do themselves. For example, it might be reasonable to find that a school was on notice that it could not circumvent Title IX's core prohibitions by, for example, delegating its admissions decisions to an outside screening committee it knew would discriminate on the basis of gender.

Given the state of gender discrimination law at the time Title IX was passed, however, there is no basis to think that Congress contemplated liability for a school's failure to remedy discriminatory acts by students or that the States would

believe the statute imposed on them a clear obligation to do so. When Title IX was enacted in 1972, the concept of "sexual harassment" as gender discrimination had not been recognized or considered by the courts. See generally C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 59–72 (1979). The types of discrimination that were recognized—discriminatory admissions standards, denial of access to programs or resources, hiring, etc.—could not be engaged in by students. See, *e. g.*, 20 U. S. C. § 1681(a)(2) (referencing application of Title IX prohibitions to school admissions).

2

The majority nonetheless appears to see no need to justify drawing the "enough control" line to encompass students. In truth, however, a school's control over its students is much more complicated and limited than the majority acknowledges. A public school does not control its students in the way it controls its teachers or those with whom it contracts. Most public schools do not screen or select students, and their power to discipline students is far from unfettered.

Public schools are generally obligated by law to educate all students who live within defined geographic boundaries. Indeed, the Constitution of almost every State in the country guarantees the State's students a free primary and secondary public education. See, *e. g.*, Cal. Const., Art. IX, § 5; Colo. Const., Art. IX, § 2; Ga. Const., Art. VIII, § 1, ¶ 1; Ind. Const., Art. VIII, § 1; Md. Const., Art. VIII, § 1; Mo. Const., Art. IX, § 1(a); Neb. Const., Art. VII, § 1; N. J. Const., Art. VIII, § 4, ¶ 1; N. M. Const., Art. XII, § 1; N. Y. Const., Art. XI, § 1; N. D. Const., Art. VIII, §§ 1 and 2; Okla. Const., Art. XIII, § 1; S. C. Const., Art. XI, § 3; Tex. Const., Art. VII, § 1; Va. Const., Art. VIII, § 1; Wash. Const., Art. IX, §§ 1 and 2; Wyo. Const., Art. VII, §§ 1 and 9. In at least some States, moreover, there is a continuing duty on schools to educate even students who are suspended or expelled. See, *e. g.*,

Phillip Leon M. v. *Board of Education*, 199 W. Va. 400, 484 S. E. 2d 909 (1996) (holding that the education clause of the West Virginia Constitution confers on students a fundamental right to an education and requires that a county school board provide alternative educational programs, such as an alternative school, to students who are expelled or suspended for an extended period for bringing guns to school). Schools that remove a harasser from the classroom and then attempt to fulfill their continuing-education obligation by placing the harasser in any kind of group setting, rather than by hiring expensive tutors for each student, will find themselves at continuing risk of Title IX suits brought by the other students in the alternative education program.

In addition, federal law imposes constraints on school disciplinary actions. This Court has held, for example, that due process requires, "[a]t the very minimum," that a student facing suspension "be given some kind of notice and afforded some kind of hearing." *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975).

The Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.* (1994 ed., Supp. III), moreover, places strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline. See, *e. g.*, § 1415(f)(1) (parents entitled to hearing when school proposes to change disabled student's educational placement); § 1415(k)(1)(A) (school authorities can only "order a change in the placement of a child with a disability . . . to an appropriate interim alternative educational setting, another setting, or suspension" for up to "10 school days" unless student's offense involved a weapon or illegal drugs); § 1415(k)(8) ("[A] child who has not been determined to be eligible for special education . . . and who has engaged in behavior that violated any [school rule] may assert any of the protections" of the subchapter if the school "had knowledge . . . that the child was a child with a disabil-

ity before the behavior that precipitated the disciplinary action occurred"); §1415(k)(8)(B)(ii) (school "deemed to have knowledge that a child is a child with a disability if . . . the behavior or performance of the child demonstrates the need for such [special education and related] services"). "Disability," as defined in the IDEA, includes "serious emotional disturbance," §1401(3)(A)(i), which the DOE, in turn, has defined as a "condition exhibiting . . . over a long period of time and to a marked degree that adversely affects a child's educational performance," an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers," or "[i]nappropriate types of behavior or feelings under normal circumstances." 34 CFR §300.7(b)(9) (1998). If, as the majority would have us believe, the behavior that constitutes actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of the IDEA. When imposing disciplinary sanction on a student harasser who might assert a colorable IDEA claim, the school must navigate a complex web of statutory provisions and DOE regulations that significantly limit its discretion.

The practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms may be even more significant than the legal obstacles. School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred adult employees. The limited resources of our schools must be conserved for basic educational services. Some schools lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds.

Perhaps even more startling than its broad assumptions about school control over primary and secondary school stu-

dents is the majority's failure to grapple in any meaningful way with the distinction between elementary and secondary schools, on the one hand, and universities on the other. The majority bolsters its argument that schools can control their students' actions by quoting our decision in *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655 (1995), for the proposition that "'the nature of [the State's] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" *Ante*, at 646. Yet the majority's holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students.

A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. See, *e. g.*, *Dambrot* v. *Central Mich. Univ.*, 55 F. 3d 1177 (CA6 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc.* v. *Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (ED Wis. 1991) (striking down university speech code that prohibited, *inter alia*, "'discriminatory comments'" directed at an individual that "'intentionally . . . demean'" the "'sex . . . of the individual'" and "'[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'"); *Doe* v. *University of Mich.*, 721 F. Supp. 852 (ED Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity* v. *George Mason Univ.*, 993 F. 2d 386 (CA4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones).

The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment. Despite the fact that the majority relies on the assumption that schools exercise a great deal of control over their students to justify creating the private cause of action in the first instance, it does not recognize the obvious limits on a university's ability to control its students as a reason to doubt the propriety of a private cause of action for peer harassment. It simply uses them as a factor in determining whether the university's response was reasonable. See *ante*, at 649.

3

The majority's presentation of its control test illustrates its own discomfort with the rule it has devised. Rather than beginning with the language of Title IX itself, the majority begins with our decision in *Gebser* and appears to discover there a sweeping legal duty—divorced from agency principles—for schools to remedy third-party discrimination against students. The majority then finds that the DOE's Title IX regulations and state common law gave States the requisite notice that they would be liable in damages for failure to fulfill this duty. Only then does the majority turn to the language of Title IX itself—not, it appears, to find a duty or clear notice to the States, for that the majority assumes has already been established, but rather to suggest a limit on the breathtaking scope of the liability the majority thinks is so clear under the statute. See *ante*, at 645 ("These factors [("subjects" and "under")] combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs").

Our decision in *Gebser* did not, of course, recognize some ill-defined, freestanding legal duty on schools to remedy discrimination by third parties. In particular, *Gebser* gave schools no notice whatsoever that they might be liable on the

majority's novel theory that a school "subjects" a student to third-party discrimination if it exercises some measure of control over the third party. We quoted the "subjected to discrimination" language only once in *Gebser*, when we quoted the text of Title IX in full, and we did not use the word "control." Instead, we affirmed that Title IX prohibits discrimination by the grant recipient. See *Gebser*, 524 U. S., at 286; *id.*, at 291–292; *supra*, at 658–659.

Neither the DOE's Title IX regulations nor state tort law, moreover, could or did provide States the notice required by our Spending Clause principles. The majority contends that the DOE's Title IX regulations have "long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents." *Ante*, at 643. Even assuming that DOE regulations could give schools the requisite notice, they did not do so. Not one of the regulations the majority cites suggests that schools may be held liable in money damages for failure to respond to third-party discrimination.

In addition, as discussed above, the DOE regulations provide no support for the proposition that schools were on notice that students were among those "nonagents" whose actions the schools were bound to remedy. Most of the regulations cited by the majority merely forbid grant recipients to give affirmative aid to third parties who discriminate. See 34 CFR § 106.31(b)(6) (1998) (A grant "recipient shall not, on the basis of sex," "[a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees"); see also § 106.37(a)(2) (A grant recipient shall not, "[t]hrough solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex"); § 106.38(a) (A grant recip-

ient "which assists any agency, organization or person in making employment available to any of its students [s]hall assure itself that such employment is made available without discrimination on the basis of sex [and] [s]hall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices"). The others forbid grant recipients to delegate the provision of student (or employee) benefits and services to third parties who engage in gender discrimination in administering what is, in effect, the school's program. See § 106.51(a)(3) ("A [grant] recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient"); see also § 106.31(d) (A grant recipient "which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments" must take steps to assure itself that the education program or activity is not discriminating on the basis of gender and "shall not facilitate, require, permit, or consider such participation" if the program is discriminating). None of the regulations suggests a generalized duty to remedy discrimination by third parties over whom the school may arguably exercise some control.

Requiring a school to take affirmative steps to remedy harassment by its students imposes a much heavier burden on schools than prohibiting affirmative aid or effective delegation of school functions to an entity that discriminates. Notice of these latter responsibilities, then, can hardly be said

to encompass clear notice of the former. In addition, each of the DOE regulations is predicated on a grant recipient's choice to give affirmative aid to, or to enter into voluntary association with, a discriminating entity. The recipient, moreover, as the regulations envision, is free to terminate that aid or association (or could have so provided through contract). The relationships regulated by the DOE are thus quite different from school-student relationships. The differences confirm that the regulations did not provide adequate notice of a duty to remedy student discrimination.

The majority also concludes that state tort law provided States the requisite notice. It is a non sequitur to suppose, however, that a State knows it is liable under a federal statute simply because the underlying conduct might form the basis for a state tort action. In any event, it is far from clear that Georgia law gave the Monroe County Board of Education notice that it would be liable even under state law for failure to respond reasonably to known student harassment. See, *e. g.*, *Holbrook* v. *Executive Conference Center, Inc.*, 219 Ga. App. 104, 106, 464 S. E. 2d 398, 401 (1996) (holding that school districts are entitled to sovereign immunity for claims based on their supervision of students unless the school displayed "wilfulness, malice, or corruption").

The majority's final observation about notice confirms just how far it has strayed from the basic Spending Clause principle that Congress must, through the clear terms of the statute, give States notice as to what the statute requires. The majority contends that schools were on notice because they "were being told" by a 1993 National School Boards Association publication that peer sexual harassment might trigger Title IX liability. *Ante,* at 647. By treating a publication designed to help school lawyers prevent and guard against school liability as a reliable indicium of congressional notice, the majority has transformed a litigation manual—which, like all such manuals, errs on the side of caution in describing potential liability—into a self-fulfilling prophecy. It seems

schools cannot even discuss potential liabilities amongst themselves without somehow stipulating that Congress had some specified intent.

II

Our decision in *Gebser* makes clear that the Spending Clause clear-notice rule requires both that the recipients be on general notice of the kind of conduct the statute prohibits, and—at least when money damages are sought—that they be on notice that illegal conduct is occurring in a given situation. See, *e. g.*, *Gebser*, 524 U. S., at 287–288 (rejecting vicarious liability because it would hold schools liable even when they did not know that prohibited discrimination was occurring).

Title IX, however, gives schools neither notice that the conduct the majority labels peer "sexual harassment" is gender discrimination within the meaning of the Act nor any guidance in distinguishing in individual cases between actionable discrimination and the immature behavior of children and adolescents. The majority thus imposes on schools potentially crushing financial liability for student conduct that is not prohibited in clear terms by Title IX and that cannot, even after today's opinion, be identified by either schools or courts with any precision.

The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment. See, *e. g.*, 1 E. Farnsworth, Contracts § 4.4 (2d ed. 1998) (discussing minor's ability to disaffirm a contract into which he has entered). It should surprise no one, then, that the schools that are the primary locus of most children's social development are rife with inappropriate behavior by children who are just learning to interact with their peers. The *amici* on the front lines of our schools describe the situation best:

> "Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to es-

> tablish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend." Brief for National School Boards Association et al. as *Amici Curiae* 10–11 (hereinafter Brief for School *Amici*).

No one contests that much of this "dizzying array of immature or uncontrollable behaviors by students," *ibid.*, is inappropriate, even "objectively offensive" at times, *ante*, at 650, and that parents and schools have a moral and ethical responsibility to help students learn to interact with their peers in an appropriate manner. It is doubtless the case, moreover, that much of this inappropriate behavior is directed toward members of the opposite sex, as children in the throes of adolescence struggle to express their emerging sexual identities.

It is a far different question, however, whether it is either proper or useful to label this immature, childish behavior gender discrimination. Nothing in Title IX suggests that Congress even contemplated this question, much less answered it in the affirmative in unambiguous terms.

The majority, nevertheless, has no problem labeling the conduct of fifth graders "sexual harassment" and "gender discrimination." Indeed, the majority sidesteps the difficult issue entirely, first by asserting without analysis that respondents do not "support an argument that student-on-student harassment cannot rise to the level of discrimination' for purposes of Title IX," *ante*, at 639, and then by citing *Gebser* and *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), for the proposition that "[w]e have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s no-

tice requirement and serve as a basis for a damages action," *ante,* at 649–650.

Contrary to the majority's assertion, however, respondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered "sexual harassment," much less gender discrimination actionable under Title IX:

> "[A]t the time Petitioner filed her complaint, no court, including this Court had recognized the concept of sexual harassment in any context other than the employment context. Nor had any Court extended the concept of sexual harassment to the misconduct of emotionally and socially immature children. The type of conduct alleged by Petitioner in her complaint is not new. However, in past years it was properly identified as misconduct which was addressed within the context of student discipline. The Petitioner now asks this Court to create out of whole cloth a cause of action by labeling childish misconduct as 'sexual harassment,' to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct, something this Court has consistently refused to do." Brief for Respondents 12–13 (citation omitted).

See also Brief for Independent Women's Forum as *Amicus Curiae* 19 (questioning whether "at the primary and secondary school level" it is proper to label "sexual misconduct by students" as "sexual harassment" because there is no power relationship between the harasser and the victim).

Likewise, the majority's assertion that *Gebser* and *Franklin* settled the question is little more than *ipse dixit. Gebser* and *Franklin* themselves did nothing more than cite *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57, 64 (1986), a Title VII case, for the proposition that "when a su-

pervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." See *Franklin*, *supra*, at 74; *Gebser*, 524 U. S., at 282–283. To treat that proposition as establishing that the student conduct at issue here is gender discrimination is to erase, in one stroke, all differences between children and adults, peers and teachers, schools and workplaces.

In reality, there is no established body of federal or state law on which courts may draw in defining the student conduct that qualifies as Title IX gender discrimination. Analogies to Title VII hostile environment harassment are inapposite, because schools are not workplaces and children are not adults. The norms of the adult workplace that have defined hostile environment sexual harassment, see, *e. g.*, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998), are not easily translated to peer relationships in schools, where teenage romantic relationships and dating are a part of everyday life. Analogies to Title IX teacher sexual harassment of students are similarly flawed. A teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.

The majority admits that, under its approach, "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships,' including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." *Ante*, at 651 (citations omitted). The majority does not explain how a school is supposed to discern from this mishmash of factors what is actionable discrimination. Its multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation.

The difficulties schools will encounter in identifying peer sexual harassment are already evident in teachers' manuals

designed to give guidance on the subject. For example, one teachers' manual on peer sexual harassment suggests that sexual harassment in kindergarten through third grade includes a boy being "put down" on the playground "because he wants to play house with the girls" or a girl being "put down because she shoots baskets better than the boys." Minnesota Dept. of Education, Girls and Boys Getting Along: Teaching Sexual Harassment Prevention in the Elementary Classroom 65 (1993). Yet another manual suggests that one student saying to another, "You look nice," could be sexual harassment, depending on the "tone of voice," how the student looks at the other, and "who else is around." N. Stein & L. Sjostrom, Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (Grades 6 through 12), p. 14 (1994). Blowing a kiss is also suspect. *Ibid.* This confusion will likely be compounded once the sexual harassment label is invested with the force of federal law, backed up by private damages suits.

The only guidance the majority gives schools in distinguishing between the "simple acts of teasing and name-calling among school children," said not to be a basis for suit even when they "target differences in gender," *ante*, at 652, and actionable peer sexual harassment is, in reality, no guidance at all. The majority proclaims that "in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Ibid.* The majority does not even purport to explain, however, what constitutes an actionable denial of "equal access to education." Is equal access denied when a girl who tires of being chased by the boys at recess refuses to go outside? When she cannot concentrate during class because she is worried about the recess activities? When she pretends to be sick one day so she can stay home from school? It appears the majority is content to let juries decide.

The majority's reference to a "systemic effect," *ante*, at 653, does nothing to clarify the content of its standard. The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim. That is a small concession indeed.

The only real clue the majority gives schools about the dividing line between actionable harassment that denies a victim equal access to education and mere inappropriate teasing is a profoundly unsettling one: On the facts of this case, petitioner has stated a claim because she alleged, in the majority's words, "that the harassment had a concrete, negative effect on her daughter's ability to receive an education." *Ante*, at 654. In petitioner's words, the effects that might have been visible to the school were that her daughter's grades "dropped" and her "ability to concentrate on her school work [was] affected." App. to Pet. for Cert. 97a. Almost all adolescents experience these problems at one time or another as they mature.

III

The majority's inability to provide any workable definition of actionable peer harassment simply underscores the myriad ways in which an opinion that purports to be narrow is, in fact, so broad that it will support untold numbers of lawyers who will prove adept at presenting cases that will withstand the defendant school districts' pretrial motions. Each of the barriers to runaway litigation the majority offers us crumbles under the weight of even casual scrutiny.

For example, the majority establishes what sounds like a relatively high threshold for liability—"denial of equal access" to education—and, almost in the same breath, makes clear that alleging a decline in grades is enough to survive Federal Rule of Civil Procedure 12(b)(6) and, it follows, to state a winning claim. The majority seems oblivious to the

fact that almost every child, at some point, has trouble in school because he or she is being teased by his or her peers. The girl who wants to skip recess because she is teased by the boys is no different from the overweight child who skips gym class because the other children tease her about her size in the locker room; or the child who risks flunking out because he refuses to wear glasses to avoid the taunts of "four-eyes"; or the child who refuses to go to school because the school bully calls him a "scaredy-cat" at recess. Most children respond to teasing in ways that detract from their ability to learn. The majority's test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.

The string of adjectives the majority attaches to the word "harassment"—"severe, pervasive, and objectively offensive"—likewise fails to narrow the class of conduct that can trigger liability, since the touchstone for determining whether there is Title IX liability is the effect on the child's ability to get an education. *Ante,* at 650. Indeed, the Court's reliance on the impact on the child's educational experience suggests that the "objective offensiveness" of a comment is to be judged by reference to a reasonable child at whom the comments were aimed. Not only is that standard likely to be quite expansive, it also gives schools—and juries—little guidance, requiring them to attempt to gauge the sensitivities of, for instance, the average seven-year-old.

The majority assures us that its decision will not interfere with school discipline and instructs that, "as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Ante,* at 648. The obvious reason for the majority's expressed reluctance to allow courts and litigants to second-guess school disciplinary decisions is that school officials are usually in the best position to judge the seriousness of alleged harassment and to devise an appropriate response. The problem is that the majority's test, in fact, invites courts

and juries to second-guess school administrators in every case, to judge in each instance whether the school's response was "clearly unreasonable." A reasonableness standard, regardless of the modifier, transforms every disciplinary decision into a jury question. Cf. *Doe* v. *University of Illinois*, 138 F. 3d 653, 655 (CA7 1998) (holding that college student had stated a Title IX claim for peer sexual harassment even though school officials had suspended two male students for 10 days and transferred another out of her biology class).

Another professed limitation the majority relies upon is that the recipient will be liable only where the acts of student harassment are "known." See, *e. g.*, *ante*, at 644, 647. The majority's enunciation of the standard begs the obvious question: known to whom? Yet the majority says not one word about the type of school employee who must know about the harassment before it is actionable.

The majority's silence is telling. The deliberate indifference liability we recognized in *Gebser* was predicated on notice to "an official of the recipient entity with authority to take corrective action to end the discrimination." 524 U. S., at 290. The majority gives no indication that it believes the standard to be any different in this context and—given its extensive reliance on the *Gebser* standard throughout the opinion—appears to adopt the *Gebser* notice standard by implication. At least the courts adjudicating Title IX peer harassment claims are likely to so conclude.

By choosing not to adopt the standard in explicit terms, the majority avoids having to confront the bizarre implications of its decision. In the context of teacher harassment, the *Gebser* notice standard imposes some limit on school liability. Where peer harassment is the discrimination, however, it imposes no limitation at all. In most cases of student misbehavior, it is the teacher who has authority, at least in the first instance, to punish the student and take other measures to remedy the harassment. The anomalous result will be that, while a school district cannot be held liable for

a teacher's sexual harassment of a student without notice to the school board (or at least to the principal), the district can be held liable for a teacher's failure to remedy peer harassment. The threshold for school liability, then, appears to be lower when the harasser is a student than when the harasser is a teacher who is an agent of the school. The absurdity of this result confirms that it was neither contemplated by Congress nor anticipated by the States.

The majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins. The elements of the Title IX claim created by the majority will be easy not only to allege but also to prove. A female plaintiff who pleads only that a boy called her offensive names, that she told a teacher, that the teacher's response was unreasonable, and that her school performance suffered as a result, appears to state a successful claim.

There will be no shortage of plaintiffs to bring such complaints. Our schools are charged each day with educating millions of children. Of those millions of students, a large percentage will, at some point during their school careers, experience something they consider sexual harassment. A 1993 study by the American Association of University Women Educational Foundation, for instance, found that "fully 4 out of 5 students (81%) report that they have been the target of some form of sexual harassment during their school lives." Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools 7 (1993). The number of potential lawsuits against our schools is staggering.

The cost of defending against peer sexual harassment suits alone could overwhelm many school districts, particularly since the majority's liability standards will allow almost any plaintiff to get to summary judgment, if not to a jury. In addition, there are no damages caps on the judicially implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school dis-

tricts. Petitioner, for example, seeks damages of $500,000 in this case. App. to Pet. for Cert. 101a. Respondent school district received approximately $679,000 in federal aid in 1992–1993. Brief for School *Amici* 25, n. 20. The school district sued in *Gebser* received only $120,000 in federal funds a year. 524 U. S., 289–290. Indeed, the entire 1992–1993 budget of that district was only $1.6 million. See Tr. of Oral Arg. in No. 96–1866, p. 34.

The limitless liability confronting our schools under the implied Title IX cause of action puts schools in a far worse position than businesses; when Congress established the express cause of action for money damages under Title VII, it prescribed damages caps. See *Gebser*, *supra*, at 286 ("It was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer. See 42 U. S. C. § 1981a(b)(3). Adopting petitioner's position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available"). In addition, in contrast to Title VII, Title IX makes no provision for agency investigation and conciliation of complaints (prior to the filing of a case in federal court) that could weed out frivolous suits or settle meritorious ones at minimal cost.

The prospect of unlimited Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment. It would appear to be no coincidence that, not long after the DOE issued its proposed policy guidance warning that schools could be liable for peer sexual harassment in the fall of 1996, see 61 Fed. Reg. 42728, a North Carolina school suspended a 6-year-old boy who kissed a female classmate on the cheek for sexual harassment, on the

theory that "[u]nwelcome is unwelcome at any age." Los Angeles Times, Sept. 25, 1996, p. A11. A week later, a New York school suspended a second grader who kissed a classmate and ripped a button off her skirt. Buffalo News, Oct. 2, 1996, p. A16. The second grader said that he got the idea from his favorite book "Corduroy," about a bear with a missing button. *Ibid.* School administrators said only, "We were given guidelines as to why we suspend children. We follow the guidelines." *Ibid.*

At the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights. See *supra*, at 667. Indeed, under the majority's control principle, schools presumably will be responsible for remedying conduct that occurs even in student dormitory rooms. As a result, schools may well be forced to apply workplace norms in the most private of domains.

Even schools that resist overzealous enforcement may find that the most careful and reasoned response to a sexual harassment complaint nonetheless provokes litigation. Speaking with the voice of experience, the school *amici* remind us, "[h]istory shows that, no matter what a school official chooses to do, someone will be unhappy. Student offenders almost always view their punishment as too strict, and student complainants almost always view an offender's punishment as too lax." Brief for School *Amici* 12 (footnotes omitted).

A school faced with a peer sexual harassment complaint in the wake of the majority's decision may well be beset with litigation from every side. One student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process. Another student's demand for a harassment-free classroom will conflict with the alleged harasser's claim to a mainstream placement under the IDEA or with his state constitutional right to a continuing, free public education. On college campuses, and

even in secondary schools, a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment. In each of these situations, the school faces the risk of suit, and maybe even multiple suits, regardless of its response. See *Doe* v. *University of Illinois*, 138 F. 3d, at 679 (Posner, C. J., dissenting from denial of rehearing en banc) ("Liability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measure[s] would be to expose the school to a suit by the victim of the alleged harassment").

The majority's holding in this case appears to be driven by the image of the school administration sitting idle every day while male students commandeer a school's athletic field or computer lab and prevent female students from using it through physical threats. See *ante,* at 650–651. Title IX might provide a remedy in such a situation, however, without resort to the majority's unprecedented theory of school liability for student harassment. If the school usually disciplines students for threatening each other and prevents them from blocking others' access to school facilities, then the school's failure to enforce its rules when the boys target the girls on a widespread level, day after day, may support an inference that the school's decision not to respond is itself based on gender. That pattern of discriminatory response could form the basis of a Title IX action.

(Contrary to the majority's assertion, see *ante,* at 653, I do not suggest that mere indifference to gender-based mistreatment—even if widespread—is enough to trigger Title IX liability. I suggest only that a clear pattern of discriminatory enforcement of school rules could raise an inference that the school itself is discriminating. Recognizing that the school itself might discriminate based on gender in the en-

forcement of its rules is a far cry from recognizing Title IX liability based on the majority's expansive theory that a school "subjects" its students to third-party discrimination when it has some control over the harasser and fails to take corrective action.)

Even more important, in most egregious cases the student will have state-law remedies available to her. The student will often have recourse against the offending student (or his parents) under state tort law. In some cases, like this one, the perpetrator may also be subject to criminal sanctions. And, as the majority notes, the student may, in some circumstances, have recourse against the school under state law. *Ante*, at 644.

Disregarding these state-law remedies for student misbehavior and the incentives that our schools already have to provide the best possible education to all of their students, the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code. See Brief for Independent Women's Forum as *Amicus Curiae* 2 (urging the Court to avoid that result). I fail to see how federal courts will administer school discipline better than the principals and teachers to whom the public has entrusted that task or how the majority's holding will help the vast majority of students, whose educational opportunities will be diminished by the diversion of school funds to litigation. The private cause of action the Court creates will justify a corps of federal administrators in writing regulations on student harassment. It will also embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response.

In the final analysis, this case is about federalism. Yet the majority's decision today says not one word about the federal balance. Preserving our federal system is a legitimate end in itself. It is, too, the means to other ends. It ensures that essential choices can be made by a government

more proximate to the people than the vast apparatus of federal power. Defining the appropriate role of schools in teaching and supervising children who are beginning to explore their own sexuality and learning how to express it to others is one of the most complex and sensitive issues our schools face. Such decisions are best made by parents and by the teachers and school administrators who can counsel with them. The delicacy and immense significance of teaching children about sexuality should cause the Court to act with great restraint before it displaces state and local governments.

Heedless of these considerations, the Court rushes onward, finding that the cause of action it creates is necessary to effect the congressional design. It is not. Nothing in Title IX suggests that Congress intended or contemplated the result the Court reaches today, much less dictated it in unambiguous terms. Today's decision cannot be laid at the feet of Congress; it is the responsibility of the Court.

The Court must always use great care when it shapes private causes of action without clear guidance from Congress, but never more so than when the federal balance is at stake. As we recognized in *Gebser*, the definition of an implied cause of action inevitably implicates some measure of discretion in the Court to shape a sensible remedial scheme. 524 U. S., at 284. Whether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question. What should be clear beyond any doubt, however, is that the Court is duty bound to exercise that discretion with due regard for federalism and the unique role of the States in our system. The Court today disregards that obligation. I can conceive of few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the State and its citizens than the one the Court creates today by its own hand. Trusted principles of federalism are superseded by a more contemporary imperative.

Perhaps the most grave, and surely the most lasting, disservice of today's decision is that it ensures the Court's own disregard for the federal balance soon will be imparted to our youngest citizens. The Court clears the way for the Federal Government to claim center stage in America's classrooms. Today's decision mandates to teachers instructing and supervising their students the dubious assistance of federal court plaintiffs and their lawyers and makes the federal courts the final arbiters of school policy and of almost every disagreement between students. Enforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions. After today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.

As its holding makes painfully clear, the majority's watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires. If there be any doubt of the futility of the Court's attempt to hedge its holding about with words of limitation for future cases, the result in this case provides the answer. The complaint of this fifth grader survives and the school will be compelled to answer in federal court. We can be assured that like suits will follow—suits, which in cost and number, will impose serious financial burdens on local school districts, the taxpayers who support them, and the children they serve. Federalism and our struggling school systems deserve better from this Court. I dissent.

Syllabus

CITY OF MONTEREY *v.* DEL MONTE DUNES AT MONTEREY, LTD., ET AL.

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

No. 97–1235. Argued October 7, 1998—Decided May 24, 1999

After petitioner city imposed more rigorous demands each of the five times it rejected applications to develop a parcel of land owned by respondent Del Monte Dunes and its predecessor in interest, Del Monte Dunes brought this suit under 42 U. S. C. § 1983. The District Court submitted the case to the jury on Del Monte Dunes' theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate postdeprivation remedy for the loss. The court instructed the jury to find for Del Monte Dunes if it found either that Del Monte Dunes had been denied all economically viable use of its property or that the city's decision to reject the final development proposal did not substantially advance a legitimate public purpose. The jury found for Del Monte Dunes. In affirming, the Ninth Circuit ruled, *inter alia*, that the District Court did not err in allowing Del Monte Dunes' takings claim to be tried to a jury, because Del Monte Dunes had a right to a jury trial under § 1983; that whether Del Monte Dunes had been denied all economically viable use of the property and whether the city's denial of the final proposal substantially advanced legitimate public interests were, on the facts of this case, questions suitable for the jury; and that the jury reasonably could have decided each of these questions in Del Monte Dunes' favor.

Held: The judgment is affirmed.

95 F. 3d 1422, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–A–2, concluding that:

1. The Ninth Circuit's discussion of the rough-proportionality standard of *Dolan* v. *City of Tigard*, 512 U. S. 374, 391, is irrelevant to this Court's disposition of the case. Although this Court believes the *Dolan* standard is inapposite to a case such as this one, the jury instructions did not mention proportionality, let alone require the jury to find for Del Monte Dunes unless the city's actions were roughly proportional to its asserted interests. The rough-proportionality discussion, furthermore, was unnecessary to sustain the jury's verdict, given the Ninth Circuit's holding that Del Monte Dunes had proffered evidence sufficient to rebut

each of the city's reasons for denying the final development plan. Pp. 702–703.

2. In holding that the jury could have found the city's denial of the final development plan not reasonably related to legitimate public interests, the Ninth Circuit did not impermissibly adopt a rule allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions. As the city itself proposed the essence of the jury instructions, it cannot now contend that these instructions did not provide an accurate statement of the law. In any event, the instructions are consistent with this Court's previous general discussions of regulatory takings liability. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S. 255, 260. Given that the city did not challenge below the applicability or continued viability of these authorities, the Court declines the suggestions of *amici* to revisit them. To the extent the city contends the District Court's judgment was based upon a jury determination of the reasonableness of its general zoning laws or land-use policies, its argument can be squared with neither the jury instructions nor the theory on which the case was tried, which were confined to the question whether, in light of the case's history and context, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications. To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles and is rejected. Pp. 703–707.

3. The District Court properly submitted the question of liability on Del Monte Dunes' regulatory takings claim to the jury. Pp. 707–711, 718–722.

(a) The propriety of such submission depends on whether Del Monte Dunes had a statutory or constitutional right to a jury trial, and, if it did, the nature and extent of the right. Because § 1983 does not itself confer the jury right when it authorizes "an action at law" to redress deprivation of a federal right under color of state law, the constitutional question must be reached. The Court's interpretation of the Seventh Amendment—which provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved"—has been guided by historical analysis comprising two principal inquiries: (1) whether the cause of action either was tried at law at the time of the founding or is at least analogous to one that was, and (2) if so, whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 376. Pp. 707–708.

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(b) Del Monte Dunes' § 1983 suit is an action at law for Seventh Amendment purposes. Pp. 708–711.

(1) That Amendment applies not only to common-law causes of action but also to statutory causes of action analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *E. g.*, *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 348. Pp. 708–709.

(2) A § 1983 suit seeking legal relief is an action at law within the Seventh Amendment's meaning. It is undisputed that when the Amendment was adopted there was no action equivalent to § 1983. It is settled law, however, that the Amendment's jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to "soun[d] basically in tort," and seek legal relief. *Curtis* v. *Loether*, 415 U. S. 189, 195–196. There can be no doubt that § 1983 claims sound in tort. See, *e. g.*, *Heck* v. *Humphrey*, 512 U. S. 477, 483. Here Del Monte Dunes sought legal relief in the form of damages for the unconstitutional denial of just compensation. Damages for a constitutional violation are a legal remedy. See, *e. g.*, *Teamsters* v. *Terry*, 494 U. S. 558, 570. Pp. 709–711.

(c) The particular liability issues were proper for determination by the jury. Pp. 718–722.

(1) In making this determination, the Court looks to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. Where history does not provide a clear answer, the Court looks to precedent and functional considerations. *Markman*, *supra*, at 384. P. 718.

(2) There is no precise analogue for the specific test of liability submitted to the jury in this case, although some guidance is provided by the fact that, in suits sounding in tort for money damages, questions of liability were usually decided by the jury, rather than the judge. Pp. 718–719.

(3) None of the Court's regulatory takings precedents has addressed the proper allocation of liability determinations between judge and jury in explicit terms. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 191, the Court assumed the propriety of submitting to the jury the question whether a county planning commission had denied the plaintiff landowner all economically viable use of the property. However, because *Williamson* is not a direct holding, further guidance must be found in considerations of process and function. Pp. 719–720.

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(4) In actions at law otherwise within the purview of the Seventh Amendment, the issue whether a landowner has been deprived of all economically viable use of his property is for the jury. The issue is predominantly factual, *e. g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413, and in actions at law such issues are in most cases allocated to the jury, see, *e. g.*, *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657. Pp. 720–721.

(5) Although the question whether a land-use decision substantially advances legitimate public interests is probably best understood as a mixed question of fact and law, here, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. This question was essentially fact-bound in nature, and thus was properly submitted to the jury. P. 721.

(d) This Seventh Amendment holding is limited in various respects: It does not address the jury's role in an ordinary inverse condemnation suit, or attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests that would extend to other contexts. Del Monte Dunes' argument was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury. Pp. 721–722.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE THOMAS, concluded in Part IV–A–2 that the city's request to create an exception to the general Seventh Amendment rule governing § 1983 actions for claims alleging violations of the Fifth Amendment Takings Clause must be rejected. Pp. 711–718.

1. This Court has declined in other contexts to classify § 1983 actions based on the nature of the underlying right asserted, and the city provides no persuasive justification for adopting a different rule for Seventh Amendment purposes. P. 711.

2. Even when analyzed not as a § 1983 action *simpliciter*, but as a § 1983 action seeking redress for an uncompensated taking, Del Monte Dunes' suit remains an action at law. Contrary to the city's submission, a formal condemnation proceeding—as to which the Court has said there is no constitutional jury right, *e. g.*, *United States* v. *Reynolds*, 397 U. S. 14, 18—is not the controlling analogy here. That analogy is rendered

inapposite by fundamental differences between a condemnation proceeding and a § 1983 action to redress an uncompensated taking. Most important, when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue. This difference renders the analogy not only unhelpful but inapposite. See, *e. g.*, *Bonaparte* v. *Camden & Amboy R. Co.*, 3 F. Cas. 821, 829 (No. 1,617) (CC NJ). Moreover, when the government condemns property for public use, it provides the landowner a forum for seeking just compensation as is required by the Constitution. See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 316. If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful. *E. g.*, *Williamson*, *supra*, at 195. In this case, however, Del Monte Dunes was denied not only its property but also just compensation or even an adequate forum for seeking it. In these circumstances, the original understanding of the Takings Clause and historical practice support the conclusion that the cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests. In such common-law actions, there was a right to trial by jury. See, *e. g.*, *Feltner*, *supra*, at 349. The city's argument, that because the Constitution allows the government to take property for public use, a taking for that purpose cannot be tortious or unlawful, is rejected. When the government repudiates its duty to provide just compensation, see, *e. g.*, *First English*, *supra*, at 315, it violates the Constitution, and its actions are unlawful and tortious. Pp. 711–718.

JUSTICE SCALIA concluded:

1. The Seventh Amendment provides respondents with a right to a jury trial on their § 1983 claim. All § 1983 actions must be treated alike insofar as that right is concerned. Section 1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim-creating statute itself, but by an extrinsic body of law to which the statute refers, namely, "federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U. S. 137, 144, n. 3. The question before the Court then is not what common-law action is most analogous to some generic suit seeking compensation for a Fifth Amendment taking, but what common-law action is most analogous *to a § 1983 claim.* This Court has concluded that all § 1983 claims should be characterized in the same way, *Wilson* v. *Garcia*, 471 U. S. 261, 271–272, as tort actions for the recovery of damages for personal injuries, *id.*, at 276. Pp. 723–726.

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2. It is clear that a § 1983 cause of action for damages is a tort action for which jury trial would have been provided at common law. See, *e. g.*, *Curtis* v. *Loether*, 415 U. S. 189, 195. Pp. 727–731.

3. The trial court properly submitted the particular issues raised by respondents' § 1983 claim to the jury. The question whether they were deprived of all economically viable use of their property presents primarily a question of fact appropriate for jury consideration. As to the question whether petitioner's rejection of respondents' building plans substantially advanced a legitimate public purpose, the subquestion whether the government's asserted basis for its challenged action represents a legitimate state interest was properly removed from the jury's cognizance, but the subquestion whether that legitimate state interest is substantially furthered by the challenged government action is, at least in the highly particularized context of the present case, a jury question. Pp. 731–732.

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II, the opinion of the Court with respect to Parts III, IV–A–1, IV–B, IV–C, and V, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part IV–A–2, in which REHNQUIST, C. J., and STEVENS and THOMAS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 723. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, GINSBURG, and BREYER, JJ., joined, *post*, p. 733.

George A. Yuhas argued the cause for petitioner. With him on the briefs was *Richard E. V. Harris.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Malcolm L. Stewart*, *David C. Shilton*, *Timothy J. Dowling*, and *Nina Mendelson.*

Michael M. Berger argued the cause for respondents. With him on the brief was *Frederik A. Jacobsen.**

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*Briefs of *amici curiae* urging reversal were filed for the State of New Jersey et al. by *Peter Verniero*, Attorney General of New Jersey, *Stefanie A. Brand*, Deputy Attorney General, *Mary C. Jacobson*, Assistant Attorney General, *Dan Schweitzer*, and *Gus F. Diaz*, Acting Attorney General of Guam, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston*

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–A–2.

This case began with attempts by respondent Del Monte Dunes and its predecessor in interest to develop a parcel of land within the jurisdiction of the petitioner, the

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Bryant of Arkansas, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Joseph P. Mazurek* of Montana, *Philip T. McLaughlin* of New Hampshire, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Hardy Myers* of Oregon, *Jeffrey B. Pine* of Rhode Island, *John Knox Walkup* of Tennessee, *William H. Sorrell* of Vermont, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the City and County of San Francisco et al. by *Louise H. Renne*, *Dennis Aftergut*, *Andrew W. Schwartz*, *Pamela Albers*, *Gary T. Ragghianti*, *Zach Cowan*, *Ronald R. Ball*, *John L. Cook*, *Joel D. Kuperberg*, *Edward J. Foley*, *Philip D. Kohn*, *Lois E. Jeffrey*, *John Sanford Todd*, *William W. Wynder*, *Steven F. Nord*, *Thomas B. Brown*, *George H. Eiser III*, *James R. Anderson*, *Monte L. Widders*, *Gary Gillig*, *Debra S. Margolis*, *Michael F. Dean*, *Stan Yamamoto*, *Hadden Roth*, *C. Alan Sumption*, *Daniel J. Wallace*, *John G. Barisone*, *Rene Auguste Chouteau*, *Victor J. Westman*, *Norman Y. Herring*, *Cameron L. Reeves*, *H. Peter Klein*, *Alan Seltzer*, and *Dwight L. Herr;* for the American Planning Association by *Robert H. Freilich* and *Terry D. Morgan;* for the League for Coastal Protection et al. by *John D. Echeverria;* for the Municipal Art Society of New York, Inc., by *Michael B. Gerrard*, *Michael S. Gruen*, *Dennis C. O'Donnell*, *John J. Kerr, Jr.*, *Norman Marcus*, and *Otis Pratt Pearsall;* and for the National League of Cities et al. by *Richard Ruda* and *James I. Crowley*.

Briefs of *amici curiae* urging affirmance were filed for the American Farm Bureau Federation et al. by *Timothy S. Bishop*, *Jeffrey W. Sarles*, *John J. Rademacher*, *Nancy N. McDonough*, and *Carolyn S. Richardson;* for the California Association of Realtors et al. by *Roger J. Marzulla;* for Defenders of Property Rights et al. by *Nancie G. Marzulla;* for the Institute for Justice by *William H. Mellor*, *Clint Bolick*, *Scott G. Bullock*, and *Richard A. Epstein;* for the National Association of Home Builders et al. by *Gus Bauman*, *Mary V. DiCrescenzo*, and *Nick Cammarota;* for the Pacific Legal Foundation et al. by *James S. Burling;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar*.

city of Monterey. The city, in a series of repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers. Del Monte Dunes brought suit in the United States District Court for the Northern District of California, under Rev. Stat. § 1979, 42 U. S. C. § 1983. After protracted litigation, the case was submitted to the jury on Del Monte Dunes' theory that the city effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate postdeprivation remedy for the loss. The jury found for Del Monte Dunes, and the Court of Appeals affirmed.

The petitioner contends that the regulatory takings claim should not have been decided by the jury and that the Court of Appeals adopted an erroneous standard for regulatory takings liability. We need not decide all of the questions presented by the petitioner, nor need we examine each of the points given by the Court of Appeals in its decision to affirm. The controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury. We conclude that it was, and that the judgment of the Court of Appeals should be affirmed.

I

A

The property which Del Monte Dunes and its predecessor in interest (landowners) sought to develop was a 37.6-acre ocean-front parcel located in the city of Monterey, at or near the city's boundary to the north, where Highway 1 enters. With the exception of the ocean and a state park located to the northeast, the parcel was virtually surrounded by a railroad right-of-way and properties devoted to industrial, commercial, and multifamily residential uses. The parcel itself was zoned for multifamily residential use under the city's general zoning ordinance.

The parcel had not been untouched by its urban and industrial proximities. A sewer line housed in 15-foot man-made dunes covered with jute matting and surrounded by snow fencing traversed the property. Trash, dumped in violation of the law, had accumulated on the premises. The parcel had been used for many years by an oil company as a terminal and tank farm where large quantities of oil were delivered, stored, and reshipped. When the company stopped using the site, it had removed its oil tanks but left behind tank pads, an industrial complex, pieces of pipe, broken concrete, and oil-soaked sand. The company had introduced nonnative ice plant to prevent erosion and to control soil conditions around the oil tanks. Ice plant secretes a substance that forces out other plants and is not compatible with the parcel's natural flora. By the time the landowners sought to develop the property, ice plant had spread to some 25 percent of the parcel, and, absent human intervention, would continue to advance, endangering and perhaps eliminating the parcel's remaining natural vegetation.

The natural flora the ice plant encroached upon included buckwheat, the natural habitat of the endangered Smith's Blue Butterfly. The butterfly lives for one week, travels a maximum of 200 feet, and must land on a mature, flowering buckwheat plant to survive. Searches for the butterfly from 1981 through 1985 yielded but a single larva, discovered in 1984. No other specimens had been found on the property, and the parcel was quite isolated from other possible habitats of the butterfly.

B

In 1981 the landowners submitted an application to develop the property in conformance with the city's zoning and general plan requirements. Although the zoning requirements permitted the development of up to 29 housing units per acre, or more than 1,000 units for the entire parcel, the landowners' proposal was limited to 344 residential units. In 1982 the city's planning commission denied the application

but stated that a proposal for 264 units would receive favorable consideration. In keeping with the suggestion, the landowners submitted a revised proposal for 264 units. In late 1983, however, the planning commission again denied the application. The commission once more requested a reduction in the scale of the development, this time saying a plan for 224 units would be received with favor. The landowners returned to the drawing board and prepared a proposal for 224 units, which, its previous statements notwithstanding, the planning commission denied in 1984. The landowners appealed to the city council, which overruled the planning commission's denial and referred the project back to the commission, with instructions to consider a proposal for 190 units.

The landowners once again reduced the scope of their development proposal to comply with the city's request, and submitted four specific, detailed site plans, each for a total of 190 units for the whole parcel. Even so, the planning commission rejected the landowners' proposal later in 1984. Once more the landowners appealed to the city council. The council again overruled the commission, finding the proposal conceptually satisfactory and in conformance with the city's previous decisions regarding, *inter alia*, density, number of units, location on the property, and access. The council then approved one of the site plans, subject to various specific conditions, and granted an 18-month conditional use permit for the proposed development.

The landowners spent most of the next year revising their proposal and taking other steps to fulfill the city's conditions. Their final plan, submitted in 1985, devoted 17.9 of the 37.6 acres to public open space (including a public beach and areas for the restoration and preservation of the buckwheat habitat), 7.9 acres to open, landscaped areas, and 6.7 acres to public and private streets (including public parking and access to the beach). Only 5.1 acres were allocated to buildings and patios. The plan was designed, in accordance with

the city's demands, to provide the public with a beach, a buffer zone between the development and the adjoining state park, and view corridors so the buildings would not be visible to motorists on the nearby highway; the proposal also called for restoring and preserving as much of the sand dune structure and buckwheat habitat as possible consistent with development and the city's requirements.

After detailed review of the proposed buildings, roads, and parking facilities, the city's architectural review committee approved the plan. Following hearings before the planning commission, the commission's professional staff found the final plan addressed and substantially satisfied the city's conditions. It proposed the planning commission make specific findings to this effect and recommended the plan be approved.

In January 1986, less than two months before the landowners' conditional use permit was to expire, the planning commission rejected the recommendation of its staff and denied the development plan. The landowners appealed to the city council, also requesting a 12-month extension of their permit to allow them time to attempt to comply with any additional requirements the council might impose. The permit was extended until a hearing could be held before the city council in June 1986. After the hearing, the city council denied the final plan, not only declining to specify measures the landowners could take to satisfy the concerns raised by the council but also refusing to extend the conditional use permit to allow time to address those concerns. The council's decision, moreover, came at a time when a sewer moratorium issued by another agency would have prevented or at least delayed development based on a new plan.

The council did not base its decision on the landowners' failure to meet any of the specific conditions earlier prescribed by the city. Rather, the council made general findings that the landowners had not provided adequate access for the development (even though the landowners had twice

changed the specific access plans to comply with the city's demands and maintained they could satisfy the city's new objections if granted an extension), that the plan's layout would damage the environment (even though the location of the development on the property was necessitated by the city's demands for a public beach, view corridors, and a buffer zone next to the state park), and that the plan would disrupt the habitat of the Smith's Blue Butterfly (even though the plan would remove the encroaching ice plant and preserve or restore buckwheat habitat on almost half of the property, and even though only one larva had ever been found on the property).

C

After five years, five formal decisions, and 19 different site plans, 10 Tr. 1294–1295 (Feb. 9, 1994), Del Monte Dunes decided the city would not permit development of the property under any circumstances. Del Monte Dunes commenced suit against the city in the United States District Court for the Northern District of California under 42 U. S. C. § 1983, alleging, *inter alia,* that denial of the final development proposal was a violation of the due process and equal protection provisions of the Fourteenth Amendment and an uncompensated, and so unconstitutional, regulatory taking.

The District Court dismissed the claims as unripe under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City,* 473 U. S. 172 (1985), on the grounds that Del Monte Dunes had neither obtained a definitive decision as to the development the city would allow nor sought just compensation in state court. The Court of Appeals reversed. 920 F. 2d 1496 (CA9 1990). After reviewing at some length the history of attempts to develop the property, the court found that to require additional proposals would implicate the concerns about repetitive and unfair procedures expressed in *MacDonald, Sommer & Frates* v. *Yolo*

County, 477 U. S. 340, 350, n. 7 (1986), and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review. 920 F. 2d, at 1501–1506. The court also found that because the State of California had not provided a compensatory remedy for temporary regulatory takings when the city issued its final denial, see *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), Del Monte Dunes was not required to pursue relief in state court as a precondition to federal relief. See 920 F. 2d, at 1506–1507.

On remand, the District Court determined, over the city's objections, to submit Del Monte Dunes' takings and equal protection claims to a jury but to reserve the substantive due process claim for decision by the court. Del Monte Dunes argued to the jury that, although the city had a right to regulate its property, the combined effect of the city's various demands—that the development be invisible from the highway, that a buffer be provided between the development and the state park, and that the public be provided with a beach—was to force development into the "bowl" area of the parcel. As a result, Del Monte Dunes argued, the city's subsequent decision that the bowl contained sensitive buckwheat habitat which could not be disturbed blocked the development of any portion of the property. See 10 Tr. 1288–1294, 1299–1302, 1317 (Feb. 9, 1994). While conceding the legitimacy of the city's stated regulatory purposes, Del Monte Dunes emphasized the tortuous and protracted history of attempts to develop the property, as well as the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner. Del Monte Dunes also submitted evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal and to suggest that the city had considered buying, or inducing the State to buy, the property for

public use as early as 1979, reserving some money for this purpose but delaying or abandoning its plans for financial reasons. See *id.*, at 1303–1306. The State of California's purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes' position.

At the close of argument, the District Court instructed the jury it should find for Del Monte Dunes if it found either that Del Monte Dunes had been denied all economically viable use of its property or that "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose." App. 303. With respect to the first inquiry, the jury was instructed, in relevant part, as follows:

> "For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions." *Ibid.*

With respect to the second inquiry, the jury received the following instruction:

> "Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest[s] and legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

> "The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective.
>
> "Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose, . . . its underlying motives and reasons are not to be inquired into." *Id.*, at 304.

The essence of these instructions was proposed by the city. See Tr. 11 (June 17, 1994).

The jury delivered a general verdict for Del Monte Dunes on its takings claim, a separate verdict for Del Monte Dunes on its equal protection claim, and a damages award of $1.45 million. Tr. 2 (Feb. 17, 1994). After the jury's verdict, the District Court ruled for the city on the substantive due process claim, stating that its ruling was not inconsistent with the jury's verdict on the equal protection or the takings claim. App. to Pet. for Cert. A–39. The court later denied the city's motions for a new trial or for judgment as a matter of law.

The Court of Appeals affirmed. 95 F. 3d 1422 (CA9 1996). The court first ruled that the District Court did not err in allowing Del Monte Dunes' regulatory takings claim to be tried to a jury, *id.*, at 1428, because Del Monte Dunes had a right to a jury trial under § 1983, *id.*, at 1426–1427, and whether Del Monte Dunes had been denied all economically viable use of the property and whether the city's denial of the final proposal substantially advanced legitimate public interests were, on the facts of this case, questions suitable for the jury, *id.*, at 1430. The court ruled that sufficient evidence had been presented to the jury from which it reason-

ably could have decided each of these questions in Del Monte Dunes' favor. *Id.*, at 1430–1434. Because upholding the verdict on the regulatory takings claim was sufficient to support the award of damages, the court did not address the equal protection claim. *Id.*, at 1426.

The questions presented in the city's petition for certiorari were (1) whether issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim, (2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision, and (3) whether the Court of Appeals erred in assuming that the rough-proportionality standard of *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), applied to this case. We granted certiorari, 523 U. S. 1045 (1998), and now address these questions in reverse order.

II

In the course of holding a reasonable jury could have found the city's denial of the final proposal not substantially related to legitimate public interests, the Court of Appeals stated: "Even if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest. . . . That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.' " 95 F. 3d, at 1430, quoting *Dolan*, *supra*, at 391.

Although in a general sense concerns for proportionality animate the Takings Clause, see *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960) ("The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"), we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. See *Dolan*, *supra*, at 385; *Nollan* v. *Cali-*

fornia Coastal Comm'n, 483 U. S. 825, 841 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

The instructions given to the jury, however, did not mention proportionality, let alone require it to find for Del Monte Dunes unless the city's actions were roughly proportional to its asserted interests. The Court of Appeals' discussion of rough proportionality, we conclude, was unnecessary to its decision to sustain the jury's verdict. Although the court stated that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development," 95 F. 3d, at 1432, it did so only after holding that

> "Del Monte provided evidence sufficient to rebut each of these reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes. In light of the evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives." *Id.*, at 1431–1432.

Given this holding, it was unnecessary for the Court of Appeals to discuss rough proportionality. That it did so is irrelevant to our disposition of the case.

III

The city challenges the Court of Appeals' holding that the jury could have found the city's denial of the final develop-

ment plan not reasonably related to legitimate public interests. Although somewhat obscure, the city's argument is not cast as a challenge to the sufficiency of the evidence; rather, the city maintains that the Court of Appeals adopted a legal standard for regulatory takings liability that allows juries to second-guess public land-use policy.

As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law. In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, cf., *e. g.*, *Nollan*, *supra*, at 834–835, n. 3, we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. See *Dolan*, *supra*, at 385; *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1016 (1992); *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992); *Nollan*, *supra*, at 834; *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485 (1987); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 126 (1985); *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980). The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents.

To the extent the city contends the judgment sustained by the Court of Appeals was based upon a jury determination of the reasonableness of its general zoning laws or land-use policies, its argument can be squared with neither the instructions given to the jury nor the theory on which the case was tried. The instructions did not ask the jury whether the city's zoning ordinances or policies were unreasonable

but only whether "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose," App. 303, that is, whether "there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose," *id.*, at 304. Furthermore, Del Monte Dunes' lawyers were explicit in conceding that "[t]his case is not about the right of a city, in this case the city of Monterey, to regulate land." 10 Tr. 1286 (Feb. 9, 1994). See also *id.*, at 1287 (proposals were made "keeping in mind various regulations and requirements, heights, setbacks, and densities and all that. That's not what this case is about"); *id.*, at 1287–1288 ("They have the right to set height limits. They have the right to talk about where they want access. That's not what this case is about. We all accept that in today's society, cities and counties can tell a land owner what to do to some reasonable extent with their property"). Though not presented for review, Del Monte Dunes' equal protection argument that it had received treatment inconsistent with zoning decisions made in favor of owners of similar properties, and the jury's verdict for Del Monte Dunes on this claim, confirm the understanding of the jury and Del Monte Dunes that the complaint was not about general laws or ordinances but about a particular zoning decision.

The instructions regarding the city's decision also did not allow the jury to consider the reasonableness, *per se,* of the customized, ad hoc conditions imposed on the property's development, and Del Monte Dunes did not suggest otherwise. On the contrary, Del Monte Dunes disclaimed this theory of the case in express terms: "Del Monte Dunes partnership did not file this lawsuit because they were complaining about giving the public the beach, keeping it [the development] out of the view shed, devoting and [giving] to the State all this habitat area. One-third [of the] property is going to be given away for the public use forever. That's not what we filed the lawsuit about." *Id.*, at 1288; see also *id.*, at 1288–

1289 (conceding that the city may "ask an owner to give away a third of the property without getting a dime in compensation for it and providing parking lots for the public and habitats for the butterfly, and boardwalks").

Rather, the jury was instructed to consider whether the city's denial of the final proposal was reasonably related to a legitimate public purpose. Even with regard to this issue, however, the jury was not given free rein to second-guess the city's land-use policies. Rather, the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests. See App. 304.

The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property. See, *e. g.*, 10 Tr. 1294–1295 (Feb. 9, 1994). Although Del Monte Dunes was allowed to introduce evidence challenging the asserted factual bases for the city's decision, it also highlighted the shifting nature of the city's demands and the inconsistency of its decision with the recommendation of its professional staff, as well as with its previous decisions. See, *e. g.*, *id.*, at 1300. Del Monte Dunes also introduced evidence of the city's longstanding interest in acquiring the property for public use. See, *e. g.*, *id.*, at 1303–1306.

In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications. This question was couched, moreover, in an instruction that had been proposed in essence by the city, and as to which the city made no objection.

Thus, despite the protests of the city and its *amici*, it is clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory

decisions. To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error.

IV

We next address whether it was proper for the District Court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury. (Before the District Court, the city agreed it was proper for the jury to assess damages. See Supplemental Memorandum of Petitioner Re: Court/Jury Trial Issues in No. C86–5042 (ND Cal.), p. 2, Record, Doc. No. 111.) As the Court of Appeals recognized, the answer depends on whether Del Monte Dunes had a statutory or constitutional right to a jury trial, and, if it did, the nature and extent of the right. Del Monte Dunes asserts the right to a jury trial is conferred by § 1983 and by the Seventh Amendment.

Under our precedents, "[b]efore inquiring into the applicability of the Seventh Amendment, we must 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 345 (1998) (quoting *Tull* v. *United States*, 481 U. S. 412, 417, n. 3 (1987)); accord, *Curtis* v. *Loether*, 415 U. S. 189, 192, n. 6 (1974).

The character of § 1983 is vital to our Seventh Amendment analysis, but the statute does not itself confer the jury right. See *Feltner*, *supra*, at 345 ("[W]e cannot discern 'any congressional intent to grant . . . the right to a jury trial'" (quoting *Tull*, *supra*, at 417, n. 3)). Section 1983 authorizes a party who has been deprived of a federal right under the color of state law to seek relief through "an action at law, suit in equity, or other proper proceeding for redress." Del Monte Dunes contends that the phrase "action at law" is a

term of art implying a right to a jury trial. We disagree, for this is not a necessary implication.

In *Lorillard* v. *Pons*, 434 U. S. 575, 583 (1978), we found a statutory right to a jury trial in part because the statute authorized "*legal* . . . relief." Our decision, however, did not rest solely on the statute's use of the phrase but relied as well on the statute's explicit incorporation of the procedures of the Fair Labor Standards Act, which had been interpreted to guarantee trial by jury in private actions. *Id.*, at 580. We decline, accordingly, to find a statutory jury right under § 1983 based solely on the authorization of "an action at law."

As a consequence, we must reach the constitutional question. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." Consistent with the textual mandate that the jury right be preserved, our interpretation of the Amendment has been guided by historical analysis comprising two principal inquiries. "[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was." *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 376 (1996). "If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Ibid.*

A

With respect to the first inquiry, we have recognized that "suits at common law" include "not merely suits, which the *common* law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830). The Seventh Amendment thus applies not only

to common-law causes of action but also to statutory causes of action "'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Feltner*, *supra*, at 348 (quoting *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989)); accord, *Curtis*, *supra*, at 193.

1

Del Monte Dunes brought this suit pursuant to § 1983 to vindicate its constitutional rights. We hold that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. JUSTICE SCALIA's opinion concurring in part and concurring in the judgment presents a comprehensive and convincing analysis of the historical and constitutional reasons for this conclusion. We agree with his analysis and conclusion.

It is undisputed that when the Seventh Amendment was adopted there was no action equivalent to § 1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to "soun[d] basically in tort," and seek legal relief. *Curtis*, *supra*, at 195–196.

As JUSTICE SCALIA explains, see *post*, at 727–731, there can be no doubt that claims brought pursuant to § 1983 sound in tort. Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law. Recognizing the essential character of the statute, "'[w]e have repeatedly noted that 42 U. S. C. § 1983 creates a species of tort liability,'" *Heck* v. *Humphrey*, 512 U. S. 477, 483 (1994) (quoting *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 305 (1986)), and have interpreted the statute in light of the "background of tort liability," *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961) (overruled on other grounds, *Monell* v. *New York City Dept. of Social Servs.*, 436

U. S. 658 (1978)); accord, *Heck*, *supra*, at 483. Our settled understanding of § 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law.

Here Del Monte Dunes sought legal relief. It was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. See *First English*, 482 U. S., at 308–311. The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. See *Williamson*, 473 U. S., at 194–195. Because its statutory action did not accrue until it was denied just compensation, in a strict sense Del Monte Dunes sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy. See, *e. g.*, *Teamsters* v. *Terry*, 494 U. S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law' ") (quoting *Curtis*, 415 U. S., at 196).

Even when viewed as a simple suit for just compensation, we believe Del Monte Dunes' action sought essentially legal relief. "We have recognized the 'general rule' that monetary relief is legal." *Feltner*, 523 U. S., at 352 (quoting *Teamsters* v. *Terry*, *supra*, at 570). Just compensation, moreover, differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910). As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy. The Court has recognized that compensation is a purpose "traditionally associated with legal

relief." *Feltner*, *supra*, at 352. Because Del Monte Dunes' statutory suit sounded in tort and sought legal relief, it was an action at law.

2

In an attempt to avoid the force of this conclusion, the city urges us to look not to the statutory basis of Del Monte Dunes' claim but rather to the underlying constitutional right asserted. At the very least, the city asks us to create an exception to the general Seventh Amendment rule governing § 1983 actions for claims alleging violations of the Takings Clause of the Fifth Amendment. See *New Port Largo, Inc.* v. *Monroe County*, 95 F. 3d 1084 (CA11 1996) (finding, in tension with the Ninth Circuit's decision in this case, that there is no right to a jury trial on a takings claim brought under § 1983). Because the jury's role in estimating just compensation in condemnation proceedings was inconsistent and unclear at the time the Seventh Amendment was adopted, this Court has said "that there is no constitutional right to a jury in eminent domain proceedings." *United States* v. *Reynolds*, 397 U. S. 14, 18 (1970); accord, *Bauman* v. *Ross*, 167 U. S. 548, 593 (1897). The city submits that the analogy to formal condemnation proceedings is controlling, so that there is no jury right here.

As JUSTICE SCALIA notes, see *post*, at 724–726, we have declined in other contexts to classify § 1983 actions based on the nature of the underlying right asserted, and the city provides no persuasive justification for adopting a different rule for Seventh Amendment purposes. Even when analyzed not as a § 1983 action *simpliciter*, however, but as a § 1983 action seeking redress for an uncompensated taking, Del Monte Dunes' suit remains an action at law.

Although condemnation proceedings spring from the same Fifth Amendment right to compensation which, as incorporated by the Fourteenth Amendment, is applicable here, see *First English*, *supra*, at 315 (citing *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933)), a condemnation action differs in im-

portant respects from a § 1983 action to redress an uncompensated taking. Most important, when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue. As a result, even if condemnation proceedings were an appropriate analogy, condemnation practice would provide little guidance on the specific question whether Del Monte Dunes was entitled to a jury determination of liability.

This difference renders the analogy to condemnation proceedings not only unhelpful but also inapposite. When the government takes property without initiating condemnation proceedings, it "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." *United States* v. *Clarke*, 445 U. S. 253, 257 (1980). Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner "at a significant disadvantage." *Id.*, at 258; cf. *id.*, at 255 ("There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding"); 84 Stat. 1906, § 304, 42 U. S. C. § 4654 (recognizing, at least implicitly, the added burden by providing for recovery of attorney's fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary condemnation cases). Where, as here, the government not only denies liability but fails to provide an adequate post-deprivation remedy (thus refusing to submit the question of liability to an impartial arbiter), the disadvantage to the owner becomes all the greater. At least in these circumstances, the analogy to ordinary condemnation procedures is simply untenable.

Our conclusion is confirmed by precedent. Early authority finding no jury right in a condemnation proceeding did so

on the ground that condemnation did not involve the determination of legal rights because liability was undisputed:

> "We are therefore of opinion that the trial by jury is preserved inviolate in the sense of the constitution, when in all criminal cases, and in civil cases when a right is in controversy in a court of law, it is secured to each party. In cases of this description [condemnation proceedings], the right to take, and the right to compensation, are admitted; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate." *Bonaparte* v. *Camden & Amboy R. Co.*, 3 F. Cas. 821, 829 (No. 1,617) (CC NJ 1830) (Baldwin, Circuit Justice).

(Although JUSTICE SOUTER's opinion concurring in part and dissenting in part takes issue with this distinction, its arguments are unpersuasive. First, it correctly notes that when the government initiates formal condemnation procedures, a landowner may question whether the proposed taking is for public use. The landowner who raises this issue, however, seeks not to establish the government's liability for damages, but to prevent the government from taking his property at all. As the dissent recognizes, the relief desired by a landowner making this contention is analogous not to damages but to an injunction; it should be no surprise, then, that the landowner is not entitled to a jury trial on his entitlement to a remedy that sounds not in law but in equity. Second, the dissent refers to "the diversity of rationales underlying early state cases in which the right of a direct condemnee to a jury trial was considered and denied." *Post*, at 742. The dissent mentions only the rationale that because the government is immune from suit for damages, it can qualify any remedy it provides by dispensing with the right to a jury trial. The cases cited for this proposition—two state-court cases antedating the adoption of the Fourteenth Amendment and an off-point federal case—do not implicate

the Fifth Amendment. Even if the sovereign immunity rationale retains its vitality in cases where this Amendment is applicable, cf. *First English*, 482 U. S., at 316, n. 9, it is neither limited to nor coextensive with takings claims. Rather, it would apply to all constitutional suits against the Federal Government or the States, but not to constitutional suits such as this one against municipalities like the city of Monterey. Third, the dissent contends that the distinction we have drawn is absent from our condemnation cases. Even if this were true—and it is not obvious that it is—equally absent from those decisions is any analysis or principle that would extend beyond the narrow context of direct condemnation suits to actions such as this one. Rather, as apparent even from the passages quoted by the dissent, see *post*, at 736–739, and n. 1, these cases rely only on the Court's perception of historical English and colonial practice in direct condemnation cases. Nothing in these cases detracts from the authorities cited in this opinion that do support the distinction we draw between direct condemnation and a suit like this one. Finally, the existence of a different historical practice distinguishes direct condemnation from an ordinary tort case in which the defendant concedes liability. See *post*, at 742–743, n. 5.)

Condemnation proceedings differ from the instant cause of action in another fundamental respect as well. When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution. See *First English*, *supra*, at 316. If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful. See *Williamson*, 473 U. S., at 194 ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation"). Even when the government takes property without initiating condemnation proceedings, there is no constitutional violation " 'unless or until the state fails to pro-

vide an adequate postdeprivation remedy for the property loss.'" *Id.*, at 195 (quoting *Hudson* v. *Palmer*, 468 U. S. 517, 532, n. 12 (1984)). In this case, however, Del Monte Dunes was denied not only its property but also just compensation or even an adequate forum for seeking it. That is the gravamen of the § 1983 claim.

In these circumstances, we conclude the cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests. Our conclusion is consistent with the original understanding of the Takings Clause and with historical practice.

Early opinions, nearly contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort. See, *e. g.*, *Lindsay* v. *Commissioners*, 2 Bay 38, 61 (S. C. 1796) (opinion of Waties, J.) ("But suppose they could sue, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be on a *tort;* it must be an action of trespass, in which the jury would give a reparation *in damages.* Is not this acknowledging that the act of the legislature [in authorizing uncompensated takings] is a tortious act?" (emphases in original)); *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 164, 166 (N. Y. 1816) (Kent, Ch.) (uncompensated governmental interference with property right would support a tort action at law for nuisance).

Consistent with this understanding, and as a matter of historical practice, when the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions. See, *e. g.*, *Richards* v. *Washington Terminal Co.*, 233 U. S. 546 (1914) (nuisance); *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (1872) (trespass on the case); *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243

(1833) (unspecified tort); *Bradshaw* v. *Rodgers*, 20 Johns. 103 (N. Y. 1822) (trespass). Tort actions of these descriptions lay at common law, 3 W. Blackstone, Commentaries on the Laws of England, ch. 12 (1768) (trespass; trespass on the case); *id.*, ch. 13 (trespass on the case for nuisance), and in these actions, as in other suits at common law, there was a right to trial by jury, see, *e. g.*, *Feltner*, 523 U. S., at 349 ("Actions on the case, like other actions at law, were tried before juries").

(JUSTICE SOUTER's criticism of our reliance on these early authorities misses the point of our analysis. We do not contend that the landowners were always successful. As the dissent makes clear, prior to the adoption of the Fourteenth Amendment and the concomitant incorporation of the Takings Clause against the States, a variety of obstacles—including various traditional immunities, the lack of a constitutional right, and the resulting possibility of legislative justification—stood in the way of the landowner who sought redress for an uncompensated taking. Rather, our point is that the suits were attempted and were understood to sound in tort. It is therefore ironic that the dissent invokes a law review article discussing such suits entitled "The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law." *Post*, at 746–747 (citing Brauneis, 52 Vand. L. Rev. 57 (1999)). It is true, as the dissenting opinion observes, that claims for just compensation were sometimes brought in quasi contract rather than tort. See, *e. g.*, *United States* v. *Lynah*, 188 U. S. 445, 458–465 (1903) (overruled on other grounds, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 (1941)) (comparing claims for just compensation brought in quasi contract with just-compensation claims brought in tort). The historical existence of quasi-contract suits for just compensation does nothing to undermine our Seventh Amendment analysis, however, since quasi contract was frequently available to the victim of a tort who elected to waive the tort and proceed

instead in quasi contract. See, *e. g.*, W. Prosser, Law of Torts § 110, pp. 1118–1127 (1941). In any event, quasi contract was itself an action at law. See, *e. g.*, 1 G. Palmer, Restitution §§ 1.2, 2.2–2.3 (1978); F. Woodward, Quasi Contracts § 6 (1913).)

The city argues that because the Constitution allows the government to take property for public use, a taking for that purpose cannot be tortious or unlawful. We reject this conclusion. Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English*, 482 U. S., at 315 (citing *Jacobs*, 290 U. S., at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well. See *Gardner* v. *Village of Newburgh*, *supra*, at 166, 168 ("[T]o render the exercise of the [eminent domain] power valid," the government must provide landowner "fair compensation"; "[u]ntil, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government," to deprive plaintiff of his property rights; absent such a provision, the plaintiff "would be entitled to his action at law for the interruption of his right"); *Beatty* v. *United States*, 203 F. 620, 626 (CA4 1913) ("The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete").

(The argument that an uncompensated taking is not tortious because the landowner seeks just compensation rather than additional damages for the deprivation of a remedy reveals the same misunderstanding. Simply put, there is no constitutional or tortious injury until the landowner is denied just compensation. That the damages to which the landowner is entitled for this injury are measured by the just compensation he has been denied is neither surprising nor significant.)

B

Having decided Del Monte Dunes' § 1983 suit was an action at law, we must determine whether the particular issues of liability were proper for determination by the jury. See *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370 (1996). In actions at law, issues that are proper for the jury must be submitted to it "to preserve the right to a jury's resolution of the ultimate dispute," as guaranteed by the Seventh Amendment. *Id.*, at 377. We determine whether issues are proper for the jury, when possible, "by using the historical method, much as we do in characterizing the suits and actions within which [the issues] arise." *Id.*, at 378. We look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. Where history does not provide a clear answer, we look to precedent and functional considerations. *Id.*, at 384.

1

Just as no exact analogue of Del Monte Dunes' § 1983 suit can be identified at common law, so also can we find no precise analogue for the specific test of liability submitted to the jury in this case. We do know that in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases. This allocation preserved the jury's role in resolving what was often

the heart of the dispute between plaintiff and defendant. Although these general observations provide some guidance on the proper allocation between judge and jury of the liability issues in this case, they do not establish a definitive answer.

2

We look next to our existing precedents. Although this Court has decided many regulatory takings cases, none of our decisions has addressed the proper allocation of liability determinations between judge and jury in explicit terms. This is not surprising. Most of our regulatory takings decisions have reviewed suits against the United States, see, *e. g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), suits decided by state courts, see, *e. g.*, *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), or suits seeking only injunctive relief, see, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987). It is settled law that the Seventh Amendment does not apply in these contexts. *Lehman* v. *Nakshian*, 453 U. S. 156, 160 (1981) (suits against the United States); *Curtis*, 415 U. S., at 192, n. 6 (suits brought in state court); *Parsons*, 3 Pet., at 447 (suits seeking only equitable relief).

In *Williamson*, we did review a regulatory takings case in which the plaintiff landowner sued a county planning commission in federal court for money damages under § 1983. 473 U. S., at 182. Whether the commission had denied the plaintiff all economically viable use of the property had been submitted to the jury. *Id.*, at 191–192, and n. 12. Although the Court did not consider the point, it assumed the propriety of this procedure. *E. g.*, *id.*, at 191 ("It is not clear whether the jury would have found that the respondent had

been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. . . . Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent 'will be unable to derive economic benefit' from the land").

Williamson is not a direct holding, however, and we must look for further guidance. We turn next to considerations of process and function.

3

In actions at law predominantly factual issues are in most cases allocated to the jury. See *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935). The allocation rests on a firm historical foundation, see, *e. g.*, 1 E. Coke, Institutes 155b (1628) *("ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores")*, and serves "to preserve the right to a jury's resolution of the ultimate dispute," *Markman*, *supra*, at 377.

Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922); accord, *Keystone Bituminous Coal*, *supra*, at 473–474. Consistent with this understanding, we have described determinations of liability in regulatory takings cases as "'essentially ad hoc, factual inquiries,'" *Lucas*, *supra*, at 1015 (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 503 U. S., at 523.

In accordance with these pronouncements, we hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. As our implied acknowledgment of the procedure in *Williamson*, *supra*, suggests, in actions at law

otherwise within the purview of the Seventh Amendment, this question is for the jury.

The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. Although our cases make clear that this inquiry involves an essential factual component, see *Yee*, *supra*, at 523, it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law.

In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. See Part III, *supra*. As the Court of Appeals recognized, this question was "essentially fact-bound [in] nature." 95 F. 3d, at 1430 (internal quotation marks omitted) (alteration by Court of Appeals). Under these circumstances, we hold that it was proper to submit this narrow, fact-bound question to the jury.

C

We note the limitations of our Seventh Amendment holding. We do not address the jury's role in an ordinary inverse condemnation suit. The action here was brought under § 1983, a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts. A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one. Our decision is also circumscribed in its conceptual reach. The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim; although the city objected to submitting

issues of liability to the jury at all, it approved the instructions that were submitted to the jury and therefore has no basis to challenge them.

For these reasons, we do not attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests. The city and its *amici* suggest that sustaining the judgment here will undermine the uniformity of the law and eviscerate state and local zoning authority by subjecting all land-use decisions to plenary, and potentially inconsistent, jury review. Our decision raises no such specter. Del Monte Dunes did not bring a broad challenge to the constitutionality of the city's general land-use ordinances or policies, and our holding does not extend to a challenge of that sort. In such a context, the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge. Nor was the gravamen of Del Monte Dunes' complaint even that the city's general regulations were unreasonable as applied to Del Monte Dunes' property; we do not address the proper trial allocation of the various questions that might arise in that context. Rather, to the extent Del Monte Dunes' challenge was premised on unreasonable governmental action, the theory argued and tried to the jury was that the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city. Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather that it had not done so. As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury.

V

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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

I join all except Part IV–A–2 of JUSTICE KENNEDY's opinion. In my view, all § 1983 actions must be treated alike insofar as the Seventh Amendment right to jury trial is concerned; that right exists when monetary damages are sought; and the issues submitted to the jury in the present case were properly sent there.

I

Revised Stat. § 1979, 42 U. S. C. § 1983, creates a duty to refrain from interference with the federal rights of others, and provides money damages and injunctive relief for violation of that duty. Since the statute itself confers no right to jury trial, such a right is to be found, if at all, in the application to § 1983 of the Seventh Amendment, which guarantees a jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." In determining whether a particular cause of action is a "[s]ui[t] at common law" within the meaning of this provision, we must examine whether it was tried at law in 1791 or is analogous to such a cause, see, *e. g., Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989), and whether it seeks relief that is legal or equitable in nature, see, *e. g., Tull* v. *United States*, 481 U. S. 412, 421 (1987).

The fundamental difference between my view of this case and JUSTICE SOUTER's is that I believe § 1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim-creating statute itself, but by an extrinsic body of law to which the statute refers, namely, "federal

rights elsewhere conferred." *Baker* v. *McCollan,* 443 U. S. 137, 144, n. 3 (1979). In this respect § 1983 is, so to speak, a prism through which many different lights may pass. Unlike JUSTICE SOUTER, I believe that, in analyzing this cause of action for Seventh Amendment purposes, the proper focus is on the prism itself, not on the particular ray that happens to be passing through in the present case.

The Seventh Amendment inquiry looks first to the "nature of the statutory action." *Feltner* v. *Columbia Pictures Television, Inc.,* 523 U. S. 340, 348 (1998). The only "statutory action" here is a § 1983 suit. The question before us, therefore, is not what common-law action is most analogous to some generic suit seeking compensation for a Fifth Amendment taking, but what common-law action is most analogous *to a § 1983 claim.* The fact that the breach of duty which underlies the particular § 1983 claim at issue here—a Fifth Amendment takings violation—may give rise to *another* cause of action besides a § 1983 claim, namely, a so-called inverse condemnation suit, which is (according to Part IV–A–2 of JUSTICE KENNEDY's opinion) or is not (according to JUSTICE SOUTER's opinion) entitled to be tried before a jury, seems to me irrelevant. The central question remains whether a *§ 1983 suit* is entitled to a jury. The fortuitous existence of an inverse-condemnation cause of action is surely not essential to the existence of the § 1983 claim. Indeed, for almost all § 1983 claims arising out of constitutional violations, no alternative private cause of action *does* exist—which makes it practically useful, in addition to being theoretically sound, to focus on the prism instead of the refracted light.

This is exactly the approach we took in *Wilson* v. *Garcia,* 471 U. S. 261 (1985)—an opinion whose analysis is so precisely in point that it gives this case a distinct quality of *déjà vu.* *Wilson* required us to analogize § 1983 actions to common-law suits for a different purpose: not to determine applicability of the jury-trial right, but to identify the rele-

vant statute of limitations. Since no federal limitations period was provided, the Court had to apply 42 U. S. C. § 1988(a), which stated that, in the event a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the [federal] courts in the trial and disposition of the cause . . . ." In applying this provision, the Court identified as one of the steps necessary for its analysis resolution of precisely the question I have been discussing here: "[W]e must . . . decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." 471 U. S., at 268. The Court concluded (as I do here) that all § 1983 claims should be characterized in the same way. It said (as I have) that § 1983 was "a uniquely federal remedy," and that it is "the purest coincidence . . . when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Id.*, at 271–272 (citations, footnotes, and internal quotation marks omitted). And the Court was affected (as I am here) by the practical difficulties of the other course, which it described as follows:

> "Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
>
> "A catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without pro-

> cedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard—to identify only a few." *Id.*, at 272–273 (footnotes omitted).

For these reasons the Court concluded that *all* § 1983 actions should be characterized as "tort action[s] for the recovery of damages for personal injuries." *Id.*, at 276.

To be sure, § 1988 is not the Seventh Amendment. It is entirely possible to analogize § 1983 to the "common law" in one fashion for purposes of that statute, and in another fashion for purposes of the constitutional guarantee. But I cannot imagine why one would want to do that. For both purposes it is a "unique federal remedy" whose character is determined by the federal cause of action, and not by the innumerable constitutional and statutory violations upon which that cause of action is dependent. And for both purposes the search for (often nonexistent) common-law analogues to remedies for those particular violations is a major headache. Surely, the burden should be upon JUSTICE SOUTER to explain why a different approach is appropriate in the present context. I adhere to the approach of *Wilson*, reaffirmed and refined in *Owens* v. *Okure*, 488 U. S. 235 (1989), that a § 1983 action is a § 1983 action.[1]

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[1] JUSTICE SOUTER properly notes that "trial by jury is not a uniform feature of § 1983 actions." *Post*, at 751. This does not lead, however, to his desired conclusion that all § 1983 actions can therefore not properly be analogized to tort claims. *Post*, at 740, 750–752. Before the merger of law and equity, a contested right would have to be established at law before relief could be obtained in equity. Thus, a suit in equity to enjoin an alleged nuisance could not be brought until a tort action at law established the right to relief. See 1 J. High, Law of Injunctions 476–477 (2d ed. 1880). Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit—so that I can file a tort action seeking only an injunction against a nuisance. If I should do so, the fact that I seek only equitable relief would disentitle me to a jury, see, *e. g.*, *Curtis* v. *Loether*, 415 U. S. 189, 198 (1974); *Dairy Queen*,

II

To apply this methodology to the present case: There is no doubt that the cause of action created by § 1983 is, and was always regarded as, a tort claim. Thomas Cooley's treatise on tort law, which was published roughly contemporaneously with the enactment of § 1983, tracked Blackstone's view, see 3 W. Blackstone, Commentaries on the Laws of England 115–119 (1768), that torts are remedies for invasions of certain rights, such as the rights to personal security, personal liberty, and property. T. Cooley, Law of Torts 2–3 (1880). Section 1983 assuredly fits that description. Like other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties, see *Carey* v. *Piphus*, 435 U. S. 247, 254 (1978), and thereby, of course, to deter future violations.

This Court has confirmed in countless cases that a § 1983 cause of action sounds in tort. We have stated repeatedly that § 1983 "creates a species of tort liability," *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976); see also *Heck* v. *Humphrey*, 512 U. S. 477, 483 (1994); *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 305 (1986); *Smith* v. *Wade*, 461 U. S. 30, 34 (1983); *Carey*, *supra*, at 253; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 507 (1939) (opinion of Roberts, J.) (describing a claim brought under a predecessor of § 1983 as seeking relief for "tortious invasions of alleged civil rights by persons acting under color

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Inc. v. *Wood*, 369 U. S. 469, 471 (1962); *Parsons* v. *Bedford*, 3 Pet. 433, 446–447 (1830); E. Re & J. Re, Cases and Materials on Remedies 46 (4th ed. 1996)—but that would not render the nuisance suit any less a *tort* suit, so that if damages *were* sought a jury *would* be required. So also here: Some § 1983 suits do not require a jury because only equitable relief is sought. But since they are *tort* suits, when damages are requested, as they are in the present case, a jury must be provided. Thus, the relief sought is an important consideration in the Seventh Amendment inquiry, but contrary to JUSTICE SOUTER's belief it is a consideration separate from the determination of the analogous common-law cause of action.

of state authority"). We have commonly described it as creating a "constitutional tort," since violations of constitutional rights have been the most frequently litigated claims. See *Crawford-El* v. *Britton*, 523 U. S. 574, 600–601 (1998); *Jefferson* v. *City of Tarrant*, 522 U. S. 75, 78–79 (1997); *McMillian* v. *Monroe County*, 520 U. S. 781, 784 (1997); *Richardson* v. *McKnight*, 521 U. S. 399, 401 (1997); *Johnson* v. *Jones*, 515 U. S. 304, 307 (1995); *Albright* v. *Oliver*, 510 U. S. 266, 269 (1994); *Siegert* v. *Gilley*, 500 U. S. 226, 231 (1991); *St. Louis* v. *Praprotnik*, 485 U. S. 112, 121 (1988); *Daniels* v. *Williams*, 474 U. S. 327, 329 (1986); *Memphis Community School Dist.*, *supra*, at 307; *Smith*, *supra*, at 35; *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978). In *Wilson* v. *Garcia*, we explicitly identified § 1983 as a personal-injury tort, stating that "[a] violation of [§ 1983] is an injury to the individual rights of the person," and that "Congress unquestionably would have considered the remedies established in the Civil Rights Act [of 1871] to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." 471 U. S., at 277.

As described earlier, in *Wilson*, *supra*, and *Okure*, *supra*, we used § 1983's identity as a personal-injury tort to determine the relevant statute of limitations under 42 U. S. C. § 1988(a). We have also used § 1983's character as a tort cause of action to determine the scope of immunity, *Kalina* v. *Fletcher*, 522 U. S. 118, 124–125 (1997), the recoverable damages, *Heck*, *supra*, at 483; *Memphis Community School Dist.*, *supra*, at 305–306, and the scope of liability, *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961). In *Owen* v. *Independence*, 445 U. S. 622, 657 (1980), we even asserted that the attributes of § 1983 could change to keep up with modern developments in the law of torts: "Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evo-

lution. . . . [T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."

The Seventh Amendment's right to jury trial attaches to a statutory cause of action that, although unknown at common law, is analogous to common-law causes that were tried before juries. See, *e. g.*, *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S., at 347–348. The initial Seventh Amendment question before us, therefore, is whether a tort action seeking money damages was a "suit at common law" for which a jury trial was provided. The answer is obviously yes. Common-law tort actions were brought under the writs of trespass and trespass on the case. See generally S. Milsom, Historical Foundations of the Common Law 283–313 (2d ed. 1981). Trespass remedied direct, forcible tortious injuries, while the later developed trespass on the case remedied indirect or consequential harms. See, *e. g.*, Dix, Origins of the Action of Trespass on the Case, 46 Yale L. J. 1142, 1163 (1937); Krauss, Tort Law and Private Ordering, 35 St. Louis U. L. J. 623, 637, and n. 66 (1991). Claims brought pursuant to these writs and seeking money damages were triable to juries at common law. See, *e. g.*, T. Plucknett, A Concise History of the Common Law 125, 348 (4th ed. 1948); J. Baker, An Introduction to English Legal History 59 (2d ed. 1979). It is clear from our cases that a tort action for money damages is entitled to jury trial under the Seventh Amendment. See *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974) (according jury trial because "[a] damages action under [Title VIII of the Civil Rights Act of 1968] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach"); *Pernell* v. *Southall Realty*, 416 U. S. 363, 370 (1974) ("This Court has long assumed that . . . actions for damages to a person or property . . . are actions at law triable to a jury"); *Ross* v.

Bernhard, 396 U. S. 531, 533 (1970) ("The Seventh Amendment . . . entitle[s] the parties to a jury trial in actions for damages to a person or property . . .").

A number of lower courts have held that a § 1983 damages action—without reference to what might have been the most analogous common-law remedy for violation of the particular federal right at issue—must be tried to a jury. See, *e. g.*, *Caban-Wheeler* v. *Elsea*, 71 F. 3d 837, 844 (CA11 1996); *Perez-Serrano* v. *DeLeon-Velez*, 868 F. 2d 30, 32–33 (CA1 1989); *Laskaris* v. *Thornburgh*, 733 F. 2d 260, 264 (CA3 1984); *Segarra* v. *McDade*, 706 F. 2d 1301, 1304 (CA4 1983); *Dolence* v. *Flynn*, 628 F. 2d 1280, 1282 (CA10 1980); *Amburgey* v. *Cassady*, 507 F. 2d 728, 730 (CA6 1974); *Brisk* v. *Miami Beach*, 726 F. Supp. 1305, 1311–1312 (SD Fla. 1989); *Ruth Anne M.* v. *Alvin Independent School Dist.*, 532 F. Supp. 460, 475 (SD Tex. 1982); *Mason* v. *Melendez*, 525 F. Supp. 270, 282 (WD Wis. 1981); *Cook* v. *Cox*, 357 F. Supp. 120, 124–125, and n. 4 (ED Va. 1973).

In sum, it seems to me entirely clear that a § 1983 cause of action for damages is a tort action for which jury trial would have been provided at common law. The right of jury trial is not eliminated, of course, by virtue of the fact that, under our modern unified system, the equitable relief of an injunction is also sought. See, *e. g.*, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 479 (1962); *Scott* v. *Neely*, 140 U. S. 106, 109–110 (1891). Nor—to revert to the point made in Part I of this discussion—is the tort nature of the cause of action, and its entitlement to jury trial, altered by the fact that another cause of action was available (an inverse-condemnation suit) to obtain the same relief. Even if that were an equitable cause of action—or, as JUSTICE SOUTER asserts, a peculiar legal cause of action to which the right to jury trial did not attach—the nature of the § 1983 suit would no more be transformed by it than, for example, a common-law fraud action would be deprived of the right to jury trial by the fact that

the defendant was a trustee who could, instead, have been sued for an equitable accounting.

III

To say that respondents had the right to a jury trial on their § 1983 claim is not to say that they were entitled to have the jury decide every issue. The precise scope of the jury's function is the second Seventh Amendment issue before us here—and there again, as we stated in *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 377 (1996), history is our guide. I agree with the Court's methodology, see *ante*, at 718–719, 720, which, in the absence of a precise historical analogue, recognizes the historical preference for juries to make primarily factual determinations and for judges to resolve legal questions. See *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935). That fact-law dichotomy is routinely applied by the lower courts in deciding § 1983 cases. For instance, in cases alleging retaliatory discharge of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech. See, *e. g.*, *Horstkoetter* v. *Department of Public Safety*, 159 F. 3d 1265, 1271 (CA10 1998). And in cases asserting municipal liability for harm caused by unconstitutional policies, judges determine whether the alleged policies were unconstitutional, while juries find whether the policies in fact existed and whether they harmed the plaintiff. See, *e. g.*, *Myers* v. *County of Orange*, 157 F. 3d 66, 74–76 (CA2 1998), cert. denied, 525 U. S. 1146 (1999).

In the present case, the question of liability for a Takings Clause violation was given to the jury to determine by answering two questions: (1) whether respondents were deprived of "all economically viable use" of their property, and (2) whether petitioner's 1986 rejection of respondents' building plans "substantially advance[d] [a] legitimate public in-

teres[t]." *Ante,* at 701. I concur in the Court's assessment that the "economically viable use" issue presents primarily a question of fact appropriate for consideration by a jury. *Ante,* at 720–721. The second question—whether the taking "substantially advance[s] [a] legitimate public interes[t]"[2]—seems to me to break down (insofar as is relevant to the instructions here) into two subquestions: (1) Whether the government's asserted basis for its challenged action represents a legitimate state interest. That was a question of law for the court. (2) Whether that legitimate state interest is substantially furthered by the challenged government action. I agree with the Court that at least in the highly particularized context of the present case, involving the denial of a single application for stated reasons, that was a question of fact for the jury. As the matter was put to the jury in the present case, the first subquestion was properly removed from the jury's cognizance: the court instructed that "legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development." App. 304. These included the only public interests asserted in the case. The second subquestion, on the other hand, was properly left to the jury: "[O]ne of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose." *Ibid.;* see *ante,* at 721.

* * *

I conclude that the Seventh Amendment provides respondents with a right to a jury trial on their § 1983 claim, and that the trial court properly submitted the particular issues raised by that § 1983 claim to the jury. For these reasons, I concur in the judgment and join all but Part IV–A–2 of JUSTICE KENNEDY's opinion.

[2] As the Court explains, petitioner forfeited any objection to this standard, see *ante,* at 704, and I express no view as to its propriety.

JUSTICE SOUTER, with whom JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

A federal court commits error by submitting an issue to a jury over objection, unless the party seeking the jury determination has a right to a jury trial on the issue. Fed. Rule Civ. Proc. 39(a)(2). In this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, the city unsuccessfully objected to submitting respondents' regulatory takings (or inverse condemnation) claim to a jury. Respondents had no right to a jury trial either by statute or under the Constitution; the District Court thus erred in submitting their claim to a jury. In holding to the contrary, that such a right does exist under the Seventh Amendment, the Court misconceives a takings claim under § 1983 and draws a false analogy between such a claim and a tort action. I respectfully dissent from this error.

I

I see eye to eye with the Court on some of the preliminary issues. I agree in rejecting extension of "rough proportionality" as a standard for reviewing land-use regulations generally and so join Parts I and II of the majority opinion. I also join the Court in thinking the statutory language "an action at law" insufficient to provide a jury right under 42 U. S. C. § 1983, *ante*, at 707–708, with the consequence that *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370 (1996), must provide the appropriate questions in passing on the issue of a constitutional guarantee of jury trial: "'whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was'"; and, if so, "'whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.'" *Ante*, at 708 (quoting *Markman*, *supra*, at 376). The Court soundly concedes that at the adoption of the Seventh Amendment there was no action like the modern in-

verse condemnation suit for obtaining just compensation when the government took property without invoking formal condemnation procedures. Like the Court, I am accordingly remitted to a search for any analogy that may exist and a consideration of any implication going to the substance of the jury right that the results of that enquiry may raise. But this common launching ground is where our agreement ends.

II

The city's proposed analogy of inverse condemnation proceedings to direct ones is intuitively sensible, given their common Fifth Amendment constitutional source and link to the sovereign's power of eminent domain. Accord, *e. g.*, *New Port Largo, Inc.* v. *Monroe County*, 95 F. 3d 1084, 1092 (CA11 1996) ("We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework"); *Northglenn* v. *Grynberg*, 846 P. 2d 175, 178 (Colo. 1993) ("Because an inverse condemnation action is based on the 'takings' clause of our constitution, it is to be tried as if it were an eminent domain proceeding"). See Grant, A Revolutionary View of the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144, 191–205 (1996).

The intuition is borne out by closer analysis of the respective proceedings. The ultimate issue is identical in both direct and inverse condemnation actions: a determination of "the fair market value of the property [taken] on the date it is appropriated," as the measure of compensation required by the Fifth Amendment. *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984). It follows, as Justice Brandeis said in *Hurley* v. *Kincaid*, 285 U. S. 95 (1932), that "[t]he compensation which [a property owner] may obtain in [an inverse condemnation] proceeding will be the same as that which he might have been awarded had the [government] instituted . . . condemnation proceedings," *id.*, at 104. This, indeed, has been our settled understanding, in cases

before *Hurley* and after *Kirby Forest Industries*, which have emphasized the common underlying nature of direct and inverse condemnation cases; the commencement of inverse condemnation actions by property owners, and direct condemnation proceedings by the government, does not go to the substance of either. As we said in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987):

> "'The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners d[oes] not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment.'" *Id.*, at 315 (quoting *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933)).

Accord, *Boom Co.* v. *Patterson*, 98 U. S. 403, 407 (1879) ("The point in issue [in the inverse condemnation proceeding] was the compensation to be made to the owner of the land; in other words, the value of the property taken. . . . The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value"). It is presumably for this reason that this Court has described inverse condemnation actions as it might speak of eminent domain proceedings brought by property owners instead of the government. See *Agins* v. *City of Tiburon*, 447 U. S. 255, 258, n. 2 (1980) ("Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted'") (quoting *United States* v. *Clarke*, 445 U. S. 253, 257 (1980)). See also *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); Grant, *supra*, at 192–193 ("The difference between condemnation and inverse condemnation inheres precisely in the 'character' of

the former as *United States v. Landowner* and the latter as *Landowner v. United States*"). Thus, the analogy between direct and inverse condemnation is apparent whether we focus on the underlying Fifth Amendment right or the common remedy of just compensation.

The strength of the analogy is fatal to respondents' claim to a jury trial as a matter of right. Reaffirming what was already a well-established principle, the Court explained over a century ago that "the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury," *Bauman* v. *Ross*, 167 U. S. 548, 593 (1897) (citing, *inter alia*, *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 6 Cranch 233 (1810); *United States* v. *Jones*, 109 U. S. 513, 519 (1883); and *Shoemaker* v. *United States*, 147 U. S. 282, 300, 301 (1893)),[1]

[1] In *Bauman*, the Court upheld a statute (providing for condemnation of land for streets) that contemplated a form of jury "differing from an ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity," and stated that the just compensation determination "may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury." 167 U. S., at 593. The Court relied upon prior cases that had assumed the absence of a constitutional right to a jury determination of just compensation. See, *e. g.*, *Shoemaker*, 147 U. S., at 301–302, 304–305 (upholding statute providing for ascertainment of the value of condemned land by three presidentially appointed commissioners); *Jones*, 109 U. S., at 519 ("The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate"). See also *Kohl* v. *United States*, 91 U. S. 367, 376 (1876) ("That [the right of eminent domain] was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury"); *Crane* v. *Hahlo*, 258 U. S. 142, 147 (1922) ("[T]he reference of such a question [determining the amount of compensation], especially in eminent domain proceedings, to a commission, or board, or sheriff's jury, or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal

and we have since then thought it "long . . . settled that there is no constitutional right to a jury in eminent domain proceedings," *United States* v. *Reynolds*, 397 U. S. 14, 18 (1970).[2] See 12 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 3051, p. 224 (1997) ("It is absolutely settled that there is no constitutional right to a trial by jury in compensation cases").

The reason that direct condemnation proceedings carry no jury right is not that they fail to qualify as "Suits at common law" within the meaning of the Seventh Amendment's guarantee, for we may assume that they are indeed common law proceedings,[3] see *Kohl* v. *United States*, 91 U. S. 367, 376 (1876) ("The right of eminent domain always was a right at common law"); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 28 (1959) ("[A]n eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law' "). The reason there is no right to

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Constitution that it has been held repeatedly that it is a form of procedure within the power of the State to provide").

[2] Similarly, the Due Process Clause of the Fourteenth Amendment does not require a jury trial in state condemnation proceedings. See, *e. g.*, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 694 (1897); *Crane*, *supra*, at 147; *Dohany* v. *Rogers*, 281 U. S. 362, 369 (1930).

[3] Several commentators and courts have advanced theories that a condemnation proceeding is not an action at law, but rather is either some sort of special proceeding, or else an equitable proceeding. See, *e. g.*, H. Mills & A. Abbott, Mills on Law of Eminent Domain § 84, p. 225 (2d ed. 1888); *id.*, § 91, at 239 ("Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury"); 1A J. Sackman, Nichols on Eminent Domain § 4.105[1], p. 4–137 (rev. 3d ed. 1998) ("Condemnation proceedings are not suits at common law"). There is some accumulated support for the idea that condemnation proceedings derive from the writ *ad quod damnum*, which was issued by the courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of the taking. Nonetheless, since *Kohl* v. *United States*, *supra*, at 376, the first case involving the Federal Government's exercise of its power of eminent domain, this Court has classified condemnation proceedings as suits at common law.

jury trial, rather, is that the Seventh Amendment "preserve[s]" the common law right where it existed at the time of the framing, but does not create a right where none existed then. See U. S. Const., Amdt. 7 ("In Suits at common law . . . the right of trial by jury shall be preserved"). See also 5 J. Moore, J. Lucas, & J. Wicker, Moore's Federal Practice ¶ 38.32[1], p. 38–268 (2d ed. 1996) ("[T]he Seventh Amendment does not guarantee a jury trial in all common law actions in the federal courts; [instead] it preserves the right of jury trial as at common law"). There is no jury right, then, because condemnation proceedings carried "no uniform and established right to a common law jury trial in England or the colonies at the time . . . the Seventh Amendment was adopted." *Ibid.* See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 458 (1977) ("Condemnation was a suit at common law but constitutionally could be tried without a jury"). The statement in *Reynolds* indeed expressly rested on these considerations, as shown in the Court's quotation of Professor Moore's statement that "[t]he practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain." *Reynolds*, *supra*, at 18 (quoting 5 J. Moore, Federal Practice ¶ 38.32[1], p. 239 (2d ed. 1969) (internal quotation marks omitted)).

The Court in *Reynolds* was on solid footing. In England, while the general practice of Parliament was to provide for the payment of compensation, parliamentary supremacy enabled it to take private property for public use without compensation. See, *e. g.*, Randolph, The Eminent Domain, 3 L. Q. Rev. 314, 323 (1887) ("That there is no eminent domain

sub nomine in England is because the power is included, and the right to compensation lost, in the absolutism of Parliament. The only technical term approximating eminent domain is 'compulsory powers' as used in statutes granting to companies and associations the right to take private property for their use"). See also McNulty, The Power of "Compulsory Purchase" Under the Law of England, 21 Yale L. J. 639, 644–646 (1912). Thus, when Parliament made provision for compensation, it was free to prescribe whatever procedure it saw fit, and while the agency of a common law jury was sometimes chosen, very frequently other methods were adopted. See Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 Harv. L. Rev. 29, 32–36 (1928); *id.*, at 36 ("[A]n ample basis exists in the parliamentary precedents for the conclusion that the common law sanctioned such diverse methods of assessment that no one method can be said to have been made imperative by the Seventh Amendment"). See also 1A J. Sackman, Nichols on Eminent Domain § 4.105[1], p. 4–115, and § 4.107, pp. 4–136 to 4–137 (rev. 3d ed. 1998) ("It had become the practice in almost all of the original thirteen states at the time when their constitutions were adopted, to refer the question of damages from the construction of [high]ways . . . to a commission of viewers or appraisers, generally three or five in number"); *id.*, at 4–137 ("[I]t has been repeatedly held that when land is taken by authority of the United States, the damages may be ascertained by any impartial tribunal").

In sum, at the time of the framing the notion of regulatory taking or inverse condemnation was yet to be derived, the closest analogue to the then-unborn claim was that of direct condemnation, and the right to compensation for such direct takings carried with it no right to a jury trial, just as the jury right is foreign to it in the modern era. On accepted Seventh Amendment analysis, then, there is no reason to find a jury right either by direct analogy or for the sake of preserving the substance of any jury practice known to the law

at the crucial time. Indeed, the analogy with direct condemnation actions is so strong that there is every reason to conclude that inverse condemnation should implicate no jury right.

III

The plurality avoids this obvious conclusion in two alternative ways. One way is to disparage the comparison of inverse to direct taking, on the grounds that litigation of the former involves proof of liability that the latter does not and is generally more onerous to the landowner. The disparagement is joined with adoption of a different analogy, between inverse condemnation proceedings and actions for tortious interference with property interests, the latter of which do implicate a right to jury trial. The plurality's stated grounds for avoiding the direct condemnation analogy, however, simply break down, and so does the purported comparison to the tort actions. The other way the plurality avoids my conclusion is by endorsing the course followed by JUSTICE SCALIA in his separate opinion, by selecting an analogy not to tort actions as such, but to tort-like § 1983 actions. This alternative, however, is ultimately found wanting, for it prefers a statutory analogy to a constitutional one.

A

1

The plurality's argument that no jury is required in a direct condemnation proceeding because the government's liability is conceded, leaving only the issue of damages to be assessed, rests on a premise that is only partially true. The part that is true, of course, is that the overwhelming number of direct condemnation cases join issue solely on the amount of damages, that is, on the just compensation due the landowner. But that is not true always. Now and then a landowner will fight back by denying the government's right to condemn, claiming that the object of the taking was not a public purpose or was otherwise unauthorized by statute.

See, *e. g., Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 240 (1984) ("There is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even . . . [if] it is an 'extremely narrow' one" (citation omitted)); *Shoemaker,* 147 U. S., at 298. See also 2A Sackman, *supra,* at 7–81 to 7–82, and nn. 89–90 (listing state cases where condemnation clauses and the Due Process Clause of the Fourteenth Amendment have been relied upon by property owners to contest attempts to acquire their property for private purposes); 2 J. Lewis, Law of Eminent Domain § 417, p. 923, and n. 51 (2d ed. 1900). What is more, when such a direct condemnation does have more than compensation at stake, the defense of no public purpose or authority closely resembles, if indeed it does not duplicate, one of the grounds of liability for inverse condemnation noted in *Agins,* 447 U. S., at 260–261, and raised in this case: the failure of the regulation to contribute substantially to the realization of a legitimate governmental purpose.[4] Indeed, the distinction between direct and inverse condemnation becomes murkier still when one considers that, even though most inverse condemnation plaintiffs accept the lawfulness of the taking and just want money, see *infra,* at 747, n. 7, some such plaintiffs ask for an injunction against the government's action, in which event they seek the same ultimate relief as the direct condemnee who defends against the taking as unauthorized. If the direct condemnee has no right to a jury, see 2A Sackman, Nichols on Eminent Domain § 7.03[11][a], at 7–90 ("The question of whether a legislative determination of a public use is really public has been declared by the courts ultimately to be a judicial one"), the inverse condemnee should fare no differently.

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[4] See, *e. g.,* J. Laitos, Law of Property Rights Protection § 12.04[A], pp. 12–12 to 12–13 (1999) ("The police power takings standard also means that the taking prohibition becomes more like a due process check on the police power"; describing two claims as "an identical test").

This recognition may underlie the fact that the plurality's absence-of-liability-issue reasoning for distinguishing direct and inverse condemnation fails to resonate through the cases holding that direct actions carry no jury right or commenting on the absence of juries in such cases. While the plurality cites an opinion of Justice Baldwin, sitting on Circuit, for its position, *ante*, at 713 (citing *Bonaparte* v. *Camden & Amboy R. Co.*, 3 F. Cas. 821, 829 (No. 1,617) (CC NJ 1830)), this citation leaves the reader with a rather skewed perspective on the diversity of rationales underlying early state cases in which the right of a direct condemnee to a jury trial was considered and denied. Several courts rested on the fact that proceedings to secure compensation were in the nature of suits against the sovereign, and thus the legislature could qualify and condition the right to bring such suits, at least to the extent of providing that they be conducted without a jury. See, *e. g.*, *Ligat* v. *Commonwealth*, 19 Pa. 456, 460 (1852) ("A sovereign state is not liable to an action at law, against her consent; and the right of trial by jury has, therefore, no existence in such a case"); *Pennsylvania R. Co.* v. *First German Lutheran Congregation of Pittsburgh*, 53 Pa. 445, 449 (1866) ("In taking private property for its road [the railroad corporation] exercises a part of the sovereign power of the state . . . [and] the right of trial by jury has never been held to belong to the citizen himself in proceedings by the state under her powers of eminent domain"). See also *McElrath* v. *United States*, 102 U. S. 426, 440 (1880). Just as significantly, the plurality's new rationale is absent from any of our precedents, including those underlying the *Reynolds* decision.[5]

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[5] See n. 1, *supra*. Moreover, if presence of a liability issue were crucial, then the jury right presumably would be lost in every tort case with liability conceded, which goes to trial on damages alone. Such, of course, is not the practice. See, *e. g.*, *Blazar* v. *Perkins*, 463 A. 2d 203, 207 (R. I. 1983) ("The fact that prior to trial, defendants admitted liability, thereby removing one issue from the consideration of the jury, does not alter the

Finally, the absence of the plurality's rationale from our prior discussions of the matter most probably reflects the fact that the want of a liability issue in most condemnation cases says nothing to explain why no jury ought to be provided on the question of damages that always is before the courts. The dollars-and-cents issue is about as "factual" as one can be (to invoke a criterion of jury suitability emphasized by the Court in another connection, *ante*, at 720–721), and no dispute about liability provokes more contention than the price for allowing the government to put a landowner out of house and home. If an emphasis on factual issues vigorously contested were a sufficient criterion for identifying something essential to the preservation of the Seventh Amendment jury right, there ought to be a jury right in direct condemnation cases as well as the inverse ones favored by the plurality.

The plurality's second reason for doubting the comparability of direct and inverse condemnation is that the landowner has a heavier burden to shoulder in the latter case, beginning with a need to initiate legal action, see *United States* v. *Clarke*, 445 U. S., at 257. Once again, however, it is apparent that the two varieties of condemnation are not always so distinguishable. The landowner who defends in a direct condemnation action by denying the government's right to take is in no significantly different position from the inverse condemnee who claims the government must pay or be enjoined because its regulation fails to contribute substantially to its allegedly public object. See, *e. g.*, 2A Sackman, *supra*, § 7.03[12], at 7–105 to 7–106 (citing cases where "the challenger has the burden of proof to show that the taking is not for a public purpose"). And once again one may ask why, even if the inverse condemnee's burden always were the heavier, that should make any difference. Some plaintiffs' cases are easy and some are difficult, but the difficult ones

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application of th[e] principle [that plaintiffs cannot waive a jury trial on the issue of damage when defendants have demanded a jury trial]").

are no different in front of a jury (except on the assumption that juries are more apt to give David the advantage against Goliath, which I do not believe is the plurality's point). Neither the Fifth nor the Seventh Amendment has ever been thought to shift and spring with ease of proof. Cf. *United States* v. *101.88 Acres of Land, More or Less, Situated in St. Mary Parish, La.*, 616 F. 2d 762, 772 (CA5 1980) ("The 5th Amendment, while it guarantees that compensation be just, does not guarantee that it be meted out in a way more convenient to the landowner than to the sovereign").

2

Just as the plurality's efforts to separate direct from inverse condemnation actions thus break down, so does its proposal to analogize inverse condemnation to property damage torts. Whereas the plurality posits an early practice of litigating inverse condemnation as a common law tort, there was in fact a variety of treatments, some of them consistent with the plurality's argument, some of them not. None of those treatments turned on the plurality's analysis that a State's withholding of some recovery process is essential to the cause of action. In the end, the plurality's citations simply do not point to any early practice both consistently followed and consistent with the concepts underlying today's inverse condemnation law.

a

The plurality introduces its claimed analogue of tort actions for property damage by emphasizing what it sees as a real difference between the action of the government in direct condemnations, and those inverse condemnations, at least, that qualify for litigation under § 1983. Whereas in eminent domain proceedings the government admits its liability for the value of the taking, in the inverse condemnation cases litigated under § 1983, it refuses to do so inasmuch as it denies the landowner any state process (or effective process) for litigating his claim. See *Williamson County Re-*

gional Planning Comm'n v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194–195 (1985). Thus the plurality explains that

> "[a]lthough the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English*, 482 U. S., at 315 (citing *Jacobs*, 290 U. S., at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well." *Ante*, at 717.

According to the plurality, it is the taking of property without providing compensation or a mechanism to obtain it that is tortious and subject to litigation under § 1983. See *ante*, at 714–715, 717. By this reasoning, the plurality seeks to distinguish such a § 1983 action from a direct condemnation action and possibly from "an ordinary inverse condemnation suit," as well, *ante*, at 721, by which the plurality presumably means a suit under a state law providing a mechanism for redress of regulatory takings claims.

The plurality claims to have authority for this view in some early state and federal cases seeing regulatory interference with land use as akin to nuisance, trespass, or trespass on the case, *ante*, at 715–716, and I agree that two of the plurality's cited cases,[6] decided under state law, are

[6] Two of the cases cited by the plurality offer at most tangential support. Plaintiff's claim in *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 249 (1833), was dismissed for lack of jurisdiction, on the ground that the Fifth Amendment was not applicable to the States. In *Lindsay* v. *Commissioners*, 2 Bay 38 (S. C. 1796), the plaintiff sought a writ of prohibition restraining city commissioners from laying out a street, not damages. While the plurality relies on the opinion of one justice favoring the grant-

authority for the tort treatment the plurality claims to be the appropriate analogy. See *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162 (N. Y. 1816) (Kent, Ch.); *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (1872). One other is arguably such authority; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546 (1914), is somewhat ambiguous, holding that the law of nuisance would provide compensation for interference with enjoyment of land when the State chose not to take the interest by direct condemnation; the measure of damages (not explained) may well have been what the Fifth Amendment would provide for a temporary partial taking.

Beyond these cases, however, any prospect of a uniform tort treatment disappears. One of the plurality's cited cases, *Bradshaw* v. *Rodgers*, 20 Johns. 103 (N. Y. 1822), was reversed by *Rogers* v. *Bradshaw*, 20 Johns. 735 (N. Y. 1823). As the concept of public liability was explained in the latter opinion, it turned not on an issue of garden variety tort law, but on whether there was a total absence or not of legal authority for a defending public officer's action with respect to the land. See *id.*, at 743 ("I should doubt exceedingly, whether the general principle, that private property is not to be taken for public uses without just compensation, is to be carried so far as to make a public officer, who enters upon private property by virtue of legislative authority, specially given for a public purpose, a *trespasser*, if he enters before the property has been paid for. I do not know, nor do I find, that the precedents will justify any court of justice in carrying the general principle to such an extent"). See also Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 64–65 (1999) (demonstrating that pre-Civil War owner-initiated just compensation plaintiffs

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ing of the writ, the court actually divided equally, the result being denial of the writ. Moreover, even within that opinion, the quoted statement is the equivalent of dictum since it is not necessary to the reasoning in favor of granting the writ.

could recover retrospective damages under common law action of trespass or trespass on the case only after defendant was "stripped of his [legislative] justification"). Cf. *Leader* v. *Moxon*, 2 Black. W. 924, 927, 96 Eng. Rep. 546, 547 (C. P. 1773) (commissioners acted outside their statutory authority and were thus liable in tort); *Boulton* v. *Crowther*, 2 Barn. & Cress. 701, 707, 107 Eng. Rep. 544, 547 (K. B. 1824). Under these cases, there would be no recovery unless the public officer interfering with the property right was acting wholly without authority. But as absence of legal authorization becomes crucial to recovery, the analogy to tort liability fades. What is even more damaging to the attempted tort analogy, whether it rests on simple tort cases like *Gardner* or legal authorization cases like *Bradshaw*, is that this very assumption that liability flows from wrongful or unauthorized conduct is at odds with the modern view of acts effecting inverse condemnation as being entirely lawful.[7] See *First English Evangelical Lutheran*, 482 U. S., at 314–315 (citing *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S., at 194; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 297, n. 40 (1981); *Hurley* v. *Kincaid*, 285 U. S., at 104; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336 (1893); *United States* v. *Jones*, 109 U. S., at 518). Unlike damages to redress a wrong as understood in *Gardner* or *Bradshaw* (or even in a modern tort action), a damages award in an inverse condemnation action orders payment of the "just compensation" required by the Constitution for payment of an obligation lawfully incurred.

To the plurality's collection of tort and authorization cases, one must add those that are so far from reflecting any early understanding of inverse condemnation as conventionally

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[7] When an inverse condemnee seeks an injunction (as when a direct condemnee challenges the taking, or a plaintiff claims a substantive due process violation), there is a claim of wrong in the sense of lack of authority. But this is not so in the usual case where damages are sought.

tortious that they treat inverse condemnation as grounding an action in quasi contract, see, *e. g.*, *Jacobs* v. *United States*, 290 U. S., at 16. Although the quasi-contractual action seems to be the closest cousin to the plurality's conception of § 1983 as applied here, the resemblance is limited by that strain of quasi-contract[8] theory holding that the defendant must pay for what he has received to avoid unjust enrichment, see E. Farnsworth, Contracts § 2.20, p. 101 (3d ed. 1999), whereas the theory of just compensation for a taking is that the owner must be paid for what he has lost, *United States* v. *Miller*, 317 U. S. 369, 373–374 (1943).

After a canvass of these materials, the only conclusion that seems reasonable to me is that prior to the emergence of the modern inverse condemnation action a spectrum of legal theories was employed to respond to the problem of inverse taking. No one of these experiments can be accepted as a definitive analogue of the contemporary action, and each of them is inconsistent in some way with the contemporary view that inverse condemnation enforces payment for the owner's value in property lawfully taken.

b

If the chosen tort analogy were not already too weak to sustain the plurality's position, it would be rendered so by the plurality's inability to identify any tort recovery under the old cases for the government's sin of omission in failing to provide a process of compensation (which the plurality finds at the heart of the § 1983 claim), as distinct from the acts of interfering with use or enjoyment of land. The plurality simply fails to find any analogue on this element, and its failure is in fact matched by the failure of its § 1983 theory to fit the reality of § 1983 litigation for inverse takings. When an inverse condemnation claim is brought under § 1983, the "provision" of law that is thereby enforced,

[8] See 1 R. Lord, Williston on Contracts § 1.6, pp. 27–28 (4th ed. 1990) (restitution not limited by theory of unjust enrichment).

Golden State Transit Corp. v. *Los Angeles*, 493 U. S. 103, 106 (1989), is the Fifth Amendment Just Compensation Clause and no other.[9] There is no separate cause of action for withholding process, and respondents in the instant case do not claim otherwise; they simply seek just compensation for their land, subject to the usual rules governing § 1983 liability and damages awards.[10]

c

Finally, it must be said that even if the tort analogue were not a failure, it would prove too much. For if the comparison to inverse condemnation were sound, it would be equally

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[9] Of course, § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U. S. 137, 144, n. 3 (1979). Accord, *Johnson* v. *University of Wisconsin-Eau Claire*, 70 F. 3d 469, 481 (CA7 1995) ("Because § 1983 does not create substantive rights, but rather provides a remedy for violations of pre-existing rights, § 1983 claims must specifically allege a violation of the Constitution or 'laws' of the United States").

[10] Respondents in this case sought damages for the fair market value of the property, interim damages for a temporary taking, holding costs, interest, attorney's fees, costs, and other consequential damages. Complaint pp. 14–15; First Amended Complaint pp. 16–17. The jury was instructed that in calculating damages: "[I]t's up to you to decide the difference in value, the fair market value as a result of the City's decision. Multiply it by an interest rate you think is appropriate, for a length of time you think is appropriate. So those are the three elements of computing the damages claimed if you determine the plaintiff is entitled to recover." 11 Record 1426. Respondents thus sought no incremental "damages" (beyond just compensation) for denial of state compensation procedures. Indeed, the only "damages" available in inverse condemnation cases is the just compensation measured by the value of the land. See *supra*, at 734. See, *e. g.*, *Eide* v. *Sarasota County*, 908 F. 2d 716 (CA11 1990). The fact that no further element of damages is recognized confirms rejection of the tort analogy, for it would be a peculiar tort indeed that did not recognize its concomitant injury in damages. Cf. *Miller* v. *Campbell County*, 854 P. 2d 71, 77 (Wyo. 1993) (rejecting reliance on tort law in holding that emotional distress is not a proper element of damages in inverse condemnation actions).

sound as to direct condemnation and so require recognition of the very jury right that we have previously denied. This perception was apparent to the Court of Appeals in this case, when it wrote (erroneously) that "both eminent domain and inverse condemnation actions resemble common-law actions for trover to recover damages for conversion of personal property, and detinue and replevin." 95 F. 3d 1422, 1427 (CA9 1996). The Court of Appeals, indeed, cited *Beatty* v. *United States*, 203 F. 620 (CA4 1913), as does the plurality, *ante*, at 717, in which the Fourth Circuit held that the landowner in a direct condemnation proceeding had a Seventh Amendment right to a jury determination of just compensation:

> "The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. . . . The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury." 203 F., at 626.

The plurality's analogy, if accepted, simply cannot be confined to inverse condemnation actions alone, and if it is not so confined it runs squarely against the settled law in the field of direct condemnation.

B

In addition to the plurality's direct tort analogy, the Court pursues a different analytical approach in adopting JUSTICE SCALIA's analogy to § 1983 actions seeking legal relief, see *ante*, at 709. JUSTICE SCALIA begins with a more sweeping

claim: "The central question remains whether a *§ 1983 suit* is entitled to a jury." *Ante*, at 724 (opinion concurring in part and concurring in judgment). The analogy to the broad class of § 1983 actions is put forward as serving the undoubted virtues of simplicity and uniformity in treating various actions that may be brought under a single remedial statute. It is only when "apply[ing] this methodology to the present case," *ante*, at 727, that JUSTICE SCALIA is careful not to claim too much: he no longer argues for drawing an analogy between § 1983 inverse condemnation actions and all § 1983 actions, but only those § 1983 actions brought to recover money damages, see *ante*, at 729. This subclass of § 1983 actions, he quite correctly notes, has been treated as tortlike in character and thus as much entitled to jury trial as tort actions have been at common law. For two independent reasons, however, I think the analogy with § 1983 actions, either as a class or as a subclass of damages actions, is inadequate.

1

First, the analogy to all § 1983 actions does not serve any unified field theory of jury rights under § 1983. While the statute is indeed a prism through which rights originating elsewhere may pass on their way to a federal jury trial, trial by jury is not a uniform feature of § 1983 actions. The statute provides not only for actions at law with damages remedies where appropriate, but for "suit[s] in equity, or other proper proceeding[s] for redress." 42 U. S. C. § 1983. Accordingly, rights passing through the § 1983 prism may in proper cases be vindicated by injunction, see, *e. g.*, *Mitchum* v. *Foster*, 407 U. S. 225, 242–243 (1972) (§ 1983 falls within "expressly authorized" exception of Anti-Injunction Act and thus authorizes injunctions staying state-court proceedings), by orders of restitution, see, *e. g.*, *Samuel* v. *University of Pittsburgh*, 538 F. 2d 991, 994–995 (CA3 1976) (restitution of university fees collected pursuant to rule held to violate Equal Protection Clause), and by declaratory judgments, see,

e. g., Steffel v. *Thompson,* 415 U. S. 452, 454, 475 (1974) (declaratory relief under § 1983 available in suit claiming state criminal statute constitutionally invalid), none of which implicate, or always implicate, a right to jury trial. Comparing inverse condemnation actions to the class of § 1983 actions that are treated like torts does not, therefore, preserve a uniformity in jury practice under § 1983 that would otherwise be lost. JUSTICE SCALIA's metaphor is, indeed, an apt one: § 1983 is a prism, not a procrustean bed.

Nor, as I have already mentioned, see *supra,* at 748–750, is there a sound basis for treating inverse condemnation as providing damages for a tort. A State's untoward refusal to provide an adequate remedy to obtain compensation, the *sine qua non* of an inverse condemnation remedy under § 1983, is not itself the independent subject of an award of damages (and respondents do not claim otherwise); the remedy is not damages for tortious behavior, but just compensation for the value of the property taken.

2

Even if an argument for § 1983 simplicity and uniformity were sustainable, however, it would necessarily be weaker than the analogy with direct condemnation actions. That analogy rests on two elements that are present in each of the two varieties of condemnation actions: a Fifth Amendment constitutional right and a remedy specifically mandated by that same amendment. Because constitutional values are superior to statutory values, uniformity as between different applications of a given constitutional guarantee is more important than uniformity as between different applications of a given statute. If one accepts that proposition as I do, a close analogy between direct and inverse condemnation proceedings is necessarily stronger than even a comparably close resemblance between two statutory actions.

IV

Were the results of the analysis to this point uncertain, one final anomaly of the Court's position would point up its error. The inconsistency of recognizing a jury trial right in inverse condemnation, notwithstanding its absence in condemnation actions, appears the more pronounced on recalling that under *Agins* one theory of recovery in inverse condemnation cases is that the taking makes no substantial contribution to a legitimate governmental purpose.[11] This issue includes not only a legal component that may be difficult to resolve, but one so closely related to similar issues in substantive due process property claims, that this Court cited a substantive due process case when recognizing the theory under the rubric of inverse condemnation. See *Agins*, 447 U. S., at 260 (citing *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928)).[12] Substantive due process claims are, of course, routinely reserved without question for the court. See, *e. g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 853–855 (1998); *Washington* v. *Glucksberg*, 521 U. S. 702, 722–723 (1997); *FM Properties Operating Co.* v. *Austin*, 93 F. 3d 167, 172, n. 6 (CA5 1996) (rational relationship to legitimate government interest for purposes of substantive due process a question of law for the court); *Sameric Corp.* v. *Philadelphia*, 142 F. 3d 582, 590–591 (CA3 1998) (same as to city

[11] The jury's inverse condemnation verdict did not indicate which of the theories formed the basis of its liability finding: (1) whether the city's action did not substantially advance a legitimate purpose; or (2) whether the city's denial of the permit deprived the subject property of all economically viable use.

[12] I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.

historical commission action).[13] Thus, it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government's objective or the constitutional adequacy of its relationship to the government's chosen means.

The usual practice makes perfect sense. While juries are not customarily called upon to assume the subtleties of deferential review, courts apply this sort of limited scrutiny in all sorts of contexts and are routinely accorded institutional competence to do it. See, *e. g.*, *Pearson* v. *Grand Blanc*, 961 F. 2d 1211, 1222 (CA6 1992) (deferential substantive due process review a matter of law for the court). Scrutinizing the legal basis for governmental action is "one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis." *Markman*, 517 U. S., at 388. It therefore should bring no surprise to find that in the takings cases a question whether regulatory action substantially advances a legitimate public aim has more often than not been treated by the federal courts as a legal issue. See, *e. g.*, *New Port Largo, Inc.* v. *Monroe County*, 95 F. 3d 1084, 1092 (CA11 1996) (whether regulatory taking occurred is an issue for the court); *Mid Gulf, Inc.* v. *Bishop*, 792 F. Supp. 1205, 1213–1214, 1215 (Kan. 1992) (whether city's regulations unreasonable and a taking a question of law for the court); *Gissel* v. *Kenmare Township*, 512 N. W. 2d 470, 474 (N. D. 1994) (necessity for proposed taking a question for the court); *Yegen* v. *Bismarck*, 291 N. W. 2d 422, 424 (N. D. 1980) (taking *vel non* of private property for public use a question of law). But see *Gray* v. *South Carolina Dept. of Highways*, 427 S. E. 2d 899 (S. C. App. 1992) (whether no taking because closing of intersection was needed to prevent serious public harm is jury issue). These practices point up

[13] The substantive due process takings claim concentrates on whether the government's aims are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395 (1926).

the great gulf between the practical realities of takings litigation, and the Court's reliance on the assertion that "in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge, in most cases," *ante*, at 718.

Perhaps this is the reason that the Court apparently seeks to distance itself from the ramifications of today's determination. The Court disclaims any attempt to set a "precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." *Ante*, at 722. It denies that today's holding would extend to "a broad challenge to the constitutionality of the city's general land-use ordinances or policies," in which case, "the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge." *Ibid.* (And the plurality presumably does not mean to address any Seventh Amendment issue that someone might raise when the government has provided an adequate remedy, for example, by recognizing a compensatory action for inverse condemnation, see *ante*, at 714–715, 717.) But the Court's reticence is cold comfort simply because it rests upon distinctions that withstand analysis no better than the tort-law analogies on which the Court's conclusion purports to rest. The narrowness of the Court's intentions cannot, therefore, be accepted as an effective limit on the consequences on its reasoning, from which I respectfully dissent.[14]

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[14] I would therefore remand the case. There would be no need for a new trial; the judge could treat the jury's verdict as advisory, so long as he recorded his own findings consistent with the jury's verdict. See Fed. Rule Civ. Proc. 52(a).

Syllabus

CALIFORNIA DENTAL ASSOCIATION *v.* FEDERAL TRADE COMMISSION

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

No. 97–1625. Argued January 13, 1999—Decided May 24, 1999

Petitioner California Dental Association (CDA), a nonprofit association of local dental societies to which about three-quarters of the State's dentists belong, provides desirable insurance and preferential financing arrangements for its members, and engages in lobbying, litigation, marketing, and public relations for members' benefit. Members agree to abide by the CDA's Code of Ethics, which, *inter alia*, prohibits false or misleading advertising. The CDA has issued interpretive advisory opinions and guidelines relating to advertising. Respondent Federal Trade Commission brought a complaint, alleging that the CDA violated § 5 of the Federal Trade Commission Act (Act), 15 U. S. C. § 45, in applying its guidelines so as to restrict two types of truthful, nondeceptive advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA and found a § 5 violation. As relevant here, the Commission held that the advertising restrictions violated the Act under an abbreviated rule-of-reason analysis. In affirming, the Ninth Circuit sustained the Commission's jurisdiction and concluded that an abbreviated or "quick look" rule-of-reason analysis was proper in this case.

Held:

1. The Commission's jurisdiction extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members. The Act gives the Commission authority over a "corporatio[n]," 15 U. S. C. § 45(a)(2), "organized to carry on business for its own profit or that of its members," § 44. The Commission's claim that the Act gives it jurisdiction over nonprofit associations whose activities provide substantial economic benefits to their for-profit members is clearly the better reading of the Act, which does not require that a supporting organization must devote itself entirely to its members' profits or say anything about how much of the entity's activities must go to raising the members' bottom lines. There is thus no apparent reason to let the Act's application turn on meeting some threshold percentage of activity for this purpose or even a softer formulation calling for a substantial part of the entity's total activities to be aimed at its members' pecuniary

benefit. The Act does not cover all membership organizations of profit-making corporations without more. However, the economic benefits conferred upon CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit," which is the Act's jurisdictional touchstone. The Act's logic and purpose comport with this result, and its legislative history is not inconsistent with this interpretation. Pp. 765–769.

2. Where any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the abbreviated analysis the Ninth Circuit performed in this case. Pp. 769–781.

(a) An abbreviated or "quick-look" analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets. See, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85. This case fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious, for the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect or possibly no effect at all on competition. Pp. 769–771.

(b) The discount and nondiscount advertising restrictions are, on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. The existence of significant challenges to informed decisionmaking by the customer for professional services suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment. In applying cursory review, the Ninth Circuit brushed over the professional context and described no anticompetitive effects from the discount advertising bar. The CDA's price advertising rule appears to reflect the prediction that any costs to competition associated with eliminating across-the-board advertising will be outweighed by gains to consumer information created by discount advertising that is exact, accurate, and more easily verifiable. This view may or may not be correct, but it is not implausible; and neither a court nor the Commission may initially dismiss it as presumptively wrong. The CDA's plausible explanation for its nonprice advertising restrictions, namely that restricting unverifiable quality claims would have a procompetitive effect by preventing misleading or false claims that distort the market, likewise rules out the Ninth Circuit's use of abbreviated rule-of-reason analysis for those restrictions. The obvious anticompetitive effect that triggers such analysis has not been shown. Pp. 771–778.

Syllabus

(c) Saying that the Ninth Circuit's conclusion required a more extended examination of the possible factual underpinnings than it received is not necessarily to call for the fullest market analysis. Not every case attacking a restraint not obviously anticompetitive is a candidate for plenary market examination. There is generally no categorical line between restraints giving rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required is an enquiry meet for the case, looking to a restraint's circumstances, details, and logic. Here, a less quick look was required for the initial assessment of the CDA's advertising restrictions. Pp. 779–781.

128 F. 3d 720, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, KENNEDY, and GINSBURG, JJ., joined, *post,* p. 781.

Peter M. Sfikas argued the cause for petitioner. With him on the briefs were *Scott M. Mendel*, *Erik F. Dyhrkopp*, and *Edward M. Graham.*

Deputy Solicitor General Wallace argued the cause for respondent. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Klein*, *Paul R. Q. Wolfson*, *Debra A. Valentine*, *John F. Daly*, *Joanne L. Levine*, and *Elizabeth R. Hilder.**

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*Briefs of *amici curiae* urging reversal were filed for the American College for Advancement in Medicine by *Elizabeth Toni Guarino*, *William C. MacLeod*, and *Robert A. Skitol;* for the American Dental Association et al. by *Jack R. Bierig* and *Virginia A. Seitz;* for the American Society of Association Executives by *Jerry A. Jacobs*, *Paul M. Smith*, and *Nory Miller;* and for the National Collegiate Athletic Association by *Roy T. Englert, Jr.*, *Donald M. Falk*, *Gregory L. Curtner*, *Stephen M. Shapiro*, *Michael W. McConnell*, *Michele L. Odorizzi*, and *Elsa Kircher Cole.*

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *James E. Ryan*, Attorney General of Illinois, *Don R. Sampen*, Assistant Attorney General, *Betty D. Montgomery*, Attorney General of Ohio, and *Thomas G. Lindgren*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren*

JUSTICE SOUTER delivered the opinion of the Court.

There are two issues in this case: whether the jurisdiction of the Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.

I

The CDA is a voluntary nonprofit association of local dental societies to which some 19,000 dentists belong, including about three-quarters of those practicing in the State. *In re California Dental Assn.*, 121 F. T. C. 190, 196–197 (1996). The CDA is exempt from federal income tax under 26 U. S. C. § 501(c)(6), covering "[b]usiness leagues, chambers

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of California, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *José A. Fuentes-Agostini* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin.

James S. Turner and *Betsy E. Lehrfeld* filed a brief for the Consumer Dental Choice Project of the National Institute for Science, Law and Public Policy, Inc., as *amicus curiae.*

of commerce, real-estate boards, [and] boards of trade," although it has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills. The CDA lobbies and litigates in its members' interests, and conducts marketing and public relations campaigns for their benefit. 128 F. 3d 720, 723 (CA9 1997).

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following § 10:

> "Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect." App. 33.

The CDA has issued a number of advisory opinions interpreting this section,[1] and through separate advertising

[1] The advisory opinions, which substantially mirror parts of the California Business and Professions Code, see Cal. Bus. & Prof. Code Ann. §§ 651, 1680 (West 1999), include the following propositions:

"A statement or claim is false or misleading in any material respect when it:

"a. contains a misrepresentation of fact;

"b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

"c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;

"d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;

guidelines intended to help members comply with the Code and with state law the CDA has advised its dentists of disclosures they must make under state law when engaging in discount advertising.[2]

Responsibility for enforcing the Code rests in the first instance with the local dental societies, to which applicants for CDA membership must submit copies of their own advertisements and those of their employers or referral services to assure compliance with the Code. The local societies also actively seek information about potential Code violations by applicants or CDA members. Applicants who refuse to withdraw or revise objectionable advertisements may be denied membership; and members who, after a hearing, remain

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"e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

"Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, 'low fees'—must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity."

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect." 128 F. 3d 720, 723–724 (CA9 1997) (some internal quotation marks omitted).

[2] The disclosures include:

"1. The dollar amount of the nondiscounted fee for the service[.]

"2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service[.]

"3. The length of time that the discount will be offered[.]

"4. Verifiable fees[.]

"5. [The identity of] [s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." *Id.*, at 724.

similarly recalcitrant are subject to censure, suspension, or expulsion from the CDA. 128 F. 3d, at 724.

The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of the FTC Act, 38 Stat. 717, 15 U. S. C. § 45.[3] The complaint alleged that the CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. Complaint ¶ 7. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127," 121 F. T. C., at 207. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under *In re Mass. Bd. of Registration in Optometry*, 110 F. T. C. 549 (1988), since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services. He accordingly found a violation of § 5 of the FTC Act. 121 F. T. C., at 272–273.

The Commission adopted the factual findings of the ALJ except for his conclusion that the CDA lacked market power, with which the Commission disagreed. The Commission treated the CDA's restrictions on discount advertising as illegal *per se*. 128 F. 3d, at 725. In the alternative, the Commission held the price advertising (as well as the nonprice) restrictions to be violations of the Sherman and FTC Acts

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[3] The FTC Act's prohibition of unfair competition and deceptive acts or practices, 15 U. S. C. § 45(a)(1), overlaps the scope of § 1 of the Sherman Act, 15 U. S. C. § 1, aimed at prohibiting restraint of trade, *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 454–455 (1986), and the Commission relied upon Sherman Act law in adjudicating this case, *In re California Dental Assn.*, 121 F. T. C. 190, 292, n. 5 (1996).

under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should have applied the *Mass. Bd.* standard, not the *per se* analysis, to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule of reason, or that the CDA had market power. 128 F. 3d, at 725.

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's assertion of jurisdiction over the CDA and its ultimate conclusion on the merits. *Id.*, at 730. The court thought it error for the Commission to have applied *per se* analysis to the price advertising restrictions, finding analysis under the rule of reason required for all the restrictions. But the Court of Appeals went on to explain that the Commission had properly

> "applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. *See* [*National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 109–110, and n. 39 (1984)] ('The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.' [*Ibid.* (citing P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981) (parenthetical omitted)).] It allows the condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.' *Id.*, at 109." *Id.*, at 727.

The Court of Appeals thought truncated rule-of-reason analysis to be in order for several reasons. As for the restrictions on discount advertising, they "amounted in practice to a fairly 'naked' restraint on price competition itself," *ibid.* The CDA's procompetitive justification, that the re-

strictions encouraged disclosure and prevented false and misleading advertising, carried little weight because "it is simply infeasible to disclose all of the information that is required," *id.*, at 728, and "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid.* As to nonprice advertising restrictions, the court said that

> "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1505 at 693–94 (Supp. 1997). . . . The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so. . . . Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid.*

The Court of Appeals went on to hold that the Commission's findings with respect to the CDA's agreement and intent to restrain trade, as well as on the effect of the restrictions and the existence of market power, were all supported by substantial evidence. *Id.*, at 728–730. In dissent, Judge Real took the position that the Commission's jurisdiction did not cover the CDA as a nonprofit professional association engaging in no commercial operations. *Id.*, at 730. But even assuming jurisdiction, he argued, full-bore rule-of-reason analysis was called for, since the disclosure requirements were not naked restraints and neither fixed prices nor banned nondeceptive advertising. *Id.*, at 730–731.

We granted certiorari to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association[4] and the occasions for abbreviated

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[4] Compare *In re American Medical Assn.*, 94 F. T. C. 701, 983–984, aff'd, 638 F. 2d 443 (CA2 1980), aff'd by an equally divided Court, 455 U. S. 676 (1982) *(per curiam)*, and *FTC* v. *National Comm'n on Egg Nutrition*, 517

rule-of-reason analysis.[5] 524 U. S. 980 (1998). We now vacate the judgment of the Court of Appeals and remand.

II

The FTC Act gives the Commission authority over "persons, partnerships, or corporations," 15 U. S. C. § 45(a)(2), and defines "corporation" to include "any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members," § 44. Although the Circuits have not agreed on the precise extent of this definition, see n. 4, *supra*, the Commission has long held that some circumstances give it jurisdiction over an entity that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provides pecuniary benefits to its members, see *In re American Medical Assn.*, 94 F. T. C. 701, 983–984 (1980), respondent now advances the slightly different formulation that the Commission has jurisdiction "over anticompetitive practices by nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members' businesses." Brief for Respondent 20.

Respondent urges deference to this interpretation of the Commission's jurisdiction as reasonable. *Id.*, at 25–26 (citing *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, 380–382

F. 2d 485, 487–488 (CA7 1975), with *Community Blood Bank* v. *FTC*, 405 F. 2d 1011, 1017 (CA8 1969).

[5] Cf. *Bogan* v. *Hodgkins*, 166 F. 3d 509, 514, and n. 6 (CA2 1999); *United States* v. *Brown University*, 5 F. 3d 658, 669 (CA3 1993); *Chicago Professional Sports Limited Partnership* v. *National Basketball Assn.*, 961 F. 2d 667, 674–676 (CA7 1992); *Law* v. *National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1020 (CA10 1998); *U. S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F. 2d 589, 594–595 (CA1 1993).

(1988) (SCALIA, J., concurring) (*Chevron* deference applies to agency's interpretation of its own statutory jurisdiction)). But we have no occasion to review the call for deference here, the interpretation urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction.

The FTC Act is at pains to include not only an entity "organized to carry on business for its own profit," 15 U. S. C. § 44, but also one that carries on business for the profit "of its members," *ibid.* While such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, no one here has claimed that such an entity must devote itself single-mindedly to the profit of others. It could, indeed, hardly be supposed that Congress intended such a restricted notion of covered supporting organizations, with the opportunity this would bring with it for avoiding jurisdiction where the purposes of the FTC Act would obviously call for asserting it.

Just as the FTC Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines. There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

There is no line drawing exercise in this case, however, where the CDA's contributions to the profits of its individual

members are proximate and apparent. Through for-profit subsidiaries, the CDA provides advantageous insurance and preferential financing arrangements for its members, and it engages in lobbying, litigation, marketing, and public relations for the benefit of its members' interests. This congeries of activities confers far more than *de minimis* or merely presumed economic benefits on CDA members; the economic benefits conferred upon the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit,"[6] which the FTC Act makes the jurisdictional touch-

[6] This conclusion is consistent with holdings by a number of Courts of Appeals. In *FTC* v. *National Comm'n on Egg Nutrition*, the Court of Appeals held that a nonprofit association "organized for the profit of the egg industry," 517 F. 2d, at 488, fell within the Commission's jurisdiction. In *American Medical Assn.* v. *FTC*, 638 F. 2d 443 (CA2 1980), the Court of Appeals held that the "business aspects," *id.*, at 448, of the AMA's activities brought it within the Commission's reach. These cases are consistent with our conclusion that an entity organized to carry on activities that will confer greater than *de minimis* or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction. In *Community Blood Bank* v. *FTC*, the Court of Appeals addressed the question whether the Commission had jurisdiction over a blood bank and an association of hospitals. It held that "the question of the jurisdiction over the corporations or other associations involved should be determined on an ad hoc basis," 405 F. 2d, at 1018, and that the Commission's jurisdiction extended to "any legal entity without shares of capital which engages in business for profit within the traditional meaning of that language," *ibid.* (emphasis deleted). The Court of Appeals also said that "[a]ccording to a generally accepted definition 'profit' means gain from business or investment over and above expenditures, or gain made on business or investment where both receipts or payments are taken into account," *id.*, at 1017, although in the same breath it noted that the term's "meaning must be derived from the context in which it is used," *id.*, at 1016. Our decision here is fully consistent with *Community Blood Bank*, because the CDA contributes to the profits of at least some of its members, even on a restrictive definition of profit as gain above expenditures. (It should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit.) Nonetheless, we do not, and indeed, on the facts here, could

stone. There is no difficulty in concluding that the Commission has jurisdiction over the CDA.

The logic and purpose of the FTC Act comport with this result. The FTC Act directs the Commission to "prevent" the broad set of entities under its jurisdiction "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U. S. C. § 45(a)(2). Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts. It may even be possible that a nonprofit entity up to no good would have certain advantages, not only over a for-profit member but over a for-profit membership organization as well; it would enjoy the screen of superficial disinterest while devoting itself to serving the interests of its members without concern for doing more than breaking even.

Nor, contrary to petitioner's argument, is the legislative history inconsistent with this interpretation of the Commission's jurisdiction. Although the versions of the FTC Act first passed by the House and the Senate defined "corporation" to refer only to incorporated, joint stock, and share-capital companies organized to carry on business for profit, see H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 11, 14 (1914), the Conference Committee subsequently revised the definition to its present form, an alteration that indicates an

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not, decide today whether the Commission has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players. We therefore do not foreclose the possibility that various paradigms of profit might fall within the ambit of the FTC Act. Nor do we decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate the Commission's jurisdiction.

intention to include nonprofit entities.[7] And the legislative history, like the text of the FTC Act, is devoid of any hint at an exemption for professional associations as such.

We therefore conclude that the Commission had jurisdiction to pursue the claim here, and turn to the question whether the Court of Appeals devoted sufficient analysis to sustain the claim that the advertising restrictions promulgated by the CDA violated the FTC Act.

III

The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion.[8]

In *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984), we held that a "naked restraint on price and output requires some competitive jus-

[7] A letter from Bureau of Corporations Commissioner Joseph E. Davies to Senator Francis G. Newlands, the bill's sponsor and a member of the Conference Committee, written August 8, 1914, before the Conference Committee revisions, included a memorandum dated August 7, 1914, that expressed concern that the versions of the bill passed by the House and the Senate would not extend jurisdiction to purportedly nonprofit organizations, which might "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to law." Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H. R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess., 3 (1914).

[8] We leave to the Court of Appeals the question whether on remand it can effectively assess the Commission's decision for substantial evidence on the record, or whether it must remand to the Commission for a more extensive rule-of-reason analysis on the basis of an enhanced record.

tification even in the absence of a detailed market analysis." *Id.*, at 110. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of" horizontal agreements among competitors to refuse to discuss prices, *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978), or to withhold a particular desired service, *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986) (quoting *National Soc. of Professional Engineers*, *supra*, at 692). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. 468 U. S., at 99–100. In *National Soc. of Professional Engineers*, the restraint was "an absolute ban on competitive bidding." 435 U. S., at 692. In *Indiana Federation of Dentists*, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U. S., at 459. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. See *Law* v. *National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1020 (CA10 1998) (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); *Chicago Professional Sports Limited Partnership* v. *National Basketball Assn.*, 961 F. 2d 667, 674–676 (CA7 1992) (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications); cf. *United States* v. *Brown University*, 5 F. 3d 658, 677–678 (CA3 1993) (finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agree-

ments in *National Soc. of Professional Engineers* and *Indiana Federation of Dentists* "embodied a strong economic self-interest of the parties to them").

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on JUSTICE BREYER's view that bars on truthful and verifiable price and quality advertising are *prima facie* anticompetitive, see *post*, at 784–785 (opinion concurring in part and dissenting in part), and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with JUSTICE BREYER turns on our different responses to this issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, see, *e. g.*, *post*, at 785, 787, 790, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising[9] in a market characterized by striking disparities between the information available to the professional and the patient.[10] Cf. Carr & Mathewson, The Eco-

[9] That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established. Cf. *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 79–80 (1934) (finding a false advertisement to be unfair competition).

[10] "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could

nomics of Law Firms: A Study in the Legal Organization of the Firm, 33 J. Law & Econ. 307, 309 (1990) (explaining that in a market for complex professional services, "inherent asymmetry of knowledge about the product" arises because "professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed"); Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (pointing out quality problems in market characterized by asymmetrical information). In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth filling) or to something else (like a very tough walnut). See Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1330 (1979); 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law § 3–1, p. 86 (1995) (describing the common view that "the lay public is incapable of adequately evaluating the quality of medical services"). Patients' attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further. Cf. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 235–236 (S. Rotten-

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properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788–789, n. 17 (1975).

berg ed. 1980) (describing long-term relationship between professional and client not as "a series of spot contracts" but rather as "a long-term agreement, often implicit, to deal with each other in a set of future unspecified or incompletely specified circumstances according to certain rules," and adding that "[i]t is not clear how or if these [implicit contracts] can be reconciled with the promotion of effective price competition in individual spot markets for particular services"). The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," 128 F. 3d, at 727, and that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," *ibid.* (citing *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 364 (1977); *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 388 (1992)). The court then acknowledged that, according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." 128 F. 3d, at 728. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board

discount advertising.[11] Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," *ibid.*, followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid.*

But these observations brush over the professional context and describe no anticompetitive effects. Assuming that the record in fact supports the conclusion that the CDA disclosure rules essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not *a priori* analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might

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[11] JUSTICE BREYER claims that "the Court of Appeals did consider the relevant differences." *Post*, at 790. But the language he cites says nothing more than that *per se* analysis is inappropriate here and that "some caution" was appropriate where restrictions purported to restrict false advertising, see 128 F. 3d, at 726–727. Caution was of course appropriate, but this statement by the Court of Appeals does not constitute a consideration of the possible differences between these and other advertising restrictions.

leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.[12]

In theory, it is true, the Court of Appeals neither ruled out the plausibility of some procompetitive support for the CDA's requirements nor foreclosed the utility of an evidentiary discussion on the point. The court indirectly acknowledged the plausibility of procompetitive justifications for the

[12] JUSTICE BREYER suggests that our analysis is "of limited relevance," *post*, at 791, because "[t]he basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid.* He thinks that the Commission and the Court of Appeals "adequately answered that question," *ibid.*, but the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden shifting of the kind accepted by JUSTICE BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," 128 F. 3d, at 728. But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.

The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. The court began with the argument that "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid.* (citing P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1505, pp. 693–694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," 128 F. 3d, at 728, adding that "[t]he restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so," *ibid.* This suggestion about output is also puzzling. If quality advertising actually induces some patients to obtain more care

than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices,[13] see *General Leaseways, Inc.* v. *National Truck Leasing Assn.*, 744 F. 2d 588, 594–595 (CA7 1984) ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects").

Although the Court of Appeals acknowledged the CDA's view that "claims about quality are inherently unverifiable and therefore misleading," 128 F. 3d, at 728, it responded that this concern "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading," *ibid.* As a result, the court said, "the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid.* The court assumed, in these words, that some dental quality claims may escape justifiable censure, because they are both verifiable and true. But its implicit

[13] JUSTICE BREYER wonders if we "mea[n] this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality." *Post*, at 791. But as the preceding sentence shows, we intend simply to question the logic of the Court of Appeals's suggestion that the restrictions are anticompetitive because they somehow "affect output," 128 F. 3d, at 728, presumably with the intent to raise prices by limiting supply while demand remains constant. We do not mean to deny that an agreement not to advertise service quality might have anticompetitive effects. We merely mean that, absent further analysis of the kind JUSTICE BREYER undertakes, it is not possible to conclude that the net effect of this particular restriction is anticompetitive.

assumption fails to explain why it gave no weight to the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market. It is, indeed, entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery, cf. *Bates*, 433 U. S., at 366 (claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false"); *id.*, at 383–384 ("[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction"), notwithstanding JUSTICE BREYER's citation (to a Commission discussion that never faces the issue of the unverifiability of professional quality claims, raised in *Bates*), *post*, at 785.[14]

The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

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[14] The Commission said only that "'mere puffing' deceives no one and has never been subject to regulation." 121 F. T. C., at 318. The question here, of course, is not whether puffery may be subject to governmental regulation, but whether a professional organization may ban it.

In light of our focus on the adequacy of the Court of Appeals's analysis, JUSTICE BREYER's thorough-going, *de novo* antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with JUSTICE BREYER's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly JUSTICE BREYER's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed JUSTICE BREYER, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "requir[e] some competitive justification," *National Collegiate Athletic Assn.*, 468 U. S., at 110, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified. *Id.*, at 104, n. 26. "[W]hether the ultimate finding is the product of a presumption or actual

market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Id.*, at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a "spectrum" of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, Antitrust Law ¶ 1507, p. 402 (1986).[15] At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future." *Id.*, ¶ 1500, at 364. As the circumstances here demonstrate, there is generally no categorical line to be drawn between

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[15] Other commentators have expressed similar views. See, *e. g.*, Kolasky, Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements, Antitrust 41, 43 (spring 1998) ("[I]n applying the rule of reason, the courts, as with any balancing test, use a sliding scale to determine how much proof to require"); Piraino, Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 Vand. L. Rev. 1753, 1771 (1994) ("[C]ourts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed analysis because their competitive impact is more ambiguous"). But see Klein, A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review, Antitrust 41, 42 (spring 1990) (examination of procompetitive justifications "is by no means a full scrutiny of the proffered efficiency justification. It is, rather, a hard look at the justification to determine if it meets the defendant's burden of coming forward with—but not establishing—a valid efficiency justification").

restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I agree with the Court that the Federal Trade Commission (FTC or Commission) has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "[w]hat is required . . . is an enquiry meet for the case," and that the object is a "confident conclusion about the principal tendency of a restriction." *Ante*, at 780 and this page (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission—just as the Court of Appeals did below.

I

The Commission's conclusion is lawful if its "factual findings," insofar as they are supported by "substantial evidence," "make out a violation of Sherman Act § 1." *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 454–455 (1986). To determine whether that is so, I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?

A

The most important question is the first: What are the specific restraints at issue? See, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 98–100 (1984) *(NCAA); Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 21–23 (1979). Those restraints do *not* include merely the agreement to which the California Dental Association's (Dental Association or Association) ethical rule literally refers, namely, a promise to refrain from advertising that is " 'false or misleading in any material respect.' " *Ante*, at 760 (quoting California Dental Code of Ethics § 10 (1993), App. 33). Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications. *In re California Dental Assn.*, 121 F. T. C. 190 (1996). As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising. In particular, the Commission determined that the rule, in practice:

(1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable," *id.*, at 301;

(2) "precluded advertising . . . of across the board discounts," *ibid.;* and

(3) "prohibit[ed] all quality claims," *id.*, at 308.

Whether the Dental Association's basic rule *as implemented* actually restrained the truthful and nondeceptive advertising of low prices, across-the-board discounts, and quality service are questions of fact. The Administrative Law Judge (ALJ) and the Commission may have found those questions difficult ones. But both the ALJ and the Commission ultimately found against the Dental Association in respect to these facts. And the question for us—whether those agency findings are supported by substantial evidence, see *Indiana Federation*, *supra*, at 454–455—is not difficult.

The Court of Appeals referred explicitly to some of the evidence that it found adequate to support the Commission's conclusions. It pointed out, for example, that the Dental Association's "advisory opinions and guidelines indicate that . . . descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule; that in "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth"; and that one advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false." 128 F. 3d 720, 729 (CA9 1997).

The Commission itself had before it far more evidence. It referred to instances in which the Association, without regard for the truthfulness of the statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive."

121 F. T. C., at 301. It referred to testimony that "across-the-board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book' and '[n]obody is going to really advertise in that fashion.'" *Id.*, at 302. And it pointed to many instances in which the Dental Association suppressed such advertising claims as "we guarantee all dental work for 1 year," "latest in cosmetic dentistry," and "gentle dentistry in a caring environment." *Id.*, at 308–310.

I need not review the evidence further, for this Court has said that "substantial evidence" is a matter for the courts of appeals, and that it "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490–491 (1951). I have said enough to make clear that this is not a case warranting our intervention. Consequently, we must decide only the basic legal question whether the three restraints described above unreasonably restrict competition.

B

Do each of the three restrictions mentioned have "the potential for genuine adverse effects on competition"? *Indiana Federation*, 476 U. S., at 460; 7 P. Areeda, Antitrust Law ¶ 1503a, pp. 372–377 (1986) (hereinafter Areeda). I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious? To

restrain truthful advertising about lower prices is likely to restrict competition in respect to price—"the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1940); cf., *e. g.*, *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 364 (1977) (price advertising plays an "indispensable role in the allocation of resources in a free enterprise system"); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 765 (1976). The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions were unlawful *per se*. See 121 F. T. C., at 307; cf. *Socony-Vacuum*, *supra*, at 222–228 (finding agreement among competitors to buy "spot-market oil" unlawful *per se* because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying a *per se* rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints.

The restrictions on the advertising of service quality also have serious anticompetitive tendencies. This is not a case of "mere puffing," as the FTC recognized. See 121 F. T. C., at 317–318; cf. *ante*, at 778. The days of my youth, when the billboards near Emeryville, California, home of AAA baseball's Oakland Oaks, displayed the name of "Painless" Parker, Dentist, are long gone—along with the Oakland Oaks. But some parents may still want to know that a particular dentist makes a point of "gentle care." Others may want to know about 1-year dental work guarantees. To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition in any legitimate respect, see, *e. g.*,

Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30, 43 (1930); *United States* v. *First Nat. Pictures, Inc.*, 282 U. S. 44, 54–55 (1930), let alone one that inhibits customers from learning about the quality of a dentist's service.

Nor did the Commission rely solely on the unobjectionable proposition that a restriction on the ability of dentists to advertise on quality is likely to limit their incentive to compete on quality. Rather, the Commission pointed to record evidence affirmatively establishing that quality-based competition is important to dental consumers in California. 121 F. T. C., at 309–311. Unsurprisingly, these consumers choose dental services based at least in part on "information about the type and quality of service." *Id.*, at 249. Similarly, as the Commission noted, the ALJ credited testimony to the effect that "advertising the comfort of services will 'absolutely' bring in more patients," and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients that a dentist could attract. *Id.*, at 310. Finally, the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of care. See *id.*, at 310–311.

The FTC found that the price advertising restrictions amounted to a "naked attempt to eliminate price competition." *Id.*, at 300. It found that the service quality advertising restrictions "deprive consumers of information they value and of healthy competition for their patronage." *Id.*, at 311. It added that the "anticompetitive nature of these restrictions" was "plain." *Ibid.* The Court of Appeals agreed. I do not believe it possible to deny the anticompetitive tendencies I have mentioned.

C

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other procompetitive tendencies or redeeming virtues. See 7 Areeda,

¶ 1504, at 377–383. This is a closer question—at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even *made* the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges *only* advertising that is false or misleading." 121 F. T. C., at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." 128 F. 3d, at 728. With respect to quality advertising, the Commission stressed that the Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts." 121 F. T. C., at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." 128 F. 3d, at 728.

With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop un-

truthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see 121 F. T. C., at 316–317, that fact does not make out a valid antitrust defense. See *NCAA*, 468 U. S., at 119; 7 Areeda, ¶ 1505, at 383–384.

In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification. See *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978); 7 Areeda, ¶ 1507b, at 397; 11 H. Hovenkamp, Antitrust Law ¶ 1914c, pp. 313–315 (1998); see also *Law* v. *National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1019 (CA10), cert. denied, 525 U. S. 822 (1998); *United States* v. *Brown Univ.*, 5 F. 3d 658, 669 (CA3 1993); *Capital Imaging Associates* v. *Mohawk Valley Medical Associates, Inc.*, 996 F. 2d 537, 543 (CA2), cert. denied, 510 U. S. 947 (1993); *Kreuzer* v. *American Academy of Periodontology*, 735 F. 2d 1479, 1492–1495 (CADC 1984). And the Court of Appeals was correct when it concluded that no such justification had been established here.

D

I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace. See 7 Areeda, ¶ 1503, at 376–377. The Commission, disagreeing with the ALJ on this single point, found that the Association did possess enough market power to make a difference. In at least one region of California, the mid-peninsula, its members accounted for more than 90% of the marketplace; on average they accounted for 75%. See 121 F. T. C., at 314. In addition, entry by new dentists into the marketplace is fairly difficult. Dental education is expensive (leaving graduates of dental school with $50,000–$100,000 of debt), as is opening a new dentistry office (which costs $75,000–$100,000). *Id.*, at 315–316. And Dental Association members believe membership in the Association is

important and valuable and recognized as such by the public. *Id.*, at 312–313, 315–316.

These facts, in the Court of Appeals' view, were sufficient to show "enough market power to harm competition through [the Association's] standard setting in the area of advertising." 128 F. 3d, at 730. And that conclusion is correct. Restrictions on advertising price discounts in Palo Alto may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association. And that fact, in turn, means that the remaining 90% will prove less likely to engage in price competition. Facts such as these have previously led this Court to find market power—unless the defendant has overcome the showing with strong contrary evidence. See, *e. g.*, *Indiana Federation*, 476 U. S., at 456–457; cf. *United States* v. *Loew's Inc.*, 371 U. S. 38, 45 (1962); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 341–344 (1962); accord, *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 424 (CA2 1945). I can find no reason for departing from that precedent here.

II

In the Court's view, the legal analysis conducted by the Court of Appeals was insufficient, and the Court remands the case for a more thorough application of the rule of reason. But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory—when one divides the overall Sherman Act question into its traditional component parts and adheres to traditional judicial practice for allocating the burdens of persuasion in an antitrust case.

Did the Court of Appeals misconceive the anticompetitive tendencies of the restrictions? After all, the object of the rule of reason is to separate those restraints that "may suppress or even destroy competition" from those that "merely regulat[e] and perhaps thereby promot[e] competition." *Board of Trade of Chicago* v. *United States*, 246 U. S. 231,

238 (1918). The majority says that the Association's "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Ante*, at 771. It adds that

> "advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition." *Ante*, at 773.

And it criticizes the Court of Appeals for failing to recognize that "the restrictions at issue here are very far from a total ban on price or discount advertising" and that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition . . . ." *Ibid.*

The problem with these statements is that the Court of Appeals did consider the relevant differences. It *rejected* the legal "treatment" customarily applied "to classic horizontal agreements to limit output or price competition"—*i. e.*, the FTC's (alternative) *per se* approach. See 128 F. 3d, at 726–727. It did so because the Association's "policies do not, on their face, ban truthful nondeceptive ads"; instead, they "have been enforced in a way that restricts truthful advertising," *id.*, at 727. It added that "[t]he value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly." *Ibid.*

Did the Court of Appeals misunderstand the nature of an anticompetitive effect? The Court says:

> "If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining

> whether a . . . limitation has the anticompetitive effect of artificially raising prices." *Ante*, at 776–777.

But if the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1505′, p. 404 (Supp. 1998). There is adequate reason to believe that tendency present in this case. See *supra*, at 786.

Did the Court of Appeals inadequately consider possible procompetitive justifications? The Court seems to think so, for it says:

> "[T]he [Association's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)." *Ante*, at 775.

That may or may not be an accurate assessment of the Association's motives in adopting its rule, but it is of limited relevance. Cf. *Board of Trade of Chicago*, *supra*, at 238. The basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case. Both court and Commission adequately answered that question.

The Commission found that the defendant did not make the necessary showing that a redeeming virtue existed in practice. See 121 F. T. C., at 319–320. The Court of Ap-

peals, asking whether the rules, as enforced, "augment[ed] competition and increase[d] market efficiency," found the Commission's conclusion supported by substantial evidence. 128 F. 3d, at 728. That is why the court said that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing"—which is to say that the record provides no evidence that the effects, though anticompetitive, are nonetheless redeemed or justified. *Ibid.*

The majority correctly points out that "petitioner alone would have had the incentive to introduce such evidence" of procompetitive justification. *Ante,* at 776. (Indeed, that is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues. See *supra,* at 788.) But despite this incentive, petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not support the claim of justification. Petitioner's failure to produce such evidence itself "explain[s] why [the lower court] gave no weight to the . . . suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." *Ante,* at 778.

With respect to the restraint on advertising across-the-board discounts, the majority summarizes its concerns as follows: "Assuming that the record in fact supports the conclusion that the [Association's] disclosure rules essentially bar advertisement of [such] discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here." *Ante,* at 774. I accept, rather than assume, the premise: The FTC found that the disclosure rules did bar advertisement of across-the-board discounts, and that finding is supported by substantial evidence. See *supra,* at 783–784. And I accept as *literally* true the conclusion that the Court says follows from that premise, namely, that "net anticompetitive effects" do not "*obviously*" follow from that

premise. But obviousness is not the point. With respect to any of the three restraints found by the Commission, whether "net anticompetitive effects" follow is a matter of how the Commission, and, here, the Court of Appeals, have answered the questions I laid out at the beginning. See *supra*, at 782. Has the Commission shown that the restriction has anticompetitive tendencies? It has. Has the Association nonetheless shown offsetting virtues? It has not. Has the Commission shown market power sufficient for it to believe that the restrictions will likely make a real world difference? It has.

The upshot, in my view, is that the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion. It is the same legal conclusion that this Court itself reached in *Indiana Federation*—a much closer case than this one. There the Court found that an agreement by dentists not to submit dental X rays to insurers violated the rule of reason. The anticompetitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit X rays to insurers, see 476 U. S., at 456—a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and service quality, the matters at issue here. The redeeming virtue in *Indiana Federation* was the alleged undesirability of having insurers consider a range of matters when deciding whether treatment was justified—a virtue no less plausible, and no less proved, than the virtue offered here. See *id.*, at 462–464. The "power" of the dentists to enforce their agreement was no greater than that at issue here (control of 75% to 90% of the relevant markets). See *id.*, at 460. It is difficult to see how the two cases can be reconciled.

* * *

I would note that the form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation

of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the "Government always wins," *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 301 (1966) (Stewart, J., dissenting). I hope that this case does not represent an abandonment of that basic, and important, form of analysis.

For these reasons, I respectfully dissent from Part III of the Court's opinion.

Syllabus

CLEVELAND *v.* POLICY MANAGEMENT SYSTEMS CORP. ET AL.

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

No. 97–1008. Argued February 24, 1999—Decided May 24, 1999

After suffering a stroke and losing her job, petitioner Cleveland sought and obtained Social Security Disability Insurance (SSDI) benefits, claiming that she was unable to work due to her disability. The week before her SSDI award, she filed suit under the Americans with Disabilities Act of 1990 (ADA), contending that her former employer, respondent Policy Management Systems Corporation, had discriminated against her on account of her disability. In granting Policy Management Systems summary judgment, the District Court concluded that Cleveland's claim that she was totally disabled for SSDI purposes estopped her from proving an essential element of her ADA claim, namely, that she could "perform the essential functions" of her job, at least with "reasonable . . . accommodation," 42 U. S. C. § 12111(8). The Fifth Circuit affirmed, holding that the application for, or receipt of, SSDI benefits creates a rebuttable presumption that a recipient is estopped from pursuing an ADA claim and that Cleveland failed to rebut the presumption.

Held:

1. Pursuit, and receipt, of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim or erect a strong presumption against the recipient's ADA success. However, to survive a summary judgment motion, an ADA plaintiff cannot ignore her SSDI contention that she was too disabled to work, but must explain why that contention is consistent with her ADA claim that she can perform the essential functions of her job, at least with reasonable accommodation. Pp. 801–807.

(a) Despite the appearance of conflict between the SSDI program (which provides benefits to a person with a disability so severe that she is unable to do her previous work or any other kind of substantial gainful work) and the ADA (which prohibits covered employers from discriminating against a disabled person who can perform the essential functions of her job, including those who can do so only with reasonable accommodation), the two claims do not inherently conflict to the point where courts should apply a special negative presumption such as the one applied below. There are many situations in which an SSDI claim and an ADA claim can comfortably exist side by side. For example,

Syllabus

since the Social Security Administration (SSA) does not take into account the possibility of "reasonable accommodation" in determining SSDI eligibility, an ADA plaintiff's claim that she can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that she could not perform her own job (or other jobs) *without* it. An individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job. Or her condition might have changed over time, so that a statement about her disability made at the time of her application for SSDI benefits does not reflect her capacities at the time of the relevant employment decision. Thus, this Court would not apply a special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in some limited and highly unusual set of circumstances. Pp. 801–805.

(b) Nonetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. Summary judgment for a defendant is appropriate when a plaintiff fails to make a sufficient showing to establish the existence of an essential element on which she has the burden of proof at trial. *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322. An ADA plaintiff's sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job, and a court should require an explanation of this apparent inconsistency. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation. Pp. 805–807.

2. Here, the parties should have the opportunity in the trial court to present, or to contest, Cleveland's explanations for the discrepancy between her SSDI statements and her ADA claim, which include that the SSDI statements that she was totally disabled were made in a forum that does not consider the effect that reasonable workplace accommodation would have on her ability to work and that those statements were reliable at the time they were made. P. 807.

120 F. 3d 513, vacated and remanded.

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

John E. Wall, Jr., argued the cause for petitioner. With him on the brief was *Laura Eardley Calhoun.*

Matthew D. Roberts 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*, *Arthur J. Fried*, *C. Gregory Stewart*, *Philip B. Sklover*, *Lorraine C. Davis*, and *Robert J. Gregory.*

Stephen G. Morrison argued the cause for respondents. With him on the brief were *C. Adair Bledsoe, Jr.*, *David N. Kitner*, and *Kimberly S. Moore.**

JUSTICE BREYER delivered the opinion of the Court.

The Social Security Disability Insurance (SSDI) program provides benefits to a person with a disability so severe that she is "unable to do [her] previous work" and "cannot . . . engage in any other kind of substantial gainful work which exists in the national economy." § 223(a) of the Social Security Act, as set forth in 42 U. S. C. § 423(d)(2)(A). This case asks whether the law erects a special presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an action for disability discrimination under the Americans with Disabilities Act of 1990 (ADA), claiming that "with . . . reasonable accommodation" she could "perform the essential functions" of her job. § 101, 104 Stat. 331, 42 U. S. C. § 12111(8).

We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against

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*Briefs of *amici curiae* urging reversal were filed for the Aids Policy Center for Children, Youth, and Families et al. by *Catherine A. Hanssens* and *Beatrice Dohrn;* and for the National Employment Lawyers Association et al. by *Alan B. Epstein* and *Paula A. Brantner.*

Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Daniel Saphire;* and for the Equal Employment Advisory Council by *Ann Elizabeth Reesman.*

the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."

I

After suffering a disabling stroke and losing her job, Carolyn Cleveland sought and obtained SSDI benefits from the Social Security Administration (SSA). She has also brought this ADA suit in which she claims that her former employer, Policy Management Systems Corporation, discriminated against her on account of her disability. The two claims developed in the following way:

August 1993: Cleveland began work at Policy Management Systems. Her job required her to perform background checks on prospective employees of Policy Management System's clients.

January 7, 1994: Cleveland suffered a stroke, which damaged her concentration, memory, and language skills.

January 28, 1994: Cleveland filed an SSDI application in which she stated that she was "disabled" and "unable to work." App. 21.

April 11, 1994: Cleveland's condition having improved, she returned to work with Policy Management Systems. She reported that fact to the SSA two weeks later.

July 11, 1994: Noting that Cleveland had returned to work, the SSA denied her SSDI application.

July 15, 1994: Policy Management Systems fired Cleveland.

September 14, 1994: Cleveland asked the SSA to reconsider its July 11th SSDI denial. In doing so, she said:

"I was terminated [by Policy Management Systems] due to my condition and I have not been able to work since. I continue to be disabled." *Id.*, at 46. She later added that she had "attempted to return to work in mid April," that she had "worked for three months," and that Policy Management Systems terminated her because she "could no longer do the job" in light of her "condition." *Id.*, at 47.

November 1994: The SSA denied Cleveland's request for reconsideration. Cleveland sought an SSA hearing, reiterating that "I am unable to work due to my disability," and presenting new evidence about the extent of her injuries. *Id.*, at 79.

September 29, 1995: The SSA awarded Cleveland SSDI benefits retroactive to the day of her stroke, January 7, 1994.

On September 22, 1995, the week before her SSDI award, Cleveland brought this ADA lawsuit. She contended that Policy Management Systems had "terminat[ed]" her employment without reasonably "accommodat[ing] her disability." *Id.*, at 7. She alleged that she requested, but was denied, accommodations such as training and additional time to complete her work. *Id.*, at 96. And she submitted a supporting affidavit from her treating physician. *Id.*, at 101. The District Court did not evaluate her reasonable accommodation claim on the merits, but granted summary judgment to the defendant because, in that court's view, Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled. And that fact, the court concluded, now estopped Cleveland from proving an essential element of her ADA claim, namely, that she could "perform the essential functions" of her job, at least with "reasonable accommodation." 42 U. S. C. § 12111(8).

The Fifth Circuit affirmed the District Court's grant of summary judgment. 120 F. 3d 513 (1997). The court wrote:

> "[T]he application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" *Id.*, at 518.

The Circuit Court noted that it was "at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive." *Id.*, at 517. But it concluded that, because

> "Cleveland consistently represented to the SSA that she was totally disabled, she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that for the time in question she was nevertheless a 'qualified individual with a disability' for purposes of her ADA claim." *Id.*, at 518–519.

We granted certiorari in light of disagreement among the Circuits about the legal effect upon an ADA suit of the application for, or receipt of, disability benefits. Compare, *e. g.*, *Rascon* v. *U S West Communications, Inc.*, 143 F. 3d 1324, 1332 (CA10 1998) (application for, and receipt of, SSDI benefits is relevant to, but does not estop plaintiff from bringing, an ADA claim); *Griffith* v. *Wal-Mart Stores, Inc.*, 135 F. 3d 376, 382 (CA6 1998) (same), cert. pending, No. 97–1991; *Swanks* v. *Washington Metropolitan Area Transit Authority,* 116 F. 3d 582, 586 (CADC 1997) (same), with *McNemar* v. *Disney Store, Inc.*, 91 F. 3d 610, 618–620 (CA3 1996) (applying judicial estoppel to bar plaintiff who applied for disability benefits from bringing suit under the ADA), cert. denied, 519 U. S. 1115 (1997), and *Kennedy* v. *Applause, Inc.*, 90 F. 3d 1477, 1481–1482 (CA9 1996) (declining to apply judi-

cial estoppel but holding that claimant who declared total disability in a benefits application failed to raise a genuine issue of material fact as to whether she was a qualified individual with a disability).

II

The Social Security Act and the ADA both help individuals with disabilities, but in different ways. The Social Security Act provides monetary benefits to every insured individual who "is under a disability." 42 U. S. C. § 423(a)(1). The Act defines "disability" as an

> "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." § 423(d)(1)(A).

The individual's impairment, as we have said, *supra*, at 797, must be

> "of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." § 423(d)(2)(A).

The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity. See, *e. g.*, 42 U. S. C. §§ 12101(a)(8), (9). The ADA prohibits covered employers from discriminating "against a qualified individual with a disability because of the disability of such individual." § 12112(a). The ADA defines a "qualified individual with a disability" as a disabled person "who . . . can perform the essential functions" of her job, including those who can do so only "with . . . reasonable accommodation." § 12111(8).

We here consider but one of the many ways in which these two statutes might interact. This case does *not* involve, for example, the interaction of either of the statutes before us with other statutes, such as the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* Nor does it involve directly conflicting statements about purely factual matters, such as "The light was red/green," or "I can/cannot raise my arm above my head." An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, "I am disabled for purposes of the Social Security Act." And our consideration of this latter kind of statement consequently leaves the law related to the former, purely factual, kind of conflict where we found it.

The case before us concerns an ADA plaintiff who both applied for, and received, SSDI benefits. It requires us to review a Court of Appeals decision upholding the grant of summary judgment on the ground that an ADA plaintiff's "represent[ation] to the SSA that she was totally disabled" created a "rebuttable presumption" sufficient to "judicially esto[p]" her later representation that, "for the time in question," with reasonable accommodation, she could perform the essential functions of her job. 120 F. 3d, at 518–519. The Court of Appeals thought, in essence, that claims under both Acts would incorporate two directly conflicting propositions, namely, "I am too disabled to work" and "I am not too disabled to work." And in an effort to prevent two claims that would embody that kind of factual conflict, the court used a special judicial presumption, which it believed would ordinarily prevent a plaintiff like Cleveland from successfully asserting an ADA claim.

In our view, however, despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here. That is because there

are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.

For one thing, as we have noted, the ADA defines a "qualified individual" to include a disabled person "who . . . can perform the essential functions" of her job "*with reasonable accommodation.*" Reasonable accommodations may include:

> "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U. S. C. § 12111(9)(B).

By way of contrast, when the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of "reasonable accommodation" into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI. See Memorandum from Daniel L. Skoler, Associate Comm'r for Hearings and Appeals, SSA, to Administrative Appeals Judges, reprinted in 2 Social Security Practice Guide, App. § 15C[9], pp. 15–401 to 15–402 (1998). The omission reflects the facts that the SSA receives more than 2.5 million claims for disability benefits each year; its administrative resources are limited; the matter of "reasonable accommodation" may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide. See Brief for United States et al. as *Amici Curiae* 10–11, and n. 2, 13. The result is that an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it.

For another thing, in order to process the large number of SSDI claims, the SSA administers SSDI with the help of a five-step procedure that embodies a set of presumptions about disabilities, job availability, and their interrelation. The SSA asks:

> *Step One:* Are you presently working? (If so, you are ineligible.) See 20 CFR § 404.1520(b) (1998).
>
> *Step Two:* Do you have a "severe impairment," *i. e.*, one that "significantly limits" your ability to do basic work activities? (If not, you are ineligible.) See § 404.1520(c).
>
> *Step Three:* Does your impairment "mee[t] or equa[l]" an impairment on a specific (and fairly lengthy) SSA list? (If so, you are eligible *without more*.) See §§ 404.1520(d), 404.1525, 404.1526.
>
> *Step Four:* If your impairment does not meet or equal a listed impairment, can you perform your "past relevant work?" (If so, you are ineligible.) See § 404.1520(e).
>
> *Step Five:* If your impairment does not meet or equal a listed impairment and you cannot perform your "past relevant work," then can you perform other jobs that exist in significant numbers in the national economy? (If not, you are eligible.) See §§ 404.1520(f), 404.1560(c).

The presumptions embodied in these questions—particularly those necessary to produce Step Three's list, which, the Government tells us, accounts for approximately 60 percent of all awards, see Tr. of Oral Arg. 20—grow out of the need to administer a large benefits system efficiently. But they inevitably simplify, eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job. Hence, an individual might qualify for SSDI under the SSA's administrative rules and yet, due to special individual circumstances, remain capable of "perform[ing] the essential functions" of her job.

Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the work force, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits. See 42 U. S. C. §§ 422(c), 423(e)(1); 20 CFR § 404.1592 (1998). See also § 404.1592a (benefits available for an additional 15-month period depending upon earnings). Improvement in a totally disabled person's physical condition, while permitting that person to work, will not necessarily or immediately lead the SSA to terminate SSDI benefits. And the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision.

Finally, if an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system. Our ordinary Rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to "set forth two or more statements of a claim or defense alternately or hypothetically," and to "state as many separate claims or defenses as the party has regardless of consistency." Fed. Rule Civ. Proc. 8(e)(2). We do not see why the law in respect to the assertion of SSDI and ADA claims should differ. (And, as we said, we leave the law in respect to purely factual contradictions where we found it.)

In light of these examples, we would not apply a special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in "some limited and highly unusual set of circumstances." 120 F. 3d, at 517.

Nonetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. Summary judgment for a defendant is appropriate when the plaintiff

"fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322 (1986). An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability"—that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U. S. C. § 12111(8). And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

The lower courts, in somewhat comparable circumstances, have found a similar need for explanation. They have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity. See, *e. g.*, *Colantuoni* v. *Alfred Calcagni & Sons, Inc.*, 44 F. 3d 1, 5 (CA1 1994); *Rule* v. *Brine, Inc.*, 85 F. 3d 1002, 1011 (CA2 1996); *Hackman* v. *Valley Fair*, 932 F. 2d 239, 241 (CA3 1991); *Barwick* v. *Celotex Corp.*, 736 F. 2d 946, 960 (CA4 1984); *Albertson* v. *T. J. Stevenson & Co.*, 749 F. 2d 223, 228 (CA5 1984); *Davidson & Jones Development Co.* v. *Elmore Development Co.*, 921 F. 2d 1343, 1352 (CA6 1991); *Slowiak* v. *Land O'Lakes, Inc.*, 987 F. 2d 1293, 1297 (CA7 1993); *Camfield Tires, Inc.* v. *Michelin Tire Corp.*, 719 F. 2d 1361, 1365–1366 (CA8 1983); *Kennedy* v. *Allied Mutual Ins. Co.*, 952 F. 2d 262, 266 (CA9 1991); *Franks* v. *Nimmo*, 796 F. 2d 1230, 1237 (CA10 1986); *Tippens* v. *Celotex Corp.*, 805 F. 2d 949, 953–954 (CA11 1986); *Pyramid Securities Ltd.* v. *IB Resolution, Inc.*,

924 F. 2d 1114, 1123 (CADC), cert. denied, 502 U. S. 822 (1991); *Sinskey* v. *Pharmacia Opthalmics, Inc.*, 982 F. 2d 494, 498 (CA Fed. 1992), cert. denied, 508 U. S. 912 (1993). Although these cases for the most part involve purely factual contradictions (as to which we do not necessarily endorse these cases, but leave the law as we found it), we believe that a similar insistence upon explanation is warranted here, where the conflict involves a legal conclusion. When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

III

In her brief in this Court, Cleveland explains the discrepancy between her SSDI statements that she was "totally disabled" and her ADA claim that she could "perform the essential functions" of her job. The first statements, she says, "were made in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work." Brief for Petitioner 43. Moreover, she claims the SSDI statements were "accurate statements" if examined "in the time period in which they were made." *Ibid.* The parties should have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

HANLON ET AL. *v.* BERGER ET UX.

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

No. 97–1927. Argued March 24, 1999—Decided May 24, 1999

Respondents filed this suit for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that petitioners—United States Fish and Wildlife Service special agents and an assistant United States attorney—violated their Fourth Amendment rights when the agents, accompanied by Cable News Network, Inc., photographers and reporters, searched respondents' ranch and its outbuildings pursuant to a warrant.

Held: Although respondents allege a Fourth Amendment violation under *Wilson* v. *Layne*, *ante*, p. 603, petitioners are entitled to a qualified immunity defense. In *Wilson*, this Court held that police violate homeowners' Fourth Amendment rights when they allow the media to accompany them during the execution of a warrant in a home, but that because the law was not clearly established before today, the police in that case were entitled to a qualified immunity defense. *Wilson* makes clear that respondents' right was not established in 1992, and the parties here have cited no decisions which would have made the law any clearer when this search took place a year later.

129 F. 3d 505, vacated and remanded.

Richard A. Cordray argued the cause for petitioners. With him on the briefs was *James A. Anzelmo*.

Henry H. Rossbacher argued the cause for respondents. With him on the brief for respondents Berger et al. were *Nanci E. Nishimura* and *Jay F. Lansing*. *P. Cameron DeVore*, *Jessica L. Goldman*, and *David C. Kohler* filed briefs for respondents Cable News Network, Inc., et al.*

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*A brief of *amici curiae* urging reversal was filed for ABC, Inc., et al. by *Lee Levine*, *James E. Grossberg*, *Jay Ward Brown*, *Henry S. Hoberman*, *Richard M. Schmidt, Jr.*, *Susanna M. Lowy*, *Harold W. Fuson, Jr.*, *Barbara Wartelle Wall*, *Ralph E. Goldberg*, *Karlene W. Goller*, *Jerry S.*

PER CURIAM.

Respondents Paul and Erma Berger sued petitioners—special agents of the United States Fish and Wildlife Service and an assistant United States attorney—for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). They alleged that the conduct of petitioners had violated their rights under the Fourth Amendment to the United States Constitution. 129 F. 3d 505 (CA9 1997). We granted certiorari, 525 U. S. 981 (1998).

Respondents live on a 75,000-acre ranch near Jordan, Montana. In 1993, a Magistrate Judge issued a warrant authorizing the search of "The Paul W. Berger ranch with appurtenant structures, excluding the residence" for evidence of "the taking of wildlife in violation of Federal laws." App. 17. About a week later, a multiple-vehicle caravan consisting of Government agents and a crew of photographers and reporters from Cable News Network, Inc. (CNN), proceeded to a point near the ranch. The agents executed the warrant and explained: "Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew . . . accompanied and observed the officers, and the media crew recorded the officers' conduct in executing the warrant." Brief for Petitioners 5.

Review of the complaint's much more detailed allegations to the same effect satisfies us that respondents alleged a Fourth Amendment violation under our decision today in

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Birenz, Slade R. Metcalf, Jack N. Goodman, David S. J. Brown, René P. Milam, George Freeman, and *Jane E. Kirtley.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Joshua L. Dratel;* and for the National Association of Securities and Commercial Law Attorneys by *Kevin P. Roddy.*

M. Reed Hopper and *Robin L. Rivett* filed a brief for the Pacific Legal Foundation as *amicus curiae.*

Wilson v. *Layne*, *ante*, p. 603. There we hold that police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home. We also hold there that because the law on this question before today's decision was not clearly established, the police in that case were entitled to the defense of qualified immunity. *Ante*, at 605–606.

Petitioners maintain that even though they may have violated the Fourth Amendment rights of respondents, they are entitled to the defense of qualified immunity. We agree. Our holding in *Wilson* makes clear that this right was not clearly established in 1992. The parties have not called our attention to any decisions which would have made the state of the law any clearer a year later—at the time of the search in this case. We therefore vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

As I explain in my dissent in *Wilson* v. *Layne*, *ante*, p. 618, I am convinced that the constitutional rule recognized in that case had been clearly established long before 1992. I therefore respectfully dissent from the Court's disposition of this case on qualified immunity grounds.

CROSS *v.* PELICAN BAY STATE PRISON ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 98–8486. Decided May 24, 1999*

Pro se petitioner seeks leave to proceed *in forma pauperis* on these certiorari petitions. The instant petitions bring his total number of frivolous filings to 12, and he has 4 additional filings pending before this Court.

Held: Petitioner's motion to proceed *in forma pauperis* is denied. He is barred from filing any further certiorari petitions 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 Cross seeks leave to proceed *in forma pauperis* under Rule 39 of this Court. We deny these requests as frivolous pursuant to Rule 39.8. Cross is allowed until June 14, 1999, within which to pay the docketing fees required by Rule 38 and to submit his petitions in compliance with this Court's Rule 33.1. We also direct the Clerk not to accept any further petitions for certiorari from Cross in noncriminal matters unless he first pays the docketing fee required by Rule 38 and submits his petitions in compliance with Rule 33.1.

Cross has repeatedly abused this Court's certiorari process. On March 8, 1999, we invoked Rule 39.8 to deny Cross *in forma pauperis* status with respect to four petitions for certiorari. See *Cross* v. *Pelican Bay State Prison*, *post*, p. 1003 (three cases); *Cross* v. *Cambra*, *post*, p. 1003. Before that time, Cross had filed six petitions for certiorari, all of which were both patently frivolous and had been denied

*Together with No. 98–8487, *Cross* v. *Wieking, Clerk, United States District Court for the Northern District of California*, also on motion for leave to proceed *in forma pauperis*.

without recorded dissent. The 2 instant petitions bring Cross' total number of frivolous filings to 12, and he has 4 additional filings—all of them patently frivolous—pending before this Court.

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)*. Cross' abuse of the writ of certiorari has been in noncriminal cases, and we limit our sanction accordingly. The order therefore will not prevent Cross from petitioning to challenge criminal sanctions which might be imposed on him. Similarly, because Cross has not abused this Court's extraordinary writs procedures, the order will not prevent him from filing nonfrivolous petitions for extraordinary writs. The order will, however, allow this Court to devote its limited resources to the claims of petitioners who have not abused our certiorari process.

It is so ordered.

JUSTICE STEVENS, dissenting.

As I have suggested in the past, the Court uses more of its "limited resources" preparing, entering, and policing orders of this kind than it would by following a consistent policy of simply denying the many frivolous petitions that are filed by a large number of litigants. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting), and cases cited. I respectfully dissent.

Syllabus

RICHARDSON *v.* UNITED STATES

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

No. 97–8629. Argued February 22, 1999—Decided June 1, 1999

At petitioner Richardson's trial for violating 21 U. S. C. § 848—which forbids any "person" from "engag[ing] in a continuing criminal enterprise," § 848(a), and defines "continuing criminal enterprise" (CCE) as involving a violation of the drug statutes where "such violation is part of a continuing series of violations," § 848(c)—the judge rejected Richardson's proposal to instruct the jury that it must unanimously agree on which three acts constituted the series of violations. Instead, the judge instructed the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses, but did not have to agree as to the particular offenses. The jury convicted Richardson, and the Seventh Circuit upheld the trial judge's instruction.

Held: A jury in a § 848 case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series." Pp. 817–824.

(a) A jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element of the offense. However, it need not always decide unanimously which of several possible means the defendant used to commit an element. If § 848(c)'s phrase "series of violations" refers to one element, a "series," in respect to which individual "violations" are but the means, then the jury need only agree that the defendant committed at least three underlying crimes, and need not agree about which three. Conversely, if the statute creates several elements, the several "violations," then the jury must agree unanimously about which three crimes the defendant committed. Pp. 817–818.

(b) Considerations of language, tradition, and potential unfairness support a reading of "violations" as elements rather than means. The Government has not found any legal source reading any instance of the words "violation" or "violations" as means. To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not. The CCE statute's breadth aggravates the dangers of unfairness that treating each violation as a means would risk. The statute's word "vio-

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lations" covers many different kinds of behavior of varying degrees of seriousness. The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as "violations" for purposes of § 848's series requirement. This consideration increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do. Moreover, the Government may seek to prove that a defendant has been involved in numerous underlying violations, significantly aggravating the risk that jurors will fail to focus on specific factual detail unless required to do so. Finally, this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. *Schad* v. *Arizona*, 501 U. S. 624, 632–633. Pp. 818–820.

(c) The Government's arguments for interpreting "violations" as means—that the words "continuing series" focus on the drug business, not on the particular violations that constitute the business; that an analogy can be found in state courts' interpretations of statutes permitting conviction upon proof of a continuous course of conduct without jury agreement on a specific underlying crime; that a jury-unanimity requirement will make the statute's crime too difficult to prove; and that other portions of the statute do not require jury unanimity—are not sufficiently powerful to overcome the foregoing considerations. Pp. 820–824.

(d) The questions whether to engage in harmless-error analysis, and if so, whether the error was harmless in this case, are left to the Seventh Circuit on remand. P. 824.

130 F. 3d 765, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which O'CONNOR and GINSBURG, JJ., joined, *post*, p. 825.

William A. Barnett, Jr., by appointment of the Court, 525 U. S. 959, argued the cause and filed briefs for petitioner.

Irving L. Gornstein argued the cause for the United States. With him on the brief were *Solicitor General Wax-*

man, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben, and *Joel M. Gershowitz.**

JUSTICE BREYER delivered the opinion of the Court.

A federal criminal statute forbids any "person" from "engag[ing] in a continuing criminal enterprise." 84 Stat. 1264, 21 U. S. C. § 848(a). It defines "continuing criminal enterprise" (CCE) as involving a "violat[ion]" of the drug statutes where "such violation is a part of a continuing series of violations." § 848(c). We must decide whether a jury has to agree unanimously about which specific violations make up the "continuing series of violations." We hold that the jury must do so. That is to say, a jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some "continuing series of violations" but also that the defendant committed each of the individual "violations" necessary to make up that "continuing series."

I

The CCE statute imposes a mandatory minimum prison term of at least 20 years upon a person who engages in a "continuing criminal enterprise." § 848(a). It says:

> "[A] person is engaged in a continuing criminal enterprise if—
>
> "(1) he violates any provision of [the federal drug laws, *i. e.*,] this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> "(2) such violation is a part of a continuing series of violations of [the federal drug laws, *i. e.*,] this subchapter or subchapter II of this chapter—
>
> "(A) which are undertaken by such person in concert with five or more other persons with respect to whom

**Wendy Sibbison, David M. Porter,* and *Edward M. Chikofsky* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

> such person occupies a position of organizer [or supervisor or manager] and
>
> "(B) from which such person obtains substantial income or resources." § 848(c).

In 1994 the Federal Government charged the petitioner, Eddie Richardson, with violating this statute. The Government presented evidence designed to show that in 1970 Richardson had organized a Chicago street gang called the Undertaker Vice Lords; that the gang had distributed heroin, crack cocaine, and powder cocaine over a period of years stretching from 1984 to 1991; and that Richardson, known as "King of all the Undertakers," had run the gang, managed the sales, and obtained substantial income from those unlawful activities. The jury convicted Richardson.

The question before us arises out of the trial court's instruction about the statute's "series of violations" requirement. The judge rejected Richardson's proposal to instruct the jury that it must "unanimously agree on which three acts constituted [the] series of violations." App. 21. Instead, the judge instructed the jurors that they "must unanimously agree that the defendant committed at least three federal narcotics offenses," while adding, "[y]ou do not . . . have to agree as to the particular three or more federal narcotics offenses committed by the defendant." *Id.*, at 37. On appeal, the Seventh Circuit upheld the trial judge's instruction. 130 F. 3d 765, 779 (1997). Recognizing a split in the Circuits on the matter, we granted certiorari. Compare *United States* v. *Edmonds*, 80 F. 3d 810, 822 (CA3 1996) (en banc) (jury must unanimously agree on which "violations" constitute the series), with *United States* v. *Hall*, 93 F. 3d 126, 129 (CA4 1996) (unanimity with respect to particular "violations" is not required), and *United States* v. *Anderson*, 39 F. 3d 331, 350–351 (CADC 1994) (same). We now conclude that unanimity in respect to each individual violation is necessary.

II

Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just mentioned. Cf. 18 U. S. C. § 2113(a). Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez-Torres* v. *United States*, 523 U. S. 224, 239 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson* v. *Louisiana*, 406 U. S. 356, 369–371 (1972) (Powell, J., concurring); *Andres* v. *United States*, 333 U. S. 740, 748 (1948); Fed. Rule Crim. Proc. 31(a).

The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad* v. *Arizona*, 501 U. S. 624, 631–632 (1991) (plurality opinion); *Andersen* v. *United States*, 170 U. S. 481, 499–501 (1898). Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force. See *McKoy* v. *North Carolina*, 494 U. S. 433, 449 (1990) (Blackmun, J., concurring).

In this case, we must decide whether the statute's phrase "series of violations" refers to one element, namely a "series," in respect to which the "violations" constitute the underlying brute facts or means, or whether those words

create several elements, namely the several "violations," in respect to *each* of which the jury must agree unanimously and separately. Our decision will make a difference where, as here, the Government introduces evidence that the defendant has committed more underlying drug crimes than legally necessary to make up a "series." (We assume, but do not decide, that the necessary number is three, the number used in this case.) If the statute creates a single element, a "series," in respect to which individual violations are but the means, then the jury need only agree that the defendant committed at least three of all the underlying crimes the Government has tried to prove. The jury need not agree about which three. On the other hand, if the statute makes each "violation" a separate element, then the jury must agree unanimously about which three crimes the defendant committed.

A

When interpreting a statute, we look first to the language. *United States* v. *Wells*, 519 U. S. 482, 490 (1997). In this case, that language may seem to permit either interpretation, that of the Government or of the petitioner, for the statute does not explicitly tell us whether the individual violation is an element or a means. But the language is not totally neutral. The words "violates" and "violations" are words that have a legal ring. A "violation" is not simply an act or conduct; it is an act or conduct that is contrary to law. Black's Law Dictionary 1570 (6th ed. 1990). That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct "violates" the law, see *infra*, at 822, and, as noted above, a federal criminal jury must act unanimously when doing so. Indeed, even though the words "violates" and "violations" appear more than 1,000 times in the United States Code, the Government has not pointed us to, nor have we found, any legal source reading any instance of either word as the Government would have us read them in this case. To hold that

each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not.

The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. Cf. *Schad* v. *Arizona*, *supra*, at 645 (plurality opinion). The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as "violations" for purposes of the series requirement in the statute. Compare, *e. g.*, 21 U. S. C. §§ 842(a)(4) and (c) (1994 ed. and Supp. III) (providing civil penalties for removing drug labels) and 21 U. S. C. § 844(a) (Supp. III) (simple possession of a controlled substance) with 21 U. S. C. § 858 (endangering human life while manufacturing a controlled substance in violation of the drug laws) and § 841(b)(1)(A) (possession with intent to distribute large quantities of drugs). At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

Finally, this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. *Schad* v. *Arizona*, 501 U. S., at 632–633 (plurality opinion); *id.*, at 651 (SCALIA, J., concurring) ("We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . ."). We have no reason to believe that Congress intended to come close to, or to test, those constitutional limits when it wrote this statute. See *Garrett* v. *United States*, 471 U. S. 773, 783–784 (1985) (citing H. R. Rep. No. 91–1444, pt. 1, pp. 83–84 (1970)) (in making CCE a separate crime, rather than a sentencing provision, Congress sought increased procedural protections for defendants); cf. *Gomez* v. *United States*, 490 U. S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"); *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring).

B

The Government's arguments for an interpretation of "violations" as means are not sufficiently powerful to overcome the considerations just mentioned, those of language, tradition, and potential unfairness. The Government, emphasizing the words "*continuing series*," says that the statute, in seeking to punish drug kingpins, focuses upon the drug business, not upon the particular violations that constitute the business. Brief for United States 18–19. The argument, however, begs the question. Linguistically speaking, the statute punishes those kingpins who are involved in a "continuing series of *violations*" of the drug laws. And Congress might well have intended a jury to focus upon individual violations in order to assure guilt of the serious

crime the statute creates. Emphasizing the first two words in the passage does not eliminate the last.

Nor can the Government successfully appeal to a history or tradition of treating individual criminal "violations" as simply means toward the commission of a greater crime. The Government virtually concedes the absence of any such tradition when it says that the statute "departed significantly from common-law models and prior drug laws, creating a new crime keyed to the concept of a 'continuing criminal enterprise.'" *Id.*, at 18. The closest analogies it cites consist of state statutes making criminal such crimes as sexual abuse of a minor. State courts interpreting such statutes have sometimes permitted jury disagreement about a "specific" underlying criminal "incident" insisting only upon proof of a "continuous course of conduct" in violation of the law. *E. g.*, *People* v. *Gear*, 19 Cal. App. 4th 86, 89–94, 23 Cal. Rptr. 2d 261, 263–267 (1993) (continuous sexual abuse of a child); *People* v. *Reynolds*, 294 Ill. App. 3d 58, 69–71, 689 N. E. 2d 335, 343–344 (1997) (criminal sexual assault of a minor and aggravated sexual abuse of a minor); *State* v. *Spigarolo*, 210 Conn. 359, 391–392, 556 A. 2d 112, 129 (1989) (committing an act likely to impair the health or morals of a child); *Soper* v. *State*, 731 P. 2d 587, 591 (Alaska App. 1987) (sexual assault in the first degree). With one exception, see Cal. Penal Code Ann. §288.5(a) (West Supp. 1998), the statutes do not define the statutory crime in terms that require the commission of other predicate crimes by the defendant. The state practice may well respond to special difficulties of proving individual underlying criminal acts, *People* v. *Gear*, *supra*, at 90–92, 23 Cal. Rptr. 2d, at 264–265, which difficulties are absent here. See *infra*, at 823–824. The cases are not federal but state, where this Court has not held that the Constitution imposes a jury-unanimity requirement. *Johnson* v. *Louisiana*, 406 U. S., at 366 (Powell, J., concurring). And their special subject matter indicates that they represent an exception; they do not represent a general

tradition or a rule. *People* v. *Gear*, *supra*, at 89–92, 23 Cal. Rptr. 2d, at 263–265.

In fact, federal criminal law's treatment of recidivism offers a competing analogy no more distant than the analogy the Government offers. See *Garrett* v. *United States*, *supra*, at 782 (the statute originated in a "recidivist provision . . . that provided for enhanced sentences"). If one looks to recidivism, one finds that commission of a prior crime will lead to an enhanced punishment only when a relevant factfinder, judge, or jury has found that the defendant committed that specific individual prior crime. Where sentencing is at issue, the judge, enhancing a sentence in light of recidivism, must find a prior individual conviction, United States Sentencing Commission, Guidelines Manual §§ 4A1.1, 4B1.1 (Nov. 1998), which means that an earlier factfinder (*e. g.*, a unanimous federal jury in the case of a federal crime) found that the defendant committed the specific earlier crime, §§ 4A1.2(a)(1), 4B1.2(c). Where a substantive statute is at issue, for example, a statute forbidding a felon's possession of a firearm, 18 U. S. C. § 922(g) (1994 ed. and Supp. III), the relevant precondition, namely that the gun possessor be a felon, means at a minimum that an earlier factfinder (*e. g.*, a unanimous federal jury in the case of a federal crime) found that the defendant in fact committed that earlier individual crime. The Government's interpretation is inconsistent with this practice, for it, in effect, imposes punishment on a defendant for the underlying crimes without any factfinder having found that the defendant committed those crimes. If there are federal statutes reflecting a different practice or tradition, the Government has not called them to our attention, which suggests that any such statute would represent a lesser known exception to ordinary practice. Cf. *Schad* v. *Arizona*, 501 U. S., at 633 (plurality opinion) ("[I]t is an assumption of our system of criminal justice . . . that no person may be punished criminally save upon proof of some specific illegal conduct").

Neither are we convinced by the Government's two remaining significant arguments. First, the Government says that a jury-unanimity requirement will make the statute's crime too difficult to prove—to the point where it is unreasonable to assume Congress intended such a requirement. But we do not understand why a unanimity requirement would produce that level of difficulty. After all, the Government routinely obtains the testimony of underlings—street-level dealers who could point to specific incidents—as well as the testimony of agents who make controlled buys or otherwise observe drug transactions. Such witnesses should not have inordinate difficulty pointing to specific transactions. Or, if they do have difficulty, would that difficulty in proving individual specific transactions not tend to cast doubt upon the existence of the requisite "series"?

The dissent, but not the Government, argues that the prosecution will now have to prove that the defendant derived substantial income or resources from, and that five persons were involved with, the specific underlying crimes the jury unanimously agrees were committed. See *post*, at 830. To the extent the dissent suggests that those other statutory requirements must be satisfied with respect to *each* underlying crime, it is clearly wrong. Those requirements must be met with respect to the *series*, which, at a minimum, permits the jury to look at all of the agreed-upon violations in combination. Even if the jury were limited to the agreed-upon violations, we still fail to see why prosecutions would prove unduly difficult. The dissent writes as if it follows from its reading that conviction under the CCE statute depends on specific proof of specific sales to specific street-level users. See *post*, at 832. That is not true. A specific transaction is not an element of possession with intent to distribute under 21 U. S. C. § 841. It would be enough to present testimony, like that of Michael Sargent partially recounted by the dissent, showing that the defendant supplied a runner in his organization with large quantities of drugs on or about

particular dates as alleged in an indictment. And one need only examine Sargent's testimony to dispel any fears about fading memories. He testified that he received from Richardson large quantities of heroin three times a week; he was able to specify the location where Richardson gave him the drugs; he was able to recall precisely how the heroin was packaged when Richardson gave it to him. Tr. 1399–1401. Though he was not pressed to be specific, he even testified that he started receiving drugs from Richardson sometime in the beginning of 1989. *Id.*, at 1382. Given the record in this case, we find it hard to believe the Government will have as hard a time producing evidence sufficient to support a CCE conviction as the dissent suggests.

Second, the Government points to a different portion of the statute, which requires a defendant to have supervised "five or more other persons." 21 U. S. C. § 848(c)(2)(A). The Government says that no one claims that the jury must unanimously agree about the identity of those five other persons. It adds that the jury may also disagree about the brute facts that make up other statutory elements such as the "substantial income" that the defendant must derive from the enterprise, § 848(c)(2)(B), or the defendant's role in the criminal organization, § 848(c)(2)(A). Assuming, without deciding, that there is no unanimity requirement in respect to these other provisions, we nonetheless find them significantly different from the provision before us. They differ in respect to language, breadth, tradition, and the other factors we have discussed.

These considerations, taken together, lead us to conclude that the statute requires jury unanimity in respect to each individual "violation." We leave to the Court of Appeals the question whether to engage in harmless-error analysis, and if so, whether the error was harmless in this case.

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 JUSTICE O'CONNOR and JUSTICE GINSBURG join, dissenting.

The evidence in this case established that petitioner was the head of a sophisticated, well-entrenched, successful drug distribution enterprise. It had sales of hundreds of kilograms of heroin and cocaine over a period of years in Chicago. The jury found that petitioner was engaged in a "continuing criminal enterprise" (CCE).

Title 21 U. S. C., subchapter I, § 848(c), defines a person as engaged in a CCE if—

> "(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> "(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> "(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> "(B) from which such person obtains substantial income or resources." 84 Stat. 1266.

We are concerned with subparagraph (2), which by its terms requires the Government to establish the following elements if it is to prove a CCE: (1) that the violation is part of a continuing series of violations of the drug laws; (2) that the continuing series is undertaken by the accused in concert with five or more other persons; (3) that the accused occupied a position of organizer, supervisor, or manager, with respect to those other persons; and (4) that the accused obtained substantial income or resources from the continuing series of violations.

The Court today reasons that the first enumerated element in the subparagraph is not an element at all; instead, it is shorthand for some number of other elements corresponding to the individual violations in the series. The jury

must therefore be unanimous not as to whether there was a continuing series of violations but rather as to each of the individual violations making up some subset of the continuing series. The Court does not decide how many elements this portion of the statute contains, although it assumes without deciding that three will do. *Ante*, at 818. The Court gives no satisfactory explanation for confining its holding to the continuing series phrase, while assuming nonunanimity as to the specifics of the other elements in the same subparagraph. Nor does the Court attempt to explain how a jury is supposed to make sense of the other elements—like deriving substantial income from the series—now that the series has in effect been replaced with a few discrete violations.

The consequences of the Court's decision go well beyond the jury instruction the Court discusses. The Court's decision of necessity alters the manner in which the Government must frame its indictment and design its trial strategy. The elements of the offenses charged must be set forth in the indictment, see *Hamling* v. *United States*, 418 U. S. 87, 117 (1974), so henceforth when the Government indicts it must choose three or more specific violations and allege those, despite its ability to show that the CCE involves hundreds or thousands of sales. This is a substantial departure from what Congress intended. I submit my respectful dissent.

I

The Government procured a two-count indictment against petitioner. The CCE charge is in Count II and the Government, in my view, charged precisely what Congress said it should. Count II was as follows:

> "1. From in or about 1984, to and including October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,

EDDIE RICHARDSON,
also known as 'Hi Neef' and 'Chief,' and
CARMEN TATE,
also known as 'Red' and 'Redman,'

defendants herein, did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Section 841(a)(1) of Title 21, United States Code, which continuing series of violations was undertaken by defendants in concert with at least five other persons with respect to whom defendants occupied a position as organizer, a supervisory position, and some other position of management, and from which continuing series of violations defendants obtained substantial income and resources.

"2. The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:

"a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).

"b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).

"In violation of Title 21, United States Code, Section 848." App. 11–12.

By holding that the Government must in addition allege three or more discrete violations, thus pinning a case involving thousands of transactions on just three of them, the Court misunderstands the whole design and purpose of the statute.

We begin on common ground, for, as the Court acknowledges, it is settled that jurors need not agree on all of the means the accused used to commit an offense. *Schad* v. *Arizona*, 501 U. S. 624 (1991), confirmed this principle. In my view, Congress intended the "continuing series of violations" to be one of the defining characteristics of a continuing criminal enterprise, and therefore to be a single element of the offense, subject to fulfillment in various ways. The important point is not just that the violations occurred but that they relate to the enterprise and demonstrate its ongoing nature, hence the requirement of a "continuing" series. Evidence that the accused supervised a ring that engaged in thousands of illegal transactions is more probative of the continuing nature of the enterprise than evidence tending to show three particular violations.

Nowhere in the text of the statute or its legislative history does Congress show an interest in the particular predicate violations constituting the continuing series. Rather, the CCE offense is aimed at what Congress perceived to be a peculiar evil: the drug kingpin. The Court's observation that there is a tradition requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law, *ante*, at 818, simply restates the question presented. The Court has made clear in an earlier case that Congress did not "inten[d] to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer," but rather intended "to permit prosecution for CCE in addition to prosecution for the predicate offenses." *Garrett* v. *United States*, 471 U. S. 773, 785, 786 (1985). The CCE statute provides a specific remedy to combat criminal organizations, in large part because of the perceived inade-

quacies of prior law. *Id.*, at 782–784. By treating the CCE offense like a simple recidivism statute, the Court's opinion does not conform to the statutory purpose.

The continuing series element reflects Congress' intent to punish those who organize or direct ongoing narcotics-related activity. As the Court said in *Garrett:* "A common-sense reading of this definition [of 'engaged in a continuing criminal enterprise'] reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Id.*, at 781. As part of that statutory design, the continuing series element of the offense aims to punish those whose persistence and organization establish a successful, ongoing criminal operation. The continuing series element, as a consequence, is directed at identifying drug enterprises of the requisite size and dangerousness, not at punishing drug offenders for discrete drug violations.

The remaining elements of the CCE definition likewise target drug kingpins. With respect to the requirement of action in concert with five or more other persons, every Court of Appeals to have considered the issue has concluded that the element aims the statute at enterprises of a certain size, so the identity of the individual supervisees is irrelevant. See, *e. g.*, *United States* v. *Harris*, 959 F. 2d 246, 255 (CADC 1992) *(per curiam)* (panel including Ruth Bader Ginsburg and Clarence Thomas, JJ.); *United States* v. *Garcia*, 988 F. 2d 965, 969 (CA9 1993); *United States* v. *Moorman*, 944 F. 2d 801, 803 (CA11 1991); *United States* v. *English*, 925 F. 2d 154, 159 (CA6 1991); *United States* v. *Linn*, 889 F. 2d 1369, 1374 (CA5 1989); *United States* v. *Jackson*, 879 F. 2d 85, 88 (CA3 1989); *United States* v. *Tarvers*, 833 F. 2d 1068, 1074–1075 (CA1 1987); *United States* v. *Markowski*, 772 F. 2d 358, 364 (CA7 1985). As for the remaining elements, it is undisputed that the jury need not agree unanimously on whether the defendant was a supervisor as opposed to an organizer or other manager, because the leader-

ship role is what matters. It should be equally apparent that the jury need not agree unanimously on which income or resources the defendant received from the CCE, because what matters is that there be substantial income from the continuing series, without regard to the form in which it arrives.

The Court assumes that other elements of the statute can be fulfilled without juror unanimity as to the means of fulfillment, and offers nothing more than the conclusory assertion that these other elements "differ in respect to language, breadth, [and] tradition" from the continuing series element. *Ante*, at 824. Not only does the Court fail to provide any analysis that might explain how the elements differ, it also ignores the point that they are the same in the one respect that counts for the statute's purposes, namely, that they are all ways of ensuring that the accused directs schemes of sufficient size, duration, and effectiveness to warrant special punishment, without regard to the particulars of the schemes.

It is easy enough to understand that a drug distribution organization should have five or more other persons to come within the condemnation of the statute. It is likewise easy to understand that the organization should generate substantial income for its leaders as a requirement for conviction. Once the continuing series has been replaced with three individual violations, however, the remaining elements become difficult for the jury to apply. The Court's unnecessary atomization of the continuing series element disrupts Congress' careful concentration on the ongoing enterprise and replaces it with a concentration on perhaps three violations picked out of the continuing series.

The Court seems to proceed on the assumption that any three small transactions involving a few grams will establish the requisite series. That is not so. In my view, the necessary consequence of the Court's ruling is that the three specific crimes must themselves be the ones, in the words

of the statute, "from which [the accused] obtains substantial income or resources." 21 U. S. C. § 848(c)(2)(B). Just any three will not do. This significant new burden will make prosecutions under the CCE statute remarkably more difficult. Three small transactions will probably not generate substantial income, and it is unlikely that each transaction will involve five or more other persons. Or there might be different views among the jurors as to which transactions netted substantial income and as to which were undertaken in concert with five or more others. It is disruptive of the statutory purpose to require the Government at the outset to isolate just three or more violations and then relate all the other parts of the CCE definition to just these offenses. Yet that is what the Court appears to require. As a consequence, the statute might not even reach businesses (like petitioner's) which depend for their success upon a high volume of relatively small sales, unless there is jury unanimity on 20 or 30 discrete transactions. It is all but inconceivable that Congress intended, in effect, to exempt such businesses from coverage by this unwarranted emphasis on individual transactions. It is the enterprise as a whole that must be examined, and the continuing series of violations relates to the entire scope of the operations.

In addition, the individual violations making up a continuing series may not always be easy to prove with particularity. The Court assures us that "witnesses should not have inordinate difficulty pointing to specific transactions." *Ante*, at 823. It then asks the rhetorical question: "Or, if they do have difficulty, would that difficulty in proving individual specific transactions not tend to cast doubt upon the existence of the requisite 'series'?" *Ibid.* Quite apart from the point already mentioned that the continuing series must relate to the elements of action in concert and receipt of substantial income, the answer to that question is "no." The evidence in this case so demonstrates.

Petitioner was the founder and leader of a gang called the Undertaker Vice Lords. The evidence indicated that petitioner operated what might be called a chain drugstore in Chicago, selling various kinds of drugs, including white and brown heroin, powder cocaine, and rock or crack cocaine, at various established locations or "spots." Several gang members pleaded guilty, cooperated with the Government, and testified at petitioner's trial. The following are but a few examples of the testimony offered against petitioner. Johnnie Chew, who ran a brown heroin distribution spot for the gang in 1987 and 1988, estimated that the gang sold a "frame"—25 packs, each containing 25 bags worth $25 apiece—every three to four days. Michael Sargent testified that, while he was in charge of a white heroin distribution spot, Richardson supplied him with $40,000 to $60,000 worth of heroin three times a week. Joseph Westmoreland estimated the Undertakers were collecting about $20,000 to $30,000 per day selling white heroin from 1988 to 1990. Andre Cal admitted cooking a quarter kilo of powder cocaine into crack cocaine two to three times a week for 10 months in the early 1990's. Several other gang members admitted to earning $50,000 to $60,000 each selling drugs for the gang on a regular basis. To suggest that Congress intended, in the face of devastating testimony like this, to allow petitioner to escape a CCE conviction because the witnesses did not describe any specific, individual transaction out of thousands (many of which are more than a decade old) is to misunderstand the nature of the crime Congress sought to prohibit.

State course-of-conduct crimes provide an analog to the federal CCE statute. A crime may be said to involve a continuing course of conduct because it is committed over a period of time, like kidnaping, harboring a fugitive, or failing to provide support for a minor. In such cases, the jury need not agree unanimously on individual acts that occur during the ongoing crime. See generally, *e. g.*, B. Witkin &

N. Epstein, California Criminal Law § 2942, p. 245 (2d ed., Supp. 1997) ("A unanimity instruction is not required when the crime charged involves a continuous course of conduct . . . such as failure to provide, child abuse, contributing to the delinquency of a minor, and driving under the influence"). States have also chosen to define as continuous some crimes that involve repeated conduct where the details of specific instances may be difficult to prove, as in cases of child molestation or promoting prostitution. See, *e. g.*, *People* v. *Adames*, 54 Cal. App. 4th 198, 62 Cal. Rptr. 2d 631 (1997) (continuous sexual abuse of a child); *People* v. *Reynolds*, 294 Ill. App. 3d 58, 689 N. E. 2d 335 (1997) (criminal sexual assault and aggravated sexual abuse of a minor); *State* v. *Molitor*, 210 Wis. 2d 416, 565 N. W. 2d 248 (App. 1997) (repeated sexual intercourse with underage partner); *State* v. *Doogan*, 82 Wash. App. 185, 917 P. 2d 155 (1996) (advancing prostitution and profiting from prostitution). The CCE offense has some attributes of both of these categories: To the extent the CCE offense aims to punish acting as leader of a drug enterprise, it targets an ongoing violation. To the extent it relies on there being a series of violations, it may be susceptible to difficulties of proof which make it reasonable to base a conviction upon the existence of the series rather than the individual violations. As in this very case, the transactions may have been so numerous or taken place so long ago that they cannot be recalled individually.

Having failed to confront the acknowledged purpose of the statute, the Court invokes the principle of constitutional doubt. Just last Term we warned that overuse of the doctrine risks aggravating the friction between the branches of Government "by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998). As discussed in Part II, *infra*, the CCE statute in my view passes constitutional muster. Yet the

Court today interprets the statute in a way foreign to Congress' intent without discussing any possible constitutional infirmity other than to say that it has "no reason to believe that Congress intended to come close to, or to test," the limits on the definition of crimes imposed by the Due Process Clause when it wrote the CCE statute. *Ante*, at 820.

There is no indication that Congress had any concerns about the statute's constitutionality. The Court seems to imply the contrary by citing *Garrett* for the proposition that Congress "sought increased procedural protections for defendants" in making CCE a separate crime, *ante*, at 820 (paraphrasing *Garrett*, 471 U. S., at 783–784). Taken in context, the passage from *Garrett* supports neither the Court's reading of the statute nor its invocation of constitutional doubt. *Garrett* held the Double Jeopardy Clause did not bar prosecution for the CCE offense after a prior conviction for one of the underlying predicate offenses. The passage in question discussed the debate in Congress over whether to impose enhanced punishments for drug kingpins by means of a separate offense or by means of a sentencing factor. The House Report cited by the Court noted that an amendment by Representative Dingell "made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." H. R. Rep. No. 91–1444, pt. 1, p. 84 (1970). That is of course true, but it begs the question presented in this case, namely, whether the existence of a series is itself an element, or whether the individual offenses in that series are elements. To say that the jury must agree unanimously on the elements provides no guidance in determining what those elements are. The competing provision from Representative Poff, moreover, which would have treated engaging in a CCE as a sentencing factor, was also adopted, with the result that "both approaches are contained in the statute." *Garrett*, *supra*, at 784 (citing 21 U. S. C. §§ 848, 849, 850). There is thus no reason to think Congress thought it necessary for the jury to agree on which

particular predicate offenses made up the continuing series before an enhanced punishment may be imposed.

II

In my view, there is no due process problem with interpreting the continuing series requirement as a single element of the crime. The plurality opinion in *Schad* spoke of "the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution." 501 U. S., at 637. Rather, our inquiry is guided by "due process with its demands for fundamental fairness and for the rationality that is an essential component of that fairness." *Ibid.* (citation omitted). Our analysis of fundamental fairness and rationality, by necessity, is contextual, taking into account both the purposes of the legislature and the practicalities of the criminal justice system. In the CCE context, the continuing series element advances the goals of the statute in a way that is neither unfair nor irrational: It is a direct and overt prohibition upon drug lords whose very persistence and success makes them a particular evil.

The CCE statute does not in any way implicate the suggestion in *Schad* that an irrational single crime consisting of, for instance, either robbery or failure to file a tax return would offend due process. See *id.*, at 633, 650. Although the continuing series may consist of different drug crimes, the mere proof of a series does not suffice to convict. The Government must also prove action in concert with five or more persons, a leadership role for the defendant with respect to those persons, and substantial income or resources derived from the continuing series. The presence of these additional elements distinguishes the CCE statute from a simple recidivism statute, notwithstanding the Court's attempt to draw an analogy between the two. See *ante*, at 822.

The Court cites *Garrett* for the proposition that the CCE statute originated in a "'recidivist provision . . . that provided for enhanced sentences.'" *Ante*, at 822. In fact, the point the Court was making in *Garrett* was that Congress rejected the simple recidivist provision in favor of the current definition of a CCE, which, as the Court in *Garrett* took pains to point out, "is not drafted in the way that a recidivist provision would be drafted" but instead uses "starkly contrasting language." 471 U. S., at 781–782 (comparing the CCE definition of § 848 with the recidivist provision incorporated into § 849).

One could concede, *arguendo*, that if Congress were to pass a habitual-offender statute the sole element of which was the existence of a series of crimes without a requirement of jury unanimity on any underlying offense, then the statute would raise serious questions as to fairness and rationality because the jury's discretion would be so unconstrained. The statute before us is not of that type, for the various elements work together to channel the jury's attention toward a certain kind of ongoing enterprise. We should not strike down this reasonable law out of fear that we will not be able to deal in an appropriate manner with an unreasonable law if one should confront us. The CCE statute does not represent an end run around the Constitution's jury unanimity requirement, for Congress had a sound basis for defining the elements as it did: to punish those who act as drug kingpins. There are many ways to be a drug kingpin, just as there are many ways to commit murder or kidnaping.

With regard to the fundamental fairness of the alternative means of satisfying the continuing series element, the plurality opinion in *Schad* indicated that the Court should look to see whether the alleged predicate offenses making up the series in each particular case are morally equivalent. The alternative means of fulfilling an element "must reasonably reflect notions of equivalent blameworthiness or culpabil-

ity, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether." 501 U. S., at 643. The proper question is not whether the blameworthiness is comparable "in all possible instances"; rather, the question is whether one means of fulfillment "may ever be treated as [the] equivalent" of another, and in particular whether the alternative means presented in a given case may be so treated. *Id.*, at 643, 644. The continuity itself is what Congress sought to prohibit with the series element, so it makes no difference if the violations in the series involve comparable amounts of drugs.

In the absence of any reason to think Congress' definition of the CCE offense was irrational, or unfair under fundamental principles, or an illicit attempt to avoid the constitutional requirement of jury unanimity, there is no constitutional barrier to requiring jury unanimity on the existence of a continuing series of violations without requiring unanimity as to the underlying predicate offenses.

* * *

Petitioner is just the sort of person at whom the CCE statute is aimed. Where witnesses have testified they sold drugs on a regular basis as part of an enterprise led by the defendant, it is appropriate for the jury to conclude that a continuing series of violations of the drug laws has taken place. Neither Congress' intent nor the Due Process Clause requires the result the Court reaches today, which rewards those drug kingpins whose operations are so vast that the individual violations cannot be recalled or charged with specificity. I would affirm the judgment of the Court of Appeals.

Syllabus

O'SULLIVAN *v.* BOERCKEL

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

No. 97–2048. Argued March 30, 1999—Decided June 7, 1999

After respondent Boerckel's state convictions were affirmed by the Illinois Appellate Court and the Illinois Supreme Court denied his petition for leave to appeal, he filed a federal habeas petition raising six grounds for relief. In denying the petition, the District Court found, among other things, that Boerckel had procedurally defaulted his first three claims by failing to include them in his petition to the Illinois Supreme Court. The Seventh Circuit reversed and remanded, concluding that Boerckel had not procedurally defaulted those claims because he was not required to present them in a petition for discretionary review to the Illinois Supreme Court in order to satisfy 28 U. S. C. §§ 2254(b)(1), (c), under which federal habeas relief is available to state prisoners only after they have exhausted their claims in state court.

Held: In order to satisfy the exhaustion requirement, a state prisoner must present his claims to a state supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure. As a matter of comity, § 2254(c)—which provides that a habeas petitioner "shall not be deemed to have exhausted [state court] remedies . . . if he has the right under [state] law . . . to raise, by any available procedure, the question presented"—requires that state prisoners give state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. See, *e. g.*, *Castille* v. *Peoples*, 489 U. S. 346, 351. State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. Here, Illinois' established, normal appellate review procedure is a two-tiered system: Most criminal appeals are heard first by the intermediate appellate courts, and a party may petition for leave to appeal a decision by the Appellate Court to the Illinois Supreme Court. Whether to grant such a petition is left to the sound discretion of the Illinois Supreme Court, Ill. Sup. Ct. Rule 315(a). Although a state prisoner has no right to *review* in the Illinois Supreme Court, he does have a "right . . . to raise" his claims before that court. That is all § 2254(c) requires. Boerckel's argument that Rule 315(a) discourages the filing of discretionary petitions raising routine allegations of error, and instead directs litigants to present to the

Supreme Court only those claims that present questions of broad significance, is rejected. Boerckel's related argument, that a rule requiring state prisoners to file petitions for review with that court offends comity by inundating the Illinois Supreme Court with countless unwanted petitions presenting routine allegations of error, is also rejected. There is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a procedure is unavailable, but the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable. As the time for filing a petition for leave to appeal to the Illinois Supreme Court has long past, Boerckel's failure to present three of his federal habeas claims to that court in a timely fashion has resulted in a procedural default of those claims. Pp. 842–849.

135 F. 3d 1194, reversed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, Souter, and Thomas, JJ., joined. Souter, J., filed a concurring opinion, *post*, p. 849. Stevens, J., filed a dissenting opinion, in which Ginsburg and Breyer, JJ., joined, *post*, p. 850. Breyer, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ., joined, *post*, p. 862.

William L. Browers, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *James E. Ryan*, Attorney General, and *Michael M. Glick*, Assistant Attorney General.

David B. Mote argued the cause for respondent. With him on the brief were *Richard H. Parsons* and *Jeffrey T. Green*.*

Justice O'Connor delivered the opinion of the Court.

Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. 28 U. S. C. §§ 2254(b)(1), (c) (1994 ed. and Supp. III). In this case, we are asked to decide whether a state prisoner must present his claims to a state supreme court in a petition for

**Edward M. Chikofsky* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

discretionary review in order to satisfy the exhaustion requirement. We conclude that he must.

I

In 1977, respondent Darren Boerckel was tried in the Circuit Court of Montgomery County, Illinois, for the rape, burglary, and aggravated battery of an 87-year-old woman. The central evidence against him at trial was his written confession to the crimes, a confession admitted over Boerckel's objection. The jury convicted Boerckel on all three charges, and he was sentenced to serve 20 to 60 years' imprisonment on the rape charge, and shorter terms on the other two charges, with all sentences to be served concurrently.

Boerckel appealed his convictions to the Appellate Court of Illinois, raising several issues. He argued, among other things, that his confession should have been suppressed because the confession was the fruit of an illegal arrest, because the confession was coerced, and because he had not knowingly and intelligently waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Boerckel also claimed that prosecutorial misconduct denied him a fair trial, that he had been denied discovery of exculpatory material held by the police, and that the evidence was insufficient to support his conviction. The Illinois Appellate Court, with one justice dissenting, rejected Boerckel's claims and affirmed his convictions and sentences. *People* v. *Boerckel*, 68 Ill. App. 3d 103, 385 N. E. 2d 815 (1979).

Boerckel next filed a petition for leave to appeal to the Illinois Supreme Court. In this petition, he raised only three issues. Boerckel claimed first that his confession was the fruit of an unlawful arrest because, contrary to the Appellate Court's ruling, he *was* under arrest when he gave his confession. Boerckel also contended that he was denied a fair trial by prosecutorial misconduct and that he had been erroneously denied discovery of exculpatory material

in the possession of the police. The Illinois Supreme Court denied the petition for leave to appeal, and this Court denied Boerckel's subsequent petition for a writ of certiorari. *Boerckel* v. *Illinois*, 447 U. S. 911 (1980).

In 1994, Boerckel filed a *pro se* petition for a writ of habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Central District of Illinois. The District Court appointed counsel for Boerckel, and Boerckel's counsel filed an amended petition in March 1995. The amended petition asked for relief on six grounds: (1) that Boerckel had not knowingly and intelligently waived his *Miranda* rights; (2) that his confession was not voluntary; (3) that the evidence against him was insufficient to sustain the conviction; (4) that his confession was the fruit of an illegal arrest; (5) that he received ineffective assistance of counsel at trial and on appeal; and (6) that his right to discovery of exculpatory material under *Brady* v. *Maryland*, 373 U. S. 83 (1963), was violated.

In an order dated November 15, 1995, the District Court found, as relevant here, that Boerckel had procedurally defaulted his first, second, and third claims by failing to include them in his petition for leave to appeal to the Illinois Supreme Court. No. 94–3258 (CD Ill.), pp. 4–10. Boerckel attempted to overcome the procedural defaults by presenting evidence that he fell within the "fundamental miscarriage of justice" exception to the procedural default rule. See *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). At a hearing on this issue, Boerckel argued that he was actually innocent of the offenses for which he had been convicted and he presented evidence that he claimed showed that two other men were responsible for the crimes. In a subsequent ruling, the District Court concluded that Boerckel had failed to satisfy the standards established in *Schlup* v. *Delo*, 513 U. S. 298 (1995), for establishing the "fundamental miscarriage of justice" exception, and thus held that Boerckel could not overcome the procedural bars preventing review

of his claims. No. 94–3258 (CD Ill., Oct. 28, 1996), pp. 14–15. After rejecting Boerckel's remaining claims for relief, the District Court denied his habeas petition. *Id.*, at 18.

On appeal, the Court of Appeals for the Seventh Circuit considered one question, namely, whether Boerckel had procedurally defaulted the first three claims in his habeas petition (whether he knowingly and intelligently waived his *Miranda* rights, whether his confession was voluntary, and whether the evidence was sufficient to support a verdict) by failing to raise those claims in his petition for leave to appeal to the Illinois Supreme Court. The Court of Appeals reversed the judgment of the District Court denying Boerckel's habeas petition and remanded for further proceedings. 135 F. 3d 1194 (1998). The court concluded that Boerckel was not required to present his claims in a petition for discretionary review to the Illinois Supreme Court to satisfy the exhaustion requirement. *Id.*, at 1199–1202. Thus, according to the Court of Appeals, Boerckel had not procedurally defaulted those claims. *Id.*, at 1202.

We granted certiorari to resolve a conflict in the Courts of Appeals on this issue. 525 U. S. 999 (1998). Compare *e. g., Richardson* v. *Procunier*, 762 F. 2d 429 (CA5 1985) (must file petition for discretionary review), with *Dolny* v. *Erickson*, 32 F. 3d 381 (CA8 1994) (petition for discretionary review not required), cert. denied, 513 U. S. 1111 (1995).

II

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. The exhaustion doctrine, first announced in *Ex parte Royall*, 117 U. S. 241 (1886), is now codified at 28 U. S. C. § 2254(b)(1) (1994 ed., Supp. III). This doctrine, however, raises a recurring question: What state remedies must a habeas peti-

tioner invoke to satisfy the federal exhaustion requirement? See *Castille* v. *Peoples*, 489 U. S. 346, 349–350 (1989); *Wainwright* v. *Sykes*, 433 U. S. 72, 78 (1977). The particular question posed by this case is whether a prisoner must seek review in a state court of last resort when that court has discretionary control over its docket.

Illinois law provides for a two-tiered appellate review process. Criminal defendants are tried in the local circuit courts, and although some criminal appeals (*e. g.*, those in which the death penalty is imposed) are heard directly by the Supreme Court of Illinois, most criminal appeals are heard first by an intermediate appellate court, the Appellate Court of Illinois. Ill. Sup. Ct. Rule 603 (1998). A party may petition for leave to appeal a decision by the Appellate Court to the Illinois Supreme Court (with exceptions that are irrelevant here), but whether "such a petition will be granted is a matter of sound judicial discretion." Rule 315(a). See also Rule 612(b) (providing that Rule 315 governs criminal, as well as civil, appeals). Rule 315 elaborates on the exercise of this discretion as follows:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." Rule 315(a).

Boerckel's amended federal habeas petition raised three claims that he had not included in his petition for leave to appeal to the Illinois Supreme Court. To determine whether Boerckel was required to present those claims to the Illinois Supreme Court in order to exhaust his state

remedies, we turn first to the language of the federal habeas statute. Section 2254(c) provides that a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke *any possible* avenue of state court review, we have never interpreted the exhaustion requirement in such a restrictive fashion. See *Wilwording* v. *Swenson*, 404 U. S. 249, 249–250 (1971) *(per curiam)*. Thus, we have not interpreted the exhaustion doctrine to require prisoners to file repetitive petitions. See *Brown* v. *Allen*, 344 U. S. 443, 447 (1953) (holding that a prisoner does not have "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review"). We have also held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past. See *Wilwording* v. *Swenson*, *supra*, at 249–250 (rejecting suggestion that state prisoner should have invoked "any of a number of possible alternatives to state habeas including 'a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts,' or perhaps other relief under the State Administrative Procedure Act").

Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims. See *Castille* v. *Peoples*, *supra*, at 351; *Picard* v. *Connor*, 404 U. S. 270, 275–276 (1971). State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. *Rose* v. *Lundy*, 455 U. S. 509, 515–516 (1982); *Darr* v. *Burford*, 339 U. S. 200, 204 (1950).

This rule of comity reduces friction between the state and federal court systems by avoiding the "unseem[liness]" of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance. *Ibid.* See also *Duckworth* v. *Serrano*, 454 U. S. 1, 3–4 (1981) *(per curiam); Rose* v. *Lundy*, *supra*, at 515–516.

Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. Here, Illinois' established, normal appellate review procedure is a two-tiered system. Comity, in these circumstances, dictates that Boerckel use the State's established appellate review procedures before he presents his claims to a federal court. Unlike the extraordinary procedures that we found unnecessary in *Brown* v. *Allen* and *Wilwording* v. *Swenson*, a petition for discretionary review in Illinois' Supreme Court is a normal, simple, and established part of the State's appellate review process. In the words of the statute, state prisoners have "the right . . . to raise" their claims through a petition for discretionary review in the State's highest court. § 2254(c). Granted, as Boerckel contends, Brief for Respondent 16, he has no right to *review* in the Illinois Supreme Court, but he does have a "right . . . to raise" his claims before that court. That is all § 2254(c) requires.

Boerckel contests this conclusion with two related arguments. His first argument is grounded in a stylized portrait of the Illinois appellate review process. According to Boerckel, Illinois' appellate review procedures make the intermediate appellate courts the primary focus of the system; all routine claims of error are directed to those courts. The Illinois Supreme Court, by contrast, serves only to an-

swer "questions of broad significance." *Id.*, at 4. Boerckel's view of Illinois' appellate review process derives from Ill. Sup. Ct. Rule 315(a) (1998). He reads this Rule to discourage the filing of petitions raising routine allegations of error and to direct litigants to present only those claims that meet the criteria defined by the Rule. Rule 315(a), by its own terms, however, does not "contro[l]" or "measur[e]" the Illinois Supreme Court's discretion. The Illinois Supreme Court is free to take cases that do not fall easily within the descriptions listed in the Rule. Moreover, even if we were to assume that the Rule discourages the filing of certain petitions, it is difficult to discern which cases fall into the "discouraged" category. In this case, for example, the parties disagree about whether, under the terms of Rule 315(a), Boerckel's claims should have been presented to the Illinois Supreme Court. Compare Brief for Respondent 5 with Reply Brief for Petitioner 5.

The better reading of Rule 315(a) is that the Illinois Supreme Court has the opportunity to *decide* which cases it will consider on the merits. The fact that Illinois has adopted a discretionary review system may reflect little more than that there are resource constraints on the Illinois Supreme Court's ability to hear every case that is presented to it. It may be that, given the necessity of a discretionary review system, the Rule allows the Illinois Supreme Court to expend its limited resources on "questions of broad significance." We cannot conclude from this Rule, however, that review in the Illinois Supreme Court is unavailable. By requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance, the rule we announce today serves the comity interests that drive the exhaustion doctrine.

Boerckel's second argument is related to his first. According to Boerckel, because the Illinois Supreme Court has announced (through Rule 315(a)) that it does not want to hear routine allegations of error, a rule requiring state pris-

oners to file petitions for review with that court offends comity by inundating the Illinois Supreme Court with countless unwanted petitions. Brief for Respondent 8–14. See also 135 F. 3d, at 1201. This point, of course, turns on Boerckel's interpretation of Rule 315(a), an interpretation that, as discussed above, we do not find persuasive. Nor is it clear that the rule we announce today will have the effect that Boerckel predicts. We do not know, for example, what percentage of Illinois state prisoners who eventually seek federal habeas relief decline, in the first instance, to seek review in the Illinois Supreme Court.

We acknowledge that the rule we announce today—requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State—has the *potential* to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. See, *e. g.*, *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases,* 321 S. C. 563, 471 S. E. 2d 454 (1990); see also *State* v. *Sandon,* 161 Ariz. 157, 777 P. 2d 220 (1989). Under these circumstances, Boerckel may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine. In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. Section 2254(c), in fact, directs federal courts to consider whether a habeas petitioner has "the right *under the law of the State to raise, by any available procedure,* the question presented." (Emphasis added.) The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts

to ignore a state law or rule providing that a given procedure is not available. We hold today only that the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable.

Boerckel's amended federal habeas petition raised three claims that he had pressed before the Appellate Court of Illinois, but that he had not included in his petition for leave to appeal to the Illinois Supreme Court. There is no dispute that this state court remedy—a petition for leave to appeal to the Illinois Supreme Court—is no longer available to Boerckel; the time for filing such a petition has long passed. See Ill. Sup. Ct. Rule 315(b). Thus, Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims. See *Coleman* v. *Thompson*, 501 U. S., at 731–732; *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982).

We do not disagree with JUSTICE STEVENS' general description of the law of exhaustion and procedural default. Specifically, we do not disagree with his description of the interplay of these two doctrines. *Post*, at 853–854 (dissenting opinion). As JUSTICE STEVENS notes, a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by "letting the time run" on state remedies. *Post*, at 853. To avoid this result, and thus "protect the integrity" of the federal exhaustion rule, *ibid.*, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i. e.*, whether he has fairly presented his claims to the state courts, see *post*, at 854. Our disagreement with JUSTICE STEVENS in this case turns on our differing answers to this last question: Whether a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort has *properly* presented his claims to the state courts. Because we answer this question "no," we conclude that Boerckel has procedurally defaulted his claims.

Accordingly, the judgment of the Court of Appeals for the Seventh Circuit is reversed.

It is so ordered.

JUSTICE SOUTER, concurring.

I agree with the Court's strict holding that "the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable" for purposes of federal habeas exhaustion. *Ante*, at 848. I understand the Court to have left open the question (not directly implicated by this case) whether we should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief. The Supreme Court of South Carolina, for example, has declared:

> "[I]n all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S. C. 563, 564, 471 S. E. 2d 454 (1990).

The Court is clear that "nothing in the exhaustion doctrine requir[es] federal courts to ignore a state law or rule providing that a given procedure is not available." *Ante*, at 847–848. Its citation of *In re Exhaustion of State Remedies*, for the proposition that the increased burden on state courts may be unwelcome, should not be read to suggest something more: that however plainly a State may speak its

highest court must be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review.

In construing the exhaustion requirement, "[w]e have . . . held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past." *Ante*, at 844 (citing *Wilwording* v. *Swenson*, 404 U. S. 249, 249–250 (1971) *(per curiam)*). I understand that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion. It is not obvious that either comity or precedent requires otherwise.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court's opinion confuses two analytically distinct judge-made rules: (1) the timing rule, first announced in *Ex parte Royall*, 117 U. S. 241 (1886), and later codified at 28 U. S. C. § 2254(b)(1) (1994 ed., Supp. III), that requires a state prisoner to exhaust his state remedies before seeking a federal writ of habeas corpus; and (2) the waiver, or so-called procedural default, rule, applied in cases like *Francis* v. *Henderson*, 425 U. S. 536 (1976), that forecloses relief even when the petitioner has exhausted his remedies.

Properly phrased, the question presented by this case is not whether respondent's claims were exhausted; they clearly were because no state remedy was available to him when he applied for the federal writ. The question is whether we should hold that his claims are procedurally defaulted and thereby place still another procedural hurdle in

the path of applicants for federal relief who have given at least two state courts a fair opportunity to consider the merits of their constitutional claims. Before addressing that question, I shall briefly trace the history of the two separate doctrines that the Court has improperly commingled.

I

"[T]he problem of waiver is separate from the question whether a state prisoner has exhausted state remedies." *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982). The question of exhaustion "refers only to remedies still available at the time of the federal petition," *ibid.;* it requires federal courts to ask whether an applicant for federal relief could still get the relief he seeks in the state system. If the applicant currently has a state avenue available for raising his claims, a federal court, in the interest of comity, must generally abstain from intervening. This time-honored rule has developed over several decades of cases, always with the goal of respecting the States' interest in passing first on their prisoners' constitutional claims in order to act as the primary guarantor of those prisoners' federal rights, and always separate and apart from rules of waiver.

In *Ex parte Royall* this Court reviewed a federal trial judge's decision dismissing for want of jurisdiction a state prisoner's application for a writ of habeas corpus. The prisoner, who was awaiting trial on charges that he had violated a Virginia statute, alleged that the statute was unconstitutional. This Court held that the trial court had jurisdiction, but nevertheless concluded that as a matter of comity the court had "discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted." 117 U. S., at 253. Moreover, we held that, even if the prisoner was convicted, the court still had discretion to await a decision by the highest court of the State.

We clarified this abstention principle in *Urquhart* v. *Brown*, 205 U. S. 179 (1907). We stated that the "excep-

tional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State are those of great urgency," *id.*, at 182, that involve the authority of the General Government. Apart from those rare cases presenting "exceptional circumstances of peculiar urgency," see *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17 (1925), our early cases consistently applied the rule summarized in *Ex parte Hawk*, 321 U. S. 114, 116–117 (1944) *(per curiam):* "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted."

The 1948 statute changed neither that rule nor its exclusive emphasis on timing. In that year, "Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion." *Rose* v. *Lundy*, 455 U. S. 509, 516 (1982). The statute as enacted provided that an application for a writ by a state prisoner "shall not be granted" unless the applicant has exhausted his state remedies and, as the amended statute still does today, further provided that the applicant shall not be deemed to have done so "if he has the right under the law of the State to raise, by any available procedure, the question presented." 62 Stat. 967; 28 U. S. C. § 2254(d) (1994 ed., Supp. III). We interpreted this statute in *Rose* as requiring "total exhaustion"—that is, as requiring federal courts to dismiss habeas petitions when any of the claims could still be brought in state court. 455 U. S., at 522. Conversely, of course, if no state procedure is available for raising any claims at the time a state prisoner applies for federal relief, the exhaustion requirement is satisfied.

To be sure, the fact that a prisoner has failed to invoke an available state procedure may provide the basis for a

conclusion that he has waived a claim. But the exhaustion inquiry focuses entirely on the availability of state procedures at the time when the federal court is asked to entertain a habeas petition. Our decision in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), which was cited with approval in *Hawk*, 321 U. S., at 118, illustrates this principle. In that case, the Arkansas Supreme Court had rejected the petitioner's jury discrimination claim because he had asserted it in a motion for new trial that "came too late." 261 U. S., at 93. But, in holding that the Federal District Court should have entertained the claim, we obviously found that the state court's refusal to hear the claim on procedural grounds did not mean that the claim had not been exhausted. When we implicitly overruled *Moore* several years later in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), we did so only on waiver grounds. We explicitly noted that "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Id.*, at 732.

Neither party argues that respondent currently has any state remedies available to him. The Court recognizes this circumstance, see *ante*, at 848, but still purports to analyze whether respondent has "exhausted [his] claims in state court." *Ante*, at 839, 842. Since I do not believe that this case raises an exhaustion issue, I turn to the subject of waiver.

II

In order to protect the integrity of our exhaustion rule, we have also crafted a separate waiver rule, or—as it is now commonly known—the procedural default doctrine. The purpose of this doctrine is to ensure that state prisoners not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so. If we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible

state remedies and then rushing into the federal system, the comity interests that animate the exhaustion rule could easily be thwarted. We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair "opportunity to pass upon [his claims]." *Darr* v. *Burford*, 339 U. S. 200, 204 (1950). When a prisoner has deprived the state courts of such an opportunity, he has procedurally defaulted his claims and is ineligible for federal habeas relief save a showing of "cause and prejudice," *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986), or "'a fundamental miscarriage of justice'" *id.*, at 495.

In the first of our modern procedural default cases, *Francis* v. *Henderson*, 425 U. S. 536 (1976), we held that a state prisoner had waived his right to challenge the composition of his grand jury because he had failed to comply with a state law requiring that such a challenge be made in advance of trial. Our opinion did not even mention the obvious fact that the petitioner had exhausted his state remedies; rather, it stressed the importance of requiring "'prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury.'" *Id.*, at 541.

Similarly, in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), we held that the failure to object at trial to the admission of an inculpatory statement precluded a federal court from entertaining in a habeas proceeding the claim that the statement was involuntary. Our opinion correctly assumed that the petitioner had exhausted his state remedies. *Id.*, at 80–81. Our conclusion that waiver was appropriate rested largely on the importance of treating a trial as "the 'main event,' so to speak," and making the necessary record "with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding."

Id., at 88, 90. In *Engle* v. *Isaac*, 456 U. S. 107 (1982), another case in which the prisoner had unquestionably exhausted his state remedies, see *id.*, at 125–126, n. 28, we held that a claimed constitutional defect in the trial judge's instructions to the jury had been waived because the objection had not been raised at trial.

In *Coleman*, the Court extended our procedural default doctrine to state collateral appellate proceedings. The Court held that an inmate's constitutional claims that he had advanced in a state habeas proceeding could not be entertained by a federal court because his appeal from the state trial court's denial of collateral relief had been filed three days late. The Court, as I noted above, expressly stated that the exhaustion requirement had been satisfied because "there [were] no state remedies any longer 'available' to him." 501 U. S., at 732. But because the State had consistently and strictly applied its timing deadlines for filing such appellate briefs in this and other cases, we concluded that Coleman had effectively deprived the State of a fair opportunity to pass on his claims and thus had procedurally defaulted them.

On the other hand, we have continually recognized, as the Court essentially does again today, *ante*, at 844, that a state prisoner need not have invoked every conceivably "available" state remedy in order to avoid procedural default. As far back as *Brown* v. *Allen*, 344 U. S. 443, 447 (1953), we held that even when a State offers postconviction procedures, a prisoner does not have "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review." We later held that prisoners who have exhausted state habeas procedures need not have requested in state courts an injunction, a writ of prohibition, mandamus relief, a declaratory judgment, or relief under the State Administrative Procedure Act, even if those procedures were technically available. *Wilwording* v. *Swenson*, 404 U. S. 249 (1971) *(per curiam)*. Federal courts also routinely and cor-

rectly hold that prisoners have exhausted their state remedies, and have *not* procedurally defaulted their claims, when those prisoners had the right under state law to file a petition for rehearing from the last adverse state-court decision and failed to do so.

The presence or absence of exhaustion, in sum, tells us nothing about whether a prisoner has defaulted his constitutional claims. Exhaustion is purely a rule of timing and has played no role in the series of waiver decisions that foreclosed challenges to the composition of the grand jury, evidentiary rulings at trial, instructions to the jury, and finally, counsel's inadvertent error in failing to file a timely appeal from a state court's denial of collateral relief. The Court's reasons for progressively expanding its procedural default doctrine were best explained in the cases that arose in a trial setting. By failing to raise their constitutional objections at trial, defendants truly impinge state courts' ability to correct, or even to make a record regarding the effect of, legal errors. See *Engle*, 456 U. S., at 128; *Wainwright*, 433 U. S., at 90. Though I found that reasoning unsatisfactory in the state postconviction context, see *Coleman*, 501 U. S., at 758 (Blackmun, J., joined by Marshall and STEVENS, JJ., dissenting), at least the Court did not make the analytical error that pervades its opinion today. It did not assume that there was any necessary connection between the question of exhaustion and the question of procedural default.

III

I come now to the real issue presented by this case: whether respondent's failure to include all six of his current claims in his petition for leave to appeal to the Illinois Supreme Court should result in his procedurally defaulting the three claims he did not raise.

The Court barely answers this question. Even though no one contends that respondent currently has any state remedy available to him, the Court concentrates instead on

exhaustion. It states that respondent has not exhausted his claims because he had "'the right . . . to raise' [his] claims through a petition for discretionary review in the [Illinois Supreme Court]." *Ante,* at 845 (quoting 28 U. S. C. § 2254(c)). The Court adds to this that "the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable." *Ante,* at 848. But, as the Court acknowledges almost immediately thereafter, the fact that "the time for filing [a petition to that court] has long passed" most assuredly makes such review unavailable in this case. *Ibid.* The Court then resolves this case's core issue in a single sentence and two citations: "Thus, Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims. *Coleman* v. *Thompson,* 501 U. S., at 731–732; *Engle* v. *Isaac,* 456 U. S. 107, 125–126, n. 28 (1982)." *Ibid.*

I disagree that respondent has procedurally defaulted these three claims, and neither *Engle* nor *Coleman* suggests otherwise. The question we must ask is whether respondent has given the State a fair opportunity to pass on these claims. This Court has explained that the best way to determine the answer to this question is to "respect . . . state procedural rules" and to inquire whether the State has denied (or would deny) relief to the prisoner based on his failure to abide by any such rule. *Coleman,* 501 U. S., at 751. See also *Engle,* 456 U. S., at 129 (federal courts should avoid "undercutting the State's ability to enforce its procedural rules"). Thus, we held in *Engle* that a prisoner defaults a claim by failing to follow a state rule requiring that it be raised at trial or on direct appeal. The Court in *Coleman* felt so strongly about "the important interests served by state procedural rules at every stage of the judicial process and the harm to the States that results when federal courts ignore these rules," 501 U. S., at 749, that it imposed procedural default on a death-row inmate for filing his appellate

brief in state postconviction review just three days after the State's deadline.

Surely the Illinois Supreme Court's discretionary review rule and respondent's attempt to follow it are entitled to at least as much respect. It is reasonable to assume that the Illinois Supreme Court, like this Court, has established a discretionary review system in order to reserve its resources for issues of broad significance. Claims of violations of well-established constitutional rules, important as they may be to individual litigants, do not ordinarily present such issues.

Discretionary review rules not only provide an effective tool for apportioning limited resources, but also foster more useful and effective advocacy. We have recognized on numerous occasions that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy.'" *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983)). This maxim is even more germane regarding petitions for certiorari. The most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts. Given the page limitations that we impose, a litigant cannot write such a petition if he decides, or is required, to raise every claim that might possibly warrant reversal in his particular case.

The Court of Appeals for the Seventh Circuit found that these same factors animate the Illinois Supreme Court's discretionary review rule. See 135 F. 3d 1194, 1200 (1998). It also pointed out that Illinois courts in state habeas proceedings dismiss claims like respondent's on res judicata—not waiver—grounds once they have been pressed at trial and on direct appeal; it makes no difference whether the prisoner has raised the claim in a petition for review to

the Illinois Supreme Court. *Id.*, at 1199 (citing *Gomez* v. *Acevedo,* 106 F. 3d 192, 195–196 (CA7 1997) (which cites in turn *People* v. *Coleman,* 168 Ill. 2d 509, 522–523, 660 N. E. 2d 919, 927 (1995))). The Illinois courts, in other words, are prepared to stand behind the merits of their decisions regarding constitutional criminal procedure once a trial court and an appellate court have passed on them. No state procedural ground independently supports such decisions, so federal courts do not undercut Illinois' procedural rules by reaching the merits of the constitutional claims resolved therein. See *Coleman,* 501 U. S., at 736–738.

We ordinarily defer to a federal court of appeals' interpretation of state-law questions. See *Bishop* v. *Wood,* 426 U. S. 341, 346–347 (1976). The Court today nevertheless refuses to conclude that the Illinois rule "discourages the filing of certain petitions" (or even certain claims in petitions), and surmises instead that the rule does nothing more than announce the State Supreme Court's desire to decide for itself which cases it will consider on the merits. *Ante,* at 846. This analysis strikes me as unsatisfactory. I would, consistent with the Seventh Circuit's view, read the Illinois rule as dissuading the filing of fact-intensive claims of error that fail to present any issue of broad significance. I would also deduce from the rule that Illinois prisoners need not present their claims in discretionary review petitions before raising them in federal court.

The Court's decision to the contrary is unwise. It will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and, most ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets. If, as the Court has repeatedly held, the purpose of our waiver doctrine is to cultivate comity by respecting state procedural rules, then I agree with the Court of Appeals that we should not create procedural obstacles when state prison-

ers follow those rules. In fact, I find these observations by the Court of Appeals far more persuasive than anything in today's opinion:

> "Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. Federal courts do not snatch claims from state courts when they review claims not included in discretionary petitions to state supreme courts. Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.
>
> "We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request habeas review. The exhaustion requirement of § 2254 does not require such a result.
>
> "Moreover, contrary to O'Sullivan's suggestion, this decision will not 'obliterate any opportunity for a state's highest court to protect federally secured rights because it will leave state prisoners with little incentive to petition state supreme courts.' Respondent Br. at 19. It is difficult to imagine that this holding will induce attorneys and defendants in state government custody to withhold an appropriate claim in a petition for leave to appeal to the state's highest court, knowing that it cannot hurt and could only potentially help their cause. O'Sullivan's argument assumes a remarkably risk-prone

group of defendants and attorneys, especially given the fact that 'the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus.' *See* Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 894 (1984). We do not believe that it accurately predicts the effect our holding will have on the incentives to petition the Illinois Supreme Court.

"Finally, we reiterate our concern that '[t]reating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners, whose efforts to identify unsettled and important issues suitable for discretionary review would preclude review of errors under law already established.' *Hogan* [v. *McBride*], 74 F. 3d [144,] 147 [(CA7 1996)]." 135 F. 3d, at 1201–1202.

The Court of Appeals, in effect, held that federal courts should respect state procedural rules regardless of whether applying them impedes access to federal habeas review or signals the availability of such relief. The Court today, on the other hand, admits that its decision may "disserv[e] . . . comity" and may cause an "unwelcome" influx of filings in state supreme courts. *Ante,* at 847. It takes no issue with the Court of Appeals' finding that Illinois would not invoke an independent state procedural ground as an alternative basis for denying relief to prisoners in respondent's situation. The Court today nevertheless requires defendants in every criminal case in States like Illinois to present to the state supreme court every federal issue that the defendants think might possibly warrant some relief if brought in a future federal habeas petition.

Thankfully, the Court leaves open the possibility that state supreme courts with discretionary dockets may avoid a deluge of undesirable claims by making a plain statement—as Arizona and South Carolina have done, see *ibid.*—that they do not wish the opportunity to review such claims before they pass into the federal system. I agree with

JUSTICE SOUTER, *ante,* at 850 (concurring opinion), that a proper conception of comity obviously requires deference to such a policy. But we should accord such deference under the procedural default doctrine, not by allowing state courts to construe for themselves the federal-law exhaustion requirement in § 2254. No matter how plainly a state court has said that it does not want the opportunity to review certain claims, discretionary review was either "available" to a prisoner when he was in the state system or it was not. And when the prisoner arrives in federal court, either the time for seeking discretionary review has run or it has not. The key point is that federal courts should not find *procedural default* when a prisoner has relied on a state supreme court's explicit statement that criminal defendants need not present to it every claim that they might wish to assert as a ground for relief in federal habeas proceedings.

I see no compelling reason to require States that already have discretionary docket rules to take this additional step of expressly disavowing any desire to be presented with every such claim. In my view, it should be enough to avoid waiving a claim that a state prisoner in a State like Illinois raised that claim at trial and in his appeal as of right.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In my view, whether a state prisoner (who failed to seek discretionary review in a state supreme court) can seek federal habeas relief depends upon the State's own preference. If the State does not want the prisoner to seek discretionary state review (or if it does not care), why should that failure matter to federal habeas law? See, *e. g.*, *Coleman* v. *Thompson,* 501 U. S. 722, 731–732, 751 (1991) (emphasizing comity interest in federal habeas). Illinois' procedural rules, like similar rules in other States, suggest that the State does not want prisoners to seek discretionary State Supreme Court

review except in unusual circumstances. See Ill. Sup. Ct. Rule 315(a) (1998); accord, *e. g.*, Colo. Rule App. 49 (1998) (discretionary review granted "only when there are special and important reasons therefor"); Idaho Rule App. 118(b) (1999) (similar); Tenn. Rule App. Proc. 11(a) (1998) (similar). And JUSTICE STEVENS has explained how the majority's view of the matter will force upon state supreme courts many petitions for review that fall outside the scope of their discretionary review and which those courts would likely prefer not to handle. *Ante*, at 858 (dissenting opinion).

The small number of cases actually reviewed by state courts with discretion over their dockets similarly suggests that States such as Illinois have no particular interest in requiring state prisoners to seek discretionary review in every case. In 1997, the latest year for which statistics are available, the Illinois Supreme Court granted review in only 33 of the 1,072 criminal petitions filed (3.1%). See memorandum from Carol R. Flango, National Center for State Courts, to Supreme Court Library (June 11, 1999) (available in Clerk of Court's case file). Nor is Illinois unique among state courts of last resort employing discretionary review. See *ibid.* (in 1997, Virginia's Supreme Court granted 30 of 1,160 criminal petitions for review (2.6%); California granted 39 of 3,265 (1.2%); Georgia granted 11 of 189 (5.8%); Ohio granted 16 of 595 (2.7%); Connecticut granted 24 of 113 (21.2%); Louisiana granted 127 of 1,410 (9.0%); Minnesota granted 38 of 222 (17.1%); North Carolina granted 23 of 237 (9.7%); Tennessee granted 41 of 549 (7.5%); Texas granted 111 of 1,677 (6.6%)). On the majority's view, these courts must now consider additional petitions for review of criminal cases, which petitions will contain many claims raised only to preserve a right to pursue those claims in federal habeas proceedings. The result will add to the burdens of already overburdened state courts and delay further a criminal process that is often criticized for too much delay. Cf. *Hohn* v. *United States,* 524 U. S. 236, 264 (1998) (SCALIA, J., dissenting) (complaining of

"interminable delays in the execution of state . . . criminal sentences"). I do not believe such a result "demonstrates respect for the state courts." *Rose* v. *Lundy*, 455 U. S. 509, 525 (1982) (Blackmun, J., concurring).

I nonetheless see cause for optimism. JUSTICE SOUTER's concurring opinion suggests that a federal habeas court should respect a State's desire that prisoners *not* file petitions for discretionary review, where the State has expressed the desire clearly. *Ante*, at 849–850. On that view, today's holding creates a kind of presumption that a habeas petitioner must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas, but the State could rebut the presumption through state law clearly expressing a desire to the contrary. South Carolina has expressed that contrary preference. See *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S. C. 563, 471 S. E. 2d 454 (1990). Other States may do the same.

Even were I to take the majority's approach, however, I would reverse the presumption. I would presume, on the basis of Illinois' own rules and related statistics, and in the absence of any clear legal expression to the contrary, that Illinois does not mind if a state prisoner does not ask its Supreme Court for discretionary review prior to seeking habeas relief in federal court. But the presumption to which JUSTICE SOUTER refers would still help. And I write to emphasize the fact that the majority has left the matter open.

Syllabus

AMOCO PRODUCTION CO., ON BEHALF OF ITSELF AND THE CLASS IT REPRESENTS *v.* SOUTHERN UTE INDIAN TRIBE ET AL.

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

No. 98–830. Argued April 19, 1999—Decided June 7, 1999

Land patents issued to western settlers pursuant to the Coal Lands Acts of 1909 and 1910 conveyed the land and everything in it, except the "coal," which was reserved to the United States. Patented lands included reservation lands previously ceded by respondent Southern Ute Indian Tribe to the United States. In 1938, the United States restored to the Tribe, in trust, title to ceded reservation lands still owned by the Government, including the reserved coal in lands patented under the 1909 and 1910 Acts. These lands contain large quantities of coalbed methane gas (CBM gas) within the coal formations. At the time of the 1909 and 1910 Acts, such gas was considered a dangerous waste product of coal mining, but it is now considered a valuable energy source. Relying on a 1981 opinion by the Solicitor of the Department of the Interior that CBM gas was not included in the Acts' coal reservation, oil and gas companies entered into CBM gas leases with the individual landowners of some 200,000 acres of patented land in which the Tribe owns the coal. The Tribe filed suit against petitioners, the royalty owners and producers under the leases, and federal agencies and officials (respondents here), seeking, *inter alia*, a declaration that CBM gas is coal reserved by the 1909 and 1910 Acts. The District Court granted the defendants summary judgment, holding that the plain meaning of the term "coal" in the Acts is a solid rock substance that does not include CBM gas. In reversing, the Tenth Circuit found the term ambiguous, invoked the canon that ambiguities in land grants should be resolved in favor of the sovereign, and concluded that the coal reservation encompassed CBM gas. The Solicitor of the Interior has withdrawn the 1981 opinion, and the United States now supports the Tribe's position.

Held: The term "coal" as used in the 1909 and 1910 Acts does not encompass CBM gas. Pp. 872–880.

(a) The question here is not whether, based on what scientists know today, CBM gas is a constituent of coal, but whether Congress so regarded it in 1909 and 1910. The common understanding of coal at that

Syllabus

time would not have encompassed CBM gas. Most dictionaries of the day defined coal as the solid fuel resource and CBM gas as a distinct substance that escaped from coal during mining, rather than as a part of the coal itself. As a practical matter, moreover, it is clear that Congress intended to reserve only the solid rock fuel that was mined, shipped throughout the country, and then burned to power the Nation's railroads, ships, and factories. Public land statutes should be interpreted in light of the country's condition when they were passed, *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 682, and coal, not gas, was the primary energy for the Industrial Revolution. Congress passed the Acts to address concerns over the short supply, mismanagement, and fraudulent acquisition of this solid rock fuel and chose a narrow reservation to address these concerns. That Congress viewed CBM gas as a dangerous waste product is evident from earlier mine-safety legislation that prescribed specific ventilation standards to dilute such gas. Congress' view was confirmed by the fact that coal companies venting the gas while mining coal made no attempt to capture or preserve the gas. To the extent that Congress was aware of limited and sporadic drilling for CBM gas as fuel, there is every reason to think it viewed this as drilling for natural gas. Such a distinction is significant, since the question is not whether Congress would have thought that CBM gas had fuel value, but whether Congress thought it was coal fuel. In the 1909 and 1910 Acts, Congress chose to reserve only coal, not oil, natural gas, or other energy resources. This reservation's limited nature is confirmed by subsequent enactments, in which Congress used explicit terms to reserve gas rights. Pp. 874–878.

(b) Respondents contend that Congress did not reserve the solid coal but convey the CBM gas because the resulting split estate would be impractical and mining would be difficult if miners had to capture and preserve escaping CBM gas. It is unlikely that Congress considered this issue, since it did not think that CBM gas would be a profitable energy source. Nor would the prospect of a split estate have deterred Congress from reserving only coal, since including CBM gas in the coal reservation would create a split estate between CBM gas and natural gas, which would be at least as difficult to administer as a split coal/CBM gas estate. Pp. 878–880.

151 F. 3d 1251, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, *post*, p. 880. BREYER, J., took no part in the consideration or decision of the case.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Stephen B. Kinnaird*, *Charles L. Kaiser*, *Gary L. Paulson*, *Rebecca S. McGee*, and *David E. Brody*.

Thomas J. Davidson, Deputy Attorney General of Wyoming, argued the cause for the State of Montana et al. as *amici curiae* urging reversal. With him on the brief were *Gay Woodhouse*, Attorney General of Wyoming, and *Drake D. Hill* and *Cynthia Lamb Harnett*, Senior Assistant Attorneys General, joined by *Jan Graham*, Attorney General of Utah, *Heidi Heitkamp*, Attorney General of North Dakota, *Joseph P. Mazurek*, Attorney General of Montana, and *Patricia A. Madrid*, Attorney General of New Mexico.

Jeffrey P. Minear argued the cause for the federal respondents. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Elizabeth Ann Peterson*, and *John D. Leshy*.

Thomas H. Shipps argued the cause for respondent Southern Ute Indian Tribe. With him on the brief were *Frank E. Maynes*, *Scott B. McElroy*, *Alice E. Walker*, and *Michael T. McConnell*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Land patents issued pursuant to the Coal Lands Acts of 1909 and 1910 conveyed to the patentee the land and everything in it, except the "coal," which was reserved to the United States. Coal Lands Act of 1909 (1909 Act), 35 Stat.

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*Briefs of *amici curiae* urging reversal were filed for Campbell County, Wyoming, by *S. Thomas Throne;* for the Coal Bed Methane Ad Hoc Committee et al. by *L. Poe Leggette;* for the Independent Petroleum Association of Mountain States by *William R. Rapson* and *Mary Viviano Laitos;* for La Plata County, Colorado, by *Michael A. Goldman*, *Jeffery P. Robbins*, and *Sheryl Rogers;* and for the Mountain States Legal Foundation et al. by *William Perry Pendley* and *Steven J. Lechner*.

Harold P. Quinn, Jr., filed a brief for the National Mining Association as *amicus curiae* urging affirmance.

844, 30 U. S. C. § 81; Coal Lands Act of 1910 (1910 Act), ch. 318, 36 Stat. 583, 30 U. S. C. §§ 83–85. The United States Court of Appeals for the Tenth Circuit determined that the reservation of "coal" includes gas found within the coal formation, commonly referred to as coalbed methane gas (CBM gas). See 151 F. 3d 1251, 1256 (1998) (en banc). We granted certiorari, 525 U. S. 1118 (1999), and now reverse.

I

During the second half of the 19th century, Congress sought to encourage the settlement of the West by providing land in fee simple absolute to homesteaders who entered and cultivated tracts of a designated size for a period of years. See, *e. g.,* 1862 Homestead Act, 12 Stat. 392; 1877 Desert Land Act, ch. 107, 19 Stat. 377, as amended, 43 U. S. C. §§ 321–323. Public lands classified as valuable for coal were exempted from entry under the general land-grant statutes and instead were made available for purchase under the 1864 Coal Lands Act, ch. 205, § 1, 13 Stat. 343, and the 1873 Coal Lands Act, ch. 279, § 1, 17 Stat. 607, which set a maximum limit of 160 acres on individual entry and minimum prices of $10 to $20 an acre. Lands purchased under these early Coal Lands Acts—like lands patented under the Homestead Acts—were conveyed to the entryman in fee simple absolute, with no reservation of any part of the coal or mineral estate to the United States. The coal mined from the lands purchased under the Coal Lands Acts and from other reserves fueled the Industrial Revolution.

At the turn of the 20th century, however, a coal famine struck the West. See Hearings on Coal Lands and Coal-Land Laws of the United States before the House Committee on Public Lands, 59th Cong., 2d Sess., 11–13 (1906) (testimony of Edgar E. Clark, Interstate Commerce Commissioner). At the same time, evidence of widespread fraud in the administration of federal coal lands came to light. Lacking the resources to make an independent assessment

of the coal content of each individual land tract, the Department of the Interior in classifying public lands had relied for the most part on the affidavits of entrymen. *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 48, and n. 9 (1983). Railroads and other coal interests had exploited the system to avoid paying for coal lands and to evade acreage restrictions by convincing individuals to falsify affidavits, acquire lands for homesteading, and then turn the land over to them. C. Mayer & G. Riley, Public Domain, Private Dominion 117–118 (1985).

In 1906, President Theodore Roosevelt responded to the perceived crisis by withdrawing 64 million acres of public land thought to contain coal from disposition under the public land laws. *Western Nuclear*, 462 U. S., at 48–49. As a result, even homesteaders who had entered and worked the land in good faith lost the opportunity to make it their own unless they could prove to the land office that the land was not valuable for coal.

President Roosevelt's order outraged homesteaders and western interests, and Congress struggled for the next three years to construct a compromise that would reconcile the competing interests of protecting settlers and managing federal coal lands for the public good. President Roosevelt and others urged Congress to begin issuing limited patents that would sever the surface and mineral estates and allow for separate disposal of each. See *id.*, at 49 (quoting Special Message to Congress, Jan. 22, 1909, 15 Messages and Papers of the Presidents 7266). Although various bills were introduced in Congress that would have severed the estates—some of which would have reserved "natural gas" as well as "coal" to the United States—none was enacted. See 41 Cong. Rec. 630 (1907) (bill by Rep. Volstead "reserving coal, lignite, petroleum, and natural-gas deposits from disposal . . . under existing land laws"); *id.*, at 1483–1484 (bill by Sen. La Follette providing for the sale of surface lands, but "reserving from entry and sale the mineral rights to coal and other

materials mined for fuel, oil, gas, or asphalt"); *id.*, at 1788 (bill by Sen. Nelson "to provide for the reservation of the coal, lignite, oil, and natural gas in the public lands").

Finally, Congress passed the 1909 Act, which authorized the Federal Government, for the first time, to issue limited land patents. In contrast to the broad reservations of mineral rights proposed in the failed bills, however, the 1909 Act provided for only a narrow reservation. The 1909 Act authorized issuance of patents to individuals who had already made good-faith agricultural entries onto tracts later identified as coal lands, but the issuance was to be subject to "a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same." 30 U. S. C. § 81. The 1909 Act also permitted the patentee to "mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit." *Ibid.* A similar Act in 1910 opened the remaining coal lands to new entry under the homestead laws, subject to the same reservation of coal to the United States. 30 U. S. C. §§ 83–85.

Among the lands patented to settlers under the 1909 and 1910 Acts were former reservation lands of the Southern Ute Indian Tribe, which the Tribe had ceded to the United States in 1880 in return for certain allotted lands provided for their settlement. Act of June 15, 1880, ch. 223, 21 Stat. 199. In 1938, the United States restored to the Tribe, in trust, title to the ceded reservation lands still owned by the United States, including the reserved coal in lands patented under the 1909 and 1910 Acts. As a result, the Tribe now has equitable title to the coal in lands within its reservation settled by homesteaders under the 1909 and 1910 Acts.

We are advised that over 20 million acres of land were patented under the 1909 and 1910 Acts and that the lands—including those lands in which the Tribe owns the coal—contain large quantities of CBM gas. Brief for Montana et al. as *Amici Curiae* 2. At the time the Acts were passed, CBM

gas had long been considered a dangerous waste product of coal mining. By the 1970's, however, it was apparent that CBM gas could be a significant energy resource, see Duel & Kimm, Coalbed Gas: A Source of Natural Gas, Oil & Gas J., June 16, 1975, p. 47, and, in the shadow of the Arab oil embargo, the Federal Government began to encourage the immediate production of CBM gas through grants, see 42 U. S. C. §§ 5901–5915 (1994 ed. and Supp. III), and substantial tax credits, see 26 U. S. C. § 29 (1994 ed. and Supp. III).

Commercial development of CBM gas was hampered, however, by uncertainty over its ownership. "In order to expedite the development of this energy source," the Solicitor of the Department of the Interior issued a 1981 opinion concluding that the reservation of coal to the United States in the 1909 and 1910 Acts did not encompass CBM gas. See *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 I. D. 538, 539. In reliance on the Solicitor's 1981 opinion, oil and gas companies entered into leases to produce CBM gas with individual landowners holding title under 1909 and 1910 Act patents to some 200,000 acres in which the Tribe owns the coal.

In 1991, the Tribe brought suit in Federal District Court against petitioners, the royalty owners and producers under the oil and gas leases covering that land, and the federal agencies and officials responsible for the administration of lands held in trust for the Tribe. The Tribe sought, *inter alia*, a declaration that Congress' reservation of coal in the 1909 and 1910 Acts extended to CBM gas, so that the Tribe—not the successors in interest of the land patentees—owned the CBM gas.

The District Court granted summary judgment for the defendants, holding that the plain meaning of "coal" is the "solid rock substance" used as fuel, which does not include CBM gas. 874 F. Supp. 1142, 1154 (Colo. 1995). On appeal, a panel of the Court of Appeals reversed. 119 F. 3d 816, 819 (CA10 1997). The court then granted rehearing en banc

on the question whether the term "coal" in the 1909 and 1910 Acts "unambiguously excludes or includes CBM." 151 F. 3d, at 1256. Over a dissenting opinion by Judge Tacha, joined by two other judges, the en banc court agreed with the panel. *Ibid.* The court held that the term "coal" was ambiguous. *Ibid.* It invoked the interpretive canon that ambiguities in land grants should be resolved in favor of the sovereign and concluded that the coal reservation encompassed CBM gas. *Ibid.*

The United States did not petition for, or participate in, the rehearing en banc. Instead, it filed a supplemental brief explaining that the Solicitor of the Interior was reconsidering the 1981 Solicitor's opinion in light of the panel's decision. Brief for Federal Respondents 14, n. 8. On the day the federal respondents' response to petitioners' certiorari petition was due, see *id.*, at 47, n. 37, the Solicitor of the Interior withdrew the 1981 opinion in a one-line order, see Addendum to Brief for Federal Respondents in Opposition 1a. The federal respondents now support the Tribe's position that CBM gas is coal reserved by the 1909 and 1910 Acts.

II

We begin our discussion as the parties did, with a brief overview of the chemistry and composition of coal. Coal is a heterogeneous, noncrystalline sedimentary rock composed primarily of carbonaceous materials. See, *e. g.*, Gorbaty & Larsen, Coal Structure and Reactivity, in 3 Encyclopedia of Physical Science and Technology 437 (R. Meyers ed. 2d ed. 1992). It is formed over millions of years from decaying plant material that settles on the bottom of swamps and is converted by microbiological processes into peat. D. Van Krevelen, Coal 90 (3d ed. 1993). Over time, the resulting peat beds are buried by sedimentary deposits. *Id.*, at 91. As the beds sink deeper and deeper into the earth's crust, the peat is transformed by chemical reactions which increase the carbon content of the fossilized plant material. *Ibid.*

The process in which peat transforms into coal is referred to as coalification. *Ibid.*

The coalification process generates methane and other gases. R. Rogers, Coalbed Methane: Principles and Practice 148 (1994). Because coal is porous, some of that gas is retained in the coal. CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas "adsorped" on the solid surface of the coal, that is, held to the surface by weak forces called van der Waals forces. *Id.*, at 16–17, 117. These are the same three states or conditions in which gas is stored in other rock formations. Because of the large surface area of coal pores, however, a much higher proportion of the gas is adsorped on the surface of coal than is adsorped in other rock. *Id.*, at 16–17. When pressure on the coalbed is decreased, the gas in the coal formation escapes. As a result, CBM gas is released from coal as the coal is mined and brought to the surface.

III

While the modern science of coal provides a useful backdrop for our discussion and is consistent with our ultimate disposition, it does not answer the question presented to us. The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense." *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 679 (1914) (rejecting "scientific test" for determining whether a reservation of "mineral lands" included "petroleum lands"); see also *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time

Congress enacted the statute). We are persuaded that the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource.

A

At the time the Acts were passed, most dictionaries defined coal as the solid fuel resource. For example, one contemporary dictionary defined coal as a "solid and more or less distinctly stratified mineral, varying in color from dark-brown to black, brittle, combustible, and used as fuel, not fusible without decomposition and very insoluble." 2 Century Dictionary and Cyclopedia 1067 (1906). See also American Dictionary of the English Language 244 (N. Webster 1889) (defining "coal" as a "black, or brownish black, solid, combustible substance, consisting, like charcoal, mainly of carbon, but more compact"); 2 New English Dictionary on Historical Principles 549 (J. Murray ed. 1893) (defining coal as a "mineral, solid, hard, opaque, black, or blackish, found in seams or strata in the earth, and largely used as fuel"); Webster's New International Dictionary of the English Language 424 (W. Harris & F. Allen eds. 1916) (defining coal as a "black, or brownish black, solid, combustible mineral substance").

In contrast, dictionaries of the day defined CBM gas—then called "marsh gas," "methane," or "fire-damp"—as a distinct substance, a gas "contained in" or "given off by" coal, but not as coal itself. See, *e. g.*, 3 Century Dictionary and Cyclopedia 2229 (1906) (defining "fire-damp" as "[t]he gas contained in coal, often given off by it in large quantities, and exploding, on ignition, when mixed with atmospheric air"; noting that "[f]ire-damp is a source of great danger to life in coal-mines").

As these dictionary definitions suggest, the common understanding of coal in 1909 and 1910 would not have encompassed CBM gas, both because it is a gas rather than a solid

mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself.

B

As a practical matter, moreover, it is clear that, by reserving coal in the 1909 and 1910 Act patents, Congress intended to reserve only the solid rock fuel that was mined, shipped throughout the country, and then burned to power the Nation's railroads, ships, and factories. Cf. *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 682 (1979) (public land statutes should be interpreted in light of "the condition of the country when the acts were passed" (internal quotation marks omitted)). In contrast to natural gas, which was not yet an important source of fuel at the turn of the century, coal was the primary energy for the Industrial Revolution. See, *e. g.*, D. Yergin, The Prize 543 (1991). See also Brief for Federal Respondents 30 (recognizing that the three primary sources of energy in the United States at the turn of the century were coal, oil, and wood, and that natural gas—even from conventional reservoirs—was not yet an important energy resource).

As the history recounted in Part I, *supra*, establishes, Congress passed the 1909 and 1910 Acts to address concerns over the short supply, mismanagement, and fraudulent acquisition of this solid rock fuel resource. Rejecting broader proposals, Congress chose a narrow reservation of the resource that would address the exigencies of the crisis at hand without unduly burdening the rights of homesteaders or impeding the settlement of the West.

It is evident that Congress viewed CBM gas not as part of the solid fuel resource it was attempting to conserve and manage but as a dangerous waste product, which escaped from coal as the coal was mined. Congress was well aware by 1909 that the natural gas found in coal formations was released during coal mining and posed a serious threat to

mine safety. Explosions in coal mines sparked by CBM gas occurred with distressing frequency in the late 19th and early 20th centuries. Brief for National Mining Association as *Amicus Curiae* 7. Congress was also well aware that the CBM gas needed to be vented to the greatest extent possible. Almost 20 years prior to the passage of the 1909 and 1910 Acts, Congress had enacted the first federal coal-mine-safety law which, among other provisions, prescribed specific ventilation standards for coal mines of a certain depth "so as to dilute and render harmless . . . the noxious or poisonous gases." 1891 Territorial Mine Inspection Act, § 6, 26 Stat. 1105. See also 3 Century Dictionary and Cyclopedia, *supra*, at 2229 (explaining the dangers associated with fire-damp).

That CBM gas was considered a dangerous waste product which escaped from coal, rather than part of the valuable coal fuel itself, is also confirmed by the fact that coal companies venting the gas to prevent its accumulation in the mines made no attempt to capture or preserve it. The more gas that escaped from the coal once it was brought to the surface, the better it was for the mining companies because it decreased the risk of a dangerous gas buildup during transport and storage. Cf. E. Moore, Coal: Its Properties, Analysis, Classification, Geology, Extraction, Uses and Distribution 308 (1922) (noting that the presence of gases such as methane in the coal increases the risk of spontaneous combustion of the coal during storage).

(The fact that CBM gas was known to escape naturally from coal distinguishes it from the "producer gas" that was generated from coal in the 1800's. Brief for Federal Respondents 30. Producer gas was produced by "destructive distillation, that is, by heating the coal to a temperature where it decomposed chemically." App. 531 (reproducing Perry, The Gasification of Coal, Scientific American 230, (Mar. 1974)). The natural escape of CBM gas from the coal also distinguishes CBM gas from other "volatile matter,"

expelled when coal is heated, or liquid "coal extracts," which "can be extracted through the use of appropriate solvents." Brief for Federal Respondents 26–27. The federal respondents' expressed concern that if the coal reservation does not encompass CBM gas it does not encompass these "components" of coal, see *ibid.*, is unfounded.)

There is some evidence of limited and sporadic exploitation of CBM gas as a fuel prior to the passage of the 1909 and 1910 Acts. See, *e. g.*, E. Craig & M. Myers, Ownership of Methane Gas in Coalbeds, 24 Rocky Mt. Min. L. Inst. 767, 768 (1978) ("As early as 1746, methane was being drained from an English coal mine through pipes and used for heating"); see also *United States Steel Corp.* v. *Hoge*, 503 Pa. 140, 146, 468 A. 2d 1380, 1383 (1983) (noting that as early as 1900, "certain wells were drilled [into coalbeds in Pennsylvania, which] produced coalbed gas"). It seems unlikely, though, that Congress considered this limited drilling for CBM gas. To the extent Congress had an awareness of it, there is every reason to think it viewed the extraction of CBM gas as drilling for natural gas, not mining coal.

That distinction is significant because the question before us is not whether Congress would have thought that CBM gas had some fuel value, but whether Congress considered it part of the coal fuel. When it enacted the 1909 and 1910 Acts, Congress did not reserve all minerals or energy resources in the lands. It reserved only coal, and then only in lands that were specifically identified as valuable for coal. It chose not to reserve oil, natural gas, or any other known or potential energy resources.

The limited nature of the 1909 and 1910 Act reservations is confirmed by subsequent congressional enactments. When Congress wanted to reserve gas rights that might yield valuable fuel, it did so in explicit terms. In 1912, for example, Congress enacted a statute that reserved "oil and gas" in Utah lands. Act of Aug. 24, 1912, 37 Stat. 496. In addition, both the 1912 Act and a later Act passed in 1914

continued the tradition begun in the 1909 and 1910 Acts of reserving only those minerals enumerated in the statute. See *ibid.;* Act of July 17, 1914, 38 Stat. 509, as amended, 30 U. S. C. §§ 121–123 (providing that "[l]ands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits," could be patented, subject to a reservation to the United States of "the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable"). It was not until 1916 that Congress passed a public lands Act containing a general reservation of valuable minerals in the lands. See Stock-Raising Homestead Act, ch. 9, 39 Stat. 862, as amended, 43 U. S. C. § 299 (reserving "all the coal and other minerals in the lands" in all lands patented under the Act). See also *Western Nuclear*, 462 U. S., at 49 ("Unlike the preceding statutes containing mineral reservations, the [1916 Stock-Raising Homestead Act] was not limited to lands classified as mineral in character, and it did not reserve only specifically identified minerals").

C

Respondents contend that Congress did not reserve the solid coal but convey the CBM gas because the resulting split estate would be impractical and would make mining the coal difficult because the miners would have to capture and preserve the CBM gas that escaped during mining. See, *e. g.*, Brief for Respondent Southern Ute Indian Tribe 46; see also *id.*, at 25–26 (emphasizing that the reservation includes the right to "mine" the coal, indicating that "Congress reserved all rights needed to develop the underlying coal" including the right to vent CBM gas during mining). We doubt Congress would have given much consideration to these problems, however, because—as noted above—it does not appear to have given consideration to the possibility that CBM gas would one day be a profitable energy source developed on a large scale.

It may be true, nonetheless, that the right to mine the coal implies the right to release gas incident to coal mining where it is necessary and reasonable to do so. The right to dissipate the CBM gas where reasonable and necessary to mine the coal does not, however, imply the ownership of the gas in the first instance. Rather, it simply reflects the established common-law right of the owner of one mineral estate to use, and even damage, a neighboring estate as necessary and reasonable to the extraction of his own minerals. See, *e. g.*, *Williams* v. *Gibson*, 84 Ala. 228, 4 So. 350 (1888); Rocky Mountain Mineral Law Foundation, 6 American Law of Mining § 200.04 (2d ed. 1997). Given that split estates were already common at the time the 1909 and 1910 Acts were passed, see, *e. g.*, *Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. 286, 25 A. 597 (1893), and that the common law has proved adequate to the task of resolving the resulting conflicts between estates, there is no reason to think that the prospect of a split estate would have deterred Congress from reserving only the coal.

Were a case to arise in which there are two commercially valuable estates and one is to be damaged in the course of extracting the other, a dispute might result, but it could be resolved in the ordinary course of negotiation or adjudication. That is not the issue before us, however. The question is one of ownership, not of damage or injury.

In all events, even were we to construe the coal reservation to encompass CBM gas, a split estate would result. The United States concedes (and the Tribe does not dispute) that once the gas originating in the coal formation migrates to surrounding rock formations it belongs to the natural gas, rather than the coal, estate. See Brief for Federal Respondents 35; Brief for Respondent Southern Ute Indian Tribe 3, n. 4. Natural gas from other sources may also exist in the lands at issue. Including the CBM gas in the coal reservation would, therefore, create a split gas estate that would be at least as difficult to administer as a split

coal/CBM gas estate. If CBM gas were reserved with the coal estate, those developing the natural gas resources in the land would have to allocate the gas between the natural gas and coal estates based on some assessment of how much had migrated outside the coal itself. There is no reason to think Congress would have been more concerned about the creation of a split coal/CBM gas estate than the creation of a split gas estate.

Because we conclude that the most natural interpretation of "coal" as used in the 1909 and 1910 Acts does not encompass CBM gas, we need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign or the competing canons relied on by petitioners.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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

JUSTICE GINSBURG, dissenting.

I would affirm the judgment below substantially for the reasons stated by the Court of Appeals and the federal respondents. See 151 F. 3d 1251, 1256–1267 (CA10 1998) (en banc); Brief for Federal Respondents 14–16. As the Court recognizes, in 1909 and 1910 coalbed methane gas (CBM) was a liability. See *ante*, at 870–871, 875–876. Congress did not contemplate that the surface owner would be responsible for it. More likely, Congress would have assumed that the coal owner had dominion over, and attendant responsibility for, CBM. I do not find it clear that Congress understood dominion would shift if and when the liability became an asset. I would therefore apply the canon that ambiguities in land grants are construed in favor of the sovereign. See *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 59 (1983) (noting "established rule that land grants are con-

strued favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it" (internal quotation marks omitted)).

Reporter's Note

The next page is purposely numbered 1001. The numbers between 881 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 MARCH 3 THROUGH JUNE 7, 1999

MARCH 3, 1999

Certiorari Granted—Reversed

No. 98–1412 (A–735). STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* LAGRAND. C. A. 9th Cir. Application to lift the restraining order entered by the United States Court of Appeals for the Ninth Circuit on March 3, 1999, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted. Certiorari granted, and judgment summarily reversed. A *per curiam* opinion will follow [*ante*, p. 115].

Miscellaneous Order. (See No. 127, Orig., *ante*, p. 111.)

Certiorari Denied

No. 98–8343 (A–734). LAGRAND *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.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

For the reasons set forth in my opinion dissenting from the denial of a stay in *Federal Republic of Germany* v. *United States*, *ante*, p. 111, and because this petition for certiorari in part raises similar issues, I would grant a stay of execution.

MARCH 8, 1999

Certiorari Granted—Vacated and Remanded

No. 98–836. IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* MAGANA-PIZANO; and

No. 98–1011. MAGANA-PIZANO *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Reno* v. *American-Arab Anti-Discrimination Comm.*,

525 U. S. 471 (1999). Reported below: 152 F. 3d 1213 and 159 F. 3d 1217.

Miscellaneous Orders. (See also Nos. 98–7771 and 98–7782, *ante*, p. 122.)

No. A–584. MONROE *v.* BADING, SHERIFF, CALDWELL COUNTY. Application for certificate of appealability, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–2013. IN RE DISBARMENT OF REHBERGER. Disbarment entered. [For earlier order herein, see 525 U. S. 998.]

No. D–2049. IN RE DISBARMENT OF MCGEE. Charles A. McGee, of Fort Payne, Ala., 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–2050. IN RE DISBARMENT OF PHILLIPS. Edward Hamilton Phillips, of Chicago, 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–2051. IN RE DISBARMENT OF BURGESS. John All Burgess, of South Burlington, Vt., 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. 98–231. GRUPO MEXICANO DE DESARROLLO, S. A., ET AL. *v.* ALLIANCE BOND FUND, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 525 U. S. 1015.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 98–387. GREATER NEW ORLEANS BROADCASTING ASSN., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. [Certiorari granted, 525 U. S. 1097.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 98–436. ALDEN ET AL. *v.* MAINE. Sup. Jud. Ct. Me. [Certiorari granted, 525 U. S. 981.] Motion of the Solicitor General for divided argument granted.

No. 98–7547. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir.;

No. 98–7548. Cross *v.* Cambra, Warden. C. A. 9th Cir.;

No. 98–7550. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir.; and

No. 98–7551. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until March 29, 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. 98–8092. In re Richards. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 98–896. Rotella *v.* Wood et al. C. A. 5th Cir. Certiorari granted. Reported below: 147 F. 3d 438.

No. 98–1037. Smith, Warden *v.* Robbins. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 152 F. 3d 1062.

Certiorari Denied

No. 97–526. Ramallo *v.* Reno, Attorney General, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 114 F. 3d 1210.

No. 97–9553. Williams *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 136 F. 3d 547.

No. 98–512. Davis et al. *v.* Bush, Governor of Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 139 F. 3d 1414.

No. 98–704. Sommerdyke Estate *v.* City of Kentwood. Sup. Ct. Mich. Certiorari denied. Reported below: 458 Mich. 642, 581 N. W. 2d 670.

No. 98–724. Cunningham *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1189.

No. 98–730. Reno, Attorney General, et al. *v.* Walters et al. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1032.

No. 98–751. HECLA MINING CO. *v.* WASHINGTON WILDERNESS COALITION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1241.

No. 98–764. MORTON COMMUNITY UNIT SCHOOL DISTRICT NO. 709 *v.* J. M., A MINOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 152 F. 3d 583.

No. 98–835. RENO, ATTORNEY GENERAL, ET AL. *v.* PEREIRA GONCALVES. C. A. 1st Cir. Certiorari denied. Reported below: 144 F. 3d 110.

No. 98–932. LAROSA ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 155 F. 3d 562.

No. 98–959. PRECISION CUTTING SERVICES, INC. *v.* KING OCEAN CENTRAL AMERICA, S. A. Sup. Ct. Fla. Certiorari denied. Reported below: 717 So. 2d 507.

No. 98–970. RIDDER ET AL. *v.* OFFICE OF THRIFT SUPERVISION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 146 F. 3d 1035.

No. 98–996. RENO, ATTORNEY GENERAL, ET AL. *v.* NAVAS ET AL.; and

No. 98–1160. NAVAS ET AL. *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 157 F. 3d 106.

No. 98–1007. WALLIN *v.* MINNESOTA DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 153 F. 3d 681.

No. 98–1025. EDWARDS ET AL. *v.* CITY OF SANTA BARBARA; and

No. 98–1074. CITY OF SANTA BARBARA *v.* EDWARDS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 150 F. 3d 1213.

No. 98–1055. EDWARDS *v.* CLARKE. Sup. Ct. R. I. Certiorari denied. Reported below: 723 A. 2d 785.

No. 98–1063. SHADE *v.* GREAT LAKES DREDGE & DOCK CO.; and

No. 98–1228. GREAT LAKES DREDGE & DOCK CO. *v.* SHADE. C. A. 3d Cir. Certiorari denied. Reported below: 154 F. 3d 143.

No. 98–1064. American Academy of Pain Management et al. *v.* Joseph, Executive Director, Medical Board of California. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 629.

No. 98–1065. Indianapolis Power & Light Co. *v.* Pennsylvania Public Utility Commission et al. Commw. Ct. Pa. Certiorari denied. Reported below: 711 A. 2d 1071.

No. 98–1079. Halicki *v.* Louisiana Casino Cruises, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 151 F. 3d 465.

No. 98–1085. Gumbhir *v.* Curators of the University of Missouri et al. C. A. 8th Cir. Certiorari denied. Reported below: 157 F. 3d 1141.

No. 98–1091. Time Warner Entertainment Co., L. P., et al. *v.* Byers et al. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 712 So. 2d 681.

No. 98–1103. Hazzard *v.* Howard et al. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1338.

No. 98–1104. Davidson *v.* Hubbard et al. C. A. 1st Cir. Certiorari denied.

No. 98–1108. Schachter *v.* Schachter. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1104, 726 N. E. 2d 224.

No. 98–1119. Jones *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied.

No. 98–1123. Carmona *v.* Department of the Treasury. C. A. Fed. Cir. Certiorari denied. Reported below: 168 F. 3d 1318.

No. 98–1126. Cass *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 98–1136. Easley et al. *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 288 Ill. App. 3d 487, 680 N. E. 2d 776.

No. 98–1141. de Larracoechea Azumendi *v.* Pan American World Airways, Inc., et al. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 718 So. 2d 944.

No. 98–1150. BERRY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 17.

No. 98–1162. SUMRELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 98–1184. HOSEY *v.* HOSEY. Sup. Ct. Miss. Certiorari denied.

No. 98–1199. STAVROFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 149 F. 3d 478.

No. 98–1200. ZEE, PLAN ADMINISTRATOR OF LIGHTING WORLD, INC., EMPLOYEES PROFIT-SHARING PLAN, ET AL. *v.* BELFER, EXECUTRIX OF THE ESTATE OF BELFER, DECEASED. C. A. 3d Cir. Certiorari denied. Reported below: 166 F. 3d 1204.

No. 98–1208. BEYENA *v.* HENDERSON, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 162 F. 3d 1163.

No. 98–1214. PUNKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 143 F. 3d 274.

No. 98–1221. IN RE MURPHY; and
No. 98–1222. MURPHY *v.* PLANNED PARENTHOOD OF GREATER IOWA, INC. C. A. 8th Cir. Certiorari denied.

No. 98–1233. CHAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–1249. COWHIG *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 168 F. 3d 1321.

No. 98–1254. PEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 724.

No. 98–1259. PATILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–1263. ESTATE OF RINALDI, DECEASED *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1308.

No. 98–7182. BOLIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 18 Cal. 4th 297, 956 P. 2d 374.

No. 98–7437. SOLTESZ *v.* DIVERSITEC IMAGE TECHNOLOGY, INC., ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 98–7438. RODRIGUEZ *v.* CAMBRA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7451. REYNOLDS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1113, 726 N. E. 2d 228.

No. 98–7452. HERNANDEZ *v.* AYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7453. RHODEN *v.* CAMPBELL, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 153 F. 3d 773.

No. 98–7459. BABA *v.* SILVERMAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–7460. BABA *v.* GI UNG KIM ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–7462. SCOTT *v.* MAYLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7463. SCARBROUGH *v.* AETNA LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 152 F. 3d 935.

No. 98–7476. MACPHEE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–7477. MAJORS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 18 Cal. 4th 385, 956 P. 2d 1137.

No. 98–7487. KINNEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 85, 698 N. E. 2d 49.

No. 98–7490. OLIVER *v.* KOLODY. C. A. 3d Cir. Certiorari denied. Reported below: 162 F. 3d 1151.

No. 98–7491. JACKSON *v.* WHITTLE ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 725 So. 2d 1120.

No. 98–7500. MCVEIGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 153 F. 3d 1166.

No. 98–7505. PENNINGTON *v.* OGLESBY ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7506. PENNINGTON *v.* HUCKABEE, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7511. DADDAZIO *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 98–7514. FORD *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7515. GONZALEZ *v.* WALLIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 149 F. 3d 1178.

No. 98–7518. DEBARDELEBEN *v.* HEDRICK, WARDEN, ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 98–7521. SHROFF *v.* FABULOUS VACATIONS. C. A. 9th Cir. Certiorari denied.

No. 98–7522. RODRIGUEZ *v.* ONWARDS INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 166 F. 3d 1206.

No. 98–7526. BROWNING *v.* MATUSINKA, JUDGE, SUPERIOR COURT OF LOS ANGELES COUNTY-SOUTHWEST DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 924.

No. 98–7528. COUSINO *v.* NOWICKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 26.

No. 98–7538. CURETON *v.* ALFORD, SUPERINTENDENT, GULF CORRECTIONAL INSTITUTION. Sup. Ct. Fla. Certiorari denied. Reported below: 719 So. 2d 892.

No. 98–7542. WHITE *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 157 F. 3d 1226.

No. 98–7546. BUTLER *v.* GRIGAS, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 1687, 988 P. 2d 806.

No. 98–7549. CROSS *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7593. JACKSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 964 P. 2d 875.

No. 98–7594. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 183 Ill. 2d 176, 700 N. E. 2d 996.

No. 98–7673. THURMAN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 975 S. W. 2d 888.

No. 98–7678. ARMSTRONG *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 183 Ill. 2d 130, 700 N. E. 2d 960.

No. 98–7687. DAUGHERTY *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–7748. ESPARZA *v.* TRIJJILO. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 915.

No. 98–7801. SOWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 185.

No. 98–7802. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 903.

No. 98–7803. BARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 93.

No. 98–7847. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–7849. WILSON *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 337.

No. 98–7856. BOURGEOIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 607.

No. 98–7859. CALDWELL *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 159 F. 3d 639.

No. 98–7863. DENNIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 608.

No. 98–7865. FRANK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 94.

No. 98–7877. WILLIAMS *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 168 F. 3d 480.

No. 98–7882. WASHINGTON *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 725.

No. 98–7884. JORDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 150 F. 3d 895.

No. 98–7885. LIDMAN *v.* DEPARTMENT OF STATE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 421.

No. 98–7893. STEPHENS *v.* UNITED STATES; and
No. 98–8035. WOODS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 1177.

No. 98–7899. NORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 926.

No. 98–7907. SKIPPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1159.

No. 98–7935. DEATON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1361.

No. 98–7941. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 42.

No. 98–7956. MUHAMMAD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 98–7957. MURDOCK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 145 F. 3d 1332.

No. 98–7961. MACON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1160.

No. 98–7962. MARSH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–7963. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 340.

No. 98–7966. CARMONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 918.

No. 98–7968. MAYS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–7969. BURCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 156 F. 3d 1315.

No. 98–7980. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 158 F. 3d 1291.

No. 98–7984. SOUTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1223.

No. 98–7988. DELGADO-MUNOZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 98–7991. FITZGERALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 20.

No. 98–7995. HAO HOANG HO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–7997. DEVORKIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 159 F. 3d 465.

No. 98–7998. RANEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 627.

No. 98–8001. RICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 141 F. 3d 550.

No. 98–8003. LANDON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 718 A. 2d 1042.

No. 98–8005. LYONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–8009. SANTOYO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8010. RASHID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 168 F. 3d 480.

No. 98–8021. BOUNDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8029. SAUNDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1158.

No. 98–8031. CLAY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 80.

No. 98–8032. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1354.

No. 98–8036. TALLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 156 F. 3d 638.

No. 98–8037. WATTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 1357.

No. 98–8038. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 163 F. 3d 600.

No. 98–8040. WIGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–684. IDAHO *v.* UNITED STATES; and
No. 98–706. HOAGLAND ET AL. *v.* UNITED STATES. Sup. Ct. Idaho. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 131 Idaho 468, 959 P. 2d 449.

No. 98–983. LACKS *v.* FERGUSON-FLORISSANT REORGANIZED SCHOOL DISTRICT R–2. C. A. 8th Cir. Motion of Pen American Center et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 147 F. 3d 718.

Rehearing Denied

No. 98–6177. MONTFORD *v.* METROPOLITAN DADE COUNTY ET AL., 525 U. S. 1022;
No. 98–6178. MONTFORD *v.* METROPOLITAN DADE COUNTY POLICE DEPARTMENT ET AL., 525 U. S. 1022;
No. 98–6518. BALDWIN *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, 525 U. S. 1057;
No. 98–6599. BOULINEAU *v.* WOZNIAK ET AL., 525 U. S. 1076;
No. 98–6605. MCCLANAHAN *v.* WELLMORE COAL CORP., 525 U. S. 1045;
No. 98–6720. PECK *v.* CHAFIN, JUDGE, CIRCUIT COURT OF WEST VIRGINIA, WAYNE COUNTY, ET AL., 525 U. S. 1078;
No. 98–6873. WEST *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 525 U. S. 1082;
No. 98–7011. SUMTER *v.* NATIONAL LABOR RELATIONS BOARD, 525 U. S. 1111; and
No. 98–7044. THOMAS *v.* DEPARTMENT OF THE NAVY, 525 U. S. 1111. Petitions for rehearing denied.

MARCH 9, 1999

Miscellaneous Order

No. 98–8405 (A–757). IN RE ROBERTS. 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. 98–8295 (A–724). QUESINBERRY *v.* TAYLOR, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death and for leave to file amended petition for writ of certiorari, 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 and for leave to file amended petition for writ of certiorari. Reported below: 162 F. 3d 273.

No. 98–8404 (A–756). ROBERTS *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.

MARCH 10, 1999

Dismissals Under Rule 46

No. 98–739. LOUISIANA ET AL. *v.* USSERY. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 150 F. 3d 431.

No. 98–7497. MCCRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 151 F. 3d 446.

MARCH 16, 1999

Certiorari Denied

No. 98–8476 (A–768). KOKORALEIS *v.* ILLINOIS. Sup. Ct. Ill. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: —— Ill. 2d ——, 707 N. E. 2d 978.

MARCH 19, 1999

Miscellaneous Order

No. 98–8046. IN RE RECTOR. Petition for writ of habeas corpus denied.

MARCH 22, 1999

Certiorari Granted—Reversed and Remanded. (See No. 98–1071, *ante*, p. 124.)

Miscellaneous Orders. (See also No. 98–7450, *ante*, p. 135.)

No. A–648 (98–1441). ROE, WARDEN *v.* FLORES-ORTEGA. C. A. 9th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–2026. IN RE DISBARMENT OF FREYDL. Thomas Patrick Freydl, of Bloomfield Hills, Mich., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on January 19, 1999 [525 U. S. 1100], is discharged.

No. D–2052. IN RE DISBARMENT OF BAXTER. Jeffrey Lynn Baxter, of Leavenworth, Kan., 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–2053. IN RE DISBARMENT OF SHAFRAN. Michael Shafran, of Cleveland, Ohio, 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–2054. IN RE DISBARMENT OF SENTEEN. Walter Louis Senteen, Jr., of New Orleans, 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.

No. D–2055. IN RE DISBARMENT OF SPALLINA. William F. Spallina, of Newton Highlands, Mass., 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–2056. IN RE DISBARMENT OF WEISS. Howard Stephen Weiss, of Franklin Lakes, N. J., 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–46. HAIRSTON *v.* NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES;

No. M–47. BARTELL *v.* FRANCIS MARION UNIVERSITY ET AL.;

No. M–48. KUCEJ *v.* ZONING COMMISSION, TOWN OF STRATFORD;

No. M–49. RUFFIN *v.* MARYLAND ET AL.;

No. M–51. PROVENZANO *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and

No. M–52. BANKER ET UX. *v.* RANK. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–50. FANNING, PHILLIPS & MOLNAR *v.* WEST, SECRETARY OF VETERANS AFFAIRS, ET AL. Motion to direct the clerk to file petition for writ of certiorari submitted by Gary Molnar, *pro se* and agent for petitioner, denied.

No. 98–7649. RIVERA *v.* RUSH ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 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. 98–7904. IN RE REIDT. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 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. 98–8169. IN RE GRAVES;

No. 98–8237. IN RE MONTGOMERY; and

No. 98–8244. IN RE HOLT. Petitions for writs of habeas corpus denied.

No. 98–7667. IN RE WILLIAMS;

No. 98–7689. IN RE EVANS;
No. 98–7731. IN RE AINSWORTH; and
No. 98–8076. IN RE SMITH-STEWART. Petitions for writs of mandamus denied.

Certiorari Granted

No. 98–818. RICE *v.* CAYETANO, GOVERNOR OF HAWAII. C. A. 9th Cir. Certiorari granted. Reported below: 146 F. 3d 1075.

No. 98–1170. PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY *v.* AGARD. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 117 F. 3d 696 and 159 F. 3d 98.

Certiorari Denied

No. 98–757. DAYS INNS OF AMERICA, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 151 F. 3d 822.

No. 98–766. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 147 F. 3d 851 and 152 F. 3d 931.

No. 98–825. CUETO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 151 F. 3d 620.

No. 98–826. HAINES *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 154 F. 3d 1298.

No. 98–950. SENGPIEL ET AL. *v.* B. F. GOODRICH CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 156 F. 3d 660.

No. 98–957. SHARPER IMAGE CORP. *v.* FLORIDA DEPARTMENT OF REVENUE. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 704 So. 2d 657.

No. 98–961. MILLER *v.* J. D. ABRAMS, INC.; and
No. 98–1120. J. D. ABRAMS, INC. *v.* MILLER. C. A. 5th Cir. Certiorari denied. Reported below: 156 F. 3d 598.

No. 98–989. QUALITY PROFESSIONAL NURSING, INC., ET AL. *v.* BETHESDA MEMORIAL HOSPITAL, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 740.

No. 98–1008. FOREMAN ET AL. *v.* AS MID-AMERICA, INC. Sup. Ct. Neb. Certiorari denied. Reported below: 255 Neb. 323, 586 N. W. 2d 290.

No. 98–1044. CHI-MING CHOW *v.* VAN BUREN TOWNSHIP ET AL. Ct. App. Mich. Certiorari denied.

No. 98–1093. ADCO OIL CO. *v.* HOME INSURANCE COMPANY OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 154 F. 3d 739.

No. 98–1094. SCHIFFNER *v.* MOTOROLA, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 297 Ill. App. 3d 1099, 697 N. E. 2d 868.

No. 98–1098. FLINT ET AL. *v.* DAVIS, EXECUTRIX OF THE ESTATE OF FLINT, DECEASED. Cir. Ct. Loudoun County, Va. Certiorari denied.

No. 98–1099. AK STEEL CORP. *v.* CHAMBERLAIN ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 82 Ohio St. 3d 389, 696 N. E. 2d 569.

No. 98–1106. ACM PARTNERSHIP *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 157 F. 3d 231.

No. 98–1113. SPELLACY ET AL. *v.* AIR LINE PILOTS ASSOCIATION-INTERNATIONAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 156 F. 3d 120.

No. 98–1116. SAMARAS *v.* AFC ENTERPRISES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 153 F. 3d 268.

No. 98–1122. AZIZ *v.* ORBITAL SCIENCE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 17.

No. 98–1125. KOTECKI ET UX. *v.* CITY OF PERU. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 296 Ill. App. 3d 1084, 726 N. E. 2d 1196.

No. 98–1128. VERMILION CORP. *v.* GREEN. C. A. 5th Cir. Certiorari denied. Reported below: 144 F. 3d 332.

No. 98–1133. SHERWIN-WILLIAMS CO. *v.* NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND. C. A. 6th Cir. Certiorari denied. Reported below: 158 F. 3d 387.

No. 98–1138. SCOTT *v.* NORFOLK SOUTHERN CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 722.

No. 98–1145. BREWSTER *v.* BOARD OF EDUCATION OF LYNWOOD UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 149 F. 3d 971.

No. 98–1146. SCHLEIFER, A MINOR, BY SCHLEIFER, ET AL. *v.* CITY OF CHARLOTTESVILLE. C. A. 4th Cir. Certiorari denied. Reported below: 159 F. 3d 843.

No. 98–1147. VAN POYCK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 715 So. 2d 930.

No. 98–1148. CAMPBELL ET UX., AS NEXT FRIENDS OF CAMPBELL *v.* MCALISTER. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 94.

No. 98–1151. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–1154. ABF FREIGHT SYSTEM, INC. *v.* WEBB. C. A. 10th Cir. Certiorari denied. Reported below: 155 F. 3d 1230.

No. 98–1164. COLWELL ET AL. *v.* SUFFOLK COUNTY POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 158 F. 3d 635.

No. 98–1166. NAZARYAN ET AL. *v.* SIMPSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1169.

No. 98–1169. BAXTER ET AL. *v.* HOLY CROSS HOSPITAL OF SILVER SPRING, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 155 F. 3d 557.

No. 98–1174. BRANCHBURG PLAZA ASSOCIATES, L. P. *v.* FESQ. C. A. 3d Cir. Certiorari denied. Reported below: 153 F. 3d 113.

No. 98–1176. INSITUFORM TECHNOLOGIES, INC., ET AL. *v.* CAT CONTRACTING, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 161 F. 3d 688.

No. 98–1182. GOLD ET AL. *v.* HARRISON ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 88 Haw. 94, 962 P. 2d 353.

No. 98–1183. Anderson Community School Corp. *v.* Willis, by His Next Friend and Father, Willis. C. A. 7th Cir. Certiorari denied. Reported below: 158 F. 3d 415.

No. 98–1186. Collum *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 98–1190. Wisconsin Central Ltd. *v.* Baltimore & Ohio Chicago Terminal Railroad Co. et al. C. A. 7th Cir. Certiorari denied. Reported below: 154 F. 3d 404.

No. 98–1192. Orlandi et al. *v.* Miller, Commissioner, West Virginia Department of Highways, et al. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 98–1195. Donovan *v.* West, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 158 F. 3d 1377.

No. 98–1197. Hall *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 50 M. J. 344.

No. 98–1207. Turner *v.* Frey et al. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–1213. Dupree, aka Taylor *v.* Oregon, By and Through its Department of Transportation. Ct. App. Ore. Certiorari denied. Reported below: 154 Ore. App. 181, 961 P. 2d 232.

No. 98–1220. Salisbury, Secretary, New Mexico Energy, Minerals and Natural Resources Department, et al. *v.* Elephant Butte Irrigation District of New Mexico et al. C. A. 10th Cir. Certiorari denied. Reported below: 160 F. 3d 602.

No. 98–1223. Williams et ux. *v.* Klamath County. Ct. App. Ore. Certiorari denied. Reported below: 149 Ore. App. 436, 942 P. 2d 303.

No. 98–1226. Johnston *v.* New Jersey et al. Super. Ct. N. J., App. Div. Certiorari denied.

No. 98–1237. El-Fadly *v.* City of Los Angeles et al. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 924.

No. 98–1245. COONS ET AL. *v.* HOLMES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1179.

No. 98–1248. KLECAN ET AL. *v.* NEW MEXICO RIGHT TO CHOOSE/NARAL ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 126 N. M. 788, 975 P. 2d 841.

No. 98–1256. STONEBURNER *v.* CALDERA, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 152 F. 3d 485.

No. 98–1274. LOCASCIO *v.* RUBIN, SECRETARY OF THE TREASURY. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1177.

No. 98–1281. GONZALEZ *v.* DRUG ENFORCEMENT ADMINISTRATION, OFFICE OF ASSET FORFEITURE, ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–1293. SULLIVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–1295. MALLEY *v.* MALLEY. Super. Ct. Pa. Certiorari denied. Reported below: 714 A. 2d 1092.

No. 98–1300. SABA *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–1305. THORPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1216.

No. 98–1326. GLUZMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 154 F. 3d 49.

No. 98–1329. FRANK *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 156 F. 3d 332.

No. 98–1342. TAFTSIOU *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 144 F. 3d 287.

No. 98–1348. ANGELES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 151 F. 3d 68.

No. 98–1352. MOHWISH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–1364. SELLERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–1370. CARRERAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 146 F. 3d 1326.

No. 98–6581. KARENBAUER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 552 Pa. 420, 715 A. 2d 1086.

No. 98–7024. LANDSBERGER *v.* SCHAFER, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1237.

No. 98–7054. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–7164. BLACKMON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 145 F. 3d 205.

No. 98–7349. REED *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–7374. THIELE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 931.

No. 98–7524. WELLS *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 968 S. W. 2d 483.

No. 98–7534. JONES *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–7535. MCFADDEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 98–7553. JONES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 332 S. C. 329, 504 S. E. 2d 822.

No. 98–7555. LINK *v.* CITY OF COLUMBUS. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 98–7557. MALENOSKY *v.* VARNER ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–7559. MENEFIELD *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1169.

No. 98–7562. GARDNER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 332 S. C. 389, 505 S. E. 2d 338.

No. 98–7573. CLARK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7578. HONG MAI *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 98–7580. LEWIS *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 156 F. 3d 1243.

No. 98–7581. JONES *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 296 Ill. App. 3d 1082, 726 N. E. 2d 1195.

No. 98–7584. MAYRIDES *v.* OHIO STATE ADULT PAROLE AUTHORITY. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 98–7596. MACKEY *v.* LEWIS, DEPUTY WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1339.

No. 98–7597. MCCONICO *v.* CONRADI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1188.

No. 98–7598. JENNINGS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 148 F. 3d 1070.

No. 98–7604. CAIN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 98–7605. MCGLOTHLIN *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 151 F. 3d 1029.

No. 98–7610. BROWN *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 98–7615. MCCASLIN *v.* MCBRIDE ET AL. Ct. App. Neb. Certiorari denied. Reported below: 6 Neb. App. xxxiv.

No. 98–7616. SCHWANDT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1136, 726 N. E. 2d 238.

No. 98–7618. SHEARIN *v.* JARMAN ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–7619. SHIRLEY *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 98–7620. FRYE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 18 Cal. 4th 894, 959 P. 2d 183.

No. 98–7621. MALLOY *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–7623. LLOYD *v.* MARSHALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 927.

No. 98–7626. COLLIER *v.* CITY OF CHICOPEE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 158 F. 3d 601.

No. 98–7628. OCHOA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 963 P. 2d 583.

No. 98–7634. MITCHELL *v.* PRICE, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 156 F. 3d 182.

No. 98–7638. RAWLINS *v.* COURT OF APPEALS OF ARIZONA, DIVISION ONE. Sup. Ct. Ariz. Certiorari denied.

No. 98–7640. WILSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 975 S. W. 2d 901.

No. 98–7641. SIMS *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari denied.

No. 98–7642. SOLIS *v.* PARKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 901.

No. 98–7644. WALKER *v.* ROGERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–7645. WOLFE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 98–7646. THOMPSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7647. THOMAS *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7648. CAMPBELL *v.* DOE, A MINOR CHILD, BY AND THROUGH HER FATHER AND NEXT FRIEND, DOE, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 725 So. 2d 1112.

No. 98–7652. BARRETT ET UX. *v.* NOLAN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 720 So. 2d 518.

No. 98–7654. OGUNDE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 98–7656. KISKILA ET AL. *v.* MCCONNELL ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–7659. CHUMPIA *v.* MICHIGAN STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 26.

No. 98–7660. VASQUEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 98–7662. ANDERSON *v.* DEEDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 718.

No. 98–7668. TURNER *v.* UTAH DEPARTMENT OF WORKFORCE SERVICES ET AL. Ct. App. Utah. Certiorari denied.

No. 98–7675. LAMB *v.* PIERCE. Sup. Ct. Alaska. Certiorari denied.

No. 98–7682. CUNNINGHAM *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 98–7686. GRANT *v.* PRICE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 162 F. 3d 1150.

No. 98–7688. HILLARD *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–7690. FELTON *v.* FRENCH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 98–7692. HALL *v.* STEWART. C. A. 9th Cir. Certiorari denied.

No. 98–7694. SMITH *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7695. PATTERSON *v.* LEWIS ET AL. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 98–7696. SANBORN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 975 S. W. 2d 905.

No. 98–7697. LACY *v.* AMERITECH MOBILE COMMUNICATIONS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 142 F. 3d 440.

No. 98–7698. MCCRAY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 332 S. C. 536, 506 S. E. 2d 301.

No. 98–7699. MOORE *v.* REYNOLDS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 153 F. 3d 1086.

No. 98–7701. JASON *v.* SEATTLE UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 12.

No. 98–7702. BRUMFIELD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 737 So. 2d 660.

No. 98–7703. LARREA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 251 App. Div. 2d 113, 674 N. Y. S. 2d 39.

No. 98–7716. JONES *v.* HUBBARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7717. MORRIS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 1728, 988 P. 2d 847.

No. 98–7719. JOHNSTON *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 154 F. 3d 417.

No. 98–7722. WENGER *v.* CANASTOTA CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 146 F. 3d 123.

No. 98–7726. VAUGHN *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7727. SIKORA *v.* HOPKINS, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 163 F. 3d 603.

No. 98–7735. THOMAS *v.* AMERICAN BRAND, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1197.

No. 98–7736. WENDELL *v.* SIMPSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–7738. BRADY *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 965 P. 2d 1.

No. 98–7742. SPRIK *v.* WEBER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7749. DELBRIDGE *v.* CITY OF UNION SPRINGS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1189.

No. 98–7751. HENDERSON *v.* HENNEBERRY, DIRECTOR, PATUXENT INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 145 F. 3d 1324.

No. 98–7760. BANDA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 719 So. 2d 892.

No. 98–7761. TRICE *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–7767. CLARK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 297 Ill. App. 3d 1117, 737 N. E. 2d 709.

No. 98–7768. BERNYS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1199.

No. 98–7769. CAGLE *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 17.

No. 98–7778. MARTINEZ *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 98–7791. MOSES-EL *v.* SIZER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 625.

No. 98–7796. CONTRERAS *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 629.

No. 98–7798. BREWER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 725 So. 2d 106.

No. 98–7827. TYSON *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 159 F. 3d 732.

No. 98–7828. ALEXANDER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7833. RIVERA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7838. NORMAN *v.* SANTA CLARA COUNTY PROBATION DEPARTMENT. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 606.

No. 98–7853. WARREN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 903.

No. 98–7858. COMBS *v.* DALLAS COUNTY CHILD PROTECTIVE SERVICE UNIT OF THE TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 98–7864. DAVIS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 98–7886. LAMMERS *v.* ENDICOTT ET AL. (two judgments). C. A. 7th Cir. Certiorari denied.

No. 98–7894. RAMIREZ *v.* STINSON, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1201.

No. 98–7909. HALEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 163 F. 3d 599.

No. 98–7911. FARRAR *v.* UNITED STATES; and
No. 98–8053. GORDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 490.

No. 98–7912. GILMER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7917. FREEMAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 142 F. 3d 1283.

No. 98–7919. HAYDEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 250 App. Div. 2d 937, 672 N. Y. S. 2d 538.

No. 98–7924. HAMILTON *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7925. FARVER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 98–7933. HICKS *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7949. MOZER *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–7950. LAUDERDALE *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7960. MOORE *v.* POWELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 2.

No. 98–7978. CARROLL *v.* DETELLA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–7985. SALAMEH *v.* UNITED STATES; and
No. 98–8006. AYYAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 152 F. 3d 88.

No. 98–7990. HATCHETT *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1155.

No. 98–7996. HUNTER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8004. LANGLER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 725 So. 2d 1120.

No. 98–8019. CLIFF *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 253 App. Div. 2d 559, 676 N. Y. S. 2d 516.

No. 98–8020. CORBETT *v.* POLK, SUPERINTENDENT, FRANKLIN CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1154.

No. 98–8026. DUGUAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 33.

No. 98–8028. FLETCHER *v.* MANN. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 13.

No. 98–8033. BYRNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 977.

No. 98–8034. WARFEL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Santa Clara County. Certiorari denied.

No. 98–8047. O'DELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 154 F. 3d 358.

No. 98–8052. DOWTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 15.

No. 98–8054. EXARHOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 135 F. 3d 723.

No. 98–8055. GRAHAM *v.* LEONARDO, SUPERINTENDENT, GREENE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1200.

No. 98–8060. WALKER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 722 A. 2d 1257.

No. 98–8061. STUART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8062. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 873.

No. 98–8064. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–8065. IRAVANI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 98–8066. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–8067. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 93.

No. 98–8068. LESLIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 103 F. 3d 1093.

No. 98–8074. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8083. MENDOZA-CORRALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–8085. MALONE *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 98–8090. WESTERLING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 176 F. 3d 473.

No. 98–8096. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–8097. LOVETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 1176.

No. 98–8098. KOEBERLEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 946.

No. 98–8101. ROACH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 49.

No. 98–8104. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 860.

No. 98–8107. MADDEX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–8110. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8111. HIBBLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 159 F. 3d 233.

No. 98–8114. ANDREWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–8118. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–8119. SALAZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 920.

No. 98–8122. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 632.

No. 98–8123. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 250.

No. 98–8125. LARSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 33.

No. 98–8127. YU KIKUMURA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 859.

No. 98–8132. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1170.

No. 98–8133. ARNENTEROS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8135. PRICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–8137. GERALDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 158 F. 3d 977.

No. 98–8139. EGGLESTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 165 F. 3d 624.

No. 98–8140. GRAJALES MURGA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 832.

No. 98–8145. CASTILLO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 271, 956 P. 2d 103.

No. 98–8152. AMARAME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 187.

No. 98–8155. DAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 149 F. 3d 1171.

No. 98–8156. VEASEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8160. CONERLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 159 F. 3d 1350.

No. 98–8162. GILBERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 15.

No. 98–8164. YAROMICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1216.

No. 98–8167. HATTEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 154 F. 3d 1245.

No. 98–8170. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1171.

No. 98–8174. CURTIS *v.* LEWIS, SPECIAL JUDGE, OHIO CIRCUIT COURT. Sup. Ct. Ky. Certiorari denied.

No. 98–8175. ARTIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 185.

No. 98–8176. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–8179. MEDINA CHIPREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1170.

No. 98–8182. SUMMERLIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1175.

No. 98–8186. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 29.

No. 98–8188. MATTOX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 335.

No. 98–8194. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1356.

No. 98–8195. LUCAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 632.

No. 98–8197. BAILEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8198. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 39.

No. 98–8199. OBLEA-GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–8200. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–8202. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 729.

No. 98–8206. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1358.

No. 98–8211. HOLLOWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–8213. HENRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 919.

No. 98–8215. FOWLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–8216. GONZALEZ-MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 643.

No. 98–8217. FONTENOT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 39.

No. 98–8219. STAPLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 868.

No. 98–8220. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–8223. HOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 335.

No. 98–8229. BEAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 33.

No. 98–8230. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1156.

No. 98–8233. BORROME *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 166 F. 3d 1206.

No. 98–878. CULT AWARENESS NETWORK *v.* SCOTT. C. A. 9th Cir. Motion of American Family Foundation et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 140 F. 3d 1275.

No. 98–1140. WINTERS, REPRESENTATIVE OF THE ESTATE OF WINTERS, DECEASED, ET AL. *v.* DIAMOND SHAMROCK CHEMICAL CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 149 F. 3d 387.

No. 98–1143. THOMAS E. HOAR, INC. *v.* SARA LEE CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 164 F. 3d 619.

No. 98–1172. PIPER JAFFRAY, INC., ET AL. *v.* HALLIGAN, EXECUTRIX OF THE ESTATE OF HALLIGAN, DECEASED. C. A. 2d Cir. Motion of Securities Industry Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 148 F. 3d 197.

No. 98–1209. YOHN *v.* FREIDMAN, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 98–7565. HUGO P. *v.* GEORGE P. ET AL. Sup. Jud. Ct. Mass. Motion of National Association of Counsel for Children for leave to file a brief as *amicus curiae* granted. Motion of petitioner to strike affidavit from appendix to George P.'s brief in opposition denied. Certiorari denied. Reported below: 428 Mass. 219, 700 N. E. 2d 516.

Rehearing Denied

No. 97–9280. ADAMS *v.* LOCKHEED MARTIN, 525 U. S. 843;

No. 98–680. SCOTT *v.* PRUDENTIAL SECURITIES, INC., 525 U. S. 1068;

No. 98–748. LESOON *v.* UNITED STATES, 525 U. S. 1056;

No. 98–901. TOKHEIM *v.* COMMODITY FUTURES TRADING COMMISSION, 525 U. S. 1122;

No. 98–5504. NOVOSAD *v.* NEW MEXICO BOARD OF MEDICAL EXAMINERS ET AL., 525 U. S. 934;

No. 98–6027. CUNNINGHAM *v.* PACE ET AL., 525 U. S. 972;

No. 98–6180. THOMAS *v.* GILMORE, WARDEN, 525 U. S. 1123;

No. 98–6483. CHAROWSKY *v.* WAPINSKY ET AL., 525 U. S. 1074;

No. 98–6691. SCHAFFER *v.* KOENIG, 525 U. S. 1077;

No. 98–6718. NAGY *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 525 U. S. 1078;

No. 98–6784. TRIGLER *v.* BRADLEY ET AL., 525 U. S. 1081;
No. 98–6928. PORTER *v.* HENDERSON, POSTMASTER GENERAL, 525 U. S. 1084;
No. 98–7016. MCCARTNEY *v.* TERRAL ET AL., 525 U. S. 1125;
No. 98–7291. IN RE SUMMERS, 525 U. S. 1101; and
No. 98–7357. NAGY *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, 525 U. S. 1128. Petitions for rehearing denied.

No. 97–9068. MORGAN *v.* KIMBROUGH ET AL., 525 U. S. 835. Motion for leave to file petition for rehearing denied.

No. 98–6148. PERCESEPE *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL., 525 U. S. 1107. Motion of petitioner to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 25, 1999

Miscellaneous Order

No. A–790. FRENCH, WARDEN *v.* DAYAN ET AL., AS NEXT FRIENDS OF RICH. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Fourth Circuit on March 23, 1999, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

Certiorari Denied

No. 98–8538 (A–772). FISHER *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: 163 F. 3d 835.

MARCH 29, 1999

Miscellaneous Orders. (See also Nos. 98–7591, 98–7952, 98–8073, and 98–8082, *ante*, p. 273.)

No. D–2021. IN RE DISBARMENT OF RECKDENWALD. Disbarment entered. [For earlier order herein, see 525 U. S. 1099.]

No. D–2025. IN RE DISBARMENT OF SEGAL. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. D–2027. IN RE DISBARMENT OF GILL. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. D–2028. IN RE DISBARMENT OF EFIRD. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. D–2029. IN RE DISBARMENT OF PUGLIA. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. D–2030. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see 525 U. S. 1101.]

No. D–2031. IN RE DISBARMENT OF CUSTER. Disbarment entered. [For earlier order herein, see 525 U. S. 1101.]

No. D–2057. IN RE DISBARMENT OF LUCAS. James C. Lucas, of Lansing, Mich., 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–2058. IN RE DISBARMENT OF JACOBS. Daniel B. Jacobs, of Union City, N. J., 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–2059. IN RE DISBARMENT OF BLUTRICH. Michael D. Blutrich, of New York, 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. 97–1943. SUTTON ET AL. *v.* UNITED AIR LINES, INC. C. A. 10th Cir. [Certiorari granted, 525 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 97–1992. MURPHY *v.* UNITED PARCEL SERVICE, INC. C. A. 10th Cir. [Certiorari granted, 525 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–536. Olmstead, Commissioner, Georgia Department of Human Resources, et al. *v.* L. C., by Zimring, Guardian ad Litem and Next Friend, et al. C. A. 11th Cir. [Certiorari granted, 525 U. S. 1054 and 1062.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

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. 98–830. Amoco Production Co., on Behalf of Itself and the Class It Represents *v.* Southern Ute Indian Tribe et al. C. A. 10th Cir. [Certiorari granted, 525 U. S. 1118 and 1130.] Motion of Wyoming for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied without prejudice to filing a motion to divide time with petitioners. Motion of the Solicitor General for divided argument granted. Justice Breyer took no part in the consideration or decision of these motions.

No. 98–7264. Coers *v.* Texas Guaranteed Student Loan Corporation et al. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [525 U. S. 1137] denied.

No. 98–7814. Lowe *v.* Pogue et al. C. A. 10th Cir.; and

No. 98–8150. Schwarz *v.* Federal Bureau of Investigation. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until April 19, 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. 98–8007. Ramirez *v.* United States. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 19, 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. 98–8353. In re Seaton. Petition for writ of habeas corpus denied.

No. 98–1294. IN RE JOHNSTON;
No. 98–1354. IN RE CATCHPOLE; and
No. 98–8271. IN RE TAYLOR. Petitions for writs of mandamus denied.

Certiorari Granted

No. 98–942. FIORE *v.* WHITE, WARDEN, ET AL. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 3 presented by the petition. Reported below: 149 F. 3d 221.

No. 98–1189. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM *v.* SOUTHWORTH ET AL. C. A. 7th Cir. Certiorari granted limited to the following question: "Whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech?" Reported below: 151 F. 3d 717.

Certiorari Denied

No. 97–1356. COUNTY OF AITKIN ET AL. *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 124 F. 3d 904.

No. 98–579. CACHE VALLEY ELECTRIC CO. *v.* UTAH DEPARTMENT OF TRANSPORTATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 149 F. 3d 1119.

No. 98–1061. CASE *v.* KINSEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1173.

No. 98–1124. KABIR ET AL. *v.* BACKSTROM & NEAL ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 98–1130. DALLAS FIRE FIGHTERS ASSN. ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 150 F. 3d 438.

No. 98–1159. HUFFMAN ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 147 F. 3d 1054.

No. 98–1173. CITY OF ATLANTA *v.* R. MAYER OF ATLANTA, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 538.

No. 98–1181. MARY HITCHCOCK MEMORIAL HOSPITAL ET AL. *v.* KLONOSKI. C. A. 1st Cir. Certiorari denied. Reported below: 156 F. 3d 255.

No. 98–1191. PENRY ET AL. *v.* FEDERAL HOME LOAN BANK OF TOPEKA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 155 F. 3d 1257.

No. 98–1193. SNYDER *v.* MURRAY CITY CORPORATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 159 F. 3d 1227.

No. 98–1198. COX *v.* UTAH LABOR COMMISSION ET AL. Ct. App. Utah. Certiorari denied.

No. 98–1210. GUARINO *v.* KAISER ALUMINUM & CHEMICAL CORP. ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 712 So. 2d 989.

No. 98–1216. CENTURY MARINE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 153 F. 3d 225.

No. 98–1217. FIREMAN'S FUND INSURANCE CO. *v.* TARKINGTON, O'CONNOR & O'NEILL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 98–1238. BERG *v.* NEWSOM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 605.

No. 98–1247. SANDERS *v.* BLATNICK. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1238.

No. 98–1251. CARTER *v.* ALLEN. C. A. 11th Cir. Certiorari denied. Reported below: 157 F. 3d 907.

No. 98–1262. LOMBARD CORP. *v.* COLLINS, COMMISSIONER, GEORGIA DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 270 Ga. 120, 508 S. E. 2d 653.

No. 98–1292. FOREST COMMODITIES CORP. ET AL. *v.* CONSTRUCTION AGGREGATES, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 147 F. 3d 1334.

No. 98–1296. BERNARDO *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied.

No. 98–1302. HEIDISCH *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied. Reported below: 162 F. 3d 1161.

No. 98–1318. LEHMAN ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 154 F. 3d 1010.

No. 98–1344. UNIROYAL GOODRICH TIRE CO. *v.* MARTINEZ ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF MARTINEZ ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 977 S. W. 2d 328.

No. 98–1355. MOCZYGEMBA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 148 F. 3d 487.

No. 98–1363. WILL & GRUNDY BUILDING TRADES COUNCIL ET AL. *v.* BE&K CONSTRUCTION CO. C. A. 7th Cir. Certiorari denied. Reported below: 156 F. 3d 756.

No. 98–1371. MEDEROS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–1374. HOUGH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 162 F. 3d 1151.

No. 98–1376. TACKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–1378. COE *v.* COOK COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 491.

No. 98–1384. STANFA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 159 F. 3d 1354.

No. 98–1385. OKOLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 1357.

No. 98–1390. LEVY-CORDERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 156 F. 3d 244.

No. 98–7046. PRYOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 152 F. 3d 934.

No. 98–7280. WISEHART *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 693 N. E. 2d 23.

No. 98–7372. SILVA *v.* KNOX. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–7391. WOODWARD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 726 So. 2d 524.

No. 98–7398. DOE (R. S. W.) *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 136 F. 3d 631.

No. 98–7468. CAFFEY *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 6th Cir. Certiorari denied.

No. 98–7508. CRUMMIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 20.

No. 98–7532. CLINE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 126 N. M. 77, 966 P. 2d 785.

No. 98–7607. LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–7773. RAVER *v.* MCANINCH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7776. MORRIS *v.* GEORGIA. Super. Ct. Bibb County, Ga. Certiorari denied.

No. 98–7779. LAGO *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 159 F. 3d 1360.

No. 98–7781. LANG *v.* BOONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1173.

No. 98–7786. KEMPER *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7812. JACKSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 150 F. 3d 520.

No. 98–7813. MYERS *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 631.

No. 98–7815. KIM *v.* LICALSI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 630.

No. 98–7818. WHITAKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 738 So. 2d 940.

No. 98–7820. JOHNSON *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 624.

No. 98–7822. MITCHELL *v.* ROGERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7825. MOST *v.* BERSIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1339.

No. 98–7829. BERGMANN *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–7830. BERNTSON *v.* INDIANA DIVISION OF FAMILY AND CHILDREN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 31.

No. 98–7832. REESE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1160.

No. 98–7834. ROBENSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 725 So. 2d 1109.

No. 98–7851. WIGGINS *v.* SQUIRES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 166 F. 3d 1207.

No. 98–7854. SHAIKH *v.* HABIB BANK LTD. C. A. 2d Cir. Certiorari denied. Reported below: 159 F. 3d 1348.

No. 98–7871. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 15.

No. 98–7872. GRIFFITH *v.* GOTTHELF ET AL. C. A. 2d Cir. Certiorari denied.

No. 98–7875. SHIBATA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–7876. TRIPATI *v.* ARIZONA (two judgments). Sup. Ct. Ariz. Certiorari denied.

No. 98–7880. COOKS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 720 So. 2d 637.

No. 98–7914. HILL *v.* COWART. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1173.

No. 98–7942. HARVEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 919.

No. 98–7977. TOBIE *v.* DEPARTMENT OF THE INTERIOR. C. A. 9th Cir. Certiorari denied.

No. 98–7986. SUMMERS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 159 F. 3d 1353.

No. 98–7993. FALES *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 925.

No. 98–8008. RODRIGUEZ *v.* FRANK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 98–8011. RICHARDSON *v.* MURPHY. C. A. 4th Cir. Certiorari denied.

No. 98–8018. ST. JOHN *v.* BOZARTH ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8087. MANGRUM *v.* COBB ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8106. FULTON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 155 F. 3d 568.

No. 98–8115. HOCHHAUSER *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 98–8163. BAKER *v.* DEPARTMENT OF THE ARMY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–8190. MOORE *v.* GROOSE, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied.

No. 98–8191. MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 867.

No. 98–8214. GRANT *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 49 M. J. 295.

No. 98–8221. SMITH *v.* BUREAU OF PRISONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 186.

No. 98–8227. SEPULVADO ET UX. *v.* CSC CREDIT SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 890.

No. 98–8240. INGRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 484.

No. 98–8242. JIMENEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–8243. MOHAMED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 161 F. 3d 1132.

No. 98–8247. SANGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–8248. STATON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 724.

No. 98–8250. WASHBURN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 37.

No. 98–8257. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 160 F. 3d 1096.

No. 98–8259. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8261. AJAJ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 152 F. 3d 88.

No. 98–8265. HASLIP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 160 F. 3d 649.

No. 98–8266. GAMBOA *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 98–8268. SCRUGGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8269. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8274. SIMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 5.

No. 98–8280. BARNES *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 26.

No. 98–8287. PARA-GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–8288. POPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 40.

No. 98–8289. RYMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 39.

No. 98–8291. SHAYESTEH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 349.

No. 98–8299. BOWERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 98–8301. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 34.

No. 98–8302. TONEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 404.

No. 98–8303. AVERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 37.

No. 98–8305. LEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 24.

No. 98–8307. MAYFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 161 F. 3d 1143.

No. 98–8308. VINH HUU NGUYEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1219.

No. 98–8312. WARE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 414.

No. 98–8313. TUCKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1223.

No. 98–8314. BETANCUR-ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 38.

No. 98–8317. CASTRO-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1218.

No. 98–966. CITY OF DALLAS ET AL. *v.* DALLAS FIRE FIGHTERS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 150 F. 3d 438.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

This case involves the legitimacy of an affirmative-action plan adopted by the Dallas Fire Department. The Court of Appeals for the Fifth Circuit held that there was insufficient evidence of past discrimination in the Dallas Fire Department to justify the fire department's policy of promoting some women and minorities over white males who had achieved scores within the same "band" on a civil service exam. See 150 F. 3d 438, 441 (1998); Pet. for Cert. 4. And the petitioners ask us to review that determination.

The defendants offered the following evidence of past discrimination in support of the plan: (1) The Dallas Fire Department did not hire its first black firefighter until 1969. App. to Pet. for Cert. 72. (2) Blacks and Latinos comprised less than 1 percent of the fire department in 1972. *Ibid.* (3) In 1972, the Department of Justice concluded that the fire department had engaged in impermissible racial discrimination. *Ibid.* (4) In 1976, the Dallas Fire Department entered into a consent decree with the Department of Justice "to alleviate the effects of any past discrimination that might have occurred." *Id.*, at 62. (5) The consent decree and subsequent plans led to advances in the hiring of minorities and women, and, in 1988, 38.7 percent of the entry-level "fire and rescue officers" were black or Latino and 1.9 percent were women. See *id.*, at 143. (6) In the upper ranks of the fire department, in 1988, blacks and Latinos made up 14.8 percent of the "driver-engineers," 5.8 percent of the "lieutenants," and 5.2 percent of the "executives/deputy chiefs." Pet. for Cert. 4–5; App. to Pet. for Cert. 141–143. Women made up 1.6 percent of the "driver-engineers," but there were no women "lieutenants" or "executives/deputy chiefs." *Ibid.*

This Court has held that a government entity's implementation of race-conscious measures that are narrowly tailored to remedy past discrimination by that entity does not violate the Equal Pro-

tection Clause. See, *e. g., Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989); *United States* v. *Paradise*, 480 U. S. 149, 167 (1987) (plurality opinion). And it has indicated that significant statistical disparities between the pool of those selected for a job and those eligible for the job may be used, among other things, to show past discrimination. See *Croson*, *supra*, at 501–502. In this case, there are both statistics and other evidentiary indicia of past discrimination, including a finding by the Department of Justice of a history of discrimination. Courts of Appeals apparently have upheld affirmative-action plans in other cities based on similar records. See *McNamara* v. *Chicago*, 138 F. 3d 1219, 1223–1224 (CA7), cert. denied, 525 U. S. 981 (1998); see also *Stuart* v. *Roche*, 951 F. 2d 446, 450–452 (CA1 1991), cert. denied, 504 U. S. 913 (1992).

In light of the many affirmative-action plans in effect throughout the Nation, the question presented, concerning the means of proving past discrimination, is an important one; the lower courts are divided; and the Fifth Circuit's decision may be questionable in light of our precedents. Accordingly, I respectfully dissent from the denial of certiorari in this case.

No. 98–990. PERILLO ET AL. *v.* AT&T CORP. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 98–7889. BALDWIN *v.* JOHNSON, WARDEN. C. A. 11th Cir. Motion of Former State Supreme Court Justices et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 152 F. 3d 1304.

No. 98–8151. PARHAM *v.* COCA-COLA CO. C. A. 4th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 151 F. 3d 1029.

Rehearing Denied

No. 98–1088. IN RE VEY, 525 U. S. 1138;

No. 98–6860. IN RE VANDERBECK, 525 U. S. 1101;

No. 98–6952. ANSLEY *v.* GREENBUS LINES, INC., ET AL., 525 U. S. 1124; and

No. 98–7229. CROSS *v.* UNITED STATES, 525 U. S. 1112. Petitions for rehearing denied.

April 2, 1999

Miscellaneous Order

No. A–746 (98–8384). Williams *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, granted 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 sending down of the judgment of this Court.

Certiorari Denied

No. 98–8742 (A–811). Calambro, as Next Friend of Calambro *v.* Ignacio, Warden. 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. Justice Stevens would grant the application for stay of execution.

April 5, 1999

Miscellaneous Orders

No. A–726. Weinstein *v.* New Jersey. Application for injunctive relief, addressed to Justice Ginsburg and referred to the Court, denied.

No. M–53. Thompson *v.* Cain, Warden;

No. M–54. Hardo *v.* Henderson, Postmaster General;

No. M–55. Burrell *v.* Pensacola Police Department et al.; and

No. M–56. Obba, aka Procher *v.* Marshall, Superintendent, Massachusetts Correctional Institution-Cedar Junction. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 105, Orig. Kansas *v.* Colorado. Motion of the Special Master for compensation and reimbursement of expenses granted, and it is ordered that the Special Master is awarded a total of $36,708.57 for the period September 10, 1997, through February 28, 1999, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 522 U. S. 1026.]

No. 98–149. College Savings Bank *v.* Florida Prepaid Postsecondary Education Expense Board et al. C. A. 3d

Cir. [Certiorari granted, 525 U. S. 1063.] Motion of the Solicitor General for divided argument granted to be divided evenly between counsel for petitioner and the Solicitor General. Motion of American Intellectual Property Law Association for leave to file a brief as *amicus curiae* granted.

No. 98–531. Florida Prepaid Postsecondary Education Expense Board *v.* College Savings Bank et al. C. A. Fed. Cir. [Certiorari granted, 525 U. S. 1064.] Motion of the Solicitor General for divided argument granted to be divided evenly between counsel for College Savings Bank and the Solicitor General.

No. 98–591. Albertson's, Inc. *v.* Kirkingburg. C. A. 9th Cir. [Certiorari granted, 525 U. S. 1064.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 98–830. Amoco Production Co., on Behalf of Itself and the Class It Represents *v.* Southern Ute Indian Tribe et al. C. A. 10th Cir. [Certiorari granted, 525 U. S. 1118 and 1130.] Motion of Wyoming for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: 20 minutes for petitioner and 10 minutes for Wyoming. Justice Breyer took no part in the consideration or decision of this motion.

No. 98–6322. Slack *v.* McDaniel, Warden, et al. C. A. 9th Cir. [Certiorari granted, 525 U. S. 1138.] Motion for appointment of counsel granted, and it is ordered that Michael Pescetta, Esq., of Las Vegas, Nev., be appointed to serve as counsel for petitioner in this case.

No. 98–6879. Mace *v.* Missouri et al. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [525 U. S. 1066] denied.

No. 98–8434. In re Kinney;
No. 98–8448. In re YoungBear;
No. 98–8468. In re Artis;
No. 98–8474. In re Radovich;
No. 98–8503. In re Hill; and
No. 98–8520. In re Hundley. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 98–8384. WILLIAMS *v.* TAYLOR, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1a, 1b, 2, and 3 presented by the petition. Reported below: 163 F. 3d 860.

Certiorari Denied

No. 98–876. CLARK *v.* UNITED STATES;
No. 98–7027. WADENA *v.* UNITED STATES; and
No. 98–7069. RAWLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 152 F. 3d 831.

No. 98–1035. STATE-RECORD CO., INC. *v.* QUATTLEBAUM. Sup. Ct. S. C. Certiorari denied. Reported below: 332 S. C. 346, 504 S. E. 2d 592.

No. 98–1056. CITY OF LITTLE ROCK *v.* GOSS; and
No. 98–1234. GOSS *v.* CITY OF LITTLE ROCK. C. A. 8th Cir. Certiorari denied. Reported below: 151 F. 3d 861.

No. 98–1135. AQUATHERM INDUSTRIES, INC. *v.* FLORIDA POWER & LIGHT CO. C. A. 11th Cir. Certiorari denied. Reported below: 145 F. 3d 1258.

No. 98–1149. COTO ET AL. *v.* J. RAY MCDERMOTT, S. A., ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 709 So. 2d 1023.

No. 98–1218. MICHAUD *v.* STATE FARM INSURANCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 13.

No. 98–1219. RUSSELL *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 28.

No. 98–1224. BROWN ET UX. *v.* MEDICAL CENTER OF NEW ORLEANS. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 715 So. 2d 1249.

No. 98–1225. BARNES *v.* LOWE'S COS., INC. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1154.

No. 98–1227. JONES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF SHEPP, DECEASED, ET AL. *v.* LUHR BROS., INC. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 333.

No. 98–1229. BOYD *v.* STATE FARM INSURANCE COS. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 326.

No. 98–1231. BANKRUPTCY ESTATE OF UNANUE-CASAL, AKA UNANUE *v.* GOYA FOODS, INC., ET AL.; and

No. 98–1250. UNANUE-CASAL, AKA UNANUE *v.* GOYA FOODS, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 311 N. J. Super. 589, 710 A. 2d 1036.

No. 98–1239. AETNA FINANCE CO., DBA ITT FINANCIAL SERVICES *v.* WILLIAMS. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 464, 700 N. E. 2d 859.

No. 98–1241. MCGUINESS *v.* UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE. C. A. 10th Cir. Certiorari denied. Reported below: 170 F. 3d 974.

No. 98–1244. BRADSHAW ET AL. *v.* IGLOO PRODUCTS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 173 F. 3d 433.

No. 98–1283. DORWART *v.* CARAWAY ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 290 Mont. 196, 966 P. 2d 1121.

No. 98–1286. MCLEMORE *v.* WFAA–TV, INC. Sup. Ct. Tex. Certiorari denied. Reported below: 978 S. W. 2d 568.

No. 98–1335. UTAH FOAM PRODUCTS CO. *v.* UPJOHN CO. C. A. 10th Cir. Certiorari denied. Reported below: 154 F. 3d 1212.

No. 98–1347. MCEACHERN *v.* BLACK. Ct. App. S. C. Certiorari denied. Reported below: 329 S. C. 642, 496 S. E. 2d 659.

No. 98–1349. DIXON *v.* BOISE CASCADE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–1383. STAHULAK *v.* CITY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 184 Ill. 2d 176, 703 N. E. 2d 44.

No. 98–1397. JARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1157.

No. 98–1400. ROBINSON *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 168 F. 3d 1319.

No. 98–1402. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 1311.

No. 98–1413. HOFFMAN *v.* COHEN, SECRETARY OF DEFENSE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 48.

No. 98–1432. TAMBASCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–6140. CHI PANG LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 141 F. 3d 1181.

No. 98–6973. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 149 F. 3d 1026.

No. 98–7479. NESBIT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 978 S. W. 2d 872.

No. 98–7486. LEDFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 29.

No. 98–7795. BURGESS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 723 So. 2d 770.

No. 98–7890. CUMMINGS *v.* EVANS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 610.

No. 98–7901. COUSINO *v.* KIEFER. Ct. App. Mich. Certiorari denied.

No. 98–7902. COPLEY *v.* SAMMONS ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–7903. CAMPBELL *v.* CITY OF UNION POINT, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 152 F. 3d 936.

No. 98–7906. SPENCER *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 3.

No. 98–7908. GYADU *v.* D'ADDARIO INDUSTRIES ET AL. App. Ct. Conn. Certiorari denied.

No. 98–7910. DICKINSON *v.* CHITWOOD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 79.

No. 98–7913. GUTIERREZ *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7916. EDISON *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7920. EUGE *v.* ADLER, JUDGE, ST. LOUIS COUNTY MUNICIPAL COURT, 21ST JUDICIAL CIRCUIT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 162 F. 3d 1163.

No. 98–7921. HARRIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 152 F. 3d 430.

No. 98–7923. ESTELL *v.* EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1172.

No. 98–7926. DODSON *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–7928. RANSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 727 So. 2d 909.

No. 98–7931. HOFFMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 167, 505 S. E. 2d 80.

No. 98–7934. HENRY *v.* CONLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1214.

No. 98–7937. DECARLO *v.* EASLEY, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 719.

No. 98–7938. DAVIS *v.* LENSING, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–7939. HAWKINS *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 98–7940. FREEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7943. ELLIS *v.* LYLES, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 95.

No. 98–7945. DE SANTIS *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–7946. DORSEY *v.* HARRIS COUNTY JAIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–7947. EWING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–7948. FLOWERS *v.* DOYLE, ATTORNEY GENERAL OF WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 98–7953. JAMES *v.* TAYLOR, WARDEN, ET AL. Sup. Ct. S. C. Certiorari denied.

No. 98–7954. MOORE-BEY *v.* DELROSARIO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 32.

No. 98–7955. KAUGURS *v.* TARR. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 1714, 988 P. 2d 833.

No. 98–7958. LAVERTU *v.* NEW HAMPSHIRE SUPREME COURT. Sup. Ct. N. H. Certiorari denied.

No. 98–7959. MAPLES *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 98–7971. HAWKINS *v.* CZARNECKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 142 F. 3d 434.

No. 98–7972. TOLENTO *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–7973. VOTH *v.* FUGAZZI. C. A. 5th Cir. Certiorari denied.

No. 98–7974. VALCHAR *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–7975. THIBODEAUX *v.* DAY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 96.

No. 98–7976. TYLER *v.* DUCKWORTH, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 98–7989. HIGGASON *v.* SHROYER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 32.

No. 98–7992. FORD *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 32.

No. 98–7994. DELBOSQUE *v.* MORGAN. C. A. 9th Cir. Certiorari denied.

No. 98–8012. WARE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 98–8013. THOMAS *v.* BORG. C. A. 9th Cir. Certiorari denied. Reported below: 159 F. 3d 1147.

No. 98–8014. WEBB *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 163 F. 3d 600.

No. 98–8022. BEATTY *v.* CHARKRAVORTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 13.

No. 98–8023. AMURA, AKA JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 98–8024. CHRISTIAN *v.* AHITOW, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8025. BENFORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 695, 692 N. E. 2d 1285.

No. 98–8050. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 728 So. 2d 36.

No. 98–8116. BIRO *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8117. ANDUHA *v.* MARSHALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 342.

No. 98–8144. CARBIN *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8148. SIDLES *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 921.

No. 98–8149. ROWE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 98–8161. BROWN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 698 N. E. 2d 1132.

No. 98–8171. HARPER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 978 S. W. 2d 311.

No. 98–8187. MARIN *v.* DEPARTMENT OF DEFENSE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–8192. JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 97.

No. 98–8196. COLLINS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 164 F. 3d 621.

No. 98–8225. OGUNDE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 98–8236. MANNING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 726 So. 2d 1152.

No. 98–8241. MARTIN *v.* CITY OF DANVILLE, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1155.

No. 98–8254. MCKINLEY *v.* UNITED STATES; and
No. 98–8345. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 160 F. 3d 1078.

No. 98–8276. JAMES *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 173 F. 3d 437.

No. 98–8286. BRIONES *v.* UNITED STATES; and
No. 98–8340. BRIONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 918.

No. 98–8296. TONUBBEE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–8304. WEBB *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 132 F. 3d 44.

No. 98–8322. Franco, aka Merrill *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1359.

No. 98–8325. Hanserd *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 98–8326. Gonzalez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 919.

No. 98–8332. Santos Gallegos *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 98–8334. Rodgers *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 338.

No. 98–8335. Ramirez-Galvan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–8336. Smith *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 50.

No. 98–8337. Soloye *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–8338. Perry *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 50.

No. 98–8339. Speal *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 350.

No. 98–8347. Torres *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 162 F. 3d 6.

No. 98–8349. Behrens *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1175.

No. 98–8350. Baldwin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 625.

No. 98–8351. Collier *v.* United States. Ct. App. D. C. Certiorari denied.

No. 98–8354. Sweed *v.* United States Court of Appeals for the Fifth Circuit. C. A. 5th Cir. Certiorari denied.

No. 98–8355. Redd *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 793.

No. 98–8356. SIMONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–8358. BOUNSALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–8365. STEARNS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 39.

No. 98–8367. LORGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 516.

No. 98–8368. LASZCZYNSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 155 F. 3d 562.

No. 98–8370. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 340.

No. 98–8371. LINCOLN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1358.

No. 98–8376. MAGGARD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 156 F. 3d 843.

No. 98–8379. PAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8381. WATSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 50 Conn. App. 591, 718 A. 2d 497.

No. 98–8385. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 627.

No. 98–8386. ABISIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–8388. VANTERPOOL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 40.

No. 98–8389. CHOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1156.

No. 98–8390. TODD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 339.

No. 98–8393. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 724.

No. 98–8396. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 24.

No. 98–8397. DONELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–8408. PETERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 138 F. 3d 906.

No. 98–8409. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 913.

No. 98–8415. BREWSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 20.

No. 98–8416. COFSKE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 157 F. 3d 1.

No. 98–8418. PHILLIPS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 352.

No. 98–8422. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 4.

No. 98–8423. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 152 F. 3d 680.

No. 98–8427. MILANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 152 F. 3d 934.

No. 98–8449. THURSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 913.

No. 98–8452. GARMANY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 608.

No. 98–8456. HERNANDEZ-GUEVARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 863.

No. 98–8457. HUMPHREYS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 40.

No. 98–8458. DOE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 187 F. 3d 623.

No. 98–8464. DUNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–8465. TABBAA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 920.

No. 97–1357. THOMPSON ET AL. *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL. C. A. 8th Cir. Motion of Dean Crist for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 124 F. 3d 904.

No. 98–899. PLUNK *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 153 F. 3d 1011 and 161 F. 3d 15.

No. 98–1026. WASHINGTON *v.* UNITED STATES ET AL.;
No. 98–1028. PUGET SOUND SHELLFISH GROWERS *v.* UNITED STATES ET AL.;
No. 98–1039. 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ET AL. *v.* UNITED STATES ET AL.; and
No. 98–1052. ALEXANDER ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 157 F. 3d 630.

No. 98–1077. CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION ET AL. *v.* MENDONCA ET AL. C. A. 9th Cir. Motion of California Trucking Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 152 F. 3d 1184.

No. 98–1082. CALDERON, WARDEN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLY, REAL PARTY IN INTEREST). C. A. 9th Cir. Motion of respondent Horace Edwards Kelly for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 163 F. 3d 530.

Rehearing Denied

No. 98–6636. RAMIREZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 525 U. S. 1077;
No. 98–6745. PIERCE *v.* LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., 525 U. S. 1079;
No. 98–7038. MATHISON *v.* UNITED STATES, 525 U. S. 1089;

No. 98–7149. BLOUNT *v.* UNITED STATES, 525 U. S. 1091;
No. 98–7375. RAMOS *v.* UNITED STATES, 525 U. S. 1128;
No. 98–7493. CRIALES *v.* AMERICAN AIRLINES, INC., 525 U. S. 1162;
No. 98–7807. IN RE BREWER, 525 U. S. 1137; and
No. 98–7845. MCKEEVE *v.* UNITED STATES, 525 U. S. 1184. Petitions for rehearing denied.

APRIL 13, 1999

Miscellaneous Order

No. 98–8930 (A–852). IN RE RAMSEY. 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. 98–8824 (A–828). CHICHESTER *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: 168 F. 3d 481.

APRIL 14, 1999

Dismissal Under Rule 46

No. 98–1368. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* LAGRAND. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 173 F. 3d 1144.

APRIL 19, 1999

Affirmed on Appeal

No. 98–933. APOLLOMEDIA CORP. *v.* RENO, ATTORNEY GENERAL. Affirmed on appeal from D. C. N. D. Cal. JUSTICE STEVENS would postpone question of jurisdiction to hearing of case on the merits. Reported below: 19 F. Supp. 2d 1081.

Certiorari Granted—Vacated and Remanded

No. 98–1204. BRADSHAW, LABOR COMMISSIONER OF CALIFORNIA, ET AL. *v.* G & G FIRE SPRINKLERS, INC. C. A. 9th

Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, *ante*, p. 40. Reported below: 156 F. 3d 893.

Miscellaneous Orders

No. A–717. POLYAK *v.* HULEN ET AL. Ct. App. Tenn. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. A–759. DAVIS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for certificate of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–810 (98–1586). HILL *v.* MICHIGAN ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–2024. IN RE DISBARMENT OF FORMAN. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. M–57. PERRY *v.* UNITED STATES;
No. M–58. JULIE N. *v.* TUOLUMNE COUNTY DEPARTMENT OF HUMAN SERVICES AGENCY; and
No. M–59. LEBRETON *v.* RABITO ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 98–531. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD *v.* COLLEGE SAVINGS BANK ET AL. C. A. Fed. Cir. [Certiorari granted, 525 U. S. 1064.] Motion of Federal Circuit Bar Association for leave to file a brief as *amicus curiae* granted.

No. 98–5881. LILLY *v.* VIRGINIA. Sup. Ct. Va. [Certiorari granted, 525 U. S. 981.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 98–7299. IN RE RIVERA;
No. 98–7983. IN RE RIVERA; and
No. 98–8609. IN RE RICHARDS. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until May 10, 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. 98–7547. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir.;

No. 98–7548. Cross *v.* Cambra, Warden. C. A. 9th Cir.;

No. 98–7550. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir.; and

No. 98–7551. Cross *v.* Pelican Bay State Prison et al. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1003] denied.

No. 98–8056. Fredyma *v.* Lake Sunapee Bank et al. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 10, 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. 98–8093. 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 leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 10, 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. 98–8527. In re L'Heureux; and

No. 98–8675. In re Riley. Petitions for writs of habeas corpus denied.

No. 98–1442. In re Murphy. Petition for writ of mandamus denied.

Certiorari Granted

No. 98–1109. Shalala, Secretary of Health and Human Services, et al. *v.* Illinois Council on Long Term Care, Inc. C. A. 7th Cir. Certiorari granted. Reported below: 143 F. 3d 1072.

No. 98–1101. Drye et al. *v.* United States. C. A. 8th Cir. Certiorari granted limited to the following question: "Whether the interest of an heir in an estate constitutes 'property' or a 'right to property' to which the federal tax lien attaches under

26 U. S. C. § 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law?" Reported below: 152 F. 3d 892.

No. 98–7809. MARTINEZ *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?"

Certiorari Denied

No. 98–927. MOYLE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 147 F. 3d 1116.

No. 98–977. AMERICAN BIBLE SOCIETY ET AL. *v.* RITCHIE, GUARDIAN OF THE ESTATE OF PETER. C. A. 5th Cir. Certiorari denied. Reported below: 143 F. 3d 937.

No. 98–992. MOORE ET UX. *v.* ASHLAND CHEMICAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 151 F. 3d 269.

No. 98–993. RYAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 153 F. 3d 708.

No. 98–1059. NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH *v.* ANIMAL LEGAL DEFENSE FUND, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 154 F. 3d 426.

No. 98–1066. BATES *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 63 Ark. App. xiv.

No. 98–1076. PORTLAND 76 AUTO/TRUCK PLAZA, INC. *v.* UNION OIL COMPANY OF CALIFORNIA, DBA UNOCAL CORP., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 153 F. 3d 938.

No. 98–1131. WARDER ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 149 F. 3d 73.

No. 98–1155. ELECTRIC ENGINEERING CO. *v.* CALPINE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 158 F. 3d 1051.

No. 98–1194. STEELTEK, INC. *v.* GRIFFIN. C. A. 10th Cir. Certiorari denied. Reported below: 160 F. 3d 591.

No. 98–1215. STAJOS, DBA AMERICAN EAGLE FIREWORKS, INC. *v.* CITY OF LANSING ET AL. Ct. App. Mich. Certiorari denied. Reported below: 221 Mich. App. 223, 561 N. W. 2d 116.

No. 98–1236. COMPANIA FINANCIERA ECUATORIANA DE DESAROLO, S. A. *v.* CHASE MANHATTAN BANK, SUCCESSOR IN INTEREST TO MANUFACTURERS HANOVER TRUST CO. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 13.

No. 98–1246. GRAY *v.* BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1347.

No. 98–1252. ORISEK *v.* AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 1148.

No. 98–1257. KIRSTEIN ET UX. *v.* PARKS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 1065.

No. 98–1258. HASSINE *v.* ZIMMERMAN, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 160 F. 3d 941.

No. 98–1260. STUART, A MINOR, BY HIS NATURAL GUARDIAN AND NEXT FRIEND, CRAVEN, ET AL. *v.* AMERICAN CYANAMID CO. C. A. 2d Cir. Certiorari denied. Reported below: 158 F. 3d 622.

No. 98–1261. CALHOUN ET UX. *v.* CITY OF DURANT ET AL. Ct. Civ. App. Okla. Certiorari denied. Reported below: 970 P. 2d 608.

No. 98–1264. FOURNIER *v.* REARDON, INDIVIDUALLY AND AS SHERIFF FOR THE COUNTY OF ESSEX, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 160 F. 3d 754.

No. 98–1266. BENNINGFIELD ET AL. *v.* NUCHIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 369.

No. 98–1267. KERGER *v.* BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 502, COUNTY OF DUPAGE AND STATE OF ILLINOIS, AKA COLLEGE OF DUPAGE. App. Ct. Ill., 2d

Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 272, 692 N. E. 2d 695.

No. 98–1268. UNITED STATES EX REL. BIDDLE *v.* BOARD OF TRUSTEES, LELAND STANFORD, JR., UNIVERSITY. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 533.

No. 98–1269. QUICK POINT, INC. *v.* PACIFIC HANDY CUTTER, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1307.

No. 98–1272. DALHAUSER *v.* TEXAS; and MAHAN *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 98–1277. KUCERA *v.* UNITED NEBRASKA BANK. Ct. App. Neb. Certiorari denied. Reported below: 7 Neb. App. xxviii.

No. 98–1278. SEKO INVESTMENTS, INC. *v.* CHICAGO TITLE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1005.

No. 98–1282. FRANKS & SON, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 136 Wash. 2d 737, 966 P. 2d 1232.

No. 98–1289. HISTORIC GREEN SPRINGS, INC. *v.* VIRGINIA VERMICULITE, LTD., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 156 F. 3d 535.

No. 98–1291. CONNECTICUT VALLEY ELECTRIC CO. ET AL. *v.* PATCH, CHAIRMAN, NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 167 F. 3d 29.

No. 98–1301. MCGAHREN ET AL. *v.* FIRST CITIZENS BANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 19.

No. 98–1304. STEPHENS ET AL. *v.* CMG HEALTH, FHC OPTIONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 98–1306. MENOMINEE INDIAN TRIBE OF WISCONSIN *v.* THOMPSON, GOVERNOR OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 161 F. 3d 449.

No. 98–1307. Illinois Council on Long Term Care, Inc. *v.* Shalala, Secretary of Health and Human Services, et al. C. A. 7th Cir. Certiorari denied. Reported below: 143 F. 3d 1072.

No. 98–1308. Capital Currency Exchange, N. V., dba Chequepoint USA, et al. *v.* National Westminster Bank PLC et al. C. A. 2d Cir. Certiorari denied. Reported below: 155 F. 3d 603.

No. 98–1309. Shazes *v.* Shazes. Super. Ct. Pa. Certiorari denied. Reported below: 718 A. 2d 868.

No. 98–1310. Zisk et ux. *v.* City of Roseville et al. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 16.

No. 98–1312. Donovan *v.* California. App. Dept., Super. Ct. Cal., Santa Clara County. Certiorari denied.

No. 98–1313. Davis *v.* Syntex Laboratories, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 149 F. 3d 1178.

No. 98–1314. Denouden *v.* University of Washington et al. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1236.

No. 98–1315. Johnson et ux., Trustees *v.* D. H. Blair & Co., Inc., et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 697 So. 2d 912.

No. 98–1319. Kidder, Peabody & Co., Inc., et al. *v.* Mathews et al. C. A. 3d Cir. Certiorari denied. Reported below: 161 F. 3d 156.

No. 98–1320. BSW Development Group *v.* City of Dayton. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 338, 699 N. E. 2d 1271.

No. 98–1321. Beim et al. *v.* Alix, Trustee. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 490.

No. 98–1322. Bowman *v.* Anderson, Chairman, Oklahoma Tax Commission. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 346.

No. 98–1327. OYGARD ET VIR *v.* TOWN OF COVENTRY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1201.

No. 98–1328. SMITH *v.* SCOTT ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1137, 726 N. E. 2d 239.

No. 98–1336. BRANSON SCHOOL DISTRICT RE–82 ET AL. *v.* OWENS, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 619.

No. 98–1341. BLUM ET UX. *v.* STATE FARM FIRE & CASUALTY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1336.

No. 98–1343. MANTLE *v.* MANTLE. C. A. 9th Cir. Certiorari denied. Reported below: 153 F. 3d 1082.

No. 98–1345. RASMUSSON ET AL. *v.* FROST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1354.

No. 98–1350. DAVIS *v.* WACHOVIA MORTGAGE CO., FKA FIRST WACHOVIA MORTGAGE CO. C. A. 11th Cir. Certiorari denied. Reported below: 159 F. 3d 1361.

No. 98–1351. CONRAD *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 98–1353. QUANDT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 98–1357. REEVES *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 969 S. W. 2d 471.

No. 98–1358. DAVENPORT *v.* COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC. Sup. Ct. Colo. Certiorari denied. Reported below: 962 P. 2d 963.

No. 98–1387. CATON *v.* TRUDEAU. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 1026.

No. 98–1388. FRATELLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 92 N. Y. 2d 565, 706 N. E. 2d 1173.

No. 98–1399. COMBINED INSURANCE COMPANY OF AMERICA *v.* ALDRIDGE ET AL.; and COMBINED INSURANCE COMPANY OF

America *v.* Blackwell et ux. C. A. 11th Cir. Certiorari denied. Reported below: 148 F. 3d 1266 (first judgment).

No. 98–1410. Moscariello *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 162 F. 3d 1153.

No. 98–1411. In re Smith. C. A. 10th Cir. Certiorari denied.

No. 98–1415. Hall *v.* Owen et al. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 587.

No. 98–1421. Robbins *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1358.

No. 98–1422. Nowak *v.* School Board of Palm Beach County. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 719 So. 2d 913.

No. 98–1436. Somateria Foundation et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1174.

No. 98–1445. Stoiber *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 161 F. 3d 745.

No. 98–1451. Kersey *v.* United States Air Force et al. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 427.

No. 98–1454. Seely *v.* Henderson, Postmaster General. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–1457. Renner *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 98–1463. Rhodes *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 156 F. 3d 1245.

No. 98–1479. Rosenthal *v.* Conrad. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–1484. McCollum *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 157 F. 3d 907.

No. 98–1502. JARVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 352.

No. 98–1508. LAKE ET UX. *v.* RUBIN, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 162 F. 3d 113.

No. 98–6134. UDERRA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 550 Pa. 389, 706 A. 2d 334.

No. 98–6412. CLARK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 551 Pa. 258, 710 A. 2d 31.

No. 98–6934. ARIZMENDE-MATIAS *v.* UNITED STATES; and MORALES-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 901 (first judgment); 162 F. 3d 95 (second judgment).

No. 98–7238. HOFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 157 F. 3d 1067.

No. 98–7259. KARTIK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 583.

No. 98–7262. MOSLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 983 S. W. 2d 249.

No. 98–7307. DOWTHITT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–7350. SPOTZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 552 Pa. 499, 716 A. 2d 580.

No. 98–7354. SANTOS-ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 1356.

No. 98–7384. AREVALO-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 1357.

No. 98–7399. ELDRED *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 973 S. W. 2d 43.

No. 98–7533. MURRAY *v.* DOSAL, CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 150 F. 3d 814.

No. 98–7571. Cross *v.* United States Parole Commission. C. A. 7th Cir. Certiorari denied.

No. 98–7661. Vann *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 976 S. W. 2d 93.

No. 98–7723. Venegas-Ortega *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 94.

No. 98–7861. de Leon-Castaneda *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 96.

No. 98–7982. Owens *v.* Livergood et al. C. A. 3d Cir. Certiorari denied.

No. 98–8000. Rochon *v.* City of Angola, Louisiana, et al. C. A. 5th Cir. Certiorari denied.

No. 98–8015. Walls *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 151 F. 3d 827.

No. 98–8030. Brown *v.* Hubbard, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 98–8039. Vargas *v.* Thompson et al. C. A. 11th Cir. Certiorari denied.

No. 98–8041. Watkins *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 98–8045. Simon *v.* Artuz, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 98–8057. Hunter *v.* Moore, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 911.

No. 98–8058. San Martin *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 717 So. 2d 462.

No. 98–8063. Sneed *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 98–8069. Lambirth *v.* Yearwood, Warden. C. A. 9th Cir. Certiorari denied.

No. 98–8070. KHALAF *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8071. NEWMAN *v.* KRAMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8072. NAUSS *v.* BRENNAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8075. JAMES *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 624.

No. 98–8077. KING *v.* UPSHAW, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8078. MAYNE *v.* MAYNE ET UX. Ct. Sp. App. Md. Certiorari denied. Reported below: 122 Md. App. 794.

No. 98–8079. LAYTON *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 48.

No. 98–8080. LARKINS *v.* AURELIUS, JUDGE, COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 112, 702 N. E. 2d 79.

No. 98–8084. MCQUEEN *v.* STARKE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 163 F. 3d 602.

No. 98–8086. JACKSON *v.* HARPS ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8091. WRIGHTSON ET AL. *v.* SHINGLER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1360.

No. 98–8099. STAHLMAN *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 98–8100. RILEY *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8102. SENA *v.* NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8103. DUNLAP *v.* PECO ENERGY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 159 F. 3d 1350.

No. 98–8105. DOERR *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 193 Ariz. 56, 969 P. 2d 1168.

No. 98–8109. LOWERY *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 98–8113. BURCH *v.* MARYLAND. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 98–8124. JONES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 731 So. 2d 262.

No. 98–8128. KEMP *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 335 Ark. 139, 983 S. W. 2d 383.

No. 98–8129. MCCONICO *v.* HIGHTOWER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 98.

No. 98–8130. MUSCIO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 98–8131. MILLER *v.* RICHARDSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 333.

No. 98–8134. REEVES *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8138. BRUMBAUGH-CHANLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 98–8141. BINSTOCK *v.* NEW JERSEY DIVISION OF MOTOR VEHICLES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 98–8142. WORDEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 98–8143. TYLER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 723 So. 2d 939.

No. 98–8146. BROWNING *v.* MATUSINKA, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY-SOUTHWEST DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 924.

No. 98–8147. SPEED *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 90 Wash. App. 1047.

No. 98–8153. CRUTCHER *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 969 S. W. 2d 543.

No. 98–8154. VIOLETT *v.* PEARSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 149 F. 3d 1185.

No. 98–8157. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 98–8158. VELASQUEZ *v.* KEANE, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 16.

No. 98–8165. THORN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8166. CLIFF *v.* BROWNSTEIN, CLERK, APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1199.

No. 98–8168. HOKE *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Ct. App. Ariz. Certiorari denied.

No. 98–8209. DAVIS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 806.

No. 98–8210. FRANKLIN *v.* SCHOTTEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8267. RUSSELL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 98–8279. AWOFOLU *v.* LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8282. ANDERSON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1310.

No. 98–8285. ANGELINI *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 294 Ill. App. 3d 1124, 721 N. E. 2d 862.

No. 98–8293. OWENS *v.* MOLINA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8298. STALLINGS *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8310. LOCKLEAR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 118, 505 S. E. 2d 277.

No. 98–8311. KENNEDY *v.* HALEY, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 1143.

No. 98–8324. GARCIA *v.* HARRIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8330. HOBBS *v.* HOBBS. Ct. App. Tenn. Certiorari denied. Reported below: 987 S. W. 2d 844.

No. 98–8357. BURTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 184 Ill. 2d 1, 703 N. E. 2d 49.

No. 98–8362. DELISLE *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 161 F. 3d 370.

No. 98–8372. LUCAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–8382. WILLIAMS *v.* CAMBRA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8400. ZURLA *v.* LEMASTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 19.

No. 98–8403. TATUM *v.* MISSOURI BOARD OF PROBATION AND PAROLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8420. SUMTER *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 619.

No. 98–8424. LOWERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–8436. WORKMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 632.

No. 98–8439. TEJADA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 46.

No. 98–8441. CARLSON *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 98–8442. AUGUST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 840.

No. 98–8447. SCHRAMM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 540.

No. 98–8455. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 340.

No. 98–8459. ALI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 859.

No. 98–8460. O'NEAL *v.* MCANINCH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 873.

No. 98–8467. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 141 F. 3d 1042.

No. 98–8470. DEL ANGEL POSADAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 341.

No. 98–8471. PIERRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 539.

No. 98–8472. PARKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8473. CHINAGOROM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8478. NEACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 874.

No. 98–8480. MURPH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1157.

No. 98–8482. ABUHOURAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 161 F. 3d 206.

No. 98–8489. COOK *v.* ROMINE, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8493. GILES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8497. FROST *v.* THOMAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 12.

No. 98–8504. GOINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–8505. HENRIQUES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 21.

No. 98–8508. SHEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 159 F. 3d 37.

No. 98–8509. DEJESUS SANCHEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8511. PAGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 81.

No. 98–8513. RANDALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 557.

No. 98–8514. YANEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 94.

No. 98–8515. SHUTTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 163 F. 3d 331.

No. 98–8516. TYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 164 F. 3d 150.

No. 98–8526. L'HEUREUX *v.* WHITEHOUSE, ATTORNEY GENERAL OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 187 F. 3d 622.

No. 98–8528. MCMENNAMY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 186.

No. 98–8529. MORTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8531. MIOTKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 167 F. 3d 537.

No. 98–8533. LYNCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 158 F. 3d 195.

No. 98–8537. GOLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 158 F. 3d 166.

No. 98–8540. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8541. EAGANS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 222 Wis. 2d 217, 587 N. W. 2d 214.

No. 98–8543. HOLLAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 98–8545. SPENCER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 160 F. 3d 413.

No. 98–8546. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 161 F. 3d 463.

No. 98–8550. HIGGERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 353.

No. 98–8552. WILHELM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 336.

No. 98–8553. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–8555. ADDIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–8558. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8562. DOWNS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 151 F. 3d 1301.

No. 98–8565. GRAHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8568. PUNGITORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 861.

No. 98–8569. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 98–8573. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 349.

No. 98–8574. MORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 50.

No. 98–8575. KOLE, AKA MUWANGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 164 F. 3d 164.

No. 98–8582. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8585. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 340.

No. 98–8586. HITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 164 F. 3d 1370.

No. 98–8587. HAMILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–8593. CLEMIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 26.

No. 98–8596. BARGMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 168 F. 3d 506.

No. 98–8598. MCLAUGHLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 164 F. 3d 1.

No. 98–8600. SOARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 504.

No. 98–8601. RADAMES-FERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 187 F. 3d 623.

No. 98–8603. STRICKLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8611. PINEDA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 1233.

No. 98–8613. BANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8615. COFFMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 167 F. 3d 537.

No. 98–8616. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 874.

No. 98–8619. MORAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–8621. BYRD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8624. COUNCIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 4.

No. 98–8626. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 922.

No. 98–8630. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–8633. PRAILOW *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 922.

No. 98–8634. STROPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8636. STEWART *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1312.

No. 98–8637. PARADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 832.

No. 98–8644. DEL VAL SOTO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8652. CHAVARRIA-MARQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8656. AKAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 45.

No. 98–8660. SEPULVEDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 80.

No. 98–8662. REVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8664. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 95.

No. 98–8669. BARLOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1159.

No. 98–1137. COUNTY COUNCIL OF VOLUSIA COUNTY *v.* LOGGERHEAD TURTLE (CARETTA CARETTA) ET AL. C. A. 11th Cir. Motions of Pacific Legal Foundation and Washington Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 148 F. 3d 1231.

No. 98–1242. MULL & MULL, PLC *v.* RHONE-POULENC RORER, INC., ET AL.; and

No. 98–1243. SPECE ET AL. *v.* RHONE-POULENC RORER, INC., ET AL. C. A. 7th Cir. Motion of respondent Baxter Healthcare Corp. for leave to file Rule 29.6 Corporate Disclosure Statement under seal granted. Certiorari denied. Reported below: 159 F. 3d 1016.

No. 98–8731 (A–836). JENKINS *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: 168 F. 3d 482.

No. 98–8856 (A–832). LAWRIE *v.* SNYDER, WARDEN. C. A. 3d Cir. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 176 F. 3d 472.

Rehearing Denied

No. 97–1252. RENO, ATTORNEY GENERAL, ET AL. *v.* AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL., 525 U. S. 471;

No. 98–921. NORDSTROM *v.* NORDSTROM, 525 U. S. 1142;

No. 98–982. THOMPKINS *v.* QUINCY'S RESTAURANT, INC., 525 U. S. 1144;

No. 98–1032. CHI-MING CHOW *v.* MICHIGAN ET AL., 525 U. S. 1145;

No. 98–1104. DAVIDSON *v.* HUBBARD ET AL., *ante,* p. 1005;
No. 98–1105. GIESBERG *v.* TEXAS, 525 U. S. 1147;
No. 98–6314. STEPHENS *v.* UNITED STATES, 525 U. S. 1148;
No. 98–6326. MURPHY *v.* UNITED STATES, 525 U. S. 977;
No. 98–6794. BILES *v.* CORCORAN, WARDEN, ET AL., 525 U. S. 1081;
No. 98–6886. PAL *v.* PAL, 525 U. S. 1110;
No. 98–6979. KISKILA ET UX. *v.* BUSINESS EXCHANGE, INC., 525 U. S. 1124;
No. 98–6988. STRABLE *v.* UNITED STATES, 525 U. S. 1087;
No. 98–7086. EICKLEBERRY *v.* UNITED STATES, 525 U. S. 1090;
No. 98–7108. BOOKLESS *v.* MCKUNE, WARDEN, ET AL., 525 U. S. 1151;
No. 98–7119. GREEN *v.* FLORIDA PAROLE AND PARDON COMMISSION ET AL., 525 U. S. 1125;
No. 98–7143. IN RE CARTER, 525 U. S. 1066;
No. 98–7146. CROWLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 525 U. S. 1152;
No. 98–7161. IN RE LEWIS, 525 U. S. 1137;
No. 98–7199. CODDINGTON *v.* MAKEL, WARDEN, 525 U. S. 1153;
No. 98–7200. ANDERSON *v.* REGIONAL MEDICAL CENTER AT MEMPHIS ET AL., 525 U. S. 1153;
No. 98–7228. ESPARZA *v.* ROLLINS, WARDEN, ET AL., 525 U. S. 1154;
No. 98–7230. CONTURSI *v.* CIVIL SERVICE COMMISSION ET AL., 525 U. S. 1154;
No. 98–7288. ALEXANDER *v.* SOUTH CAROLINA ET AL., 525 U. S. 1156;
No. 98–7308. WILLIAMS *v.* USX CORP., 525 U. S. 1156;
No. 98–7313. CLARK *v.* UNITED STATES, 525 U. S. 1157;
No. 98–7422. WATKIS *v.* AMERICAN NATIONAL INSURANCE CO., 525 U. S. 1181;
No. 98–7465. BITTERMAN *v.* BITTERMAN, 525 U. S. 1187;
No. 98–7608. BRAVO *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL., 525 U. S. 1166;
No. 98–7711. LINSMEIER *v.* WEST, SECRETARY OF VETERANS AFFAIRS, 525 U. S. 1168; and
No. 98–7849. WILSON *v.* CORCORAN, WARDEN, ET AL., *ante,* p. 1009. Petitions for rehearing denied.

No. 98–6571. HENRY *v.* WILLIAMSON ET AL., 525 U. S. 1093. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

APRIL 20, 1999

Dismissal Under Rule 46

No. 98–507. SNYDER *v.* TREPAGNIER ET AL. C. A. 5th Cir. [Certiorari granted, 525 U. S. 1098.] Writ of certiorari dismissed under this Court's Rule 46.

APRIL 22, 1999

Dismissal Under Rule 46

No. 98–1531. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FLAGLER FEDERAL SAVINGS AND LOAN ASSN. *v.* LACENTRA TRUCKING, INC., ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 157 F. 3d 1292.

APRIL 26, 1999

*Miscellaneous Orders**

No. A–819. LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. Application for certificate of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–2018. IN RE DISBARMENT OF MARTUCCI. Joseph C. Martucci, of Miami, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on December 7, 1998 [525 U. S. 1039], is discharged.

No. D–2032. IN RE DISBARMENT OF BOOREAM. Disbarment entered. [For earlier order herein, see 525 U. S. 1134.]

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1171; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1185; and amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1191.

No. D–2037. IN RE DISBARMENT OF SCHULMAN. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2038. IN RE DISBARMENT OF GOLDSWEIG. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2039. IN RE DISBARMENT OF LEVENE. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2040. IN RE DISBARMENT OF TIERNAN. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2042. IN RE DISBARMENT OF BUTLER. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2043. IN RE DISBARMENT OF REA. Disbarment entered. [For earlier order herein, see 525 U. S. 1136.]

No. D–2055. IN RE DISBARMENT OF SPALLINA. William F. Spallina, of Newton Highlands, Mass., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on March 22, 1999 [*ante*, p. 1014], is discharged.

No. D–2060. IN RE DISBARMENT OF SCHAMBACH. Robert B. Schambach, 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.

No. D–2061. IN RE DISBARMENT OF MAGUIRE. Michael P. Maguire, of Alexandria, 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. D–2062. IN RE DISBARMENT OF LANGFUS. Stanley Alan Langfus, of Hollywood, 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–2063. IN RE DISBARMENT OF MASSEY. Thomas Allen Massey, of Oklahoma City, Okla., 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–2064. IN RE DISBARMENT OF OLDS. Dean A. Olds, of Laguna 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–2065. IN RE DISBARMENT OF KULIE. Keith John Kulie, of Addison, 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–2066. IN RE DISBARMENT OF NORVELL. James David Norvell, of Abilene, 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–2067. IN RE DISBARMENT OF WEBB. Bryant Ashley Webb, of Woodbridge, 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. D–2068. IN RE DISBARMENT OF REYES-VIDAL. Antonio Reyes-Vidal, of San Antonio, 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. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and expenses granted, and it is ordered that the River Master is awarded a total of $2,505 for the period January 1 through March 31, 1999, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 525 U. S. 805.]

No. 98–7771. SCHWARZ *v.* NATIONAL SECURITY AGENCY ET AL. C. A. D. C. Cir.; and

No. 98–7782. SCHWARZ *v.* EXECUTIVE OFFICE OF THE PRESIDENT ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 122] denied.

No. 98–7904. IN RE REIDT. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1015] denied.

No. 98–8208. IN RE GAY. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 17, 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. 98–8238. LOWE *v.* TURNER. Sup. Ct. Okla. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until May 17, 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. 98–8733. IN RE WILLS; and

No. 98–8773. IN RE PERRY. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 98–1152. FOOD AND DRUG ADMINISTRATION ET AL. *v.* BROWN & WILLIAMSON TOBACCO CORP. ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 153 F. 3d 155.

No. 98–958. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ET AL. *v.* ANDERSON ET AL. C. A. 2d Cir. Certiorari granted limited to the following question: "Taking into account the constitutional powers pursuant to which it was enacted, does 42 U. S. C. § 1981 prohibit discrimination against noncitizens on the basis of alienage in private contracts?" Reported below: 156 F. 3d 167.

Certiorari Denied

No. 97–1867. UNUM LIFE INSURANCE COMPANY OF AMERICA *v.* CISNEROS. C. A. 9th Cir. Certiorari denied. Reported below: 134 F. 3d 939.

No. 98–1046. BELLSOUTH CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 98–1153. U S WEST, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 144 F. 3d 58.

No. 98–1156. CONNECTION DISTRIBUTING CO. *v.* RENO, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 154 F. 3d 281.

No. 98–1163. MARCU *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 147 F. 3d 1078.

No. 98–1253. CERAMICA NUOVA D'AGOSTINO, S. P. A. *v.* MCC-MARBLE CERAMIC CENTER, INC. C. A. 11th Cir. Certiorari denied. Reported below: 144 F. 3d 1384.

No. 98–1323. PNEUMO ABEX CORP. ET AL. *v.* GRUN. C. A. 7th Cir. Certiorari denied. Reported below: 163 F. 3d 411.

No. 98–1325. FALANGA ET AL. *v.* GEORGIA STATE BAR. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1333.

No. 98–1333. TESSIER *v.* COMBUSTION, INC., PLAINTIFFS' STEERING COMMITTEE. C. A. 5th Cir. Certiorari denied. Reported below: 156 F. 3d 1356.

No. 98–1339. HERWINS *v.* CITY OF REVERE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 163 F. 3d 15.

No. 98–1359. LYNDEN AIR FREIGHT, INC. *v.* KAMIKAWA, HAWAII DIRECTOR OF TAXATION. Sup. Ct. Haw. Certiorari denied. Reported below: 89 Haw. 51, 968 P. 2d 653.

No. 98–1366. SULLIVAN ET AL. *v.* DETILLIER. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 714 So. 2d 244.

No. 98–1367. AUDET, NATURAL MOTHER, GUARDIAN, AND NEXT BEST FRIEND OF AUDET, A MINOR *v.* PRUDENTIAL HEALTH CARE PLAN, INC. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 40.

No. 98–1379. LENTINO ET AL. *v.* CAGE; and
No. 98–1380. LENTINO *v.* CAGE. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–1398. WEISSER *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 721 So. 2d 1142.

No. 98–1405. MCCANN *v.* LARSON FOUNDATION. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1134, 726 N. E. 2d 237.

No. 98–1474. STEMBRIDGE *v.* PREFERRED RISK MUTUAL INSURANCE COMPANY OF IOWA ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 98–1483. MANNIX *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 98–1488. JUNIOR ET AL. *v.* WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–1492. PUBLICATIONS INTERNATIONAL, LTD. *v.* LANDOLL, INC. C. A. 7th Cir. Certiorari denied. Reported below: 164 F. 3d 337.

No. 98–1510. BROWER *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 137 Wash. 2d 44, 969 P. 2d 42.

No. 98–1520. BRADFORD ET AL. *v.* MCCLELLAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 720.

No. 98–1525. WEINSTOCK *v.* WEINSTOCK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 253 App. Div. 2d 873, 678 N. Y. S. 2d 349.

No. 98–1530. FALASTER *v.* ROTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–1538. DITTRICH *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 163 F. 3d 1349.

No. 98–1540. KRUEGER *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 168 F. 3d 1318.

No. 98–1544. BOLTON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 154 F. 3d 1313.

No. 98–1548. ADVANCED MATERIALS, INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 137.

No. 98–1555. QUIGLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 873.

No. 98–1558. MOHAMED ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 343.

No. 98–1559. CORDES FINANCE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1172.

No. 98–1567. 408 PEYTON ROAD, S. W., ATLANTA, FULTON COUNTY, GEORGIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 644.

No. 98–7290. SANFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 987.

No. 98–7395. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 902.

No. 98–7740. QUINTERO *v.* TENNESSEE; and
No. 98–7846. HALL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 976 S. W. 2d 121.

No. 98–7970. GIBBS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 154 F. 3d 253.

No. 98–8177. CRISPEN *v.* CRISPEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–8178. BALEY *v.* FORD MOTOR CO. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 13.

No. 98–8180. COOR *v.* STOCKS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 1.

No. 98–8181. COOPER *v.* KLINGER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 162 F. 3d 1172.

No. 98–8183. HUNT *v.* BRITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1209.

No. 98–8184. ROBUSKY *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8185. PRICE *v.* RYDER SYSTEM, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8189. TUAN NGUYEN *v.* POLAROID CORP. ET AL. App. Ct. Mass. Certiorari denied. Reported below: 45 Mass. App. 1112, 700 N. E. 2d 1201.

No. 98–8204. DAY, AKA ALFORD *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 98–8205. WALTON *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1241.

No. 98–8207. THANH KIEN TRINH *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–8212. DIZON *v.* ERENO ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 98–8224. GOODE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 15, 701 N. E. 2d 691.

No. 98–8228. PARKS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 98–8231. CARTER *v.* MAHON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 1.

No. 98–8232. BOYCE *v.* SEGELBAUM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 11.

No. 98–8234. BURGESS *v.* MONTANA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1167.

No. 98–8235. BEAZLEY *v.* SUPERIOR COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1336.

No. 98–8245. JOHNSON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 291 Mont. 501, 969 P. 2d 925.

No. 98–8246. POPE *v.* DEES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 98–8249. WOODS *v.* N. M. C. LABORATORIES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 1149.

No. 98–8251. VERMILLION *v.* HARRIS, SHERIFF, VIGO COUNTY, INDIANA. Ct. App. Ind. Certiorari denied.

No. 98–8253. HICKS *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–8255. LACEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 16, 701 N. E. 2d 691.

No. 98–8256. LEWIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 18, 701 N. E. 2d 692.

No. 98–8258. MONTANO-FIGUEROA *v.* CRABTREE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 548.

No. 98–8260. CLINGER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 10, 701 N. E. 2d 687.

No. 98–8263. CONDRON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 11, 701 N. E. 2d 688.

No. 98–8270. ROSENDAHL *v.* CARNAHAN, GOVERNOR OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8273. WRIGHT *v.* PRUNTY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–8275. TUNSTALL *v.* FREEMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1156.

No. 98–8277. MORALES *v.* DUBOIS ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–8284. COVEY *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 910.

No. 98–8292. SPIVEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 84 Ohio St. 3d 24, 701 N. E. 2d 696.

No. 98–8306. MCLAURIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 184 Ill. 2d 58, 703 N. E. 2d 11.

No. 98–8319. CAVALIERI-CONWAY *v.* CALIFORNIA BOARD OF EQUALIZATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 142 F. 3d 439.

No. 98–8320. BERRY *v.* BERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8321. GARDNER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 98–8361. DUNN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 302.

No. 98–8364. REYES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 743, 968 P. 2d 445.

No. 98–8414. CHILDRESS *v.* APPALACHIAN POWER CO. C. A. 4th Cir. Certiorari denied. Reported below: 155 F. 3d 558.

No. 98–8428. MENDEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 902.

No. 98–8443. BOGART *v.* HARDMAN ET AL. Sup. Ct. Va. Certiorari denied.

No. 98–8461. NELSON *v.* NEW YORK. County Ct., Monroe County, N. Y. Certiorari denied.

No. 98–8466. BURKE *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 45 Mass. App. 1120, 702 N. E. 2d 56.

No. 98–8469. SMITH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 730 So. 2d 567.

No. 98–8490. CHRISTS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1136, 716 N. E. 2d 886.

No. 98–8500. FUNDERBURK *v.* MANN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 12.

No. 98–8510. PEACOCK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–8518. WILLIAMS *v.* SIZER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1211.

No. 98–8521. TRUJILLO *v.* LYTLE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8557. HOLSEY *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 911.

No. 98–8564. DEBORD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 149 F. 3d 1178.

No. 98–8591. JONES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 66 Cal. App. 4th 760, 78 Cal. Rptr. 2d 265.

No. 98–8595. JAVIER BARTA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8597. NEWSTED *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 158 F. 3d 1085.

No. 98–8617. KILGORE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 982 S. W. 2d 252.

No. 98–8622. BEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1232.

No. 98–8643. FLOWAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 163 F. 3d 956.

No. 98–8658. CRUMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1213.

No. 98–8659. BENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8666. TORRES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–8667. ZAMARRON-CERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 167 F. 3d 538.

No. 98–8680. LOPEZ-MATA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 919.

No. 98–8684. MCNEIL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 349.

No. 98–8685. PUTTMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1297.

No. 98–8687. CONEO-GUERRERO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 148 F. 3d 44.

No. 98–8688. COARDES *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 51 Conn. App. 112, 720 A. 2d 1120.

No. 98–8692. WILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1171.

No. 98–8697. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 539.

No. 98–8707. JUNKMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 160 F. 3d 1191.

No. 98–8709. UNDERWOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 426.

No. 98–8714. SPEIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 16.

No. 98–8718. SARGENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 535.

No. 98–8721. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 348.

No. 98–8722. ARRINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 1069.

No. 98–8723. KIM LONG KO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 722 A. 2d 830.

No. 98–8725. TROWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–8729. POINDEXTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

Rehearing Denied

No. 96–8614. MCNEIL *v.* AGUILOS ET AL., 520 U. S. 1223;

No. 98–1007. WALLIN *v.* MINNESOTA DEPARTMENT OF CORRECTIONS ET AL., *ante*, p. 1004;

No. 98–1221. In re Murphy, *ante*, p. 1006;

No. 98–1222. Murphy *v.* Planned Parenthood of Greater Iowa, Inc., *ante*, p. 1006;

No. 98–1249. Cowhig *v.* United States, *ante*, p. 1006;

No. 98–1412. Stewart, Director, Arizona Department of Corrections, et al. *v.* LaGrand, *ante*, p. 115;

No. 98–6618. Sansone *v.* MCI Telecommunications, 525 U. S. 1148;

No. 98–7459. Baba *v.* Silverman et al., *ante*, p. 1007;

No. 98–7737. Woodard *v.* United States, 525 U. S. 1169; and

No. 98–7785. Langford *v.* United States, 525 U. S. 1170. Petitions for rehearing denied.

No. 98–7246. Young *v.* Michigan, 525 U. S. 1126. Motion for leave to file petition for rehearing denied.

April 27, 1999

Miscellaneous Order

No. 98–9123 (A–892). In re Davis. 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.

Rehearing Denied

No. 98–7864 (A–883). Davis *v.* Bowersox, Superintendent, Potosi Correctional Center, *ante*, p. 1027. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Petition for rehearing denied.

April 29, 1999

Certiorari Denied

No. 98–8991 (A–889). Yeatts *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: 166 F. 3d 255.

MAY 3, 1999

Certiorari Granted—Vacated and Remanded

No. 98–1284. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GRIJALVA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, *ante*, p. 40; §§ 4001 and 4002 of the Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 275–330; and the regulations of the Secretary of Health and Human Services implementing those provisions. Reported below: 152 F. 3d 1115.

*Miscellaneous Orders**

No. D–2033. IN RE DISBARMENT OF BALDRIDGE. Disbarment entered. [For earlier order herein, see 525 U. S. 1134.]

No. D–2035. IN RE DISBARMENT OF GOULD. Disbarment entered. [For earlier order herein, see 525 U. S. 1134.]

No. D–2045. IN RE DISBARMENT OF HOLLANDER. Disbarment entered. [For earlier order herein, see 525 U. S. 1136.]

No. D–2047. IN RE DISBARMENT OF HESS. Disbarment entered. [For earlier order herein, see 525 U. S. 1175.]

No. D–2048. IN RE DISBARMENT OF WOLOSIN. Disbarment entered. [For earlier order herein, see 525 U. S. 1175.]

No. D–2050. IN RE DISBARMENT OF PHILLIPS. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D–2069. IN RE DISBARMENT OF WALKER. Sheldon Irwin Walker, of Brooklyn, 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–2070. IN RE DISBARMENT OF CONLON. Benjamin V. R. Conlon, of Lake Norman, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days,

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*For revisions to the Rules of this Court effective this date, see 525 U. S. 1190.

requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–60. McDermott *v.* Department of Justice et al. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 98–8239. Lowe *v.* Oklahoma. Ct. Crim. App. Okla.;
No. 98–8366. Rivera *v.* Florida et al. Sup. Ct. Fla.; and
No. 98–8754. DeBardeleben *v.* United States. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until May 24, 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. 98–8925. In re Rogers. Petition for writ of habeas corpus denied.

No. 98–1562. In re Goad;
No. 98–8663. In re Quinones;
No. 98–8665. In re Bobchick;
No. 98–8668. In re Brown; and
No. 98–8741. In re Noble. Petitions for writs of mandamus denied.

Certiorari Granted

No. 98–1036. Illinois *v.* Wardlow. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 183 Ill. 2d 306, 701 N. E. 2d 484.

No. 98–1441. Roe, Warden *v.* Flores-Ortega. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 160 F. 3d 534.

Certiorari Denied

No. 98–1054. Malladi *v.* West, Secretary of Veterans Affairs. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1197.

No. 98–1058. Potts *v.* Securities and Exchange Commission. C. A. 8th Cir. Certiorari denied. Reported below: 151 F. 3d 810.

No. 98–1092. GONZALEZ-NAVARRO ET AL. *v.* BONILLA ET AL.; and

No. 98–1425. BONILLA ET AL. *v.* VOLVO CAR CORP.; and BONILLA ET AL. *v.* TREBOL MOTORS CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: No. 98–1092, 150 F. 3d 77; No. 98–1425, 150 F. 3d 62 (first judgment) and 77 (second judgment).

No. 98–1201. MATSUSHITA ELECTRIC CO. ET AL. *v.* ZIEGLER. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 1167.

No. 98–1211. KANOWITZ FRUIT & PRODUCE CO., INC. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1200.

No. 98–1303. KLEIN *v.* COURTWRIGHT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1359.

No. 98–1360. MONTIONE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 554 Pa. 121, 720 A. 2d 738.

No. 98–1377. ROBERTSON ET UX. *v.* NEUROMEDICAL CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 292.

No. 98–1382. PULITZER PUBLISHING CO. *v.* GODFREY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 161 F. 3d 1137.

No. 98–1386. INGLE ET AL. *v.* DOW CORNING CORP. ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–1393. STUN-TECH, INC. *v.* R. A. C. C. INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1309.

No. 98–1394. KING *v.* HERBERT J. THOMAS MEMORIAL HOSPITAL ASSN. C. A. 4th Cir. Certiorari denied. Reported below: 159 F. 3d 192.

No. 98–1395. POLAROID CORP. *v.* OFFERMAN, NORTH CAROLINA SECRETARY OF REVENUE. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 290, 507 S. E. 2d 284.

No. 98–1396. WOODYEAR *v.* CLARKE INSURANCE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1160.

No. 98–1401. LaRUE *v.* ILLINOIS EX REL. PRAIRIE STATE SECURITIES, L. L. C., ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 297 Ill. App. 3d 1140, 737 N. E. 2d 717.

No. 98–1406. JENNINGS *v.* COUTSCOUDIS ET VIR. Ct. App. D. C. Certiorari denied.

No. 98–1407. HUMPHRESS *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 48.

No. 98–1408. SCHMIDT *v.* GOSCICKI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1168.

No. 98–1409. DAWSON *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AGRICULTURAL AND MECHANICAL COLLEGE. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 24.

No. 98–1424. COLLAGEN CORP. *v.* KENNEDY ET VIR. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 1226.

No. 98–1430. BROWN *v.* MAYOR AND CITY COUNCIL OF BALTIMORE. C. A. 4th Cir. Certiorari denied. Reported below: 159 F. 3d 898.

No. 98–1431. RUPERT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER AND/OR CONSERVATOR FOR COLUMBIA SAVINGS AND LOAN ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1340.

No. 98–1496. CREEKMORE *v.* VASA NORTH ATLANTIC INSURANCE CO. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 98–1516. STICH *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1210.

No. 98–1576. TURNER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 47 M. J. 348.

No. 98–1580. TSUJI *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1170.

No. 98–1591. ROJAS-ORTEGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–1601. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 29.

No. 98–1617. EMERSON *v.* BOARD OF ZONING APPEALS OF FAIRFAX COUNTY ET AL. Sup. Ct. Va. Certiorari denied.

No. 98–7406. ROBISON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 151 F. 3d 256.

No. 98–7481. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 166 F. 3d 1206.

No. 98–7915. HUCKABY *v.* HEALTH CARE FINANCING ADMINISTRATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 185 F. 3d 877.

No. 98–8281. CUNNINGHAM *v.* WOODS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8283. RIBOT-CARINO *v.* LABOY-ALVARADO ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–8294. SUMTER *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 41.

No. 98–8297. WILSON *v.* BOLLINGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 337.

No. 98–8300. ABDUS-SABIR *v.* HIGHTOWER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8309. NUNLEY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 980 S. W. 2d 290.

No. 98–8315. BONNER *v.* CRABTREE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 914.

No. 98–8323. NIEVES DIAZ *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 719 So. 2d 865.

No. 98–8328. FORD *v.* SAUNDERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1154.

No. 98–8329. GRIFFIN *v.* SCOTT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8331. DOUGLAS *v.* EASLEY, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 18.

No. 98–8333. PARKER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 718 So. 2d 744.

No. 98–8341. COGDILL *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 1.

No. 98–8342. COX *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 624.

No. 98–8344. BROMWELL *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 98–8346. VINYARD *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Ct. App. Ariz. Certiorari denied.

No. 98–8348. ADAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 224 App. Div. 2d 433, 637 N. Y. S. 2d 477.

No. 98–8352. SHIVAEE *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 98–8360. FRASER *v.* DAWES ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–8369. KARAJAH *v.* DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND PUBLIC ASSISTANCE. C. A. D. C. Cir. Certiorari denied.

No. 98–8374. MATTHEWS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 45 Mass. App. 444, 699 N. E. 2d 347.

No. 98–8375. WHATLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 270 Ga. 296, 509 S. E. 2d 45.

No. 98–8377. MCCOY *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 98–8383. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 721 So. 2d 274.

No. 98–8391. WILLIAMS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8417. JIMENEZ CASTILLEJA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8433. COLE *v.* HOPKINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 98–8435. LARKINS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8440. LEBEDUN *v.* VIRGINIA (two judgments). Sup. Ct. Va. Certiorari denied.

No. 98–8453. GARDNER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 98–8463. GUZMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 721 So. 2d 1155.

No. 98–8475. SIMPSON *v.* LEAR ASTRONICS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 133 F. 3d 929.

No. 98–8484. CALDWELL *v.* BAKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8485. BEASLEY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 294 Ill. App. 3d 1124, 721 N. E. 2d 862.

No. 98–8492. BUTLER *v.* RENO POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8494. EASLEY *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 175 F. 3d 1010.

No. 98–8507. HUTCHINSON *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8559. HARPER *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 22.

No. 98–8566. FREDERICK *v.* GUDMANSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8605. SANTOS ARROYO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8631. CAMPBELL *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 98–8647. HOWARD *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 717 So. 2d 1209.

No. 98–8677. MOORE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8683. JOHNSON *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8694. BELLANGER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 51 M. J. 280.

No. 98–8700. SHAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–8717. SUMRALL *v.* MARYLAND DIVISION OF CORRECTION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 425.

No. 98–8728. PAGE *v.* UNITED STATES; and
No. 98–8760. BURRESS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 541.

No. 98–8734. MEANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 156 F. 3d 185.

No. 98–8746. HARDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 351.

No. 98–8751. GOODRIDGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 164 F. 3d 687.

No. 98–8753. HACH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 937.

No. 98–8755. SAVAGE-EL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 496.

No. 98–8761. LOOKER, AKA RAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 484.

No. 98–8763. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 3d 928.

No. 98–8765. WEYMOUTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1358.

No. 98–8766. CARROLL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 98–8768. BULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 145 F. 3d 1326.

No. 98–8771. HEATH *v.* UNITED STATES; and
No. 98–8839. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 154 F. 3d 1245.

No. 98–8775. SPEARMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 504.

No. 98–8776. BOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1210.

No. 98–8778. HARPINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–8779. ZAMBRANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1360.

No. 98–8780. WICKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 350.

No. 98–8784. BELL *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8792. WALLIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 64.

No. 98–8796. BETANCOURT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8801. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 484.

No. 98–8807. ADDAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 483.

No. 98–8808. ROYSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 45.

No. 98–8809. SACKY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 54.

No. 98–8811. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 F. 3d 836.

No. 98–8813. CANNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 98–8820. PEDRAZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 349.

No. 98–8825. CORDERO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 334.

No. 98–8829. WEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 167 F. 3d 541.

No. 98–8834. FREEMAN *v.* UNITED STATES; and
No. 98–8859. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 164 F. 3d 243.

No. 98–8845. JORDAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 162 F. 3d 1.

No. 98–8853. MARCILOUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 874.

No. 98–8855. MONTALVO-DOMINGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 829.

No. 98–8858. MOLINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–8865. WHITMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 913.

No. 98–1418. FLORIDA *v.* LANCASTER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 731 So. 2d 1227.

No. 98–8686 (A–884). SWANN *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. Reported below: 173 F. 3d 425.

Rehearing Denied

No. 98–1151. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL., *ante*, p. 1018;

No. 98–6473. COLEMAN *v.* BEILEIN, SHERIFF, 525 U. S. 1074;

No. 98–7369. SKORNIAK *v.* UNITED STATES, 525 U. S. 1158;

No. 98–7476. MACPHEE *v.* CALIFORNIA, *ante*, p. 1007;

No. 98–7598. JENNINGS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1022;

No. 98–7679. BOYD *v.* HELFER, CHAIRMAN, BOARD OF DIRECTORS, FEDERAL DEPOSIT INSURANCE CORPORATION, 525 U. S. 1183;

No. 98–7727. SIKORA *v.* HOPKINS, WARDEN, ET AL., *ante*, p. 1025;

No. 98–7769. CAGLE *v.* CHAMPION, WARDEN, ET AL., *ante*, p. 1026; and

No. 98–7977. TOBIE *v.* DEPARTMENT OF THE INTERIOR, *ante*, p. 1043. Petitions for rehearing denied.

No. 98–40. LAFONTAINE *v.* COMMISSIONER OF CORRECTIONAL SERVICES OF NEW YORK, 525 U. S. 869. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

MAY 4, 1999

Miscellaneous Order

No. 98–9208 (A–916). IN RE BABBITT. 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. 98–9209 (A–915). BABBITT *v.* CALIFORNIA. Sup. Ct. Cal. 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. 98–9210 (A–917). BABBITT *v.* WOODFORD, WARDEN. 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. Reported below: 177 F. 3d 744.

MAY 5, 1999

Dismissal Under Rule 46

No. 98–920. TREMBLING PRAIRIE LAND CO. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 145 F. 3d 686.

Miscellaneous Order

No. 98–9248 (A–928). IN RE VICKERS. 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. 98–9177 (A–906). COLEMAN *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: 180 F. 3d 264.

No. 98–9206 (A–914). VICKERS *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.

No. 98–9249 (A–929). VICKERS *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.

Rehearing Denied

No. 88–7629 (A–920). VICKERS *v.* ARIZONA, 497 U. S. 1033. Application for stay of execution of sentence of death, presented

to JUSTICE O'CONNOR, and by her referred to the Court, denied. Motion for leave to file petition for rehearing out of time denied.

No. 98–6440. VICKERS *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 525 U. S. 1073. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Motion for leave to file petition for rehearing out of time denied.

MAY 17, 1999

Certiorari Granted—Vacated and Remanded

No. 98–1240. LOVELACE *v.* VIRGINIA. Sup. Ct. Va. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Knowles* v. *Iowa,* 525 U. S. 113 (1998).

Miscellaneous Orders. (See also No. 120, Orig., *ante,* p. 589.)

No. A–688. LINDOW *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. D–2022. IN RE DISBARMENT OF JACKSON. Disbarment entered. [For earlier order herein, see 525 U. S. 1100.]

No. D–2034. IN RE DISBARMENT OF TEW. Disbarment entered. [For earlier order herein, see 525 U. S. 1134.]

No. D–2036. IN RE DISBARMENT OF ATKIN. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2041. IN RE DISBARMENT OF MANNING. Disbarment entered. [For earlier order herein, see 525 U. S. 1135.]

No. D–2049. IN RE DISBARMENT OF MCGEE. Disbarment entered. [For earlier order herein, see *ante,* p. 1002.]

No. D–2052. IN RE DISBARMENT OF BAXTER. Disbarment entered. [For earlier order herein, see *ante,* p. 1014.]

No. D–2071. IN RE DISBARMENT OF WOOLFORK. Norris D. Woolfork III, 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–2072. In re Disbarment of Wilson. Theodore D. Wilson, of Indianapolis, Ind., 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–61. Patrick *v.* Employment Security Department of Washington;

No. M–62. Rodriguez *v.* Artuz, Superintendent, Green Haven Correctional Facility;

No. M–65. McNally *v.* White; and

No. M–66. Svec, Individually and dba West Suburban Livery *v.* Moriarity, Trustee on Behalf of Trustees of Local Union No. 727, IBT Pension Trust, et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. M–64. In re S. H. Motion of petitioner for leave to proceed without paying the docket fee denied.

No. M–67. B. M. *v.* T. H. P. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 97–1943. Sutton et al. *v.* United Air Lines, Inc. C. A. 10th Cir. [Certiorari granted, 525 U. S. 1063.] Motion of respondent for leave to file a supplemental brief after argument granted. Motion of the Solicitor General for leave to file a supplemental brief in reply, as *amicus curiae,* after argument granted.

No. 98–1037. Smith, Warden *v.* Robbins. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1003.] Motion for appointment of counsel granted, and it is ordered that Ronald J. Nessim, Esq., of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 98–1167. Christensen et al. *v.* Harris County et al. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 98–7450. Rivera *v.* Florida Department of Corrections. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 135] denied.

No. 98–7649. RIVERA *v.* RUSH ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1015] denied.

No. 98–8150. SCHWARZ *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1037] denied.

No. 98–7809. MARTINEZ *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT. Sup. Ct. Cal. [Certiorari granted, *ante,* p. 1064.] Motion for appointment of counsel granted, and it is ordered that Ronald D. Maines, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 98–8384. WILLIAMS *v.* TAYLOR, WARDEN. C. A. 4th Cir. [Certiorari granted, *ante,* p. 1050.] Motion for appointment of counsel granted, and it is ordered that Brian A. Powers, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 98–8413. LOWE *v.* CHAMPION. Sup. Ct. Okla. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 7, 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. 98–8419. ROLE *v.* TEAMSTERS UNION LOCAL 11 ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 7, 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. 98–1443. IN RE JOHNSON; and

No. 98–8681. IN RE NABORS ET AL. Petitions for writs of mandamus denied.

No. 98–8594. IN RE BOYCE. Petition for writ of prohibition denied.

Certiorari Granted

No. 98–1464. Reno, Attorney General, et al. *v.* Condon, Attorney General of South Carolina, et al. C. A. 4th Cir. Certiorari granted. Reported below: 155 F. 3d 453.

No. 98–1161. City of Erie et al. *v.* Pap's A. M., tdba "Kandyland." Sup. Ct. Pa. Motion of Erie County Citizens Coalition Against Violent Pornography for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 553 Pa. 348, 719 A. 2d 273.

No. 98–1299. New York *v.* Hill. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 92 N. Y. 2d 406, 704 N. E. 2d 542.

Certiorari Denied

No. 98–926. Lower Tule River Irrigation District et al. *v.* Natural Resources Defense Council et al.; and

No. 98–1018. Chowchilla Water District et al. *v.* Natural Resources Defense Council et al. C. A. 9th Cir. Certiorari denied. Reported below: 146 F. 3d 1118.

No. 98–1090. Chavez Misola *v.* Immigration and Naturalization Service. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 1155.

No. 98–1139. Gilbert *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 138 F. 3d 1371.

No. 98–1230. Hardwick Brothers Co. II *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 168 F. 3d 1322.

No. 98–1271. Romano *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 155 F. 3d 107.

No. 98–1276. Aluminum Company of America *v.* Jones et al. C. A. 11th Cir. Certiorari denied.

No. 98–1279. Lucky Stores, Inc. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 153 F. 3d 964.

No. 98–1287. AIRBORNE FREIGHT CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 153 F. 3d 967.

No. 98–1290. GSCHWIND, IN HER OWN RIGHT AND ADMINISTRATRIX OF THE ESTATE OF GSCHWIND, DECEASED *v.* CESSNA AIRCRAFT CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 161 F. 3d 602.

No. 98–1317. ZIMMERMAN *v.* PONTOTOC COUNTY ET AL. Sup. Ct. Miss. Certiorari denied.

No. 98–1337. WAGNER *v.* CELEBREZZE, JUDGE, COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1216.

No. 98–1389. DUREE *v.* DOCTOR'S ASSOCIATES, INC. Sup. Ct. Kan. Certiorari denied. Reported below: 266 Kan. 433, 970 P. 2d 526.

No. 98–1392. EMI GROUP NORTH AMERICA, INC. *v.* INTEL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 157 F. 3d 887.

No. 98–1414. SCHWARTZ *v.* GREGORI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 160 F. 3d 1116.

No. 98–1416. CRITTEN ET UX. *v.* INTERNATIONAL BANK OF COMMERCE, BROWNSVILLE. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 98–1419. SEPTOWSKI *v.* MCGEHEE. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1215.

No. 98–1420. AKIN ET AL. *v.* ASHLAND CHEMICAL CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 156 F. 3d 1030.

No. 98–1423. ARMSTRONG *v.* BILLINGHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 331.

No. 98–1429. HAMILTON ET AL. *v.* ROBERTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 27.

No. 98–1434. BACOTE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 331 S. C. 328, 503 S. E. 2d 161.

No. 98–1438. CITY OF CONCORD *v.* HARDIN. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1168.

No. 98–1439. EVANS *v.* MOORE ET AL. Ct. App. La., 3d Cir. Certiorari denied.

No. 98–1444. MISCOVICH *v.* MISCOVICH. Sup. Ct. Pa. Certiorari denied. Reported below: 554 Pa. 173, 720 A. 2d 764.

No. 98–1447. SMITH *v.* US WEST DIRECT. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1221.

No. 98–1450. BROWN & ROOT, INC., ET AL. *v.* BRECKENRIDGE ET AL. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 98–1453. MCNEIL *v.* GRAYSON. C. A. 6th Cir. Certiorari denied.

No. 98–1455. BIAMONT *v.* SAIF CORP. ET AL. Ct. App. Ore. Certiorari denied. Reported below: 155 Ore. App. 644, 967 P. 2d 531.

No. 98–1456. AHITOW, WARDEN *v.* GLASS. C. A. 7th Cir. Certiorari denied. Reported below: 154 F. 3d 672.

No. 98–1458. LUKER *v.* AKRO CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1311.

No. 98–1459. GUTRIDGE *v.* MIDLAND COMPUTER, INC., DBA COMPUTERLAND OF NEBRASKA, AKA COMPUTERLAND, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 153 F. 3d 898.

No. 98–1461. CONSTRUCTIVIST FOUNDATION, INC. *v.* DEKALB COUNTY BOARD OF TAX ASSESSORS. Ct. App. Ga. Certiorari denied.

No. 98–1472. GREEN *v.* ALLIED INTERESTS, INC. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 98–1475. MASSIE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 550, 967 P. 2d 29.

No. 98–1476. LATIFF *v.* ELMINI LYMPH, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 731 So. 2d 547.

No. 98–1477. GEOTES *v.* MISSISSIPPI BOARD OF VETERINARY MEDICINE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–1482. AVR, INC. *v.* CITY OF ST. LOUIS PARK. Ct. App. Minn. Certiorari denied. Reported below: 585 N. W. 2d 411.

No. 98–1486. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS *v.* MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 66 Cal. App. 4th 672, 78 Cal. Rptr. 2d 225.

No. 98–1487. DIEDERICH *v.* COUNTY OF ROCKLAND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1200.

No. 98–1489. BARNES ET AL. *v.* AMERICAN TOBACCO CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 161 F. 3d 127.

No. 98–1490. HALL ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* CORAM HEALTHCARE CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 157 F. 3d 1286.

No. 98–1491. GLOBE INTERNATIONAL, INC. *v.* KHAWAR. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 254, 965 P. 2d 696.

No. 98–1499. LONGTIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 92 N. Y. 2d 640, 707 N. E. 2d 418.

No. 98–1504. COMEAUX *v.* UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 7.

No. 98–1507. LEE *v.* DIRECT AUTO, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 294 Ill. App. 3d 1092, 721 N. E. 2d 848.

No. 98–1515. MILLION *v.* SALAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 167 F. 3d 537.

No. 98–1517. REINHARDT ET AL. *v.* REINHARDT ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 720 So. 2d 78.

No. 98–1518. HARROW *v.* DON WILLIAMS CORP. ET AL. Cir. Ct. Fla., Hillsborough County. Certiorari denied.

No. 98–1523. BUCHEK *v.* MONSANTO CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 163 F. 3d 601.

No. 98–1532. SCHULZ ET AL. *v.* NEW YORK STATE LEGISLATURE ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 244 App. Div. 2d 126, 676 N. Y. S. 2d 237.

No. 98–1534. BANK ONE, TEXAS, NATIONAL ASSN., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 157 F. 3d 397.

No. 98–1537. MCNAB ET AL. *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 959.

No. 98–1539. GLAVEY *v.* HIGHLAND LAKES COUNTRY CLUB & COMMUNITY ASSN. Super. Ct. N. J., Sussex County. Certiorari denied.

No. 98–1542. BAKER *v.* MERCEDES BENZ OF NORTH AMERICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1356.

No. 98–1543. HAAS *v.* SCHALOW ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 53.

No. 98–1545. DOE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 98–1549. HARRISON, REPRESENTATIVE OF THE ESTATE OF BALL, ET AL. *v.* NEVADA INDUSTRIAL INSURANCE SYSTEM. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 1707, 988 P. 2d 827.

No. 98–1552. IN RE EGBUNE. Sup. Ct. Colo. Certiorari denied. Reported below: 971 P. 2d 1065.

No. 98–1557. SALEHPOUR *v.* UNIVERSITY OF TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 159 F. 3d 199.

No. 98–1563. KAPLAN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 630.

No. 98–1573. FARMERS INSURANCE EXCHANGE *v.* DENESHA. C. A. 8th Cir. Certiorari denied. Reported below: 161 F. 3d 491.

No. 98–1577. ROBY *v.* DANZIG, SECRETARY OF THE NAVY; and WELCOME *v.* DANZIG, SECRETARY OF THE NAVY. C. A. 11th Cir. Certiorari denied. Reported below: 149 F. 3d 1194 (first judgment); 150 F. 3d 1196 (second judgment).

No. 98–1582. JAGGERS *v.* WEST VIRGINIA HUMAN RIGHTS COMMISSION ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 98–1585. FUERST ET AL. *v.* GRAY. C. A. 6th Cir. Certiorari denied. Reported below: 150 F. 3d 579 and 160 F. 3d 276.

No. 98–1586. HILL *v.* MICHIGAN ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied. Reported below: 459 Mich. 1235, 590 N. W. 2d 571.

No. 98–1587. HAYNES *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 178 F. 3d 1307.

No. 98–1590. MILLER *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. 7th Cir. Certiorari denied. Reported below: 151 F. 3d 1033.

No. 98–1596. EWING *v.* DISCIPLINARY COUNSEL. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 314, 699 N. E. 2d 928.

No. 98–1597. ACEA *v.* AUTOMOBILE CLUB INSURANCE ASSN. Ct. App. Mich. Certiorari denied.

No. 98–1598. REHDER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 296 Ill. App. 3d 1069, 726 N. E. 2d 1189.

No. 98–1603. LATHROP ET UX. *v.* HANCOCK. C. A. 11th Cir. Certiorari denied. Reported below: 146 F. 3d 871.

No. 98–1610. SOARES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 159 F. 3d 1360.

No. 98–1611. POLMAR FISHERIES, INC. *v.* HURLBURT. C. A. 9th Cir. Certiorari denied.

No. 98–1623. AZAR *v.* RETIREMENT BOARD OF THE EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 721 A. 2d 872.

No. 98–1629. WELLER ET AL. *v.* DELOITTE & TOUCHE. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 976 S. W. 2d 212.

No. 98–1631. GRINE ET AL. *v.* COOMBS ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–1632. CAMPBELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 164 F. 3d 1140.

No. 98–1637. DAMPTS *v.* HOLT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 1178.

No. 98–1647. MANN *v.* UNITED STATES; and
No. 98–1652. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 840.

No. 98–1660. ELLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–1668. ENTINES ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 185 F. 3d 881.

No. 98–1669. AZIZ *v.* UNIVERSITY OF AKRON. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 634.

No. 98–1676. WWOR–TV, INC. *v.* LOCAL 209, NABET–CWA, AFL–CIO. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1203.

No. 98–1678. BREWSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 176 F. 3d 478.

No. 98–1683. CLEVELAND *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1196.

No. 98–1684. PAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 20.

No. 98–7510. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 152 F. 3d 381.

No. 98–7589. KING *v.* POPPELL ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8016. CLAPPER *v.* OHIO. Ct. App. Ohio, Carroll County. Certiorari denied.

No. 98–8044. REGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 168 F. 3d 480.

No. 98–8048. PYE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 269 Ga. 779, 505 S. E. 2d 4.

No. 98–8049. PERKINS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 269 Ga. 791, 505 S. E. 2d 16.

No. 98–8088. BARNES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 160 F. 3d 218.

No. 98–8094. WOOD *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 132 Idaho 88, 967 P. 2d 702.

No. 98–8112. BENNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–8121. HENRY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 269 Ga. 851, 507 S. E. 2d 419.

No. 98–8126. MALDONADO-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 163 F. 3d 1355.

No. 98–8378. LITTLE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 855.

No. 98–8380. PITTS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 98–8392. CROWELL *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–8394. STIDHUM *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 728 So. 2d 205.

No. 98–8398. WELCOME *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8399. WILLIAMS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8401. WALTER *v.* PARSONS CONSTRUCTION SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–8402. UNDERWOOD *v.* MERIWETHER COUNTY, GEORGIA, ET AL. Ct. App. Ga. Certiorari denied.

No. 98–8407. SMITH *v.* ROBERTS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 726 So. 2d 593.

No. 98–8410. BAKER *v.* WORKERS' COMPENSATION APPEAL BOARD. Sup. Ct. Pa. Certiorari denied.

No. 98–8411. WILLIAMS *v.* STACKS ET AL.; WILLIAMS *v.* LOPEZ ET AL.; and WILLIAMS *v.* MCELVANEY ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8412. JOHNSON *v.* GEORGIA DEPARTMENT OF REVENUE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 22.

No. 98–8421. OSBERRY *v.* DAY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–8425. JACKSON *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8426. LOFTIS *v.* CATOE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 2.

No. 98–8429. LAFRANCE *v.* MITCHELL, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 98–8430. KEELING, AKA OWENS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 256 App. Div. 2d 358, 682 N. Y. S. 2d 359.

No. 98–8431. MUELLER *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8432. BOUIE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8437. TRAFT *v.* AMERICAN THRESHOLD INDUSTRIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 20.

No. 98–8438. ABIDEKUN *v.* MARY IMOGENE BASSETT HOSPITAL. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 1147.

No. 98–8444. PATMON *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 975 P. 2d 860.

No. 98–8445. PORTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 723 So. 2d 191.

No. 98–8446. PEREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 711 So. 2d 1215.

No. 98–8450. GAUNCE *v.* DEVINCENTIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 98–8451. GRANDISON *v.* MARYLAND. Cir. Ct. Somerset County, Md. Certiorari denied.

No. 98–8454. GREENE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 192 Ariz. 431, 967 P. 2d 106.

No. 98–8477. GILLARD *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 98–8479. LYLE *v.* BRAZIL. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 490.

No. 98–8481. LA TOURETTE *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 156 N. J. 444, 720 A. 2d 339.

No. 98–8483. CARR *v.* HUN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1208.

No. 98–8488. BOBO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 725 So. 2d 1117.

No. 98–8491. GENIUS *v.* HALL, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT LANCASTER. C. A. 1st Cir. Certiorari denied. Reported below: 147 F. 3d 64.

No. 98–8495. FRIEDLAND *v.* NEW JERSEY DEPARTMENT OF CORRECTIONS. Sup. Ct. N. J. Certiorari denied. Reported below: 157 N. J. 648, 725 A. 2d 1128.

No. 98–8496. HOWLAND *v.* MEDART ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8498. EUSTACE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8499. EUSTACE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8501. DECKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–8502. GOINES *v.* HUTCHISON, SHERIFF, KNOX COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 156 F. 3d 1229.

No. 98–8506. FREEMAN *v.* SHAYNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 606.

No. 98–8512. SULESKI *v.* KENTUCKY; and
No. 98–8632. SULESKI *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 98–8517. WATKINS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 98–8519. WHITE *v.* GIBSON, WARDEN, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 98–8523. TYLER *v.* HOPKINS, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8524. NORTHARD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 741 So. 2d 490.

No. 98–8530. KOJO-KWARTENG *v.* WASHINGTON UNIVERSITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 494.

No. 98–8532. MURRAY *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 727 So. 2d 908.

No. 98–8534. CRUZ *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 98–8535. GYADU *v.* WORKERS' COMPENSATION COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 159 F. 3d 1346.

No. 98–8536. GYADU *v.* D'ADDARIO INDUSTRIES ET AL. App. Ct. Conn. Certiorari denied.

No. 98–8539. HASHIM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 298 Ill. App. 3d 1154, 738 N. E. 2d 231.

No. 98–8542. DAVILA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 249 App. Div. 2d 179, 672 N. Y. S. 2d 107.

No. 98–8547. PANIAGUA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–8548. SHERMAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 114 Nev. 998, 965 P. 2d 903.

No. 98–8549. SHEARIN *v.* BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 721 A. 2d 157.

No. 98–8554. OKOCHA *v.* CUYAHOGA COUNTY BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 3, 697 N. E. 2d 594.

No. 98–8572. BELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 725 So. 2d 836.

No. 98–8577. BROOKS *v.* MARTIN MARIETTA UTILITY SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1213.

No. 98–8599. MARIN *v.* SUPREME COURT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 98–8612. ANDREWS *v.* LAMBERT, DIRECTOR, CONSUMER AND FIDUCIARY COMPLIANCE DIVISION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–8638. ORTIZ *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 149 F. 3d 923.

No. 98–8639. HARRIS *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–8641. ALVAREZ-FONSECA *v.* PEPSI COLA OF PUERTO RICO BOTTLING CO. C. A. 1st Cir. Certiorari denied. Reported below: 152 F. 3d 17.

No. 98–8642. GONZALEZ *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8646. GINN *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 98–8655. CORBIN *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 98–8670. BUZZARD *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8672. PERELMAN *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8693. WEST *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 98–8701. OAKLEY *v.* RUSSELL. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 1159.

No. 98–8704. RIED *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE. C. A. 3d Cir. Certiorari denied.

No. 98–8705. ROBINSON *v.* SIKES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 98–8708. JOHNSON *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 343.

No. 98–8710. JENSEN *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 917.

No. 98–8719. CYR *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 169 Vt. 50, 726 A. 2d 488.

No. 98–8737. MELENDEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8739. OWAN *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 343.

No. 98–8740. MCINTOSH *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8747. DONALDSON *v.* FAMILY INDEPENDENCE AGENCY. Ct. App. Mich. Certiorari denied.

No. 98–8748. DONALDSON *v.* FAMILY INDEPENDENCE AGENCY. Ct. App. Mich. Certiorari denied.

No. 98–8752. EDWARDS *v.* FRANCHINI ET AL. Ct. App. N. M. Certiorari denied. Reported below: 125 N. M. 734, 965 P. 2d 318.

No. 98–8756. DEPREE *v.* LIBRARY OF CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 173.

No. 98–8791. WARD *v.* FRENCH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–8814. BAILEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8815. CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 156 F. 3d 22.

No. 98–8826. ALLAMBY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 15.

No. 98–8835. HIBBETTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 54.

No. 98–8837. HUGHES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–8844. MCCLELLAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 535.

No. 98–8848. JACKSON *v.* WHITE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 159 F. 3d 1351.

No. 98–8849. SEIFERT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 54.

No. 98–8850. PUGH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 158 F. 3d 1308.

No. 98–8854. MEANS *v.* HERMAN, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied.

No. 98–8864. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1219.

No. 98–8871. DONALDSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 98–8876. DAYE *v.* BRANNON. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 332.

No. 98–8877. GILL *v.* NEW YORK STATE BOARD OF LAW EXAMINERS. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1200.

No. 98–8885. MIRELES-ANZURES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 F. 3d 485.

No. 98–8888. WILLIS *v.* LATHROP CONSTRUCTION ASSOCIATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 61.

No. 98–8889. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 176 F. 3d 473.

No. 98–8891. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 98–8895. COTTON *v.* LARKINS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8898. LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 316.

No. 98–8900. WU *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 98–8901. YEPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–8902. CHANEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–8908. TINSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 49.

No. 98–8909. WARREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–8912. CONDON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 170 F. 3d 687.

No. 98–8913. SANTIAGO CHAVEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 483.

No. 98–8914. BIEGELEISEN *v.* ROSS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 164 F. 3d 617.

No. 98–8915. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8917. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–8921. ABANDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–8922. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 857.

No. 98–8939. BAILEY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 98–8940. GAEDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 145 F. 3d 1342.

No. 98–8941. EDWARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 860.

No. 98–8943. HARROD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 887.

No. 98–8944. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–8946. HELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 490.

No. 98–8951. DUNBAR *v.* GEORGIA PERSONNEL BOARD ET AL. Sup. Ct. Ga. Certiorari denied.

No. 98–8954. BIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–9008. NUCKOLS *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari denied.

No. 98–1466. PAGE, WARDEN *v.* MAHAFFEY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 162 F. 3d 481.

No. 98–1501. CONLON GROUP, INC. *v.* CITY OF ST. LOUIS. Ct. App. Mo., Eastern Dist. Motion of International Council of Shopping Centers, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 980 S. W. 2d 37.

Rehearing Denied

No. 98–1044. CHI-MING CHOW *v.* VAN BUREN TOWNSHIP ET AL., *ante*, p. 1017;

No. 98–1237. EL-FADLY *v.* CITY OF LOS ANGELES ET AL., *ante*, p. 1019;

No. 98–1262. LOMBARD CORP. *v.* COLLINS, COMMISSIONER, GEORGIA DEPARTMENT OF REVENUE, ET AL., *ante*, p. 1039;

No. 98–1292. FOREST COMMODITIES CORP. ET AL. *v.* CONSTRUCTION AGGREGATES, LTD., *ante*, p. 1039;

No. 98–7169. CARR *v.* LOUISIANA, 525 U. S. 1152;

No. 98–7189. TEDDER *v.* ALABAMA, 525 U. S. 1153;

No. 98–7210. PRUNTY *v.* OHIO, 525 U. S. 1153;

No. 98–7370. RODRIGUEZ-PENA *v.* UNITED STATES, 525 U. S. 1128;

No. 98–7553. JONES *v.* SOUTH CAROLINA, *ante*, p. 1021;

No. 98–7638. RAWLINS *v.* COURT OF APPEALS OF ARIZONA, DIVISION ONE, *ante*, p. 1023;

No. 98–7656. KISKILA ET AL. *v.* MCCONNELL ET AL., *ante*, p. 1024;

No. 98–7697. LACY *v.* AMERITECH MOBILE COMMUNICATIONS, INC., *ante*, p. 1025;

No. 98–7701. JASON *v.* SEATTLE UNIVERSITY ET AL., *ante*, p. 1025;

No. 98–7731. IN RE AINSWORTH, *ante*, p. 1016;

No. 98–7748. ESPARZA *v.* TRIJJILO, *ante*, p. 1009;

No. 98–7780. IN RE LINTZ, 525 U. S. 1137;

No. 98–7855. HARRISON, AKA IORIZZO *v.* UNITED STATES, 525 U. S. 1184; and

No. 98–7880. COOKS *v.* LOUISIANA, *ante*, p. 1042. Petitions for rehearing denied.

MAY 24, 1999

Vacated and Remanded on Appeal

No. 98–450. CROMARTIE ET AL. *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. Appeal from D. C. E. D. N. C. Judgment vacated, and case remanded for further consideration in light of *Hunt* v. *Cromartie*, *ante*, p. 541.

Certiorari Granted—Vacated and Remanded

No. 98–981. ATLAS COPCO AB ET AL. *v.* ALPINE VIEW CO. LTD. ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ruhrgas AG* v. *Marathon Oil Co.*, *ante*, p. 574. Reported below: 157 F. 3d 902.

Miscellaneous Orders. (See also Nos. 98–8486 and 98–8487, *ante*, p. 811.)

No. D–2073. IN RE DISBARMENT OF NUNES. David Smith Nunes, of Fort Lauderdale, 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–2074. IN RE DISBARMENT OF VEDATSKY. Robert J. Vedatsky, of Cherry Hill, N. J., 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–2075. IN RE DISBARMENT OF COHEN. Gerald Myron Cohen, of Boston, Mass., 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–68. DUKE ET AL. *v.* COLLECTION BUREAU CENTRAL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 98–418. WYOMING DEPARTMENT OF TRANSPORTATION *v.* STRAIGHT, 525 U. S. 982. Motion of respondent for leave to file application for attorney's fees denied without prejudice to filing the motion in the United States Court of Appeals for the Tenth Circuit.

No. 98–8567. DEBARDELEBEN *v.* HEDRICK, WARDEN, 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 June 14, 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. 98–8838. HARDY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 14, 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. 98–9119. IN RE MCNEELY. Petition for writ of habeas corpus denied.

No. 98–8905. IN RE COOPER. Petition for writ of mandamus denied.

No. 98–8918. IN RE JEFFS; and

No. 98–8968. IN RE HUGHLEY. Petitions for writs of prohibition denied.

Certiorari Denied

No. 98–915. HOUSTOUN, SECRETARY, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* MALDONADO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 157 F. 3d 179.

No. 98–1115. MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 158 F. 3d 428.

No. 98–1165. BEREANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 3.

No. 98–1275. CONSTANTINO *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 40.

No. 98–1298. LANDAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 155 F. 3d 93.

No. 98–1311. ROBERT COAL CO. ET AL. *v.* HOLLAND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 919.

No. 98–1316. ENERCON GMBH *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 151 F. 3d 1376.

No. 98–1334. FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* BRADSHAW ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 970 P. 2d 1234.

No. 98–1338. TEXAS ASSOCIATION OF DAIRYMEN ET AL. *v.* MINNESOTA MILK PRODUCERS ASSN. C. A. 8th Cir. Certiorari denied. Reported below: 153 F. 3d 632.

No. 98–1340. COHEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 151 F. 3d 1338.

No. 98–1346. H. N. AND FRANCES C. BERGER FOUNDATION *v.* CITY OF ESCONDIDO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–1373. C. R. BARD, INC. *v.* M3 SYSTEMS, INC.; and
No. 98–1572. M3 SYSTEMS, INC. *v.* C. R. BARD, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 157 F. 3d 1340.

No. 98–1433. CHILDREN OF THE ROSARY ET AL. *v.* CITY OF PHOENIX ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 154 F. 3d 972.

No. 98–1512. SANTA MONICA BEACH, LTD. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (SANTA MONICA RENT CONTROL BOARD, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 952, 968 P. 2d 993.

No. 98–1514. CASTELLANO ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 251 App. Div. 2d 194, 674 N. Y. S. 2d 364.

No. 98–1521. BROOKS ET AL. *v.* BARNES, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 158 F. 3d 1230.

No. 98–1522. HOBBS *v.* GEORGE. C. A. 10th Cir. Certiorari denied.

No. 98–1527. KNAUST ET AL. *v.* CITY OF KINGSTON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 157 F. 3d 86.

No. 98–1529. HESTER INDUSTRIES, INC. *v.* TYSON FOODS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 160 F. 3d 911.

No. 98–1535. WAGNER *v.* CITY OF WEST PALM BEACH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 1177.

No. 98–1536. BRAGDON *v.* ABBOTT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 163 F. 3d 87.

No. 98–1547. PONA *v.* CECIL WHITTAKER'S INC. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 155 F. 3d 1034.

No. 98–1553. DOUCET ET UX. *v.* OWENS CORNING FIBERGLAS, INC. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 966 S. W. 2d 161.

No. 98–1561. BURDICK ET UX. *v.* FRANKLIN COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 911.

No. 98–1571. INGRAM BARGE CO. ET AL. *v.* CLAIMANTS' STEERING COMMITTEE. C. A. 5th Cir. Certiorari denied. Reported below: 167 F. 3d 538.

No. 98–1574. HINCHLIFFE ET AL. *v.* PRUDENTIAL HOME MORTGAGE CO., INC. Super. Ct. Pa. Certiorari denied. Reported below: 715 A. 2d 514.

No. 98–1575. HINCHLIFFE ET AL. *v.* PRUDENTIAL HOME MORTGAGE CO., INC. Super. Ct. Pa. Certiorari denied. Reported below: 715 A. 2d 514.

No. 98–1578. AUSTIN INDEPENDENT SCHOOL DISTRICT ET AL. *v.* MEYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 271.

No. 98–1579. BMC INDUSTRIES, INC. *v.* BARTH INDUSTRIES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 160 F. 3d 1322.

No. 98–1589. EVERETT *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 158 F. 3d 1364.

No. 98–1592. LEWIS ET UX. *v.* GTE NORTH, INC. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1214.

No. 98–1593. MCDONALD *v.* CHEMICAL BANK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 98–1605. IN RE GREENBERG. Sup. Ct. N. J. Certiorari denied. Reported below: 155 N. J. 138, 714 A. 2d 243.

No. 98–1608. KELLY *v.* ESCAMBIA COUNTY ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 714 So. 2d 479.

No. 98–1624. KIRK ET UX. *v.* BERLIN PROBATE COURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 98–1627. CASTALDO *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1199.

No. 98–1640. THOMPSON, NEXT FRIEND OF THOMPSON, A MINOR *v.* MCFATTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 97.

No. 98–1663. DUVALL *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 493.

No. 98–1674. MEECE, DBA AMERICAN WHOLESALE JEWELRY *v.* ROLEX WATCH, U. S. A., INC. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 816.

No. 98–1693. SHEINBAUM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 136 F. 3d 443.

No. 98–1705. KANSAS *v.* BRANDAU. C. A. 10th Cir. Certiorari denied. Reported below: 168 F. 3d 1179.

No. 98–1710. MOHAMMED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–1711. DERRICK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 163 F. 3d 799.

No. 98–7700. LANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 149 F. 3d 1044 and 157 F. 3d 1161.

No. 98–7762. ALBOROLA-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 153 F. 3d 1269.

No. 98–7852. UNDERWOOD *v.* WILSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 151 F. 3d 292.

No. 98–8218. PRICE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 725 So. 2d 1063.

No. 98–8252. FULLER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 903.

No. 98–8544. GUEVARA, AKA ROSADO *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 243, 506 S. E. 2d 711.

No. 98–8556. CHENEY *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 98–8560. FISHER *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 18.

No. 98–8561. HILL *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8570. SHADEED *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 98–8576. LUANHASA *v.* BATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8578. COOPER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8579. XIN HANG CHEN *v.* RAZ ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 918.

No. 98–8580. BARNES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 720 So. 2d 518.

No. 98–8581. BRANCATO *v.* WHOLESALE TOOL CO., INC., ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8583. COLEMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–8584. DAY, AKA ALFORD *v.* GILMORE ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8590. MCLITTLE *v.* O'BRIEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 49.

No. 98–8592. BRINLEE *v.* WARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 98–8602. MILLENDER *v.* TACO BELL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 150 F. 3d 1196.

No. 98–8606. CLOUD *v.* WEBB. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 23.

No. 98–8607. COTNER *v.* HARGETT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 98–8608. CHIPMAN *v.* GUNDY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 98–8610. SMITH *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 163 F. 3d 599.

No. 98–8618. MCLAUGHLIN *v.* WEATHERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 3d 577.

No. 98–8623. ASHIEGBU *v.* WINSTON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 918.

No. 98–8627. WRIGHT *v.* CAPOTS ET AL. C. A. 6th Cir. Certiorari denied.

No. 98–8628. WHITE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–8635. REID *v.* CITY OF FLINT ET AL. Ct. App. Mich. Certiorari denied.

No. 98–8640. FLIPPEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 264, 506 S. E. 2d 702.

No. 98–8645. GREEN *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8649. AVILA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 291 Ill. App. 3d 1112, 716 N. E. 2d 875.

No. 98–8650. BLANKENSHIP *v.* GROOSE, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 492.

No. 98–8651. HAUPT *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 911.

No. 98–8653. CARTER *v.* FREESTONE COUNTY JAIL, FAIRFIELD, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 584.

No. 98–8654. BAKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 98–8657. ANDERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8661. PROCTOR *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–8671. BALLARD *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8696. FLETCHER ET AL. *v.* CITY OF FORT WAYNE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 162 F. 3d 975.

No. 98–8698. HERNANDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 19 Cal. 4th 835, 968 P. 2d 465.

No. 98–8706. KNESE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 985 S. W. 2d 759.

No. 98–8713. SELLS *v.* OHIO. Ct. App. Ohio, Logan County. Certiorari denied.

No. 98–8716. ODINKEMELU *v.* CONSOLIDATED STORES CORP. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 911.

No. 98–8738. MOORE *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 154 F. 3d 417.

No. 98–8749. GONZALES *v.* ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 98–8787. BROWN *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8788. RICE *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 98–8789. REDMON *v.* SMITH ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 729 So. 2d 922.

No. 98–8790. SMITH *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 152 F. 3d 929.

No. 98–8800. CANNON *v.* AYERS ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8819. STAFFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 160 F. 3d 265.

No. 98–8842. Ross *v.* Texas. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 98–8851. Seavey *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 98–8852. Martin *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 163 F. 3d 1212.

No. 98–8860. Leary *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 98–8919. Norris *v.* Bell, Warden. C. A. 6th Cir. Certiorari denied.

No. 98–8920. McNeill *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 438, 700 N. E. 2d 596.

No. 98–8924. Rios-Castano *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 832.

No. 98–8936. Charif *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 334.

No. 98–8942. Hussen *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 257 Va. 93, 511 S. E. 2d 106.

No. 98–8949. Sadat *v.* Tucker, Chairman, Virginia Parole Board, et al. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 44.

No. 98–8955. Boyd *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 98–8956. Toliver *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1211.

No. 98–8958. Talley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 164 F. 3d 989.

No. 98–8959. Tapar et al. *v.* City of Los Angeles et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98–8960. DeTemple *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 162 F. 3d 279.

No. 98–8965. Danley *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 98–8974. GRAY *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 173 F. 3d 435.

No. 98–8984. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 223.

No. 98–8986. GOHEEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 852.

No. 98–8989. HARRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 483.

No. 98–8992. CHARGOIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 868.

No. 98–8993. COLEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 428.

No. 98–8994. BERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 164 F. 3d 844.

No. 98–8996. ALLEN *v.* HENDERSON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 489.

No. 98–8997. BUNDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–9000. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 170 F. 3d 187.

No. 98–9001. HENNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 98–9003. GUNWALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–9004. GARLOCK, AKA HALSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 168 F. 3d 506.

No. 98–9005. HAESE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 359.

No. 98–9007. MUHAMMAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 165 F. 3d 327.

No. 98–9009. BARTALOME JIMENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–9012. LATTIMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 60.

No. 98–9013. MCINTYRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–9014. INFANTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9018. PEREZ-OCANAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 866.

No. 98–9019. RUSH *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 98–9023. WINTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 913.

No. 98–9024. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 336.

No. 98–9026. THEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 173 F. 3d 846.

No. 98–9027. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 F. 3d 486.

No. 98–9028. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 46.

No. 98–9030. KELLY *v.* SIZER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 482.

No. 98–9037. BONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1296.

No. 98–9038. PEREZ-BASTAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 3d 184.

No. 98–9040. BENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 496.

No. 98–9041. ANTONIO HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 149 F. 3d 1192.

No. 98–9042. DODSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 145 F. 3d 1326.

No. 98–9046. SMITH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–9047. SANCHEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 98–9048. PORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1219.

No. 98–9049. LAMPKIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 F. 3d 607.

No. 98–9050. MAGALLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–9058. ANDERSON *v.* COYLE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 854.

No. 98–9105. FIELDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 167 F. 3d 1189.

No. 98–9151. SECRIST *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 224 Wis. 2d 201, 589 N. W. 2d 387.

Rehearing Denied

No. 98–1149. COTO ET AL. *v.* J. RAY MCDERMOTT, S. A., ET AL., *ante,* p. 1050;

No. 98–1173. CITY OF ATLANTA *v.* R. MAYER OF ATLANTA, INC., ET AL., *ante,* p. 1038;

No. 98–1219. RUSSELL *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, *ante,* p. 1050;

No. 98–1231. BANKRUPTCY ESTATE OF UNANUE-CASAL, AKA UNANUE *v.* GOYA FOODS, INC., ET AL., *ante,* p. 1051;

No. 98–1250. UNANUE-CASAL, AKA UNANUE *v.* GOYA FOODS, INC., ET AL., *ante,* p. 1051;

No. 98–7366. WILLIAMS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 525 U. S. 1158;

No. 98–7607. LEISURE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL., *ante,* p. 1041;

No. 98–7641. SIMS *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *ante,* p. 1023;

No. 98–7773. RAVER *v.* MCANINCH, WARDEN, *ante,* p. 1041;

No. 98–8079. LAYTON *v.* GENERAL MOTORS CORP. ET AL., *ante*, p. 1072;

No. 98–8148. SIDLES *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL., *ante*, p. 1055; and

No. 98–8448. IN RE YOUNGBEAR, *ante*, p. 1049. Petitions for rehearing denied.

MAY 25, 1999

Dismissal Under Rule 46

No. 98–9143. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Orders

No. A–992. WISE *v.* MISSOURI ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 98–9540 (A–991). IN RE WISE. 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. 98–9527 (A–971). WISE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. 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.

No. 98–9536 (A–986). HARPER *v.* PARKER, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 177 F. 3d 567.

JUNE 1, 1999

Dismissals Under Rule 46

No. 98–8863. ANTEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 168 F. 3d 505.

No. 98–999. NGO *v.* RENO HILTON RESORT CORP., DBA RENO HILTON, ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 156 F. 3d 988.

No. 98–9395. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.

Certiorari Granted—Vacated and Remanded

No. 98–126. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS *v.* DOE, A MINOR, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Monroe County Bd. of Ed.*, *ante*, p. 629. Reported below: 138 F. 3d 653.

No. 98–980. JEAN *v.* COLLINS, CHIEF OF DETECTIVES, CITY OF JACKSONVILLE, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson* v. *Layne*, *ante*, p. 603. Reported below: 155 F. 3d 701.

No. 98–1361. RICHARDSON *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471 (1999). Reported below: 162 F. 3d 1338.

No. 98–1381. AMERITECH CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366 (1999). Reported below: 153 F. 3d 597.

No. 98–5286. MOORE *v.* PAYLESS SHOE SOURCE, INC. C. A. 8th 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 *Cleveland* v. *Policy Management Systems Corp.*, *ante*, p. 795. Reported below: 139 F. 3d 1210.

Miscellaneous Orders

No. D–2044. IN RE DISBARMENT OF MCCALLUM. William C. McCallum, of Framingham, Mass., having requested to resign as a member of the Bar of this Court, it is ordered that his name

be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on February 22, 1999 [525 U. S. 1136], is discharged.

No. D–2046. IN RE DISBARMENT OF PELLICANE. Disbarment entered. [For earlier order herein, see 525 U. S. 1175.]

No. D–2053. IN RE DISBARMENT OF SHAFRAN. Disbarment entered. [For earlier order herein, see *ante,* p. 1014.]

No. D–2054. IN RE DISBARMENT OF SENTEEN. Disbarment entered. [For earlier order herein, see *ante,* p. 1014.]

No. D–2056. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see *ante,* p. 1015.]

No. D–2058. IN RE DISBARMENT OF JACOBS. Disbarment entered. [For earlier order herein, see *ante,* p. 1036.]

No. D–2076. IN RE DISBARMENT OF PATT. P. Jules Patt, of Hollidaysburg, Pa., 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–69. HUBBART *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, ET AL.;

No. M–70. GRILLO *v.* UNITED STATES; and

No. M–71. HOWARD *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 98–7299. IN RE RIVERA; and

No. 98–7983. IN RE RIVERA. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1062] denied.

No. 98–8711. TYLER ET AL. *v.* MORIARTY, JUDGE, CIRCUIT COURT OF MISSOURI, CITY OF ST. LOUIS, ET AL. C. A. 8th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until June 22, 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. 98–8726. PEACE *v.* EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 22, 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. 98–1362. IN RE RICHARDSON;
No. 98–8782. IN RE MCNEIL;
No. 98–8926. IN RE SIGGERS; and
No. 98–9288. IN RE HARRISON-BEY. Petitions for writs of habeas corpus denied.

No. 98–8736. IN RE WILLIAMS LEWIS; and
No. 98–8880. IN RE BURNETT. Petitions for writs of mandamus denied.

Certiorari Denied

No. 97–1991. WAL-MART STORES, INC. *v.* GRIFFITH. C. A. 6th Cir. Certiorari denied. Reported below: 135 F. 3d 376.

No. 98–249. MAYHEW ET AL. *v.* TOWN OF SUNNYVALE. Sup. Ct. Tex. Certiorari denied. Reported below: 964 S. W. 2d 922.

No. 98–859. BOEING CO. *v.* ALDRICH. C. A. 10th Cir. Certiorari denied. Reported below: 146 F. 3d 1265.

No. 98–1048. MEESTER *v.* HENDERSON, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 149 F. 3d 855.

No. 98–1097. U-HAUL CO. OF CLEVELAND *v.* KUNKLE. C. A. 6th Cir. Certiorari denied. Reported below: 165 F. 3d 29.

No. 98–1203. GILPIN *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 155 F. 3d 1353.

No. 98–1206. MABEY, CHAPTER 11 TRUSTEE FOR CAJUN ELECTRIC POWER COOPERATIVE, INC., ET AL. *v.* SOUTHWESTERN ELECTRIC POWER CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 150 F. 3d 503.

No. 98–1280. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 157 F. 3d 451.

No. 98–1297. NICHOLSON *v.* KENTUCKY ET AL.; and
No. 98–1331. BIRD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 979 S. W. 2d 915.

No. 98–1369. BURKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 152 F. 3d 1329.

No. 98–1372. BROWN, ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED *v.* NATIONSBANK OF GEORGIA, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 8.

No. 98–1391. BLAREK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1202.

No. 98–1428. CORN, TRUSTEE *v.* CITY OF LAUDERDALE LAKES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 98.

No. 98–1440. PENSION BENEFIT GUARANTY CORPORATION *v.* CF&I FABRICATORS OF UTAH, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 150 F. 3d 1293.

No. 98–1541. BRUNEAU, A MINOR, BY AND THROUGH HER GUARDIANS AD LITEM, SCHOFIELD ET AL. *v.* SOUTH KORTRIGHT CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 163 F. 3d 749.

No. 98–1546. COYNE *v.* MOHR, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 872.

No. 98–1550. HARRIS *v.* GENERAL MOTORS POWERTRAIN. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1209.

No. 98–1560. DROSTE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 83 Ohio St. 3d 36, 697 N. E. 2d 620.

No. 98–1565. ENTEZARI-AFSHAR *v.* WRIGHT. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1217.

No. 98–1566. CLAPPER *v.* CHESAPEAKE CONFERENCE OF SEVENTH-DAY ADVENTISTS. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1208.

No. 98–1569. BROWDER *v.* GENERAL MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 162 F. 3d 99.

No. 98–1588. BENTON *v.* TEXAS COMMISSION FOR LAWYER DISCIPLINE. Sup. Ct. Tex. Certiorari denied. Reported below: 980 S. W. 2d 425.

No. 98–1594. HOWERY *v.* WOLFBERG ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 98–1614. CROMER *v.* BAYLOR UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 338.

No. 98–1630. FISHER ET VIR *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY (CITIBANK, N. A. (NEW YORK), ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 98–1686. TRANSAERO, INC. *v.* LA FUERZA AEREA BOLIVIANA. C. A. 2d Cir. Certiorari denied. Reported below: 162 F. 3d 724.

No. 98–1697. WALTERS ET AL. *v.* EDGAR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 163 F. 3d 430.

No. 98–1707. SLOANE *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 334.

No. 98–1717. INTERNATIONAL TELECARD ASSN. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 98–1720. ARAMONY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 655.

No. 98–1723. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 856.

No. 98–1731. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–1746. PETTUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 161 F. 3d 21.

No. 98–1749. MARLATT *v.* UNITED STATES (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 503.

No. 98–1751. DABNEY *v.* RUBIN, SECRETARY OF THE TREASURY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1220.

No. 98–1759. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 431.

No. 98–1765. CRENSHAW, AKA MAPP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 33.

No. 98–1786. CAMACHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 866.

No. 98–7878. VEAL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 153 F. 3d 1233.

No. 98–7929. TATE *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 164 F. 3d 631.

No. 98–7979. SHORTY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 159 F. 3d 312.

No. 98–7981. POE *v.* UNITED STATES; and
No. 98–8017. BOYD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 149 F. 3d 1062.

No. 98–8203. OLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 166 F. 3d 1216.

No. 98–8226. PIKE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 978 S. W. 2d 904.

No. 98–8262. ATKINS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 62, 505 S. E. 2d 97.

No. 98–8278. CREECH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 132 Idaho 1, 966 P. 2d 1.

No. 98–8588. SHAMBURGER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 98–8620. KARRIEM *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 717 A. 2d 317.

No. 98–8648. PRICE *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 98–8673. ROGERS *v.* CIRCUIT COURT OF MARYLAND, MONTGOMERY COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 912.

No. 98–8674. SANDERS *v.* GOMEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8676. MARTINEZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8678. MINNIECHESKE *v.* SHAWANO COUNTY ET AL. Ct. App. Wis. Certiorari denied. Reported below: 221 Wis. 2d 331, 585 N. W. 2d 625.

No. 98–8679. MOORE *v.* SAPP ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8682. JONES *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–8690. WHITE *v.* GIBSON, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 98–8691. WHITSEY *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8695. HURNS *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 98–8703. RATLIFF *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8720. CREEL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 162 F. 3d 385.

No. 98–8727. WICKLIFFE *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 98–8730. BASS *v.* PRUNTY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8732. WILLIAMS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 913.

No. 98–8735. KANE *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 916.

No. 98–8743. SERGE CORREA *v.* ELIOPOULAS ET AL. (two judgments). C. A. 7th Cir. Certiorari denied.

No. 98–8744. BECTON *v.* MARYLAND ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 98–8745. DENNEY *v.* EATON CORP. C. A. 7th Cir. Certiorari denied. Reported below: 165 F. 3d 31.

No. 98–8750. GENTRY *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 855.

No. 98–8757. RUBERGE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8759. WALKER, AKA REYNOLDS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 98–8762. KUMARAN *v.* O'MALLEY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 295 Ill. App. 3d 1105, 726 N. E. 2d 225.

No. 98–8764. BONNAR *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 98–8767. CHANG *v.* BEAUPIED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 1138.

No. 98–8832. BUSH *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 7 Neb. App. xvi.

No. 98–8841. ROYSTER *v.* GALLETTA, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 1201.

No. 98–8862. TAYLOR *v.* REINHARD, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 98–8879. SPAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–8887. WILLIAMS *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–8892. ABRAMS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 98–8897. JOHNSON *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8928. KERSTEN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 155 F. 3d 1177.

No. 98–8931. TYLER *v.* ROBERTS. C. A. D. C. Cir. Certiorari denied.

No. 98–8945. HOUGLAND ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 161 F. 3d 15.

No. 98–8950. ATWOOD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8953. BRYANT *v.* MORTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 859.

No. 98–8982. SHURELDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 430.

No. 98–8987. EPLEY *v.* WEST ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 98–8998. WALKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9011. MACKLIN *v.* FRANK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–9031. LEE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 98–9052. RAAB *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 220 Wis. 2d 715, 583 N. W. 2d 673.

No. 98–9054. BEAVEN *v.* SCROGHAM. C. A. 7th Cir. Certiorari denied.

No. 98–9055. CLAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 430.

No. 98–9056. ANGELO VARGAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 922.

No. 98–9063. MURPHY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 3d 496.

No. 98–9064. WARWICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 167 F. 3d 965.

No. 98–9065. WILLIAMS *v.* FEDERAL BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 51.

No. 98–9067. PITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 45.

No. 98–9068. PALOZIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 166 F. 3d 502.

No. 98–9070. ANTONIO REVELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 865.

No. 98–9071. AMBROSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 159 F. 3d 1356.

No. 98–9075. CUELLAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 918.

No. 98–9079. BUNDOC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 36.

No. 98–9081. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 46.

No. 98–9086. HALL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 982 S. W. 2d 675.

No. 98–9087. AGUILERA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 127 F. 3d 829.

No. 98–9088. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 502.

No. 98–9091. PENIX *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 856.

No. 98–9093. RODRIGUEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 162 F. 3d 135.

No. 98–9100. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–9101. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 59.

No. 98–9104. ELFENBEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 F. 3d 1358.

No. 98–9107. HUPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–9109. HARRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 170 F. 3d 186.

No. 98–9112. KILMARTIN *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL FACILITY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 161 F. 3d 1125.

No. 98–9115. MANGHAM *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9117. KEEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 60.

No. 98–9122. KERKOWSKI *v.* COSTELLO ET AL. C. A. 3d Cir. Certiorari denied.

No. 98–9129. GALLEGOS-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 3d 183.

No. 98–9131. MANTILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–9134. PECK ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–9135. PUNGITORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 98–9138. TILGHMAN *v.* BESHEARS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 334.

No. 98–9139. THOMPSON *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 172 F. 3d 921.

No. 98–9144. USI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 176 F. 3d 476.

No. 98–9146. VERNER *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 350.

No. 98–9150. ROMAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 868.

No. 98–9157. NEILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 943.

No. 98–9158. MCCLUNG ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 172 F. 3d 45.

No. 98–9163. NAVA-SALGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 503.

No. 98–9164. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 173 F. 3d 422.

No. 98–9165. BLANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 502.

No. 98–9168. MICHAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 882.

No. 98–9173. MEEKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 349.

No. 98–9179. PERRONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–9193. WILD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 98–9196. WILD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 866.

No. 97–1914. CABLE NEWS NETWORK, INC., ET AL. *v.* BERGER ET AL. C. A. 9th Cir. Motion of ABC, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 129 F. 3d 505.

No. 98–101. MCCAFFREY ET AL. *v.* OONA, R.-S.-, A MINOR, BY KATE S., HER GUARDIAN. C. A. 9th Cir. Motion of Redwood Empire Schools Insurance Group for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 143 F. 3d 473.

No. 98–1500. WEST PUBLISHING CO. ET AL. *v.* MATTHEW BENDER & CO., INC., ET AL. C. A. 2d Cir. Motion of Malla Pollack for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 158 F. 3d 693.

No. 98–1519. WEST PUBLISHING CO. ET AL. *v.* HYPERLAW, INC. C. A. 2d Cir. Motion of Malla Pollack for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 158 F. 3d 674.

Rehearing Denied

No. 98–6723. PEDONE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL., 525 U. S. 1078;

No. 98–7491. JACKSON *v.* WHITTLE ET AL., *ante*, p. 1007;

No. 98–7659. CHUMPIA *v.* MICHIGAN STATE UNIVERSITY, *ante*, p. 1024;

No. 98–7820. JOHNSON *v.* MOORE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *ante*, p. 1042;

No. 98–7833. RIVERA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1027;

No. 98–7958. LAVERTU *v.* NEW HAMPSHIRE SUPREME COURT, *ante*, p. 1054; and

No. 98–8196. COLLINS *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1056. Petitions for rehearing denied.

JUNE 2, 1999

Miscellaneous Orders

No. 98–9569 (A–1002). IN RE MOORE. 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.

No. 98–9588 (A–1008). IN RE MOORE. 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.

No. 98–9610 (A–1022). IN RE MOORE. 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.

JUNE 4, 1999

Miscellaneous Order

No. A–999. BECK *v.* TAYLOR, WARDEN. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

JUNE 7, 1999

Certiorari Granted—Vacated and Remanded

No. 98–1112. WEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Richardson* v. *United States*, *ante*, p. 813. Reported below: 142 F. 3d 1408.

No. 98–6975. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Richardson* v. *United States*, *ante*, p. 813. Reported below: 162 F. 3d 1158.

No. 98–7404. ROZIER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Richardson* v. *United States*, *ante*, p. 813. Reported below: 161 F. 3d 20.

Miscellaneous Orders

No. D–2070. IN RE DISBARMENT OF CONLON. Disbarment entered. [For earlier order herein, see *ante*, p. 1096.]

No. D–2077. IN RE DISBARMENT OF ARNOPOLE. David Lester Arnopole, of Los Angeles, 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–2078. IN RE DISBARMENT OF PISANO. Charles J. Pisano, of Tempe, Ariz., 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–2079. IN RE DISBARMENT OF QUAINTANCE. Charles Lee Quaintance, of Highland Falls, 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–2080. IN RE DISBARMENT OF O'GRADY. John Joseph O'Grady, of Kew Gardens, 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. M–72. LORENZ *v.* VIRGINIA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 98–1446. S & R COMPANY OF KINGSTON ET AL. *v.* LATONA TRUCKING, INC. C. A. 2d Cir. Joint motion to defer consideration of petition for writ of certiorari granted.

No. 98–1628. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT *v.* DAWAVENDEWA. C. A. 9th Cir.; and

No. 98–8327. DOMINGUES *v.* NEVADA. Sup. Ct. Nev. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 98–8609. IN RE RICHARDS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1062] denied.

No. 98–8785. BAEZ *v.* BRESLIN. C. A. 11th Cir.;

No. 98–8798. BALAWAJDER *v.* SCOTT, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir.;

No. 98–8802. CUNNINGHAM *v.* POPPELL, WARDEN, ET AL. C. A. 5th Cir.;

No. 98–8822. BRANCATO *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. C. A. 8th Cir.;

No. 98–8866. CROSS *v.* SUPERIOR COURT OF CALIFORNIA, PLACER COUNTY, ET AL. C. A. 9th Cir.;

No. 98–8867. CROSS *v.* MOULDS, CHIEF MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, ET AL. C. A. 9th Cir.;

No. 98–8868. CROSS *v.* COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT. C. A. 9th Cir.;

No. 98–8869. CROSS *v.* PELICAN BAY STATE PRISON ET AL. C. A. 9th Cir.; and

No. 98–9237. DEBARDELEBEN *v.* UNITED STATES. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until June 28, 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. 98–8821. ARBOGAST *v.* ALCOA BUILDING PRODUCTS. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 28, 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. 98–9342. IN RE MAYEUX; and

No. 98–9407. IN RE RODLEY. Petitions for writs of habeas corpus denied.

No. 98–5804. IN RE SMITH. Petition for writ of habeas corpus denied. JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER would set the case for full briefing.

No. 98–8818. IN RE SCARBOROUGH; and

No. 98–8857. IN RE MASON. Petitions for writs of mandamus denied.

Certiorari Granted

No. 98–1480. BECK *v.* PRUPIS ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 162 F. 3d 1090.

Certiorari Denied

No. 98–1121. RUIZ ET AL. *v.* CULBERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 161 F. 3d 814.

No. 98–1265. ADAMS ET AL. *v.* HINCHMAN, ACTING COMPTROLLER GENERAL, GOVERNMENT ACCOUNTING OFFICE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 154 F. 3d 420.

No. 98–1404. ROYSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 22.

No. 98–1417. GRAND CANYON TRUST ET AL. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 154 F. 3d 455.

No. 98–1426. BATJAC PRODUCTIONS INC. *v.* GOODTIMES HOME VIDEO CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 160 F. 3d 1223.

No. 98–1465. IN RE WRIGHT;
No. 98–1468. IN RE BERRY;
No. 98–1469. IN RE BIECK;
No. 98–1470. IN RE BURNS; and
No. 98–1498. SCOTT, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA *v.* TONE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 151 F. 3d 217.

No. 98–1471. ADVANTAGE WEST PALM BEACH, INC., ET AL. *v.* WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 728 So. 2d 755.

No. 98–1485. IDAHO *v.* NEWSOM. Sup. Ct. Idaho. Certiorari denied. Reported below: 132 Idaho 698, 979 P. 2d 100.

No. 98–1497. FARIA *v.* TOWN OF PALM BEACH. C. A. 11th Cir. Certiorari denied. Reported below: 166 F. 3d 352.

No. 98–1506. BARRY ET AL. *v.* MCSHARES, INC., DBA RESEARCH PRODUCTS. Sup. Ct. Kan. Certiorari denied. Reported below: 266 Kan. 479, 970 P. 2d 1005.

No. 98–1583. UNITED STATES *v.* ANDERSON. C. A. 10th Cir. Certiorari denied. Reported below: 154 F. 3d 1225.

No. 98–1602. GOODSPEED *v.* WHITMAN COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 606.

No. 98–1604. STEWART *v.* JOSLIN. C. A. 5th Cir. Certiorari denied. Reported below: 158 F. 3d 584.

No. 98–1606. DUNN *v.* COMMISSION ON PROFESSIONAL COMPETENCE (JURUPA UNIFIED SCHOOL DISTRICT, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 98–1607. AMOS-GOODWIN ET AL. *v.* CHARLESTON COUNTY COUNCIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 161 F. 3d 1.

No. 98–1609. WEEKLY *v.* CAJUN BAG CO. Ct. App. La., 3d Cir. Certiorari denied.

No. 98–1613. DOE ET AL. *v.* BOARD OF EDUCATION OF BALTIMORE COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 165 F. 3d 260.

No. 98–1615. MOTOWN BEVERAGE COMPANY OF OHIO ET AL. *v.* MOTOWN RECORD CO., L. P. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 98–1616. HOOKER ET AL. *v.* AGRIBANK, FCB, ET AL. C. A. 8th Cir. Certiorari denied.

No. 98–1619. FERGUSON ET AL. *v.* CITY OF PHOENIX ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 157 F. 3d 668.

No. 98–1621. ROE *v.* TENNESSEE. Ct. App. Tenn. Certiorari denied.

No. 98–1622. MORGAN *v.* LAKE COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 165 F. 3d 917.

No. 98–1625. MILLER *v.* BOARD OF TRUSTEES, RIRIE JOINT SCHOOL DISTRICT NO. 252, ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 132 Idaho 244, 970 P. 2d 512.

No. 98–1626. KENTUCKY RIGHT TO LIFE, INC., ET AL. *v.* STENGEL, COMMONWEALTH ATTORNEY, JEFFERSON COUNTY,

ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 48.

No. 98–1633. KEELER *v.* ACADEMY OF AMERICAN FRANCISCAN HISTORY, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 122 Md. App. 795.

No. 98–1634. DANIELS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 724 A. 2d 953.

No. 98–1644. CECIL *v.* WHITT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 168 F. 3d 489.

No. 98–1694. WILLIAMS *v.* VENTURA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1171.

No. 98–1712. VECTRA FITNESS, INC. *v.* TNWK CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 162 F. 3d 1379.

No. 98–1726. FRANDSEN *v.* FLORIDA. Cir. Ct. Brevard County, Fla. Certiorari denied.

No. 98–1738. MELLOTT ET AL. *v.* HEEMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 161 F. 3d 117.

No. 98–1770. TEXAS *v.* CONSAUL. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 960 S. W. 2d 680.

No. 98–1791. SWANQUIST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 161 F. 3d 1064.

No. 98–1806. LOFRANCO *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 175 F. 3d 1008.

No. 98–1817. CROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 164 F. 3d 229.

No. 98–1822. IN RE KERLINSKY. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 428 Mass. 656, 704 N. E. 2d 503.

No. 98–1826. GAINER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 98–6417. RICE *v.* CARTER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 148 F. 3d 747.

No. 98–7261. LYLES *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 98–8290. ORTIZ-PEREZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 339.

No. 98–8387. WILLIAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 554 Pa. 1, 720 A. 2d 679.

No. 98–8395. DAVIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 349 N. C. 1, 506 S. E. 2d 455.

No. 98–8769. HUNDLEY *v.* CITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 172 F. 3d 859.

No. 98–8772. PHELPS *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 98–8774. RELFORD *v.* HOUSTON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 98–8781. MUNICI *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 98–8783. MARTIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–8786. ALLEN *v.* EMPLOYMENT DEPARTMENT ET AL. Ct. App. Ore. Certiorari denied. Reported below: 157 Ore. App. 397, 972 P. 2d 1230.

No. 98–8793. TRIPLETT *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 720 So. 2d 468.

No. 98–8794. OMOSEFUNMI *v.* MERRIMACK COUNTY HOUSE OF CORRECTIONS ET AL. C. A. 1st Cir. Certiorari denied.

No. 98–8797. CHAPPELL *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1208.

No. 98–8803. BUFORD *v.* FLORIDA DIVISION OF DRIVER LICENSES ET AL. C. A. 11th Cir. Certiorari denied.

No. 98–8805. ORLOWSKI *v.* CITY OF COCOA BEACH, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 719 So. 2d 893.

No. 98–8806. CUMMINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 968 P. 2d 821.

No. 98–8810. O'NEILL *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 98–8812. SMITH *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 589 N. W. 2d 546.

No. 98–8817. RICHARDSON *v.* MARYLAND STATE'S ATTORNEYS OFFICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 174.

No. 98–8823. COLEMAN *v.* SMILEY, SUPERINTENDENT, WARREN CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 164 F. 3d 624.

No. 98–8827. DAY, AKA ALFORD *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 98–8830. WASHINGTON *v.* WILLIAMS, MAYOR OF DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 98–8831. THOMAS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 708 So. 2d 103.

No. 98–8833. ZICHKO *v.* CLEGG, SHERIFF, KOOTENAI COUNTY, IDAHO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 162 F. 3d 1171.

No. 98–8836. HAZLEY *v.* CITY OF AKRON ET AL. Ct. App. Ohio, Summit County. Certiorari denied.

No. 98–8843. PEARSON *v.* CATOE. C. A. 5th Cir. Certiorari denied.

No. 98–8846. KENT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 98–8847. LOTTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 255 Neb. 456, 586 N. W. 2d 591, and 255 Neb. 889, 587 N. W. 2d 673.

No. 98–8861. TAYLOR *v.* CITY OF ROCKFORD, ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 98–8962. BOYD *v.* BARKLEY, CHAPTER 13 TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 166 F. 3d 341.

No. 98–8980. SMITH *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 98–9039. BAKER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 98–9060. CHAMBERS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 982 S. W. 2d 243.

No. 98–9072. DRIVER *v.* LUEBBERS, SUPERINTENDENT, RENZ CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 98–9074. BAGLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9128. FOWLER *v.* CITY OF RALEIGH PARKS AND RECREATION DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1209.

No. 98–9153. JIMENEZ-LINARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 168 F. 3d 503.

No. 98–9159. MAYS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 173 F. 3d 862.

No. 98–9166. BENNEFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9167. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 3d 184.

No. 98–9169. MCGARY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 98–9172. MCINTYRE *v.* WARD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 98–9176. BOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 98–9181. MICHALEC *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 176 F. 3d 476.

No. 98–9184. INTISSAR, AKA IBRAHIM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9190. TRUEMAN *v.* LEKBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 168 F. 3d 479.

No. 98–9195. PARISE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 158 F. 3d 655 and 165 F. 3d 15.

No. 98–9198. SWISHER *v.* COMMISSION FOR LAWYER DISCIPLINE. Sup. Ct. Tex. Certiorari denied.

No. 98–9202. COUEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–9203. ASCANIO-BLANCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9204. BROOKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 172 F. 3d 54.

No. 98–9215. WOODS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 882.

No. 98–9218. CRUZ MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 1222.

No. 98–9219. GROSS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 167 F. 3d 628.

No. 98–9222. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 168 F. 3d 505.

No. 98–9224. RAINES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 98–9226. CIPRIANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 166 F. 3d 413.

No. 98–9228. AGUILAR-AYALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 1218.

No. 98–9229. WILLIAMS-MAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 170 F. 3d 187.

No. 98–9231. DIAZ-DE LA O *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 F. 3d 866.

No. 98–9232. GHANI-FARAHI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 430.

No. 98–9235. HAZEEM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 173 F. 3d 847.

No. 98–9240. LEONARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 63.

No. 98–9241. LATHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 165 F. 3d 39.

No. 98–9242. MIDDLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 F. 3d 724.

No. 98–9252. GALICIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 F. 3d 344.

No. 98–9253. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 427.

No. 98–9255. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 124 F. 3d 193.

No. 98–9258. YANG JIN SONG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 175 F. 3d 1008.

No. 98–9263. MCANULTY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 175 F. 3d 1017.

No. 98–9264. PRATT *v.* UNITED STATES PAROLE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 58.

No. 98–9266. SELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 98–9270. WARREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 98–9271. VEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 3d 64.

No. 98–9274. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 166 F. 3d 350.

No. 98–9275. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 172 F. 3d 881.

No. 98–9277. CHRISTOPHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 430.

No. 98–9292. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 98–1513. REDBUD COMMUNITY HOSPITAL ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL.; and

No. 98–1526. SCHUG *v.* BURROWS, SUCCESSOR-IN-INTEREST TO BURROWS, DECEASED, ET AL. C. A. 9th Cir. Motion of Physician Insurers Association of America for leave to file a brief as *amicus curiae* in No. 98–1526 granted. Motion of California Medical Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 165 F. 3d 36.

Rehearing Denied

No. 98–1162. SUMRELL *v.* VIRGINIA, *ante*, p. 1006;

No. 98–1252. ORISEK *v.* AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS, *ante*, p. 1065;

No. 98–1341. BLUM ET UX. *v.* STATE FARM FIRE & CASUALTY CO. ET AL., *ante*, p. 1068;

No. 98–1442. IN RE MURPHY, *ante*, p. 1063;

No. 98–1479. ROSENTHAL *v.* CONRAD, *ante*, p. 1069;

No. 98–7168. IN RE ABIDEKUN, 525 U. S. 1138;

No. 98–7515. GONZALEZ *v.* WALLIS ET AL., *ante*, p. 1008;

No. 98–7779. LAGO *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1041;

No. 98–7923. ESTELL *v.* EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA, *ante*, p. 1053;

No. 98–7993. FALES *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS, *ante*, p. 1043;

No. 98–8015. WALLS *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante*, p. 1071;

No. 98–8100. RILEY *v.* ROE, WARDEN, ET AL., *ante*, p. 1072;

No. 98–8138. BRUMBAUGH-CHANLEY *v.* CALIFORNIA, *ante*, p. 1073;

No. 98–8143. TYLER *v.* LOUISIANA, *ante*, p. 1073;

No. 98–8163. BAKER *v.* DEPARTMENT OF THE ARMY ET AL., *ante*, p. 1043;

No. 98–8165. THORN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1074;

No. 98–8234. BURGESS *v.* MONTANA ET AL., *ante*, p. 1090;

No. 98–8330. HOBBS *v.* HOBBS, *ante*, p. 1075;

No. 98–8353. IN RE SEATON, *ante*, p. 1037;

No. 98–8377. MCCOY *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL., *ante*, p. 1101;

No. 98–8420. SUMTER *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 1075;

No. 98–8466. BURKE *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL., *ante*, p. 1092; and

No. 98–8489. COOK *v.* ROMINE, WARDEN, ET AL., *ante*, p. 1077. Petitions for rehearing denied.

No. 98–1223. WILLIAMS ET UX. *v.* KLAMATH COUNTY, *ante*, p. 1019. Motion of petitioners for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 98–8261. AJAJ *v.* UNITED STATES, *ante*, p. 1044. Motion for leave to file petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 26, 1999, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1170. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, and 520 U. S. 1285.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 1999

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 1999

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014.

[See *infra*, pp. 1173–1181.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 1999, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1017. Dismissal or conversion of case; suspension.

(*a*) *Voluntary dismissal; dismissal for want of prosecution or other cause.*—Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002. For the purpose of the notice, the debtor shall file a list of creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it.

(*b*) *Dismissal for failure to pay filing fee.*

(1) If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.

(2) If the case is dismissed or closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

(*c*) *Dismissal of voluntary Chapter 7 or Chapter 13 case for failure to timely file list of creditors, schedules, and statement of financial affairs.*—The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.

(*d*) *Suspension.*—The court shall not dismiss a case or suspend proceedings under § 305 before a hearing on notice as provided in Rule 2002(a).

(*e*) *Dismissal of an individual debtor's Chapter 7 case for substantial abuse.*—The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, before the time has expired, the court for cause extends the time for filing the motion. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing.

(*f*) *Procedure for dismissal, conversion, or suspension.*

(1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).

(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.

Rule 1019. Conversion of a Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to a Chapter 7 liquidation case.

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(*1*) *Filing of lists, inventories, schedules, statements.*

. . . . .

(B) If a statement of intention is required, it shall be filed within 30 days after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an extension of time for cause only on written motion filed, or oral request made during a hearing, before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

(*6*) *Postpetition claims; preconversion administrative expenses; notice.*—A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)–(d) and 3002. Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d).

. . . . .

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

. . . . .

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) or is on dismissal of the case for failure to pay the filing fee;

. . . . .

(*f*) *Other notices.*—Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

. . . . .

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;

. . . . .

Rule 2003. Meeting of creditors or equity security holders.

. . . . .

(*d*) *Report of election and resolution of disputes in a Chapter 7 case.*

(*1*) *Report of undisputed election.*—In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address

of the person or entity elected and a statement that the election is undisputed.

(*2*) *Disputed election.*—If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. Unless a motion for the resolution of the dispute is filed no later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

. . . . .

Rule 3020. Deposit; confirmation of plan in a Chapter 9 municipality or a Chapter 11 reorganization case.

. . . . .

(*e*) *Stay of confirmation order.*—An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

Rule 3021. Distribution under plan.

Except as provided in Rule 3020(e), after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims under Rule 3003(c)(5) that have been allowed. For purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

(*a*) *Relief from stay; prohibiting or conditioning the use, sale, or lease of property.*

. . . . .

(*3*) *Stay of order.*—An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

. . . . .

Rule 4004. Grant or denial of discharge.

(*a*) *Time for filing complaint objecting to discharge; notice of time fixed.*—In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.

(*b*) *Extension of time.*—On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

. . . . .

Rule 4007. Determination of dischargeability of a debt.

. . . . .

(*c*) *Time for filing complaint under § 523(c) in a Chapter 7 liquidation, Chapter 11 reorganization, or Chapter 12 family farmer's debt adjustment case; notice of time fixed.*—A complaint to determine the dischargeability of a debt

under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(*d*) *Time for filing complaint under § 523(c) in a Chapter 13 individual's debt adjustment case; notice of time fixed.*—On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(c) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

. . . . .

Rule 6004. Use, sale, or lease of property.

. . . . .

(*g*) *Stay of order authorizing use, sale, or lease of property.*—An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

Rule 6006. Assumption, rejection or assignment of an executory contract or unexpired lease.

. . . . .

(*d*) *Stay of order authorizing assignment.*—An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

Rule 7001. Scope of rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U. S. C. § 1452.

Rule 7004. Process; service of summons, complaint.

. . . . .

(*e*) *Summons: time limit for service within the United States.*—Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F. R. Civ. P. shall be by delivery of the summons and complaint within 10 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the

summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

. . . . .

Rule 7062. Stay of proceedings to enforce a judgment.

Rule 62 F. R. Civ. P. applies in adversary proceedings.

Rule 9006. Time.

. . . . .

(*b*) *Enlargement.*

. . . . .

(*2*) *Enlargement not permitted.*—The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.

. . . . .

Rule 9014. Contested matters.

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 26, 1999, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1184. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, and 523 U. S. 1221.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 1999

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 1999

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rule 6(b) and Form 2.

[See *infra*, p. 1187.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1999, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Time.

. . . . .

(*b*) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

. . . . .

FORM 2. ALLEGATION OF JURISDICTION

(*a*) *Jurisdiction founded on diversity of citizenship and amount.*

Plaintiff is a [citizen of the State of Connecticut]* [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U. S. C. § 1332.

. . . . .

*[Footnotes and Explanatory Notes omitted.]

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 26, 1999, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1190. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, and 523 U. S. 1227.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 1999

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 1999

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 6, 11, 24, and 54.

[See *infra*, pp. 1193–1196.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1999, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The grand jury.

. . . . .

(*d*) *Who may be present.*

(*1*) *While grand jury is in session.*—Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session.

(*2*) *During deliberations and voting.*—No person other than the jurors, and any interpreter necessary to assist a juror who is hearing or speech impaired, may be present while the grand jury is deliberating or voting.

. . . . .

(*f*) *Finding and return of indictment.*—A grand jury may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not vote to indict, the foreperson shall so report to a federal magistrate judge in writing as soon as possible.

. . . . .

Rule 11. Pleas.

(*a*) *Alternatives.*

(*1*) *In general.*—A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18

U. S. C. § 18, fails to appear, the court shall enter a plea of not guilty.

. . . . .

(*c*) *Advice to defendant.*—Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

. . . . .

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

. . . . .

(*e*) *Plea agreement procedure.*

(*1*) *In general.*—The attorney for the government and the attorney for the defendant—or the defendant when acting pro se—may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or

is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

. . . . .

Rule 24. Trial jurors.

. . . . .

(*c*) *Alternate jurors.*

(*1*) *In general.*—The court may empanel no more than 6 jurors, in addition to the regular jury, to sit as alternate jurors. An alternate juror, in the order called, shall replace a juror who becomes or is found to be unable or disqualified to perform juror duties. Alternate jurors shall (i) be drawn in the same manner, (ii) have the same qualifications, (iii) be subject to the same examination and challenges, and (iv) take the same oath as regular jurors. An alternate juror has the same functions, powers, facilities and privileges as a regular juror.

(*2*) *Peremptory challenges.*—In addition to challenges otherwise provided by law, each side is entitled to 1 additional peremptory challenge if 1 or 2 alternate jurors are empaneled, 2 additional peremptory challenges if 3 or 4 alternate jurors are empaneled, and 3 additional peremptory challenges if 5 or 6 alternate jurors are empaneled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.

(*3*) *Retention of alternate jurors.*—When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after

deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

Rule 54. Application and exception.

(*a*) *Courts.*—These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

. . . . .

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Ownership of coalbed methane (CBM) gas.—Term "coal" as used in 1909 and 1910 Coal Lands Acts does not encompass CBM gas, and thus does not give ownership of CBM gas to respondent Tribe, which owns coal rights reserved by Acts. Amoco Production Co. v. Southern Ute Tribe, p. 865.

COLLATERAL ESTOPPEL. See **Constitutional Law,** II, 2.

COLLECTIVE BARGAINING. See **Constitutional Law,** III, 1; **Labor.**

COLLEGES AND UNIVERSITIES. See **Constitutional Law,** III, 1.

COMITY. See **Habeas Corpus,** 1.

COMMERCE CLAUSE. See **Constitutional Law,** I.

COMPULSORY SELF-INCRIMINATION. See **Constitutional Law,** IV.

CONGRESSIONAL REDISTRICTING. See **Constitutional Law,** III, 2.

CONSTITUTIONAL LAW. See also **Habeas Corpus,** 3.

I. Commerce Clause.

Discrimination against interstate commerce—State franchise tax.—Alabama's franchise tax on foreign corporations discriminates against interstate commerce in violation of Commerce Clause. South Central Bell Telephone Co. v. Alabama, p. 160.

II. Due Process.

1. *State action—Workers' compensation medical payments—Property deprivation.*—A private insurer's decision, as authorized by Pennsylvania law, to withhold workers' compensation medical payments pending administrative review is not state action under Fourteenth Amendment; nor does state regime deprive disabled employees of "property" under Due Process Clause. American Mfrs. Mut. Ins. Co. v. Sullivan, p. 40.

2. *State franchise tax—Res judicata and collateral estoppel.*—Alabama Supreme Court's refusal to permit petitioners to raise their constitutional claims against state franchise tax because of res judicata or collateral estoppel is inconsistent with Fourteenth Amendment's due process guarantee. South Central Bell Telephone Co. v. Alabama, p. 160.

III. Equal Protection of the Laws.

1. *Public universities—Instructional standards—Collective bargaining.*—Ohio Supreme Court's invalidation of a state law exempting public universities' standards for professors' instructional workloads from collective bargaining cannot be reconciled with Equal Protection Clause. Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter, p. 124.

2. *Redistricting plan—Summary judgment.*—Because North Carolina General Assembly's motivation in drawing that State's Twelfth Congressional District was in dispute, appellees were not entitled to summary judgment on their claim that district was a racial gerrymander violating equal protection. Hunt v. Cromartie, p. 541.

CONSTITUTIONAL LAW—Continued.

IV. Privilege Against Self-Incrimination.

Sentencing phase—Effect of guilty plea.—A guilty plea does not waive Fifth Amendment privilege against self-incrimination in case's sentencing phase; nor may a court draw an adverse inference from defendant's silence in determining facts about crime that bear on sentence's severity. Mitchell v. United States, p. 314.

V. Privileges or Immunities.

Right to travel—Durational residency requirements for welfare recipients.—California's requirement limiting new residents to welfare benefit level paid in State of their former residence violates right to travel guaranteed by Fourteenth Amendment; its constitutionality is not resuscitated by a change in federal welfare law. Saenz v. Roe, p. 489.

VI. Right to Liberty.

Right to practice law.—A prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession by executing a warrant to search attorney while his client is testifying before a grand jury. Conn v. Gabbert, p. 286.

VII. Searches and Seizures.

1. *Automobile searches—Passengers' belongings.*—Fourth and Fourteenth Amendments permit police with probable cause to search a car to inspect passengers' belongings that are capable of concealing object of search. Wyoming v. Houghton, p. 295.

2. *Automobile seizures—Forfeitable contraband.*—Fourth Amendment does not require police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. Florida v. White, p. 559.

3. *Media "ride-along" with police—Qualified immunity.*—A media "ride-along" search of petitioners' home violates Fourth Amendment, but because state of law was not clearly established at time home was entered, respondent officers are entitled to qualified immunity. Wilson v. Layne, p. 603.

4. *Media "ride-along" with police—Qualified immunity.*—Where respondent homeowners allege that a media "ride-along" involving a search of their home violates Fourth Amendment, but petitioner officers are entitled to a qualified immunity defense under *Wilson* v. *Layne,* Ninth Circuit's judgment for respondents is vacated. Hanlon v. Berger, p. 808.

CONTINUING CRIMINAL ENTERPRISE. See **Criminal Law,** 3.

CONTRABAND. See **Constitutional Law,** VII, 2.

CONTRACTS WITH FEDERAL GOVERNMENT. See **Federal-State Relations.**

COURTS-MARTIAL. See **Jurisdiction,** 1.

CREDITORS AND DEBTORS. See **Bankruptcy.**

CRIMINAL LAW. See also **Constitutional Law,** IV; VII, 1, 2; **Habeas Corpus.**

1. *Carjacking—"Intent" element.*—In criminalizing carjacking "with the intent to cause death or serious bodily harm," 18 U. S. C. § 2119 does not require Government to prove that a carjacker had an unconditional intent to kill or harm in all events, but merely requires proof of such an intent if necessary to effect a carjacking. Holloway v. United States, p. 1.

2. *Carjacking—Offense elements.*—Title 18 U. S. C. § 2119 establishes not a single crime with a choice of three maximum penalties, but three distinct offenses, each of which must be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for verdict. Jones v. United States, p. 227.

3. *Continuing criminal enterprise—Jury findings—Specific violations.*—A jury in a continuing criminal enterprise case under 21 U. S. C. § 848 must unanimously agree not only that defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series." Richardson v. United States, p. 813.

4. *German citizen's execution.*—Court declines to exercise its original jurisdiction to allow Germany to challenge Arizona's scheduled execution of a German citizen, given tardiness of Germany's pleas and jurisdictional barriers they implicate. Federal Republic of Germany v. United States, p. 111.

5. *Illegal gratuities to federal officials—Link with "official act."*—In order to establish an illegal gratuity in violation of 18 U. S. C. § 201(c)(1)(A), Government must prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given. United States v. Sun-Diamond Growers of Cal., p. 398.

6. *Proper venue—Crime of violence—Firearm use.*—Venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence," 18 U. S. C. § 924(c)(1), is proper in any district where crime of violence was committed. United States v. Rodriguez-Moreno, p. 275.

CRUEL AND UNUSUAL PUNISHMENT. See **Habeas Corpus,** 3.

CUSTOMS.

Classification regulations—Judicial deference.—A customs regulation relating to classification of certain imported goods is subject to analysis under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. United States v. Haggar Apparel Co., p. 380.

DEATH PENALTY. See **Criminal Law,** 4; **Habeas Corpus,** 3.

DEBTORS AND CREDITORS. See **Bankruptcy.**

DEPORTATION. See **Immigration and Nationality Act.**

DEPRIVATION OF PROPERTY. See **Constitutional Law,** II, 1.

DISABILITY BENEFITS. See **Americans with Disabilities Act of 1990.**

DISABLED INDIVIDUALS. See **Constitutional Law,** II, 1; **Individuals with Disabilities Education Act.**

DISCRETIONARY REVIEW. See **Habeas Corpus,** 1.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law,** I.

DISCRIMINATION AGAINST OUT-OF-STATE BUSINESSES. See **Constitutional Law,** I.

DISCRIMINATION BASED ON RACE. See **Constitutional Law,** III, 2.

DISCRIMINATION BASED ON SEX. See **Education Amendments of 1972.**

DISCRIMINATION IN EDUCATION. See **Education Amendments of 1972.**

DISTRICT COURTS. See **Jurisdiction,** 2, 3.

DUE PROCESS. See **Constitutional Law,** II.

DURATIONAL RESIDENCY REQUIREMENTS. See **Constitutional Law,** V.

EDUCATION AMENDMENTS OF 1972.

Title IX—Private cause of action—Student-on-student harassment.—A private Title IX damages action may lie against a school board for student-on-student harassment where board is deliberately indifferent to known sexual harassment that is so severe, pervasive, and objectively offensive that it effectively bars victim's access to educational opportunities or benefits. Davis v. Monroe County Bd. of Ed., p. 629.

EDUCATION FOR STUDENTS WITH DISABILITIES. See **Individuals with Disabilities Education Act.**

EFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus,** 3.

EIGHTH AMENDMENT. See **Habeas Corpus,** 3.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Pre-emption of state rules.—California's "notice-prejudice" rule is a "law . . . which regulates insurance" that is saved from pre-emption by ERISA; but State's rule deeming an employer administering a health plan an insurer's agent "relate[s] to" ERISA plans and does not escape pre-emption. UNUM Life Ins. Co. of America v. Ward, p. 358.

EMPLOYER AND EMPLOYEES. See **Americans with Disabilities Act of 1990; Labor.**

ENGINEERING EVIDENCE. See **Evidence.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III.

EQUITY HOLDERS IN BANKRUPT ESTATE. See **Bankruptcy.**

ESTOPPEL. See **Americans with Disabilities Act of 1990.**

EVIDENCE.

Federal Rules of Evidence—Expert testimony—Engineers and nonscientists.—Reliability rules for scientific testimony set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, may apply to testimony of engineers and other nonscientists who are expert witnesses under Rule 702. Kumho Tire Co. v. Carmichael, p. 137.

EXECUTIONS. See **Criminal Law,** 4; **Habeas Corpus,** 3.

EXHAUSTION OF STATE REMEDIES. See **Habeas Corpus,** 1.

EXHAUSTION OF TRIBAL COURT REMEDIES. See **Jurisdiction,** 3.

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FEDERAL CONTRACTS. See **Federal-State Relations.**

FEDERAL COURTS. See **Jurisdiction,** 2, 3.

FEDERAL EMPLOYER AND EMPLOYEES. See **Labor.**

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FEDERAL OFFICIALS' RECEIPT OF ILLEGAL GRATUITIES. See **Criminal Law,** 5.

FEDERAL RULES OF BANKRUPTCY PROCEDURE.

Amendments to Rules, p. 1169.

FEDERAL RULES OF CIVIL PROCEDURE.

Amendments to Rules, p. 1183.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Habeas Corpus,** 2.

Amendments to Rules, p. 1189.

FEDERAL RULES OF EVIDENCE. See **Evidence.**

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE. See **Labor.**

FEDERAL-STATE RELATIONS. See also **Habeas Corpus,** 1; **Jurisdiction,** 2; **Removal.**

Federal Government contractors—State taxes.—A State generally may impose a nondiscriminatory tax on a private company's proceeds from federal contracts regardless of whether contractor renders its services on an Indian reservation. Arizona Dept. of Revenue v. Blaze Constr. Co., p. 32.

FEDERAL TRADE COMMISSION ACT. See **Antitrust Acts.**

FIFTH AMENDMENT. See **Constitutional Law,** IV.

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FISHING RIGHTS. See **Indians.**

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FOURTH AMENDMENT. See **Constitutional Law,** VII.

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GERMANY. See **Criminal Law,** 4.

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GUILTY PLEA'S EFFECT ON PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** IV.

HABEAS CORPUS.

1. *Exhaustion of state-court remedies—Presentation for discretionary review.*—In order to satisfy exhaustion requirement, a state prisoner must present his claims to a state supreme court in a petition for discretionary review when that review is part of State's ordinary appellate review procedure. O'Sullivan v. Boerckel, p. 838.

HABEAS CORPUS—Continued.

2. *Right to appeal—District court error.*—A district court's failure to advise a defendant of his right to appeal as required by Federal Rules of Criminal Procedure does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from omission. Peguero v. United States, p. 23.

3. *Waiver of claims.*—LaGrand waived his claim that execution by lethal gas violates Eighth Amendment, and he procedurally defaulted that claim and ineffective-assistance-of-counsel claim raised in his habeas corpus petition. Stewart v. LaGrand, p. 115.

HUNTING RIGHTS. See **Indians.**

ILLEGAL GRATUITIES. See **Criminal Law,** 5.

IMMIGRATION AND NATIONALITY ACT.

Withholding of deportation—Weighing test.—In requiring Board of Immigration Appeals to supplement its weighing test for determining an alien's entitlement to withholding of deportation, Ninth Circuit failed to accord BIA's interpretation of 8 U. S. C. § 1253(h)(2)(C) level of deference required under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837. INS v. Aguirre-Aguirre, p. 415.

IMMUNITY FROM SUIT. See **Constitutional Law,** VII, 3, 4.

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Treaty usufructuary rights.—Chippewa Indians retain hunting, fishing, and gathering rights on land in present-day Minnesota that they ceded to United States in an 1837 Treaty. Minnesota v. Mille Lacs Band of Chippewa Indians, p. 172.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

Nursing services—Ventilator-dependent student.—Act requires petitioner school district to provide respondent, a ventilator-dependent student, with continuous nursing services he requires during school day. Cedar Rapids Community School Dist. v. Garret F., p. 66.

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JURIES. See **Civil Rights Act of 1871; Criminal Law,** 3.

JURISDICTION.

1. *Court of Appeals for Armed Forces—Injunction—Dropping respondent from Air Force rolls.*—CAAF lacked jurisdiction under All Writs Act to enjoin officials from dropping respondent after he was sentenced by a court-martial to more than six months' confinement and served more than six months of that sentence, where CAAF's process was neither "in aid of" its strictly circumscribed jurisdiction to review courts-martial nor "necessary or appropriate" in light of a servicemember's alternative opportunities to seek relief. Clinton v. Goldsmith, p. 529.

2. *Federal district courts—Removal from state court—Jurisdictional hierarchy.*—In cases removed from state to federal court, there is no unyielding jurisdictional hierarchy requiring federal court to adjudicate subject-matter jurisdiction before considering a challenge to personal jurisdiction. Ruhrgas AG v. Marathon Oil Co., p. 574.

3. *Federal district courts—Tribal court exhaustion doctrine.*—Doctrine, which requires a district court to stay its hand while a tribal court determines its own jurisdiction, does not extend to claims filed pursuant to Price-Anderson Act, which provides certain federal licensees with limited liability for claims of "public liability" arising out of, or resulting from, a nuclear accident. El Paso Natural Gas Co. v. Neztsosie, p. 473.

LABOR. See also **Constitutional Law,** III, 1.

Federal Service Labor-Management Relations Statute—Midterm bargaining.—Statute delegates to Federal Labor Relations Authority legal power to determine whether federal agencies and their unions must engage in midterm bargaining or bargaining about midterm bargaining. Federal Employees v. Department of Interior, p. 86.

LIBERTY INTEREST. See **Constitutional Law,** VI.

MEDIA "RIDE-ALONG." See **Constitutional Law,** VII, 3, 4.

MEDICAL PAYMENTS UNDER WORKERS' COMPENSATION LAW. See **Constitutional Law,** II, 1.

METHANE GAS RIGHTS. See **Coal Lands Acts.**

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Time to file notice.—Under 28 U. S. C. § 1446(b), a named defendant's time to remove a case from state to federal court is triggered by simultaneous service of summons and complaint or receipt of complaint, "through service or otherwise," after and apart from service of summons, but not by mere receipt of complaint unattended by any formal service. Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., p. 344.

REPETITIOUS FILINGS. See **Supreme Court,** 6.

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1. Notation of the death of Justice Blackmun (retired), p. v.
2. Proceedings in memory of Justice Powell, p. vii.
3. Amendments to Federal Rules of Bankruptcy Procedure, p. 1169.
4. Amendments to Federal Rules of Civil Procedure, p. 1183.
5. Amendments to Federal Rules of Criminal Procedure, p. 1189.
6. *In forma pauperis—Repetitious filings.*—Abusive filers are denied *in forma pauperis* status in noncriminal cases. Cross v. Pelican Bay State Prison, p. 811; Lowe v. Pogue, p. 273; Rivera v. Florida Dept. of Corrections, p. 135; Schwarz v. National Security Agency, p. 122.

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1. *"Coal."* Coal Lands Act of 1909, 30 U. S. C. § 81; Coal Lands Act of 1910, 30 U. S. C. §§ 83–85. Amoco Production Co. v. Southern Ute Tribe, p. 865.

2. *"Continuing series of violations."* 21 U. S. C. § 848. Richardson v. United States, p. 813.

3. *"During and in relation to any crime of violence."* 18 U. S. C. § 924(c)(1). United States v. Rodriguez-Moreno, p. 275.

4. *"Law . . . which regulates insurance."* § 514(a), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(a). UNUM Life Ins. Co. of America v. Ward, p. 358.

5. *"Necessary or appropriate in aid of."* All Writs Act, 28 U. S. C. § 1651(a). Clinton v. Goldsmith, p. 529.

6. *"Official act."* 18 U. S. C. § 201(c)(1)(A). United States v. Sun-Diamond Growers of Cal., p. 398.

7. *"Relate to."* § 514(b)(2)(A), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(b)(2)(A). UNUM Life Ins. Co. of America v. Ward, p. 358.

8. *"Through service or otherwise."* 28 U. S. C. § 1446(b). Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., p. 344.

9. *"With the intent to cause death or serious bodily harm."* 18 U. S. C. § 2119. Holloway v. United States, p. 1.