UNITED STATES

REPORTS

505

OCT. TERM 1991

UNITED STATES REPORTS

VOLUME 505

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1991

JUNE 18 THROUGH SEPTEMBER 30, 1992

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 1996

Printed on Uncoated Permanent Printing Paper

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

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate 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.

RETIRED

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

For the Second Circuit, Clarence Thomas, Associate Justice.

For the Third Circuit, David H. Souter, Associate Justice.

For the Fourth Circuit, William H. Rehnquist, Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. vi, and 501 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1991

NORDLINGER *v.* HAHN, IN HIS CAPACITY AS TAX ASSESSOR FOR LOS ANGELES COUNTY, ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 90–1912. Argued February 25, 1992—Decided June 18, 1992

In response to rapidly rising real property taxes, California voters approved a statewide ballot initiative, Proposition 13, which added Article XIIIA to the State Constitution. Among other things, Article XIIIA embodies an "acquisition value" system of taxation, whereby property is reassessed up to current appraised value upon new construction or a change in ownership. Exemptions from this reassessment provision exist for two types of transfers: exchanges of principal residences by persons over the age of 55 and transfers between parents and children. Over time, the acquisition-value system has created dramatic disparities in the taxes paid by persons owning similar pieces of property. Longer term owners pay lower taxes reflecting historic property values, while newer owners pay higher taxes reflecting more recent values. Faced with such a disparity, petitioner, a former Los Angeles apartment renter who had recently purchased a house in Los Angeles County, filed suit against respondents, the county and its tax assessor, claiming that Article XIIIA's reassessment scheme violates the Equal Protection Clause of the Fourteenth Amendment. The County Superior Court dismissed the complaint without leave to amend, and the State Court of Appeal affirmed.

Held: Article XIIIA's acquisition-value assessment scheme does not violate the Equal Protection Clause. Pp. 10–18.

Syllabus

(a) Unless a state-imposed classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. P. 10.

(b) Petitioner may not assert the constitutional right to travel as a basis for heightened review of Article XIIIA. Her complaint does not allege that she herself has been impeded from traveling or from settling in California because, before purchasing her home, she already lived in Los Angeles. Prudential standing principles prohibiting a litigant's raising another person's legal rights may not be overlooked in this case, since petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own, nor shown any special relationship with those whose rights she seeks to assert. Pp. 10–11.

(c) In permitting longer term owners to pay less in taxes than newer owners of comparable property, Article XIIIA's assessment scheme rationally furthers at least two legitimate state interests. First, because the State has a legitimate interest in local neighborhood preservation, continuity, and stability, it legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses. Second, the State legitimately can conclude that a new owner, at the point of purchasing his property, does not have the same reliance interest warranting protection against higher taxes as does an existing owner, who is already saddled with his purchase and does not have the option of deciding not to buy his home if taxes become prohibitively high. Pp. 11–14.

(d) *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, 488 U. S. 336, is not controlling here, since the facts of that case precluded any plausible inference that the purpose of the tax assessment practice there invalidated was to achieve the benefits of an acquisition-value tax scheme. Pp. 14–16.

(e) Article XIIIA's two reassessment exemptions rationally further legitimate purposes. The people of California reasonably could have concluded that older persons in general should not be discouraged from exchanging their residences for ones more suitable to their changing family sizes or incomes, and that the interests of family and neighborhood continuity and stability are furthered by and warrant an exemption for transfers between parents and children. Pp. 16–17.

(f) Because Article XIIIA is not palpably arbitrary, this Court must decline petitioner's request to invalidate it, even if it may appear to be

improvident and unwise yet unlikely ever to be reconsidered or repealed by ordinary democratic processes. Pp. 17–18.

225 Cal. App. 3d 1259, 275 Cal. Rptr. 684, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, and in which THOMAS, J., joined as to Part II–A. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 18. STEVENS, J., filed a dissenting opinion, *post*, p. 28.

Carlyle W. Hall, Jr., argued the cause and filed briefs for petitioner.

Rex E. Lee argued the cause for respondents. With him on the brief were *Carter G. Phillips*, *Mark D. Hopson*, *DeWitt W. Clinton*, *David L. Muir*, and *Albert Ramseyer*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In 1978, California voters staged what has been described as a property tax revolt[1] by approving a statewide ballot

*Briefs of *amici curiae* urging reversal were filed for the Building Industry Association of Southern California, Inc., et al. by *Brent N. Rushforth*, *Bruce J. Ennis, Jr.*, and *Anthony C. Epstein;* and for *William K. Rentz*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Daniel E. Lungren*, Attorney General, and *Robert D. Milam*, Deputy Attorney General; for Pete Wilson, Governor of California, et al. by *L. Michael Bogert;* for the California Taxpayers' Association by *Robert Joe Hull* and *Douglas L. Kindrick;* for the Howard Jarvis Taxpayers Association et al. by *Ronald A. Zumbrun*, *John H. Findley*, *Anthony T. Caso*, and *Trevor A. Grimm;* for the People's Advocate, Inc., et al. by *Jayna P. Kapinski;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *John C. Scully*.

Briefs of *amici curiae* were filed for the Senate of the State of California by *Jeremiah F. Hallisey;* for the American Planning Association et al. by *William W. Abbott* and *Marilee Hanson;* for the California Assessors' Association by *Douglas J. Maloney* and *Allen A. Haim;* for the International Association of Assessing Officers by *James F. Gossett;* and for the League of Women Voters of California by *Steven C. McCracken* and *Robert E. Palmer*.

[1] See N. Y. Times, June 8, 1978, p. 23, col. 1; Washington Post, June 11, 1978, p. H1.

initiative known as Proposition 13. The adoption of Proposition 13 served to amend the California Constitution to impose strict limits on the rate at which real property is taxed and on the rate at which real property assessments are increased from year to year. In this litigation, we consider a challenge under the Equal Protection Clause of the Fourteenth Amendment to the manner in which real property now is assessed under the California Constitution.

I

A

Proposition 13 followed many years of rapidly rising real property taxes in California. From fiscal years 1967–1968 to 1971–1972, revenues from these taxes increased on an average of 11.5% per year. See Report of the Senate Commission on Property Tax Equity and Revenue to the California State Senate 23 (1991) (Senate Commission Report). In response, the California Legislature enacted several property tax relief measures, including a cap on tax rates in 1972. *Id.*, at 23–24. The boom in the State's real estate market persevered, however, and the median price of an existing home doubled from $31,530 in 1973 to $62,430 in 1977. As a result, tax levies continued to rise because of sharply increasing assessment values. *Id.*, at 23. Some homeowners saw their tax bills double or triple during this period, well outpacing any growth in their income and ability to pay. *Id.*, at 25. See also Oakland, Proposition 13—Genesis and Consequences, 32 Nat. Tax J. 387, 392 (Supp. June 1979).

By 1978, property tax relief had emerged as a major political issue in California. In only one month's time, tax relief advocates collected over 1.2 million signatures to qualify Proposition 13 for the June 1978 ballot. See Lefcoe & Allison, The Legal Aspects of Proposition 13: The *Amador Valley* Case, 53 S. Cal. L. Rev. 173, 174 (1978). On election day, Proposition 13 received a favorable vote of 64.8% and carried 55 of the State's 58 counties. California Secretary of State,

Statement of Vote and Supplement, Primary Election, June 6, 1978, p. 39. California thus had a novel constitutional amendment that led to a property tax cut of approximately $7 billion in the first year. Senate Commission Report 28. A California homeowner with a $50,000 home enjoyed an immediate reduction of about $750 per year in property taxes. *Id.*, at 26.

As enacted by Proposition 13, Article XIIIA of the California Constitution caps real property taxes at 1% of a property's "full cash value." §1(a). "Full cash value" is defined as the assessed valuation as of the 1975–1976 tax year or, "thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment." §2(a). The assessment "may reflect from year to year the inflationary rate not to exceed 2 percent for any given year." §2(b).

Article XIIIA also contains several exemptions from this reassessment provision. One exemption authorizes the legislature to allow homeowners over the age of 55 who sell their principal residences to carry their previous base-year assessments with them to replacement residences of equal or lesser value. §2(a). A second exemption applies to transfers of a principal residence (and up to $1 million of other real property) between parents and children. §2(h).

In short, Article XIIIA combines a 1% ceiling on the property tax rate with a 2% cap on annual increases in assessed valuations. The assessment limitation, however, is subject to the exception that new construction or a change of ownership triggers a reassessment up to current appraised value. Thus, the assessment provisions of Article XIIIA essentially embody an "acquisition value" system of taxation rather than the more commonplace "current value" taxation. Real property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market.

Over time, this acquisition-value system has created dramatic disparities in the taxes paid by persons owning similar pieces of property. Property values in California have inflated far in excess of the allowed 2% cap on increases in assessments for property that is not newly constructed or that has not changed hands. See Senate Commission Report 31–32. As a result, longer term property owners pay lower property taxes reflecting historic property values, while newer owners pay higher property taxes reflecting more recent values. For that reason, Proposition 13 has been labeled by some as a "welcome stranger" system—the newcomer to an established community is "welcome" in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home. Indeed, in dollar terms, the differences in tax burdens are staggering. By 1989, the 44% of California homeowners who have owned their homes since enactment of Proposition 13 in 1978 shouldered only 25% of the more than $4 billion in residential property taxes paid by homeowners statewide. *Id.*, at 33. If property values continue to rise more than the annual 2% inflationary cap, this disparity will continue to grow.

B

According to her amended complaint, petitioner Stephanie Nordlinger in November 1988 purchased a house in the Baldwin Hills neighborhood of Los Angeles County for $170,000. App. 5. The prior owners bought the home just two years before for $121,500. *Id.*, at 6. Before her purchase, petitioner had lived in a rented apartment in Los Angeles and had not owned any real property in California. *Id.*, at 5; Tr. of Oral Arg. 12.

In early 1989, petitioner received a notice from the Los Angeles County Tax Assessor, who is a respondent here, informing her that her home had been reassessed upward to $170,100 on account of its change in ownership. App. 7.

She learned that the reassessment resulted in a property tax increase of $453.60, up 36% to $1,701, for the 1988–1989 fiscal year. *Ibid.*

Petitioner later discovered she was paying about five times more in taxes than some of her neighbors who owned comparable homes since 1975 within the same residential development. For example, one block away, a house of identical size on a lot slightly larger than petitioner's was subject to a general tax levy of only $358.20 (based on an assessed valuation of $35,820, which reflected the home's value in 1975 plus the up-to-2% per year inflation factor). *Id.*, at 9–10.[2] According to petitioner, her total property taxes over the first 10 years in her home will approach $19,000, while any neighbor who bought a comparable home in 1975 stands to pay just $4,100. Brief for Petitioner 3. The general tax levied against her modest home is only a few dollars short of that paid by a pre-1976 owner of a $2.1 million Malibu beachfront home. App. 24.

After exhausting administrative remedies, petitioner brought suit against respondents in Los Angeles County Superior Court. She sought a tax refund and a declaration that her tax was unconstitutional.[3] In her amended com-

[2] Petitioner proffered to the trial court additional evidence suggesting that the disparities in residential tax burdens were greater in other Los Angeles County neighborhoods. For example, a small two-bedroom house in Santa Monica that was previously assessed at $27,000 and that was sold for $465,000 in 1989 would be subject to a tax levy of $4,650, a bill 17 times more than the $270 paid the year before by the previous owner. App. 76–77. Petitioner also proffered evidence suggesting that similar disparities obtained with respect to apartment buildings and commercial and industrial income-producing properties. *Id.*, at 68–69, 82–85.

[3] California by statute grants a cause of action to a taxpayer "where the alleged illegal or unconstitutional assessment or collection occurs as the direct result of a change in administrative regulations or statutory or constitutional law that became effective not more than 12 months prior to the date the action is initiated by the taxpayer." Cal. Rev. & Tax. Code Ann. § 4808 (West 1987). Although Proposition 13 was enacted 11 years before she filed her complaint, petitioner contended that the relevant change in

plaint, she alleged: "Article XIIIA has created an arbitrary system which assigns disparate real property tax burdens on owners of generally comparable and similarly situated properties without regard to the use of the real property taxed, the burden the property places on government, the actual value of the property or the financial capability of the property owner." *Id.*, at 12. Respondents demurred. *Id.*, at 14. By minute order, the Superior Court sustained the demurrer and dismissed the complaint without leave to amend. App. to Pet. for Cert. D2.

The California Court of Appeal affirmed. *Nordlinger* v. *Lynch*, 225 Cal. App. 3d 1259, 275 Cal. Rptr. 684 (1990). It noted that the Supreme Court of California already had rejected a constitutional challenge to the disparities in taxation resulting from Article XIIIA. See *Amador Valley Joint Union High School Dist.* v. *State Bd. of Equalization*, 22 Cal. 3d 208, 583 P. 2d 1281 (1978). Characterizing Article XIIIA as an "acquisition value" system, the Court of Appeal found it survived equal protection review, because it was supported by at least two rational bases: First, it prevented property taxes from reflecting unduly inflated and unforeseen current values, and, second, it allowed property owners to estimate future liability with substantial certainty. 225 Cal. App. 3d, at 1273, 275 Cal. Rptr., at 691–692 (citing *Amador*, 22 Cal. 3d, at 235, 583 P. 2d, at 1293).

The Court of Appeal also concluded that this Court's more recent decision in *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, 488 U. S. 336 (1989), did not warrant a different result. At issue in *Allegheny Pittsburgh* was the practice of a West Virginia county tax assessor of assessing recently purchased property on the basis of its pur-

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law was this Court's decision in *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, 488 U. S. 336 (1989), decided 9 months before petitioner filed her amended complaint. Because the California courts did not discuss whether petitioner's action was timely under § 4808, we do not do so.

chase price, while making only minor modifications in the assessments of property that had not recently been sold. Properties that had been sold recently were reassessed and taxed at values between 8 and 35 times that of properties that had not been sold. *Id.*, at 341. This Court determined that the unequal assessment practice violated the Equal Protection Clause.

The Court of Appeal distinguished *Allegheny Pittsburgh* on the grounds that "California has opted for an assessment method based on each individual owner's *acquisition* cost," while, "[i]n marked contrast, the West Virginia Constitution requires property to be taxed at a uniform rate statewide according to its estimated *current* market value" (emphasis in original). 225 Cal. App. 3d, at 1277–1278, 275 Cal. Rptr., at 695. Thus, the Court of Appeal found: "*Allegheny* does not prohibit the states from adopting an acquisition value assessment method. That decision merely prohibits the arbitrary enforcement of a current value assessment method" (emphasis omitted). *Id.*, at 1265, 275 Cal. Rptr., at 686.

The Court of Appeal also rejected petitioner's argument that the effect of Article XIIIA on the constitutional right to travel warranted heightened equal protection review. The court determined that the right to travel was not infringed, because Article XIIIA "bases each property owner's assessment on acquisition value, irrespective of the owner's status as a California resident or the owner's length of residence in the state." *Id.*, at 1281, 275 Cal. Rptr., at 697. Any benefit to longtime California residents was deemed "incidental" to an acquisition-value approach. Finally, the Court of Appeal found its conclusion was unchanged by the exemptions in Article XIIIA. *Ibid.*

The Supreme Court of California denied review. App. to Pet. for Cert. B1. We granted certiorari. 502 U. S. 807 (1991).

II

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920).

As a general rule, "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439–441 (1985); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).

A

At the outset, petitioner suggests that Article XIIIA qualifies for heightened scrutiny because it infringes upon the constitutional right to travel. See, *e. g.*, *Zobel* v. *Williams*, 457 U. S. 55, 60, n. 6 (1982); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 254–256 (1974). In particular, petitioner alleges that the exemptions to reassessment for transfers by owners over the age of 55 and for transfers between parents and children run afoul of the right to travel, because they classify directly on the basis of California residency. But the complaint does not allege that petitioner herself has been impeded from traveling or from settling in California because, as has been noted, prior to purchasing her home,

petitioner lived in an apartment in Los Angeles. This Court's prudential standing principles impose a "general prohibition on a litigant's raising another person's legal rights." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). See also *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166 (1972). Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf, nor has she shown any special relationship with those whose rights she seeks to assert, such that we might overlook this prudential limitation. *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 623, n. 3 (1989). Accordingly, petitioner may not assert the constitutional right to travel as a basis for heightened review.

B

The appropriate standard of review is whether the difference in treatment between newer and older owners 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., at 446. This standard is especially deferential in the context of classifications made by complex tax laws. "[I]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams* v. *Vermont*, 472 U. S. 14, 22 (1985), quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973). See also *Regan* v. *Taxation with Representation of Wash.*, 461

U. S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

As between newer and older owners, Article XIIIA does not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments. Newer and older owners alike benefit in both the short and long run from the protections of a 1% tax rate ceiling and no more than a 2% increase in assessment value per year. New owners and old owners are treated differently with respect to one factor only—the basis on which their property is initially assessed. Petitioner's true complaint is that the State has denied her—a new owner—the benefit of the same assessment value that her neighbors—older owners—enjoy.

We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying petitioner the benefits of her neighbors' lower assessments. First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, "mom-and-pop" businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIIIA assessment scheme rationally furthers this interest.

Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally

may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.

This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws.[4] "The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification . . . ." *Heckler* v. *Mathews*, 465 U. S. 728, 746 (1984) (internal quotation marks omitted). For example, in *Kadrmas* v. *Dickinson Public Schools*, 487 U. S. 450 (1988), the Court determined that a prohibition on user fees for bus service in "reorganized" school districts, but not

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[4] Outside the context of the Equal Protection Clause, the Court has not hesitated to recognize the legitimacy of protecting reliance and expectational interests. See, *e. g.*, *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978) ("[P]rotection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (whether regulation of property constitutes a "taking" depends in part on "the extent to which the regulation has interfered with distinct investment-backed expectations"); *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972) (state-law "property" interest for purpose of federal due process denotes "interests that are secured by existing rules or understandings") (internal quotation marks omitted).

in "nonreorganized" school districts, does not violate the Equal Protection Clause, because "the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans." *Id.*, at 465. Similarly, in *United States Railroad Retirement Bd.* v. *Fritz*, the Court determined that a denial of dual "windfall" retirement benefits to some railroad workers, but not others, did not violate the Equal Protection Clause, because "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits." 449 U. S., at 178. Finally, in *New Orleans* v. *Dukes*, 427 U. S. 297 (1976), the Court determined that an ordinance banning certain street-vendor operations, but grandfathering existing vendors who had been in operation for more than eight years, did not violate the Equal Protection Clause because the "city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation." *Id.*, at 305.[5]

Petitioner argues that Article XIIIA cannot be distinguished from the tax assessment practice found to violate the Equal Protection Clause in *Allegheny Pittsburgh.* Like Article XIIIA, the practice at issue in *Allegheny Pittsburgh* resulted in dramatic disparities in taxation of properties of comparable value. But an obvious and critical factual differ-

[5] Because we conclude that Article XIIIA rationally furthers the State's interests in neighborhood stability and the protection of property owners' reliance interests, we need not consider whether it permissibly serves other interests discussed by the parties, including whether it taxes real property according to the taxpayers' ability to pay or whether it taxes real property in such a way as to promote stability of local tax revenues.

ence between this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme. In the first place, Webster County argued that "its assessment scheme is rationally related to its purpose of assessing properties *at true current value*" (emphasis added). 488 U. S., at 343.[6] Moreover, the West Virginia "Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value," and the Court found "no suggestion" that "the State may have adopted a different system in practice from that specified by statute." *Id.*, at 345.

To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification. *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S., at 179. See also *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U. S. 802, 809 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court's review does require that a purpose may conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decisionmaker. *Allied Stores of Ohio, Inc.* v. *Bow-*

[6] Webster County argued that the outdated assessments it used were consistent with current-value taxation, because periodic upward adjustments were made for inflation and it was not feasible to reassess individually each piece of property every year. Although the county obliquely referred in a footnote to the advantages of historical cost accounting, Brief for Respondent in *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, O. T. 1988, No. 87–1303, p. 30, n. 23, this was not an assertion of the general policies supporting acquisition-value taxation. Even if acquisition-value policies had been asserted, the assertion would have been nonsensical given its inherent inconsistency with the county's principal argument that it was in fact trying to promote current-value taxation.

ers, 358 U. S. 522, 528–529 (1959). See also *Schweiker* v. *Wilson*, 450 U. S. 221, 235 (1981) (classificatory scheme must "rationally advanc[e] a reasonable and *identifiable* governmental objective" (emphasis added)). *Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme.[7] By contrast, Article XIIIA was enacted precisely to achieve the benefits of an acquisition-value system. *Allegheny Pittsburgh* is not controlling here.[8]

Finally, petitioner contends that the unfairness of Article XIIIA is made worse by its exemptions from reassessment for two special classes of new owners: persons aged 55 and older, who exchange principal residences, and children who acquire property from their parents. This Court previously has declined to hold that narrow exemptions from a general scheme of taxation necessarily render the overall scheme in-

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[7] In *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), the Court distinguished on similar grounds its decision in *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949), which invalidated a state statutory scheme exempting from taxation certain notes and accounts receivable owned by residents of the State but not notes and accounts receivable owned by nonresidents. 358 U. S., at 529. After the Court in *Wheeling Steel* determined that the statutory scheme's stated purpose was not legitimate, the other purposes did not need to be considered because "[h]aving themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence." 358 U. S., at 530.

[8] In finding *Allegheny Pittsburgh* distinguishable, we do not suggest that the protections of the Equal Protection Clause are any less when the classification is drawn by legislative mandate, as in this case, than by administrative action, as in *Allegheny Pittsburgh*. See *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352 (1918). Nor do we suggest that the Equal Protection Clause constrains administrators, as in *Allegheny Pittsburgh*, from violating state law requiring uniformity of taxation of property. See *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 368–370 (1940); *Puget Sound Power & Light Co.* v. *County of King*, 264 U. S. 22, 27–28 (1924). See generally *Snowden* v. *Hughes*, 321 U. S. 1, 8–11 (1944).

vidiously discriminatory. See, *e. g.*, *Regan* v. *Taxation with Representation of Wash.*, 461 U. S., at 550–551 (denial of tax exemption to nonprofit lobbying organizations, but with an exception for veterans' groups, does not violate equal protection). For purposes of rational-basis review, the "latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S., at 415.

The two exemptions at issue here rationally further legitimate purposes. The people of California reasonably could have concluded that older persons in general should not be discouraged from moving to a residence more suitable to their changing family size or income. Similarly, the people of California reasonably could have concluded that the interests of family and neighborhood continuity and stability are furthered by and warrant an exemption for transfers between parents and children. Petitioner has not demonstrated that no rational bases lie for either of these exemptions.

III

Petitioner and *amici* argue with some appeal that Article XIIIA frustrates the "American dream" of home ownership for many younger and poorer California families. They argue that Article XIIIA places startup businesses that depend on ownership of property at a severe disadvantage in competing with established businesses. They argue that Article XIIIA dampens demand for and construction of new housing and buildings. And they argue that Article XIIIA constricts local tax revenues at the expense of public education and vital services.

Time and again, however, this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has

acted" (footnote omitted). *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979). Certainly, California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal. See 225 Cal. App. 3d, at 1282, n. 11, 275 Cal. Rptr., at 698, n. 11. Yet many wise and well-intentioned laws suffer from the same malady. Article XIIIA is not palpably arbitrary, and we must decline petitioner's request to upset the will of the people of California.

The judgment of the Court of Appeal is affirmed.

It is so ordered.

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

In *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, 488 U. S. 336 (1989), this Court struck down an assessment method used in Webster County, West Virginia, that operated precisely the same way as the California scheme being challenged today. I agree with the Court that Proposition 13 is constitutional. But I also agree with JUSTICE STEVENS that *Allegheny Pittsburgh* cannot be distinguished. See *post*, at 31–32. To me *Allegheny Pittsburgh* represents a "needlessly intrusive judicial infringement on the State's legislative powers," *New Orleans* v. *Dukes*, 427 U. S. 297, 306 (1976) *(per curiam)*, and I write separately because I see no benefit, and much risk, in refusing to confront it directly.

I

Allegheny Pittsburgh involved a county assessment scheme indistinguishable in relevant respects from Proposition 13. As the Court explains, California taxes real property at 1% of "full cash value," which means the "assessed value" as of 1975 (under the previous method) and after 1975–1976 the "appraised value of real property when pur-

chased, newly constructed, or a change in value has occurred after the 1975 assessment." The assessed value may be increased for inflation, but only at a maximum rate of 2% each year. See California Const., Art. XIIIA, §§ 1(a), 2(a); *ante*, at 5. The property tax system worked much the same way in Webster County, West Virginia. The tax assessor assigned real property an "appraised value," set the "assessed value" at half of the appraised value, then collected taxes by multiplying the assessed value by the relevant tax rate. For property that had been sold recently, the assessor set the appraised value at the most recent price of purchase. For property that had not been sold recently, she increased the appraised price by 10%, first in 1976, then again in 1981 and 1983.

The assessor's methods resulted in "dramatic differences in valuation between . . . recently transferred property and otherwise comparable surrounding land." 488 U. S., at 341; cf. Glennon, Taxation and Equal Protection, 58 Geo. Wash. L. Rev. 261, 269–270 (1990) (discussing the effects of Proposition 13); Cohen, State Law in Equality Clothing: A Comment on *Allegheny Pittsburgh Coal Company* v. *County Commission*, 38 UCLA L. Rev. 87, 91, and n. 29 (1990); Hellerstein & Peters, Recent Supreme Court Decisions Have Far-Reaching Implications, 70 J. Taxation 306, 308–310 (1989). Several coal companies that owned property in Webster County sued the county assessor, alleging violations of both the West Virginia and the United States Constitutions. The Supreme Court of Appeals of West Virginia upheld the assessment against the companies, but this Court reversed.

The *Allegheny Pittsburgh* Court asserted that with respect to taxation, the Equal Protection Clause constrains the States as follows. Although "[t]he use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command," the Clause requires that "general adjustments [be] accurate enough over a short period of time to equalize the differences in proportion be-

tween the assessments of a class of property holders." 488 U. S., at 343. "[T]he constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Ibid.* (citing *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 526–527 (1959)). Moreover, the Court stated, the Constitution and laws of West Virginia "provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value," and "[t]here [was] no suggestion . . . that the State may have adopted a different system in practice from that specified by statute." 488 U. S., at 345. "Indeed, [the assessor's] practice seems contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property." *Ibid.;* see also *ibid.* ("We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute"). The Court refused to decide "whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be." *Id.*, at 344, n. 4. Finally, the Court declared: "'[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.'" *Id.*, at 345 (quoting *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352–353 (1918), and citing *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (1923); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments in Greene County*, 284 U. S. 23 (1931)). The Court concluded that the assessments for the coal companies' properties had failed these requisites of the Equal Protection Clause.

II

As the Court accurately states today, "this Court's cases"—*Allegheny Pittsburgh* aside—"are clear that, unless a classification warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Ante*, at 10; see also *Burlington Northern R. Co.* v. *Ford*, 504 U. S. 648, 651 (1992); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973). The California tax system, like most, does not involve either suspect classes or fundamental rights, and the Court properly reviews California's classification for a rational basis. Today's review, however, differs from the review in *Allegheny Pittsburgh*.

The Court's analysis in *Allegheny Pittsburgh* is susceptible, I think, to at least three interpretations. The first is the one offered by petitioner. Under her reading of the case, properties are "similarly situated" or within the same "class" for the purposes of the Equal Protection Clause when they are located in roughly the same types of neighborhoods, for example, are roughly the same size, and are roughly the same in other, unspecified ways. According to petitioner, the Webster County assessor's plan violated the Equal Protection Clause because she had failed to achieve a "seasonable attainment of a rough equality in tax treatment" of all the objectively comparable properties in Webster County, presumably those with about the same acreage and about the same amount of coal. Petitioner contends that Proposition 13 suffers from similar flaws. In 1989, she points out, "the long-time owner of a stately 7,800-square-foot, seven-bedroom mansion on a huge lot in Beverly Hills (among the most luxurious homes in one of the most expensive neighborhoods in Los Angeles County) . . . paid *less* property tax annually than the new homeowner of a tiny 980-square-foot home on a small lot in an extremely modest Venice neighbor-

hood." Brief for Petitioner 5; see also *id.*, at 7 (Petitioner's "1988 property tax assessment on her unpretentious Baldwin Hills tract home is almost identical to that of a pre-1976 owner of a fabulous beach-front Malibu residential property worth $2.1 million, even though her property is worth only 1/12th as much as his"). Because California not only has not tried to repair this systematic, intentional, and gross disparity in taxation, but has enacted it into positive law, petitioner argues, Proposition 13 violates the Equal Protection Clause.

This argument rests, in my view, on a basic misunderstanding of *Allegheny Pittsburgh.* The Court there proceeded on the assumption of law (assumed because the parties did not contest it) that the initial classification, by the State, was constitutional, and the assumption of fact (assumed because the parties had so stipulated) that the properties were comparable under the State's classification. But cf. Glennon, 58 Geo. Wash. L. Rev., at 271–272 (noting that some of the properties contained coal and others did not). In referring to the tax treatment of a "class of property holders," or "similarly situated property owners," 488 U. S., at 343, the Court did not purport to review the constitutionality of the initial classification, by market value, drawn by the State, as opposed to the further subclassification within the initial class, by acquisition value, drawn by the assessor. Instead, *Allegheny Pittsburgh* assumed that whether properties or persons are similarly situated depended on state law, and not, as petitioner argues, on some neutral criteria such as size or location that serve as proxies for market value. Under that theory, market value would be the *only* rational basis for classifying property. But the Equal Protection Clause does not prescribe a single method of taxation. We have consistently rejected petitioner's theory, see, *e. g., Ohio Oil Co.* v. *Conway,* 281 U. S. 146 (1930); *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232 (1890), and the Court properly rejects it today.

Allegheny Pittsburgh, then, does not prevent the State of California from classifying properties on the basis of their value at acquisition, so long as the classification is supported by a rational basis. I agree with the Court that it is, both for the reasons given by this Court, see *ante*, at 11–14, and for the reasons given by the Supreme Court of California in *Amador Valley Joint Union High School Dist.* v. *State Bd. of Equalization*, 22 Cal. 3d 208, 583 P. 2d 1281 (1978). But the classification employed by the Webster County assessor, indistinguishable from California's, was rational for all those reasons as well. In answering petitioner's argument that *Allegheny Pittsburgh* controls here, respondents offer a second explanation for that case. JUSTICE STEVENS gives much the same explanation, see *post*, at 31–32, though he concludes in the end that Proposition 13, after *Allegheny Pittsburgh*, is unconstitutional.

According to respondents, the Equal Protection Clause permits a State itself to determine which properties are similarly situated, as the State of California did here (classifying properties by acquisition value) and as the State of West Virginia did in *Allegheny Pittsburgh* (classifying properties by market value). But once a State does so, respondents suggest, the Equal Protection Clause requires after *Allegheny Pittsburgh* that properties in the same class be accorded seasonably equal treatment and not be intentionally and systematically undervalued. Proposition 13 provides for the assessment of properties in the same state-determined class regularly and at roughly full value; this contrasts with the tax scheme in Webster County, where by dividing property in the same class (by market value) into a subclass (by acquisition value), the assessor regularly undervalued the property similarly situated. This, according to respondents, made the Webster County scheme unconstitutional, and distinguishes Proposition 13.

Respondents' reading of *Allegheny Pittsburgh* is, in my view, as misplaced as petitioner's; their test, for starters,

comes with a dubious pedigree. In one of the cases cited in *Allegheny Pittsburgh, Allied Stores*, we upheld against an equal protection challenge a statute that exempted some corporations from ad valorem taxes imposed on others. Not only does *Allied Stores* not even hint that the Constitution "require[s] . . . the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," 488 U. S., at 343, we took pains there to stress a very different proposition:

> "The States have very wide discretion in the laying of their taxes. . . . Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State . . . is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores*, 358 U. S., at 526–527.

Two of the other cases cited in *Allegheny Pittsburgh*, *Sunday Lake Iron* and *Sioux City Bridge*, also rejected equal protection challenges, see also *Charleston Fed. Sav. & Loan Assn.* v. *Alderson*, 324 U. S. 182 (1945), and the case in which the words intentional, systematic, and undervaluation first appeared, *Coulter* v. *Louisville & Nashville R. Co.*, 196 U. S. 599, 609 (1905), did not explain where the test came from or why.

It is true that we applied the rule of *Coulter* to strike down a tax system in *Cumberland Coal*, also cited in *Allegheny Pittsburgh*. *Cumberland Coal*, however, reflects the most serious of the problems with respondents' reading of *Allegheny Pittsburgh*. As respondents understand these two cases, their rule is categorical: A tax scheme violates the Equal Protection Clause unless it provides for "the sea-

sonable attainment of a rough equality in tax treatment" or if it results in "'intentional systematic undervaluation'" of properties similarly situated by state law. 488 U. S., at 343, 345. This would be so regardless of whether the inequality or the undervaluation, which may result (as in Webster County) from further classifications of properties within a class, is supported by a rational basis. But not since the coming of modern equal protection jurisprudence has this Court supplanted the rational judgments of state representatives with its own notions of "rough equality," "undervaluation," or "fairness." *Cumberland Coal*, which fails even to mention rational-basis review, conflicts with our current case law. *Allegheny Pittsburgh* did not, in my view, mean to return us to the era when this Court sometimes second-guessed state tax officials. In rejecting today respondents' reading of *Allegheny Pittsburgh*, the Court, as I understand it, agrees.

This brings me to the third explanation for *Allegheny Pittsburgh*, the one offered today by the Court. The Court proceeds in what purports to be our standard equal protection framework, though it reapplies an old, and to my mind discredited, gloss to rational-basis review. The Court concedes that the "Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Ante*, at 15 (citing *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980)). This principle applies, the Court acknowledges, not only to an initial classification but to all further classifications within a class. "Nevertheless, this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker," the Court says, *ante*, at 15 (quoting *Allied Stores*, *supra*, at 528–529), and "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the un-

equal assessment practice was to achieve the benefits of an acquisition-value tax scheme," *ante*, at 16. Rather than obeying the "law of a State, generally applied," the county assessor had administered an "aberrational enforcement policy." 488 U. S., at 344, n. 4. See *ante*, at 15. According to the Court, therefore, the problem in *Allegheny Pittsburgh* was that the Webster County scheme, though otherwise rational, was irrational because it was contrary to state law. Any rational bases underlying the acquisition-value scheme were "implausible" (or "unreasonable") because they were made so by the Constitution and laws of the State of West Virginia.

That explanation, like petitioner's and respondents', is in tension with settled case law. Even if the assessor did violate West Virginia law (and that she did is open to question, see *In re 1975 Tax Assessments Against Oneida Coal Co.*, 178 W. Va. 485, 489, 360 S. E. 2d 560, 564 (1987)), she would not have violated the Equal Protection Clause. A violation of state law does not by itself constitute a violation of the Federal Constitution. We made that clear in *Snowden* v. *Hughes*, 321 U. S. 1 (1944), for instance, where a candidate for state office complained that members of the local canvassing board had refused to certify his name as a nominee to the Secretary of State, thus violating an Illinois statute. Because the plaintiff had not alleged, say, that the defendants had meant to discriminate against him on racial grounds, but merely that they had failed to comply with a statute, we rejected the argument that the defendants had thereby violated the Equal Protection Clause.

> "[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. . . . [W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not

> without more a denial of the equal protection of the laws." *Id.*, at 8.

See also *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362 (1940).

The Court today promises not to have overruled *Snowden*, see *ante*, at 16, n. 8, but its disclaimer, I think, is in vain. For if, as the Court suggests, what made the assessor's method unreasonable was her supposed violation of state law, the Court's interpretation of *Allegheny Pittsburgh* recasts in this case the proposition that we had earlier rejected. See Glennon, 58 Geo. Wash. L. Rev., at 268–269; Cohen, 38 UCLA L. Rev., at 93–94; Ely, Another Spin on *Allegheny Pittsburgh*, 38 UCLA L. Rev. 107, 108–109 (1990). In repudiating *Snowden*, moreover, the Court threatens settled principles not only of the Fourteenth Amendment but of the Eleventh. We have held that the Eleventh Amendment bars federal courts from ordering state actors to conform to the dictates of state law. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984). After today, however, a plaintiff might be able to invoke federal jurisdiction to have state actors obey state law, for a claim that the state actor has violated state law appears to have become a claim that he has violated the Constitution. See Cohen, *supra*, at 103; Ely, *supra*, at 109–110 ("[B]y the Court's logic, all violations of state law—at least those violations that end (as most do) in the treatment of some people better than others—are theoretically convertible into violations of the Equal Protection Clause").

I understand that the Court prefers to distinguish *Allegheny Pittsburgh*, but in doing so, I think, the Court has left our equal protection jurisprudence in disarray. The analysis appropriate to this case is straightforward. Unless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction. See *Fritz*, *supra*; *Kassel* v. *Consolidated Freight-*

ways Corp. of Del., 450 U. S. 662, 702–706, and n. 13 (1981) (REHNQUIST, J., dissenting). This basis need not be one identified by the State itself; in fact, States need not articulate any reasons at all for their actions. See *ibid.* Proposition 13, I believe, satisfies this standard—but so, for the same reasons, did the scheme employed in Webster County. See Brief for Pacific Legal Foundation et al. as *Amici Curiae* 7, 9–10, Brief for National Association of Counties et al. as *Amici Curiae* 9–13, and Brief for Respondent 31–32, in *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County*, O. T. 1988, Nos. 87–1303, 87–1310; *ante*, at 11–14. *Allegheny Pittsburgh* appears to have survived today's decision. I wonder, though, about its legacy.

* * *

I concur in the judgment of the Court and join Part II–A of its opinion.

JUSTICE STEVENS, dissenting.

During the two past decades, California property owners have enjoyed extraordinary prosperity. As the State's population has mushroomed, so has the value of its real estate. Between 1976 and 1986 alone, the total assessed value of California property subject to property taxation increased tenfold.[1] Simply put, those who invested in California real estate in the 1970's are among the most fortunate capitalists in the world.

Proposition 13 has provided these successful investors with a tremendous windfall and, in doing so, has created se-

[1] Glennon, Taxation and Equal Protection, 58 Geo. Wash. L. Rev. 261, 270, n. 49 (1990). "For the same period, [property values in] Hawaii rose approximately 450%; Washington, D. C. approximately 350%; and New York approximately 125%." *Ibid.* (citing 2 U. S. Dept. of Commerce, Bureau of Census, Taxable Property Values 86–111 (1987) (Table 12); 2 U. S. Dept. of Commerce, Bureau of Census, Taxable Property Values and Assessment/Sales Price Ratios 42 (1977) (Table 2)).

vere inequities in California's property tax scheme.[2] These property owners (hereinafter Squires) are guaranteed that, so long as they retain their property and do not improve it, their taxes will not increase more than 2% in any given year. As a direct result of this windfall for the Squires, later purchasers must pay far more than their fair share of property taxes.

The specific disparity that prompted petitioner to challenge the constitutionality of Proposition 13 is the fact that her annual property tax bill is almost five times as large as that of her neighbors who own comparable homes: While her neighbors' 1989 taxes averaged less than $400, petitioner was taxed $1,700. App. 18–20. This disparity is not unusual under Proposition 13. Indeed, some homeowners pay 17 times as much in taxes as their neighbors with comparable property. See *id.*, at 76–77. For vacant land, the disparities may be as great as 500 to 1. App. to Pet. for Cert. A7. Moreover, as Proposition 13 controls the taxation of commercial property as well as residential property, the regime greatly favors the commercial enterprises of the Squires, placing new businesses at a substantial disadvantage.

As a result of Proposition 13, the Squires, who own 44% of the owner-occupied residences, paid only 25% of the total taxes collected from homeowners in 1989. Report of Senate Commission on Property Tax Equity and Revenue to the California State Senate 33 (1991) (Commission Report). These disparities are aggravated by § 2 of Proposition 13, which exempts from reappraisal a property owner's home and up to $1 million of other real property when that property is transferred to a child of the owner. This exemption can be invoked repeatedly and indefinitely, allowing the Proposition 13 windfall to be passed from generation to generation. As the California Senate Commission on Property Tax Equity and Revenue observed:

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[2] Proposition 13 was codified as Article XIIIA of the California Constitution; for convenience sake, however, I refer to it by its colloquial name.

> "The inequity is clear. One young family buys a new home and is assessed at full market value. Another young family inherits its home, but pays taxes based on their parents' date of acquisition even though both homes are of identical value. Not only does this constitutional provision offend a policy of equal tax treatment for taxpayers in similar situations, it appears to favor the housing needs of children with homeowner-parents over children with non-homeowner-parents. With the repeal of the state's gift and inheritance tax in 1982, the rationale for this exemption is negligible." Commission Report 9–10.

The commission was too generous. To my mind, the rationale for such disparity is not merely "negligible," it is nonexistent. Such a law establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage.

In my opinion, such disparate treatment of similarly situated taxpayers is arbitrary and unreasonable. Although the Court today recognizes these gross inequities, see *ante,* at 7, n. 2, its analysis of the justification for those inequities consists largely of a restatement of the benefits that accrue to long-time property owners. That a law benefits those it benefits cannot be an adequate justification for severe inequalities such as those created by Proposition 13.

I

The standard by which we review equal protection challenges to state tax regimes is well established and properly deferential. "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356, 359 (1973). Thus, as the Court today notes, the issue in this case is "whether the difference in

treatment between newer and older owners rationally furthers a legitimate state interest." *Ante*, at 11.[3]

But deference is not abdication and "rational-basis scrutiny" is still scrutiny. Thus we have, on several recent occasions, invalidated tax schemes under such a standard of review. See, *e. g.*, *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster Cty.*, 488 U. S. 336 (1989); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985); *Williams* v. *Vermont*, 472 U. S. 14 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869 (1985); cf. *Zobel* v. *Williams*, 457 U. S. 55, 60–61 (1982).

Just three Terms ago, this Court unanimously invalidated Webster County, West Virginia's assessment scheme under rational-basis scrutiny. Webster County employed a *de facto* Proposition 13 assessment system: The county assessed recently purchased property on the basis of its purchase price but made only occasional adjustments (averaging 3–4% per year) to the assessments of other properties. Just as in this case, "[t]his approach systematically produced dramatic differences in valuation between . . . recently transferred property and otherwise comparable surrounding land." *Allegheny Pittsburgh*, 488 U. S., at 341.

The "'[i]ntentional systematic undervaluation,'" *id.*, at 345, found constitutionally infirm in *Allegheny Pittsburgh* has been codified in California by Proposition 13. That the discrimination in *Allegheny Pittsburgh* was *de facto* and the discrimination in this case *de jure* makes little difference. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the

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[3] As the Court notes, *ante*, at 10, petitioner contends that Proposition 13 infringes on the constitutional right to travel and that, accordingly, a more searching standard of review is appropriate. There is no need to address that issue because the gross disparities created by Proposition 13 do not pass even the most deferential standard of review. Cf. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618 (1985); *Zobel* v. *Williams*, 457 U. S. 55, 60–61 (1982).

State's jurisdiction against intentional and arbitrary discrimination, *whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.*" *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352–353 (1918) (emphasis added). If anything, the inequality created by Proposition 13 is constitutionally more problematic because it is the product of a statewide policy rather than the result of an individual assessor's maladministration.

Nor can *Allegheny Pittsburgh* be distinguished because West Virginia law established a market-value assessment regime. Webster County's scheme was constitutionally invalid not because it was a departure from *state law*, but because it involved the relative "'systematic undervaluation . . . [of] property *in the same class*'" (as that class was defined by state law). *Allegheny Pittsburgh*, 488 U. S., at 345 (emphasis added). Our decisions have established that the Equal Protection Clause is offended as much by the arbitrary delineation of classes of property (as in this case) as by the arbitrary treatment of properties within the same class (as in *Allegheny Pittsburgh*). See *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 573 (1910); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments of Greene County*, 284 U. S. 23, 28–30 (1931). Thus, if our unanimous holding in *Allegheny Pittsburgh* was sound—and I remain convinced that it was—it follows inexorably that Proposition 13, like Webster County's assessment scheme, violates the Equal Protection Clause. Indeed, in my opinion, statewide discrimination is far more invidious than a local aberration that creates a tax disparity.

The States, of course, have broad power to classify property in their taxing schemes and if the "classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky*, 217 U. S., at 573. As we stated in *Allegheny Pitts-*

burgh, a "State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." 488 U. S., at 344.

Consistent with this standard, the Court has long upheld tax classes based on the taxpayer's ability to pay, see, *e. g.*, *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87, 101 (1935); the nature (tangible or intangible) of the property, see, *e. g.*, *Klein* v. *Board of Tax Supervisors of Jefferson County*, 282 U. S. 19, 23–24 (1930); the use of the property, see, *e. g.*, *Clark* v. *Kansas City*, 176 U. S. 114 (1900); and the status (corporate or individual) of the property owner, see, *e. g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Proposition 13 employs none of these familiar classifications. Instead, it classifies property based on its nominal purchase price: All property purchased for the same price is taxed the same amount (leaving aside the 2% annual adjustment). That this scheme can be named (an "acquisition value" system) does not render it any less arbitrary or unreasonable. Under Proposition 13, a majestic estate purchased for $150,000 in 1975 (and now worth more than $2 million) is placed in the same tax class as a humble cottage purchased today for $150,000. The only feature those two properties have in common is that somewhere, sometime a sale contract for each was executed that contained the price "$150,000." Particularly in an environment of phenomenal real property appreciation, to classify property based on its purchase price is "palpably arbitrary." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 530 (1959).

II

Under contemporary equal protection doctrine, the test of whether a classification is arbitrary is "whether the difference in treatment between [earlier and later purchasers] rationally furthers a legitimate state interest." *Ante*, at 11.

The adjectives and adverbs in this standard are more important than the nouns and verbs.

A *legitimate* state interest must encompass the interests of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation and one "'that we may reasonably presume to have motivated an impartial legislature.'" *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452, n. 4 (1985) (STEVENS, J., concurring) (quoting *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 180–181 (1980) (STEVENS, J., concurring in judgment)). That a classification must find justification outside itself saves judicial review of such classifications from becoming an exercise in tautological reasoning.

> "A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. 'The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.' *Rinaldi* v. *Yeager*, 384 U. S. 305, 308 (1966)." *Williams* v. *Vermont*, 472 U. S., at 27.

If the goal of the discriminatory classification is not independent from the policy itself, "each choice [of classification] will import its own goal, each goal will count as acceptable, and the requirement of a 'rational' choice-goal relation will be satisfied by the very making of the choice." Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1247 (1970).

A classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose. As noted above, in the review of tax

statutes we have allowed such fit to be generous and approximate, recognizing that "rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976). Nonetheless, in some cases the underinclusiveness or the overinclusiveness of a classification will be so severe that it cannot be said that the legislative distinction "rationally furthers" the posited state interest.[4] See, *e. g.*, *Jimenez* v. *Weinberger*, 417 U. S. 628, 636–638 (1974).

The Court's cursory analysis of Proposition 13 pays little attention to either of these aspects of the controlling standard of review. The first state interest identified by the Court is California's "interest in local neighborhood preservation, continuity, and stability." *Ante*, at 12 (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926)). It is beyond question that "inhibit[ing the] displacement of lower income families by the forces of gentrification," *ante*, at 12, is a legitimate state interest; the central issue is whether the disparate treatment of earlier and later purchasers *rationally furthers* this goal. Here the Court offers not an analysis, but only a conclusion: "By permitting older owners to pay progressively less in taxes than new owners of comparable property, [Proposition 13] rationally furthers this interest." *Ibid.*

I disagree. In my opinion, Proposition 13 sweeps too broadly and operates too indiscriminately to "rationally further" the State's interest in neighborhood preservation. No doubt there are some early purchasers living on fixed or limited incomes who could not afford to pay higher taxes and

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[4] "Herod, ordering the death of all male children born on a particular day because one of them would some day bring about his downfall, employed such a[n overinclusive] classification[, as did t]he wartime treatment of American citizens of Japanese ancestry [which imposed] burdens upon a large class of individuals because some of them were believed to be disloyal." Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351 (1949).

still maintain their homes. California has enacted special legislation to respond to their plight.[5] Those concerns cannot provide an adequate justification for Proposition 13. A statewide, across-the-board tax windfall for *all* property owners and their descendants is no more a "rational" means for protecting this small subgroup than a blanket tax exemption for all taxpayers named Smith would be a rational means to protect a particular taxpayer named Smith who demonstrated difficulty paying her tax bill.

Even within densely populated Los Angeles County, residential property comprises less than half of the market value of the property tax roll. App. 45. It cannot be said that the legitimate state interest in preserving neighborhood character is "rationally furthered" by tax benefits for owners of commercial, industrial, vacant, and other nonresidential properties.[6] It is just short of absurd to conclude that the legitimate state interest in protecting a relatively small

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[5] As pointed out in the Commission Report, California has addressed this specific problem with specific legislation. The State has established two programs:

"*Senior Citizens Property Tax Assistance.* Provides refunds of up to ninety-six percent of property taxes to low income homeowners over age 62.

. . . . .

"*Senior Citizens Property Tax Postponement.* Allows senior citizens with incomes under $20,000 to postpone all or part of the taxes on their homes until an ownership change occurs." Commission Report 23.

[6] The Court's rationale for upholding Proposition 13 does not even arguably apply to vacant property. That, as the Court recognizes, Proposition 13 discourages changes of ownership means that the law creates an impediment to the transfer and development of such property no matter how socially desirable its improvement might be. It is equally plain that the competitive advantage enjoyed by the Squires who own commercial property is wholly unjustified. There is no rational state interest in providing those entrepreneurs with a special privilege that tends to discourage otherwise desirable transfers of income-producing property. In a free economy, the entry of new competitors should be encouraged, not arbitrarily hampered by unfavorable tax treatment.

number of economically vulnerable families is "rationally furthered" by a tax windfall for all 9,787,887 property owners[7] in California.

The Court's conclusion is unsound not only because of the lack of numerical fit between the posited state interest and Proposition 13's inequities but also because of the lack of logical fit between ends and means. Although the State may have a valid interest in preserving some neighborhoods,[8] Proposition 13 not only "inhibit[s the] displacement" of settled families, it also inhibits the transfer of unimproved land, abandoned buildings, and substandard uses. Thus, contrary to the Court's suggestion, Proposition 13 is not like a zoning system. A zoning system functions by recognizing different uses of property and treating those different uses differently. See *Euclid* v. *Ambler Realty Co.*, 272 U. S., at 388–390. Proposition 13 treats all property alike, giving *all* owners tax breaks, and discouraging the transfer or improvement of *all* property—the developed and the dilapidated, the neighborly and the nuisance.

In short, although I agree with the Court that "neighborhood preservation" is a legitimate state interest, I cannot agree that a tax windfall for all persons who purchased property before 1978 *rationally* furthers that interest. To my mind, Proposition 13 is too blunt a tool to accomplish such a

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[7] Brief for California Assessors' Association as *Amicus Curiae* 2.

[8] The ambiguous character of this interest is illustrated by the options faced by a married couple that owns a three- or four-bedroom home that suited their family needs while their children lived at home. After the children have moved out, increased taxes and maintenance expenses would—absent Proposition 13—tend to motivate the sale of the home to a younger family needing a home of that size, or perhaps the rental of a room or two to generate the income necessary to pay taxes. Proposition 13, however, subsidizes the wasteful retention of unused housing capacity, making the sale of the home unwise and the rental of the extra space unnecessary.

specialized goal. The severe inequalities created by Proposition 13 cannot be justified by such an interest.[9]

The second state interest identified by the Court is the "reliance interests" of the earlier purchasers. Here I find the Court's reasoning difficult to follow. Although the protection of reasonable reliance interests is a legitimate governmental purpose, see *Heckler* v. *Mathews*, 465 U. S. 728, 746 (1984), this case does not implicate such interests. A reliance interest is created when an individual justifiably acts under the assumption that an existing legal condition will persist; thus reliance interests are most often implicated when the government provides some benefit and then acts to eliminate the benefit. See, *e. g.*, *New Orleans* v. *Dukes*, 427 U. S. 297 (1976). In this case, those who purchased property before Proposition 13 was enacted received no assurances that assessments would only increase at a limited rate; indeed, to the contrary, many purchased property in the hope that property values (and assessments) would appreciate substantially and quickly. It cannot be said, therefore, that the earlier purchasers of property somehow have a reliance interest in limited tax increases.

Perhaps what the Court means is that post-Proposition 13 purchasers have less reliance interests than pre-Proposition

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[9] Respondents contend that the inequities created by Proposition 13 are justified by the State's interest in protecting property owners from taxation on unrealized appreciation. The California Supreme Court relied on a similar state interest. See *Amador Valley Joint Union High School Dist.* v. *State Bd. of Equalization*, 22 Cal. 3d 208, 236–238, 583 P. 2d 1281, 1309–1311 (1978). This argument is closely related to the Court's reasoning concerning "neighborhood preservation"; respondents claim the State has an interest in preventing the situation in which "skyrocketing real estate prices . . . driv[e] property taxes beyond some taxpayers' ability to pay." Brief for Respondents 19. As demonstrated above, whatever the connection between acquisition price and "ability to pay," a blanket tax windfall for all early purchasers of property (and their descendants) is simply too overinclusive to "rationally further" the State's posited interest in protecting vulnerable taxpayers.

13 purchasers. The Court reasons that the State may tax earlier and later purchasers differently because

> "an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high." *Ante*, at 12–13.[10]

This simply restates the effects of Proposition 13. A pre-Proposition 13 owner has "vested expectations" in reduced taxes *only* because Proposition 13 gave her such expectations; a later purchaser has no such expectations because Proposition 13 does not provide her such expectations. But the same can be said of any arbitrary protection for an existing class of taxpayers. Consider a law that establishes that homes with even street numbers would be taxed at twice the rate of homes with odd street numbers. It is certainly true that the even-numbered homeowners could not decide to "unpurchase" their homes and that those considering buying an even-numbered home would know that it came with an extra tax burden, but certainly that would not justify the arbitrary imposition of disparate tax burdens based on house numbers. So it is in this case. Proposition 13 provides a benefit for earlier purchasers and imposes a burden on later purchasers. To say that the later purchasers know what they are getting into does not answer the critical question: Is it reasonable

[10] The Court's sympathetic reference to "existing owner[s] already saddled" with their property should not obscure the fact that these early purchasers have already seen their property increase in value more than tenfold.

and constitutional to tax early purchasers less than late purchasers when at the time of taxation their properties are comparable? This question the Court does not answer.

Distilled to its essence, the Court seems to be saying that earlier purchasers can benefit under Proposition 13 because earlier purchasers benefit under Proposition 13. If, however, a law creates a disparity, the State's interest preserving that disparity cannot be a "*legitimate* state interest" justifying that inequity. As noted above, a statute's disparate treatment must be justified by a purpose *distinct* from the very effects created by that statute. Thus, I disagree with the Court that the severe inequities wrought by Proposition 13 can be justified by what the Court calls the "reliance interests" of those who benefit from that scheme.[11]

In my opinion, it is irrational to treat similarly situated persons differently on the basis of the date they joined the class of property owners. Until today, I would have thought this proposition far from controversial. In *Zobel* v. *Williams*, 457 U. S. 55 (1982), we ruled that Alaska's program of distributing cash dividends on the basis of the recipient's years of residency in the State violated the Equal Protection Clause. The Court wrote:

> "If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access of finite pub-

[11] Respondents, drawing on the analysis of the California Supreme Court, contend that the inequities created by Proposition 13 are also justified by the State's interest in "permitting the taxpayer to make more careful and accurate predictions of future tax liability." *Amador Valley*, 22 Cal. 3d, at 239, 583 P. 2d, at 1312. This analysis suffers from the same infirmity as the Court's "reliance" analysis. I agree that Proposition 13 permits greater predictability of tax liability; the relevant question, however, is whether the inequities between earlier and later purchasers created by Proposition 13 can be justified by something other than the benefit to the early purchasers. I do not believe that they can.

> lic facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? *Could states impose different taxes based on length of residence?* Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." *Id.*, at 64 (emphasis added) (footnotes omitted).

Similarly, the Court invalidated on equal protection grounds New Mexico's policy of providing a permanent tax exemption for Vietnam veterans who had been state residents before May 8, 1976, but not to more recent arrivals. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985). The Court expressly rejected the State's claim that it had a legitimate interest in providing special rewards to veterans who lived in the State before 1976 and concluded that "[n]either the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit." *Id.*, at 623.

As these decisions demonstrate, the selective provision of benefits based on the timing of one's membership in a class (whether that class be the class of residents or the class of property owners) is rarely a "legitimate state interest." Similarly situated neighbors have an equal right to share in the benefits of local government. It would obviously be unconstitutional to provide one with more or better fire or police protection than the other; it is just as plainly unconstitutional to require one to pay five times as much in property taxes as the other for the same government services. In my opinion, the severe inequalities created by Proposition 13 are arbitrary and unreasonable and do not rationally further a legitimate state interest.

Accordingly, I respectfully dissent.

Syllabus

GEORGIA *v.* McCOLLUM ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 91–372. Argued February 26, 1992—Decided June 18, 1992

Respondents, who are white, were charged with assaulting two African-Americans. Before jury selection began, the trial judge denied the prosecution's motion to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner. The Georgia Supreme Court affirmed, distinguishing *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614—in which this Court held that private litigants cannot exercise peremptory strikes in a racially discriminatory manner—on the ground that it involved civil litigants rather than criminal defendants.

Held: The Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Pp. 46–59.

(a) The exercise of racially discriminatory peremptory challenges offends the Equal Protection Clause when the offending challenges are made by the State, *Batson* v. *Kentucky*, 476 U. S. 79; *Powers* v. *Ohio*, 499 U. S. 400, and, in civil cases, when they are made by private litigants, *Edmonson*, *supra*. Whether the prohibition should be extended to discriminatory challenges made by a criminal defendant turns upon the following four-factor analysis. Pp. 46–48.

(b) A criminal defendant's racially discriminatory exercise of peremptory challenges inflicts the harms addressed by *Batson*. Regardless of whether it is the State or the defense who invokes them, discriminatory challenges harm the individual juror by subjecting him to open and public racial discrimination and harm the community by undermining public confidence in this country's system of justice. Pp. 48–50.

(c) A criminal defendant's exercise of peremptory challenges constitutes state action for purposes of the Equal Protection Clause under the analytical framework summarized in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922. Respondents' argument that the adversarial relationship between the defendant and the prosecution negates a peremptory challenge's governmental character is rejected. Unlike other actions taken in support of a defendant's defense, the exercise of a peremptory challenge determines the composition of a governmental body. The fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action, since

whenever a private actor's conduct is deemed fairly attributable to the government, it is likely that private motives will have animated the actor's decision. Pp. 50–55.

(d) The State has third-party standing to challenge a defendant's discriminatory use of peremptory challenges, since it suffers a concrete injury when the fairness and the integrity of its own judicial process is undermined; since, as the representative of all its citizens, it has a close relation to potential jurors; and since the barriers to suit by an excluded juror are daunting. See *Powers*, 499 U. S., at 411, 413, 414. Pp. 55–56.

(e) A prohibition against the discriminatory exercise of peremptory challenges does not violate a criminal defendant's constitutional rights. It is an affront to justice to argue that the right to a fair trial includes the right to discriminate against a group of citizens based upon their race. Nor does the prohibition violate the Sixth Amendment right to the effective assistance of counsel, since counsel can normally explain the reasons for peremptory challenges without revealing strategy or confidential communication, and since neither the Sixth Amendment nor the attorney-client privilege gives a defendant the right to carry out through counsel an unlawful course of conduct. In addition, the prohibition does not violate the Sixth Amendment right to a trial by a jury that is impartial with respect to both parties. Removing a juror whom the defendant believes harbors racial prejudice is different from exercising a peremptory challenge to discriminate invidiously against jurors on account of race. Pp. 57–59.

261 Ga. 473, 405 S. E. 2d 688, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 59. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 60. O'CONNOR, J., *post*, p. 62, and SCALIA, J., *post*, p. 69, filed dissenting opinions.

Harrison W. Kohler, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers*, Attorney General, and *Charles M. Richards*, Senior Assistant Attorney General.

Michael R. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson*.

Robert H. Revell, Jr., argued the cause for respondents. With him on the brief was *Jesse W. Walters.**

JUSTICE BLACKMUN delivered the opinion of the Court.

For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause. See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). Last Term this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges also violates the Equal Protection Clause. See *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Today, we are asked to decide whether the Constitution prohibits a *criminal defendant* from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

I

On August 10, 1990, a grand jury sitting in Dougherty County, Ga., returned a six-count indictment charging respondents with aggravated assault and simple battery. See App. 2. The indictment alleged that respondents beat and assaulted Jerry and Myra Collins. Respondents are white; the alleged victims are African-Americans. Shortly after the events, a leaflet was widely distributed in the local African-American community reporting the assault and urging community residents not to patronize respondents' business.

Before jury selection began, the prosecution moved to prohibit respondents from exercising peremptory challenges in

*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent Scheidegger* and *Charles L. Hobson;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Julius L. Chambers*, *Charles Stephen Ralston*, and *Eric Schnapper.*

Briefs of *amici curiae* were filed for the National Association of Criminal Defense Lawyers by *Judy Clarke* and *Mario G. Conte;* and for *Charles J. Hynes, pro se*, by *Jay M. Cohen*, *Matthew S. Greenberg*, *Victor Barall*, and *Carol Teague Schwartzkopf.*

a racially discriminatory manner. The State explained that it expected to show that the victims' race was a factor in the alleged assault. According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African-American citizens from participating as jurors in the trial. Observing that 43 percent of the county's population is African-American, the State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors would be African-American.[1] With 20 peremptory challenges, respondents therefore would be able to remove all the African-American potential jurors.[2] Relying on *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a prima facie case of racial discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

The trial judge denied the State's motion, holding that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." App. 14. The issue was certified for immediate appeal. *Id.*, at 15 and 18.

The Supreme Court of Georgia, by a 4-to-3 vote, affirmed the trial court's ruling. 261 Ga. 473, 405 S. E. 2d 688 (1991). The court acknowledged that in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), this Court had found that the exercise of a peremptory challenge in a racially discriminatory manner "would constitute an impermissible injury" to the excluded juror. 261 Ga., at 473, 405 S. E. 2d, at 689.

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[1] Under Georgia law, the petit jury in a felony trial is selected from a panel of 42 persons. Ga. Code Ann. § 15–12–160 (1990).

[2] When a defendant is indicted for an offense carrying a penalty of four or more years, Georgia law provides that he may "peremptorily challenge 20 of the jurors impaneled to try him." § 15–12–165.

The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. "Bearing in mind the long history of jury trials as an essential element of the protection of human rights," the court "decline[d] to diminish the free exercise of peremptory strikes by a criminal defendant." 261 Ga., at 473, 405 S. E. 2d, at 689. Three justices dissented, arguing that *Edmonson* and other decisions of this Court establish that racially based peremptory challenges by a criminal defendant violate the Constitution. 261 Ga., at 473, 405 S. E. 2d, at 689 (Hunt, J.); *id.*, at 475, 405 S. E. 2d, at 690 (Benham, J.); *id.*, at 479, 405 S. E. 2d, at 693 (Fletcher, J.). A motion for reconsideration was denied. App. 60.

We granted certiorari to resolve a question left open by our prior cases—whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.[3] 502 U. S. 937 (1991).

II

Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service. In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race," *id.*, at 305, the Court held that a defendant does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. See also *Neal* v. *Delaware*, 103 U. S. 370,

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[3] The Ninth Circuit recently has prohibited criminal defendants from exercising peremptory challenges on the basis of gender. *United States* v. *De Gross*, 960 F. 2d 1433 (1992) (en banc). Although the panel decision now has been vacated by the granting of rehearing en banc, a Fifth Circuit panel has held that criminal defendants may not exercise peremptory strikes in a racially discriminatory manner. See *United States* v. *Greer*, 939 F. 2d 1076, rehearing granted, 948 F. 2d 934 (1991).

397 (1881); *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935) (State cannot exclude African-Americans from jury venire on false assumption that they, as a group, are not qualified to serve as jurors).

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), the Court was confronted with the question whether an African-American defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. *Id.*, at 209–210. Although the Court rejected the defendant's attempt to establish an equal protection claim premised solely on the pattern of jury strikes in his own case, it acknowledged that proof of systematic exclusion of African-Americans through the use of peremptories over a period of time might establish such a violation. *Id.*, at 224–228.

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the Court discarded *Swain*'s evidentiary formulation. The *Batson* Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.*, at 87. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.*, at 97.[4]

Last Term this Court applied the *Batson* framework in two other contexts. In *Powers* v. *Ohio*, 499 U. S. 400 (1991), it held that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors

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[4] The *Batson* majority specifically reserved the issue before us today. 476 U. S., at 89, n. 12. The two *Batson* dissenters, however, argued that the "clear and inescapable import" was that *Batson* would similarly limit defendants. *Id.*, at 125–126. Justice Marshall agreed, stating: "[O]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)." *Id.*, at 107 (concurring opinion).

on the basis of race. In *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), the Court decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner.[5]

In deciding whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges, we must answer four questions. First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

III

A

The majority in *Powers* recognized that "*Batson* 'was designed "to serve multiple ends,"' only one of which was to protect individual defendants from discrimination in the selection of jurors." 499 U. S., at 406. As in *Powers* and *Edmonson*, the extension of *Batson* in this context is designed to remedy the harm done to the "dignity of persons" and to the "integrity of the courts." *Powers*, 499 U. S., at 402.

As long ago as *Strauder*, this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. 100 U. S., at 308. See also *Batson*, 476 U. S., at 87. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Powers*,

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[5] In his dissent in *Edmonson*, JUSTICE SCALIA stated that the effect of that decision logically must apply to defendants in criminal prosecutions. 500 U. S., at 644.

499 U. S., at 409. Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.

But "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U. S., at 87. One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U. S., at 413. Selection procedures that purposefully exclude African-Americans from juries undermine that public confidence—as well they should. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.*, at 412. See generally Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 748–750 (1992).

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. See Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 195–196 (1989) (describing two trials in Miami, Fla., in which all African-American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal).

"[B]e it at the hands of the State or the defense," if a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens'

confidence in it." *State* v. *Alvarado*, 221 N. J. Super. 324, 328, 534 A. 2d 440, 442 (1987). Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.[6]

B

The fact that a defendant's use of discriminatory peremptory challenges harms the jurors and the community does not end our equal protection inquiry. Racial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172 (1972). Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause.

Until *Edmonson*, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor, a quintessential state actor. In *Edmonson*, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action. In order to determine whether state action was present in that setting, the

[6] The experience of many state jurisdictions has led to the recognition that a race-based peremptory challenge, regardless of who exercises it, harms not only the challenged juror, but the entire community. Acting pursuant to their state constitutions, state courts have ruled that criminal defendants have no greater license to violate the equal protection rights of prospective jurors than have prosecutors. See, *e. g.*, *State* v. *Levinson*, 71 Haw. 492, 795 P. 2d 845 (1990); *People* v. *Kern*, 149 App. Div. 2d 187, 545 N. Y. S. 2d 4 (1989), aff'd, 75 N. Y. 2d 638, 555 N. Y. S. 2d 647 (1990); *State* v. *Alvarado*, 221 N. J. Super. 324, 534 A. 2d 440 (1987); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979); *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978).

Court in *Edmonson* used the analytical framework summarized in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982).[7]

The first inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.*, at 939. "There can be no question" that peremptory challenges satisfy this first requirement, as they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Edmonson*, 500 U. S., at 620. As in *Edmonson*, a Georgia defendant's right to exercise peremptory challenges and the scope of that right are established by a provision of state law. Ga. Code Ann. § 15–12–165 (1990).

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. See *Lugar*, 457 U. S., at 941–942. In resolving that issue, the Court in *Edmonson* found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." 500 U. S., at 621–622.

As to the first principle, the *Edmonson* Court found that the peremptory challenge system, as well as the jury system as a whole, "simply could not exist" without the "overt, significant participation of the government." *Id.*, at 622. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community. Ga. Code Ann. § 15–12–40. State law fur-

[7] The Court in *Lugar* held that a private litigant is appropriately characterized as a state actor when he "jointly participates" with state officials in securing the seizure of property in which the private party claims to have rights. 457 U. S., at 932–933, 941–942.

ther provides that jurors are to be selected by a specified process, § 15–12–42; they are to be summoned to court under the authority of the State, § 15–12–120; and they are to be paid an expense allowance by the State whether or not they serve on a jury, § 15–12–9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, § 15–12–131; they are administered an oath, § 15–12–132; they are questioned on *voir dire* to determine whether they are impartial, § 15–12–164; and they are subject to challenge for cause, § 15–12–163.

In light of these procedures, the defendant in a Georgia criminal case relies on "governmental assistance and benefits" that are equivalent to those found in the civil context in *Edmonson.* "By enforcing a discriminatory peremptory challenge, the Court 'has . . . elected to place its power, property and prestige behind the [alleged] discrimination.'" *Edmonson,* 500 U. S., at 624 (citation omitted).

In regard to the second principle, the Court in *Edmonson* found that peremptory challenges perform a traditional function of the government: "Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact." *Id.,* at 620. And, as the *Edmonson* Court recognized, the jury system in turn "performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people'" *Id.,* at 624 (citation omitted). These same conclusions apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function. Compare *Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (making Sixth Amendment applicable to States through Fourteenth Amendment), with *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211 (1916) (States do not have a constitutional obligation to provide a jury trial in civil cases). Cf. *West* v. *Atkins,* 487 U. S. 42, 53, n. 10, 57 (1988) (private

physician hired by State to provide medical care to prisoners was state actor because doctor was hired to fulfill State's constitutional obligation to attend to necessary medical care of prison inmates). The State cannot avoid its constitutional responsibilities by delegating a public function to private parties. Cf. *Terry* v. *Adams*, 345 U. S. 461 (1953) (private political party's determination of qualifications for primary voters held to constitute state action).

Finally, the *Edmonson* Court indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action. These concerns are equally present in the context of a criminal trial. Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State.[8]

Respondents nonetheless contend that the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge. Respondents rely on *Polk County* v. *Dodson*, 454 U. S. 312 (1981), in which a defendant sued, under 42 U. S. C. § 1983, the public defender who represented him. The defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation. This Court determined that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant.[9]

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[8] Indeed, it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors, thus enhancing the perception that it is the court that has rejected them. See Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 751, n. 117 (1992).

[9] Although *Polk County* determined whether or not the public defender's actions were under color of state law, as opposed to whether or not they constituted state action, this Court subsequently has held that the

Polk County did not hold that the adversarial relationship of a public defender with the State precludes a finding of state action—it held that this adversarial relationship prevented the attorney's public employment from *alone* being sufficient to support a finding of state action. Instead, the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing. For example, in *Branti* v. *Finkel*, 445 U. S. 507 (1980), this Court held that a public defender, in making personnel decisions on behalf of the State, is a state actor who must comply with constitutional requirements. And the *Polk County* Court itself noted, without deciding, that a public defender may act under color of state law while performing certain administrative, and possibly investigative, functions. See 454 U. S., at 325.

The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends. Thus, as we held in *Edmonson*, when "a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality." 500 U. S., at 625.

Lastly, the fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed "fairly attributable" to the government, it is likely that private motives will have animated the actor's decision. Indeed, in *Edmonson*, the Court recognized that the private party's exercise of peremptory challenges consti-

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two inquiries are the same, see, *e. g.*, *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982), and has specifically extended *Polk County*'s reasoning to state-action cases, see *Blum* v. *Yaretsky*, 457 U. S. 991, 1009, n. 20 (1982).

tuted state action, even though the motive underlying the exercise of the peremptory challenge may be to protect a private interest. See *id.*, at 626.[10]

C

Having held that a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection, we move to the question whether the State has standing to challenge a defendant's discriminatory use of peremptory challenges. In *Powers*, 499 U. S., at 416, this Court held that a white criminal defendant has standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. While third-party standing is a limited exception, the *Powers* Court recognized that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests. *Id.*, at 411. In *Edmonson*, the Court applied the same analysis in deciding that civil litigants had standing to raise the equal protection rights of jurors excluded on the basis of their race.

In applying the first prong of its standing analysis, the *Powers* Court found that a criminal defendant suffered cog-

[10] Numerous commentators similarly have concluded that a defendant's exercise of peremptory challenges constitutes state action. See generally Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 197–198 (1989); Note, State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for *Georgia v. McCollum*, 67 Notre Dame L. Rev. 1049, 1061–1074 (1992); Note, Discrimination by the Defense: Peremptory Challeges after *Batson v. Kentucky*, 88 Colum. L. Rev. 355, 358–361 (1988); Comment, The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges, 93 Dick. L. Rev. 143, 158–162 (1988); Tanford, Racism in the Adversary System: The Defendant's Use of Peremptory Challenges, 63 S. Cal. L. Rev. 1015, 1027–1030 (1990); Underwood, 92 Colum. L. Rev., at 750–753.

nizable injury "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." 499 U. S., at 411 (citation omitted). In *Edmonson*, this Court found that these harms were not limited to the criminal sphere. 500 U. S., at 630. Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined.

In applying the second prong of its standing analysis, the *Powers* Court held that *voir dire* permits a defendant to "establish a relation, if not a bond of trust, with the jurors," a relation that "continues throughout the entire trial." 499 U. S., at 413. "Exclusion of a juror on the basis of race severs that relation in an invidious way." *Edmonson*, 500 U. S., at 629.

The State's relation to potential jurors in this case is closer than the relationships approved in *Powers* and *Edmonson*. As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State to deny persons within its jurisdiction the equal protection of the laws.

In applying the final prong of its standing analysis, the *Powers* Court recognized that, although individuals excluded from jury service on the basis of race have a right to bring suit on their own behalf, the "barriers to a suit by an excluded juror are daunting." 499 U. S., at 414. See also *Edmonson*, 500 U. S., at 629. The barriers are no less formidable in this context. See Note, Discrimination by the Defense: Peremptory Challenges after *Batson v. Kentucky*, 88 Colum. L. Rev. 355, 367 (1988); Underwood, 92 Colum. L. Rev., at 757 (summarizing barriers to suit by excluded juror). Accordingly, we hold that the State has standing to assert the excluded jurors' rights.

D

The final question is whether the interests served by *Batson* must give way to the rights of a criminal defendant. As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. See *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948); *United States* v. *Wood*, 299 U. S. 123, 145 (1936); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Swain*, 380 U. S., at 219.

Yet in *Swain*, the Court reviewed the "very old credentials," *id.*, at 212, of the peremptory challenge and noted the "long and widely held belief that the peremptory challenge is a necessary part of trial by jury," *id.*, at 219; see *id.*, at 212–219. This Court likewise has recognized that "the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts." *Edmonson*, 500 U. S., at 630.

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, "if race stereotypes are the price for acceptance of a jury panel as fair," we reaffirm today that such a "price is too high to meet the standard of the Constitution." *Id.*, at 630. Defense counsel is limited to "legitimate, lawful conduct." *Nix* v. *Whiteside*, 475 U. S. 157, 166 (1986) (defense counsel does not render ineffective assistance when he informs his client that he would disclose the client's perjury to the court and move to withdraw from representation). It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.

Nor does a prohibition of the exercise of discriminatory peremptory challenges violate a defendant's Sixth Amendment right to the effective assistance of counsel. Counsel can ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy or any confidential client communications. In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged. See *United States* v. *Zolin*, 491 U. S. 554 (1989); cf. *Batson*, 476 U. S., at 97 (expressing confidence that trial judges can develop procedures to implement the Court's holding). In any event, neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct. See *Nix*, 475 U. S., at 166; *Zolin*, 491 U. S., at 562–563. See Swift, Defendants, Racism and the Peremptory Challenge, 22 Colum. Hum. Rights L. Rev. 177, 207–208 (1991).

Lastly, a prohibition of the discriminatory exercise of peremptory challenges does not violate a defendant's Sixth Amendment right to a trial by an impartial jury. The goal of the Sixth Amendment is "jury impartiality with respect to both contestants." *Holland* v. *Illinois*, 493 U. S. 474, 483 (1990). See also *Hayes* v. *Missouri*, 120 U. S. 68 (1887).

We recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice. We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism. See *Ham* v. *South Carolina*, 409 U. S. 524, 526–527 (1973); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 189–190 (1981) (plurality opinion of White, J.). Cf. *Morgan* v. *Illinois*, 504 U. S. 719 (1992) (exclusion of juror in capital trial is permissible upon showing that juror is incapable of considering sentences other than death).

But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 499 U. S., at 410. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino* v. *Ross*, 424 U. S. 589, 596, n. 8 (1976). We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.

IV

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges. The judgment of the Supreme Court of Georgia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, concurring.

I was in dissent in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the

issue of "state action" under the Fourteenth Amendment. I therefore join the opinion of the Court.

JUSTICE THOMAS, concurring in the judgment.

As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and THE CHIEF JUSTICE that our decision last Term in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), governs this case and requires the opposite conclusion. Because the respondents do not question *Edmonson*, I believe that we must accept its consequences. I therefore concur in the judgment reversing the Georgia Supreme Court.

I write separately to express my general dissatisfaction with our continuing attempts to use the Constitution to regulate peremptory challenges. See, *e. g.*, *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Powers* v. *Ohio*, 499 U. S. 400 (1991); *Edmonson*, *supra*. In my view, by restricting a criminal defendant's use of such challenges, this case takes us further from the reasoning and the result of *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). I doubt that this departure will produce favorable consequences. On the contrary, I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.

In *Strauder*, as the Court notes, we invalidated a state law that prohibited blacks from serving on juries. In the course of the decision, we observed that the racial composition of a jury may affect the outcome of a criminal case. We explained: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.*, at 309. We thus recog-

nized, over a century ago, the precise point that JUSTICE O'CONNOR makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. *Post*, at 68–69.

I do not think that this basic premise of *Strauder* has become obsolete. The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases.[1] Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

In *Batson*, however, this Court began to depart from *Strauder* by holding that, without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy. We said, in particular, that a prosecutor could not justify peremptory strikes "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 476 U. S., at 97. As noted, however, our decision in *Strauder* rested on precisely such an "assumption" or "intuition." We reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly.

Our departure from *Strauder* has two negative consequences. First, it produces a serious misordering of our priorities. In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Un-

[1] A computer search, for instance, reveals that the phrase "all white jury" has appeared over 200 times in the past five years in the New York Times, Chicago Tribune, and Los Angeles Times.

less jurors actually admit prejudice during *voir dire*, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. Cf. Fed. Rule Evid. 606(b) (generally excluding juror testimony after trial to impeach the verdict). In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause.

Second, our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen.[2] See, *e. g.*, *State* v. *Carr*, 261 Ga. 845, 413 S. E. 2d 192 (1992). Next will come the question whether defendants may exercise peremptories on the basis of sex. See, *e. g.*, *United States* v. *De Gross*, 960 F. 2d 1433 (CA9 1992). The consequences for defendants of our decision and of these future cases remain to be seen. But whatever the benefits were that this Court perceived in a criminal defendant's having members of his class on the jury, see *Strauder*, 100 U. S., at 309–310, they have evaporated.

Justice O'Connor, dissenting.

The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection. The Court purports merely to follow

[2] The NAACP Legal Defense and Educational Fund, Inc., has submitted a brief arguing, in all sincerity, that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 3–4. Although I suppose that this issue technically remains open, it is difficult to see how the result could be different if the defendants here were black.

precedents, but our cases do not compel this perverse result. To the contrary, our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.

I

It is well and properly settled that the Constitution's equal protection guarantee forbids prosecutors to exercise peremptory challenges in a racially discriminatory fashion. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Powers* v. *Ohio*, 499 U. S. 400, 409 (1991). The Constitution, however, affords no similar protection against private action. "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendmen[t] . . . , and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 191 (1988) (footnote omitted). This distinction appears on the face of the Fourteenth Amendment, which provides that "*No State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1 (emphasis added). The critical but straightforward question this case presents is whether criminal defendants and their lawyers, when exercising peremptory challenges as part of a defense, are state actors.

In *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), the Court developed a two-step approach to identifying state action in cases such as this. First, the Court will ask "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.*, at 939. Next, it will decide whether, on the particular facts at issue, the parties who allegedly caused the deprivation of a federal right can "appropriately" and "in all fairness" be characterized as state actors. *Ibid.; Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991). The

Court's determination in this case that the peremptory challenge is a creation of state authority, *ante*, at 51, breaks no new ground. See *Edmonson*, *supra*, at 620–621. But disposing of this threshold matter leaves the Court with the task of showing that criminal defendants who exercise peremptories should be deemed governmental actors. What our cases require, and what the Court neglects, is a realistic appraisal of the relationship between defendants and the government that has brought them to trial.

We discussed that relationship in *Polk County* v. *Dodson*, 454 U. S. 312 (1981), which held that a public defender does not act "under color of state law" for purposes of 42 U. S. C. § 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U. S., at 325. We began our analysis by explaining that a public defender's obligations toward her client are no different than the obligations of any other defense attorney. *Id.*, at 318. These obligations preclude attributing the acts of defense lawyers to the State: "[T]he duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are 'officers of the court.' But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor . . . ." *Ibid.*

We went on to stress the inconsistency between our adversarial system of justice and theories that would make defense lawyers state actors. "In our system," we said, "a defense lawyer characteristically opposes the designated representatives of the State." *Ibid.* This adversarial posture rests on the assumption that a defense lawyer best serves the public "not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.*, at 318–319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)). Moreover, we pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon* v. *Wainwright*,

372 U. S. 335 (1963), "established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against [them]." 454 U. S., at 322 (internal quotation marks omitted). Implicit in this right "is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Ibid.* Thus, the defense's freedom from state authority is not just empirically true, but is a constitutionally mandated attribute of our adversarial system.

Because this Court deems the "under color of state law" requirement that was not satisfied in *Dodson* identical to the Fourteenth Amendment's state action requirement, see *Lugar*, *supra*, at 929, the holding of *Dodson* simply cannot be squared with today's decision. In particular, *Dodson* cannot be explained away as a case concerned exclusively with the employment status of public defenders. See *ante*, at 54. The *Dodson* Court reasoned that public defenders performing traditional defense functions are not state actors because they occupy the same position as other defense attorneys in relevant respects. 454 U. S., at 319–325. This reasoning followed on the heels of a critical determination: Defending an accused "is essentially a private function," not state action. *Id.*, at 319. The Court's refusal to acknowledge *Dodson*'s initial holding, on which the entire opinion turned, will not make that holding go away.

The Court also seeks to evade *Dodson*'s logic by spinning out a theory that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions. See *ante*, at 54. *Dodson*, however, established that even though public defenders might act under color of state law when carrying out administrative or investigative functions outside a courtroom, they are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a

criminal proceeding." 454 U. S., at 325. Since making peremptory challenges plainly qualifies as a "traditional function" of criminal defense lawyers, see *Swain* v. *Alabama*, 380 U. S. 202, 212–219 (1965); *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), *Dodson* forecloses the Court's functional analysis.

Even aside from our prior rejection of it, the Court's functional theory fails. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982). Thus, a private party's exercise of choice allowed by state law does not amount to state action for purposes of the Fourteenth Amendment so long as "the initiative comes from [the private party] and not from the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). See *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 165 (1978) (State not responsible for a decision it "permits but does not compel"). The government in no way influences the defense's decision to use a peremptory challenge to strike a particular juror. Our adversarial system of criminal justice and the traditions of the peremptory challenge vest the decision to strike a juror entirely with the accused. A defendant "may, if he chooses, peremptorily challenge 'on his own dislike, without showing any cause;' he may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)). "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, *supra*, at 220. See *Dodson*, *supra*, at 321–322; *Lewis*, *supra*, at 376, 378.

Certainly, *Edmonson* v. *Leesville Concrete Co.* did not render *Dodson* and its realistic approach to the state action inquiry dead letters. The *Edmonson* Court distinguished

Dodson by saying: "In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury selection process, the government and private litigants work for the same end." *Edmonson*, 500 U. S., at 627. While the nonpartisan administrative interests of the State and the partisan interests of private litigants may not be at odds during civil jury selection, the same cannot be said of the partisan interests of the State and the defendant during jury selection in a criminal trial. A private civil litigant opposes a private counterpart, but a criminal defendant is by design in an adversarial relationship with the government. Simply put, the defendant seeks to strike jurors predisposed to convict, while the State seeks to strike jurors predisposed to acquit. The *Edmonson* Court clearly recognized this point when it limited the statement that "an adversarial relation does not exist between the government and a private litigant" to "the ordinary context of *civil litigation in which the government is not a party.*" *Ibid.* (emphasis added).

From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. Rather than squarely facing this fact, the Court, as in *Edmonson*, rests its finding of governmental action on the points that defendants exercise peremptory challenges in a courtroom and judges alter the composition of the jury in response to defendants' choices. I found this approach wanting in the context of civil controversies between private litigants, for reasons that need not be repeated here. See *id.*, at 632 (O'CONNOR, J., dissenting). But even if I thought *Edmonson* was correctly decided, I could not accept today's simplistic extension of it. *Dodson* makes clear that the unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State, whatever is the case in civil trials. How could it be otherwise when the underlying question is

whether the accused "c[an] be described in all fairness as a state actor"? 500 U. S., at 620. As *Dodson* accords with our state action jurisprudence and with common sense, I would honor it.

II

What really seems to bother the Court is the prospect that leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection we espoused in *Batson*, 476 U. S., at 85–88. The concept that the government alone must honor constitutional dictates, however, is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct. See *Brady* v. *Maryland*, 373 U. S. 83 (1963) (disclosure of evidence favorable to the accused); *Berger* v. *United States*, 295 U. S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Considered in purely pragmatic terms, moreover, the Court's holding may fail to advance nondiscriminatory criminal justice. It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. See Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559–1560 (1988); Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110–112 (1990). Using peremptory challenges to secure minority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury. See *id.*, at 112–115; Developments in

the Law, *supra*, at 1559–1560. As *amicus* NAACP Legal Defense and Educational Fund explained in this case:

> "The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 9–10 (footnote omitted).

See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 56–57; *Edmonson*, *supra*, at 644 (SCALIA, J., dissenting). In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.

That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure. But such limitations are the necessary and intended consequence of the Fourteenth Amendment's state action requirement. Because I cannot accept the Court's conclusion that government is responsible for decisions criminal defendants make while fighting state prosecution, I respectfully dissent.

JUSTICE SCALIA, dissenting.

I agree with the Court that its judgment follows logically from *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). For the reasons given in the *Edmonson* dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd:

A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. JUSTICE O'CONNOR demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider *Edmonson* distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion.

Today's decision gives the lie once again to the belief that an activist, "evolutionary" constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair. I dissent.

Syllabus

KRAFT GENERAL FOODS, INC. *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE

CERTIORARI TO THE SUPREME COURT OF IOWA

No. 90–1918. Argued April 22, 1992—Decided June 18, 1992

The Iowa statute that imposes a business tax on corporations uses the federal tax code's definition of "net income" with certain adjustments. Like the federal scheme, Iowa allows corporations to take a deduction for dividends received from domestic, but not foreign, subsidiaries. However, unlike the federal scheme, Iowa does not allow a credit for taxes paid to foreign countries. Petitioner Kraft General Foods, Inc., a unitary business with operations in the United States and several foreign countries, deducted its foreign subsidiary dividends from its taxable income on its 1981 Iowa return, notwithstanding the contrary provisions of Iowa law. Respondent Iowa Department of Revenue and Finance (Iowa) assessed a deficiency, which Kraft challenged in administrative proceedings and subsequently in Iowa courts. The Iowa Supreme Court rejected Kraft's argument that the disparate treatment of domestic and foreign subsidiary dividends violated the Commerce Clause of the Federal Constitution, holding that Kraft failed to demonstrate that the taxing scheme gave Iowa businesses a commercial advantage over foreign commerce.

Held: The Iowa statute facially discriminates against foreign commerce in violation of the Foreign Commerce Clause. It is indisputable that the statute treats dividends received from foreign subsidiaries less favorably than those received from domestic subsidiaries by including the former, but not the latter, in taxable income. None of the several arguments made by Iowa and its *amici*—that, since a corporation's domicile does not necessarily establish that it is engaged in either foreign or domestic commerce, the disparate treatment is not discrimination based on the business activity's location or nature; that a taxpayer can avoid the discrimination by changing a subsidiary's domicile from a foreign to a domestic location; that the statute does not treat Iowa subsidiaries more favorably than those located elsewhere; that the benefit to domestic subsidiaries might be offset by the taxes imposed on them by other States and the Federal Government; and that the statute is intended to promote administrative convenience rather than economic protectionism—justifies Iowa's differential treatment of foreign commerce. Pp. 75–82.

465 N. W. 2d 664, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 82.

Jerome B. Libin argued the cause for petitioner. With him on the briefs were *Kathryn L. Moore* and *John V. Donnelly.*

Marcia Mason, Assistant Attorney General of Iowa, argued the cause for respondent. With her on the brief were *Bonnie J. Campbell*, Attorney General, and *Harry M. Griger*, Special Assistant Attorney General.

Kent L. Jones argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Bruton*, *Deputy Solicitor General Wallace*, *Gary R. Allen*, and *Ernest J. Brown.**

JUSTICE STEVENS delivered the opinion of the Court.

In 1981 petitioner Kraft General Foods, Inc. (Kraft), operated a unitary business throughout the United States and in several foreign countries. Because part of its business was conducted in Iowa, Kraft was subject to the Iowa Business Tax on Corporations.[1] At issue in this case is Iowa's inclusion in the tax base of the dividends that Kraft received from six subsidiaries, each of which was incorporated and conducted its business in a foreign country.[2] While Iowa taxes

*Briefs of *amici curiae* urging reversal were filed for Avon Products, Inc., et al. by *Timothy B. Dyk*, *Edward K. Bilich*, and *Maryann B. Gall;* for Chevron Corp. et al. by *Mark L. Evans*, *Alan I. Horowitz*, and *Anthony F. Shelley;* and for the Washington Legal Foundation by *Stephan G. Weil*, *Susan G. Braden*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

Richard Ruda, *Michael G. Dzialo*, *Martin Lobel*, and *James F. Flug* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging affirmance.

[1] Iowa Code § 422.32 *et seq.* (1981).

[2] See App. to Pet. for Cert. 29a. Kraft owned capital stock representing more than 80% of the voting power and of the total value of the subsidiaries. *Ibid.*

the dividends that a corporation receives from its foreign subsidiaries, Iowa does not tax dividends received from domestic subsidiaries. The question presented is whether the disparate treatment of dividends from foreign and from domestic subsidiaries violates the Foreign Commerce Clause.[3]

I

The Iowa statute uses the federal definition of "net income" with certain adjustments.[4] For federal tax purposes, corporations are generally allowed a deduction for dividends received from domestic subsidiaries.[5] As the earnings of the domestic subsidiaries, themselves, are subject to federal taxation, this deduction avoids a second federal tax on those earnings.[6] The Federal Government generally does not tax the earnings of foreign subsidiaries, and the dividends paid by foreign subsidiaries are not deductible. The parent corporation, however, does receive a credit for the foreign taxes paid on the dividends and on the underlying foreign earnings.[7] Like the deduction for domestic subsidiary dividends, the foreign tax credit is intended to mitigate multiple taxation of corporate earnings.[8]

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[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ." U. S. Const., Art. I, § 8.

[4] See Iowa Code § 422.35 (1981).

[5] See 26 U. S. C. § 243.

[6] See 465 N. W. 2d 664, 665 (Iowa 1991); B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 5.05 (5th ed. 1987).

[7] See 26 U. S. C. §§ 901, 902. Instead of taking the credit, the corporation may elect to deduct the foreign tax withheld on dividends from foreign subsidiaries. See § 164. The taxpayer may not take both the credit and the deduction. See § 275(a)(4). The credit is almost always more valuable to the taxpayer. See 3 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 69.14 (2d ed. 1991).

[8] See *United States* v. *Goodyear Tire & Rubber Co.*, 493 U. S. 132, 139 (1989); *American Chicle Co.* v. *United States*, 316 U. S. 450, 452 (1942); see also Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 17.11.

In following the federal scheme for the calculation of taxable income, Iowa allows a deduction for dividends received from domestic subsidiaries, but not for those received from foreign subsidiaries. Iowa does not directly tax the *income* of a subsidiary unless the subsidiary, itself, does business in Iowa.[9] Thus, if a domestic subsidiary transacts business in Iowa, its *income* is taxed, but if it does not do business in Iowa, neither its income nor the dividends paid to its parent are taxed. In the case of the foreign subsidiary doing business abroad, Iowa does not tax the corporate income, but does tax the dividends paid to the parent.[10] Unlike the Federal Government, Iowa does not allow a credit for taxes paid to foreign countries. See 465 N. W. 2d 664, 665 (Iowa 1991).[11]

In computing its taxable income on its 1981 Iowa return, Kraft deducted foreign subsidiary dividends, notwithstanding contrary provisions of Iowa law.[12] Respondent Iowa Department of Revenue and Finance (Iowa) assessed a defi-

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[9] Iowa is not a State that taxes an apportioned share of the entire income of a unitary business, without regard for formal corporate lines. See Tr. of Oral Arg. 37; cf. *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 164–169 (1983).

[10] At oral argument, counsel for Kraft offered the following illustration: "If an Iowa parent company had a Kentucky subsidiary, [that] did all its business in Kentucky, and another subsidiary that did all its business in Germany, Iowa would not tax the income of either of those subsidiaries. If each paid a dividend to the Iowa parent, Iowa would tax the German dividends and would not tax the Kentucky dividends." Tr. of Oral Arg. 47–48.

[11] If in calculating its federal tax liability, a taxpayer elects to deduct foreign tax withheld on foreign subsidiary dividends, a taxpayer may also deduct these tax payments in calculating its Iowa taxes. Electing the deduction, then, allows the taxpayer to reduce, but not eliminate, the Iowa tax on foreign subsidiary dividends. In the relevant year, Kraft elected to take the foreign tax credit, see 465 N. W. 2d, at 666, and thus could not deduct the foreign taxes in computing its federal or Iowa taxable income, see n. 7, *supra*.

[12] See 465 N. W. 2d, at 666.

ciency. After its administrative protest was denied,[13] Kraft challenged the assessment in Iowa courts, alleging that the disparate treatment of domestic and foreign subsidiary dividends violated the Commerce Clause and the Equal Protection Clause[14] of the Federal Constitution. The Iowa Supreme Court rejected the Commerce Clause claim because petitioner failed to demonstrate "that Iowa businesses receive a commercial advantage over foreign commerce due to Iowa's taxing scheme." *Id.*, at 668. In considering Kraft's challenge under the Equal Protection Clause, the court found that Iowa's use of the federal formula for calculation of taxable income was convenient both for the taxpayer and for the State. Concluding that the Iowa statute was rationally related to the goal of administrative efficiency, the Iowa Supreme Court held that the statute did not violate equal protection. *Id.*, at 669. We granted certiorari. 502 U. S. 1056 (1992).

II

The principal dispute between the parties concerns whether, on its face, the Iowa statute discriminates against foreign commerce. It is indisputable that the Iowa statute treats dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries. Iowa includes the former, but not the latter, in the calculation of taxable income. While admitting that the two kinds of dividends are treated differently, Iowa and its *amici* advance several arguments in support of the proposition that this differential treatment does not constitute prohibited discrimination against foreign commerce.

Amicus United States notes that a subsidiary's place of incorporation does not necessarily correspond to the locus of its business operations. A domestic corporation might do

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[13] See App. to Pet. for Cert. 26a.

[14] "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

business abroad, and its dividends might reflect earnings from its foreign activity. Conversely, a foreign corporation might do business in the United States, with its dividend payments reflecting domestic business operations. On this basis, the United States contends that the disparate treatment of dividends from foreign and domestic subsidiaries does not translate into discrimination based on the location or nature of business activity and is thus not prohibited by the Commerce Clause.

We recognize that the domicile of a corporation does not necessarily establish that it is engaged in either foreign or domestic commerce. In this case, however, it is stipulated that the foreign subsidiaries did, in fact, operate in foreign commerce and, further, that the decision to do business abroad through foreign subsidiaries is typically supported by legitimate business reasons.[15] By its nature, a unitary business is characterized by a flow of value among its components. See *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 178 (1983). The flow of value between Kraft and its foreign subsidiaries clearly constitutes foreign commerce; this flow includes the foreign subsidiary dividends, which, as Iowa acknowledges, themselves constitute foreign commerce.[16]

Moreover, through the interplay of the federal and Iowa tax statutes, the applicability of the Iowa tax necessarily depends not only on the domicile of the subsidiary, but also on the location of the subsidiary's business activities. The

[15] The parties stipulated as follows:

"Domestic Corporations typically do business in foreign countries through corporations organized in the country in which they are doing business for a variety of reasons. Reasons include, but are not limited to, the requirements of the local country, a better ability to limit their liability in that country, the marketing advantage of being perceived by customers as a local company, greater ease in repatriating funds, greater ease in borrowing funds locally, and ability to own property and manufacture in that country." App. to Pet. for Cert. 30a–31a.

[16] See Tr. of Oral Arg. 24, 35.

Federal Government generally taxes the income that a foreign corporation earns in the United States.[17] To avoid multiple taxation, the Government allows a deduction for foreign subsidiary dividends that reflect such domestic earnings.[18] In adopting the federal pattern, Iowa also allows a deduction for dividends received from a foreign subsidiary if the dividends reflect business activity in the United States. Accordingly, while the dividends of all domestic subsidiaries are excluded from the Iowa tax base, the dividends of foreign subsidiaries are excluded only to the extent they reflect domestic earnings.[19] In sum, the only subsidiary dividend payments taxed by Iowa are those reflecting the foreign business activity of foreign subsidiaries. We do not think that this discriminatory treatment can be justified on the ground that some of the (untaxed) dividend payments from domestic subsidiaries also reflect foreign earnings.

In a related argument, Iowa and *amicus* United States assert that Kraft could conduct its foreign business through domestic subsidiaries instead of foreign subsidiaries or, alternatively, could set up a domestic company to hold the stock of the foreign subsidiaries and receive the foreign dividend payments. In either case, Kraft, itself, would receive no dividends from foreign subsidiaries and would thus avoid paying Iowa tax on income attributable to the foreign operations. Iowa and the United States contend that these alternatives further demonstrate that it is not foreign commerce,

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[17] See 26 U. S. C. § 882.

[18] See § 245.

[19] The dissent presents the example of a subsidiary incorporated in a foreign country, but engaged in business exclusively in the United States. The dissent doubts whether a dividend payment from such a subsidiary is properly characterized as "foreign commerce." *Post*, at 85. As discussed above, however, a dividend payment from such a subsidiary would *not* be taxed by Iowa. Iowa taxes foreign subsidiary dividends only to the extent that they reflect *foreign* earnings. The dissent does not dispute that this kind of dividend payment does constitute "foreign commerce." *Post*, at 84.

but, at most, a particular form of corporate organization that is burdened.

This argument is not persuasive. Whether or not the suggested methods of tax avoidance would be practical as a business matter, and whether or not they might generate adverse tax consequences in other jurisdictions, we do not think that a State can force a taxpayer to conduct its foreign business through a domestic subsidiary in order to avoid discriminatory taxation of foreign commerce. Cf. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869, 878–879 (1985). We have previously found that the Commerce Clause is not violated when the differential tax treatment of two categories of companies "results solely from differences between the nature of their businesses, not from the location of their activities." *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66, 78 (1989).[20] We find no authority for the different proposition advanced here that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business. Our cases suggest the contrary. See *Westinghouse Electric Corp.* v. *Tully*, 466 U. S. 388, 406 (1984); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 72 (1963).

Repeating the argument that prevailed in the Iowa Supreme Court, Iowa next insists that its tax system does not violate the Commerce Clause because it does not favor local interests. To the extent corporations do business in Iowa, an apportioned share of their entire corporate income is subject to Iowa tax. In the case of a foreign subsidiary doing business abroad, Iowa would tax the dividends paid to the domestic parent, but would not tax the subsidiary's earnings.

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[20] In *Amerada Hess*, we rejected the contention that a New Jersey tax violated the Commerce Clause because it "discriminate[d] against oil producers who market their oil in favor of independent retailers who do not produce oil." 490 U. S., at 78.

Summarizing this analysis, Iowa asserts: "More earnings of the domestic subsidiary, which has income producing activities in Iowa, than earnings of the foreign subsidiary, which has no Iowa activities, are included in the preapportioned net income base for the unitary business as a whole." Brief for Respondent 19. Far from favoring local commerce, Iowa argues, the tax system places additional burdens on Iowa businesses.

We agree that the statute does not treat Iowa subsidiaries more favorably than subsidiaries located elsewhere. We are not persuaded, however, that such favoritism is an essential element of a violation of the Foreign Commerce Clause. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), we concluded that the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce, *id.*, at 445–446, in part because matters of concern to the entire Nation are implicated, *id.*, at 448–451. Like the Import-Export Clause,[21] the Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole. *Id.*, at 450. So here, we think that a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination. As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions.

Iowa and *amicus* United States also assert the stronger claim that Iowa's tax system does not favor business activity in the United States generally over business activity abroad. If true, this would indeed suggest that the statute does not

[21] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." U. S. Const., Art. I, § 10, cl. 2.

discriminate against foreign commerce. We are not convinced, however, that this description adequately characterizes the relevant features of the Iowa statute. It is true that if a subsidiary were located in another State, its earnings would be subject to taxation by the Federal Government and by the other State (assuming that the State was one of the great majority that impose a corporate income tax).[22] This state and federal tax burden might exceed the sum of the foreign tax that a foreign subsidiary would pay and the tax that Iowa collects on dividends received from a foreign subsidiary. But whatever the tax burdens imposed by the Federal Government or by other States, the fact remains that *Iowa* imposes a burden on foreign subsidiaries that it does not impose on domestic subsidiaries.[23] We have no reason to doubt the assertion of the United States that "[i]n evaluating the alleged facial discrimination effected by the Iowa tax, it is not proper to ignore the operation of other

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[22] Corporate income is taxed by 45 States and by the District of Columbia. See 1 J. Hellerstein, State Taxation: Corporate Income and Franchise Taxes ¶ 1.6 (1983).

[23] If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.

In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 71 (1963). A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

provisions of the *same* statute." Brief for United States as *Amicus Curiae* 14, n. 19 (emphasis added). We find no authority, however, for the principle that discrimination against foreign commerce can be justified if the benefit to domestic subsidiaries might happen to be offset by other taxes imposed not by Iowa, but by other States and by the Federal Government.

Finally, Iowa insists that even if discrimination against foreign commerce does result, the statute is valid because it is intended to promote administrative convenience rather than economic protectionism. Iowa contends that the adoption of the federal definition of "taxable income," which includes foreign subsidiary dividends, provides significant advantages both to the taxpayers and to the taxing authorities. Taxpayers may compute their Iowa tax easily based on their federal calculations, and the Iowa authorities may rely on federal regulations and interpretations and may take advantage of federal efforts to monitor taxpayer compliance. See 465 N. W. 2d, at 669.

We do not minimize the value of having state forms and auditing procedures replicate federal practice. Absent a compelling justification, however, a State may not advance its legitimate goals by means that facially discriminate against foreign commerce. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 626–628 (1978); *Maine* v. *Taylor*, 477 U. S. 131, 148, n. 19 (1986). In this instance, Iowa could enjoy substantially the same administrative benefits by utilizing the federal definition of taxable income, while making adjustments that avoid the discriminatory treatment of foreign subsidiary dividends. Many other States have adopted this approach.[24] It is apparent, then, that this is not a case in which the State's goals "cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana* v. *Limbach*, 486 U. S. 269, 278 (1988). Even if such

[24] See App. to Pet. for Cert. 74a–75a.

adjustments would diminish the administrative benefits of adopting federal definitions, this marginal loss in convenience would not constitute the kind of serious health and safety concern that we have sometimes found sufficient to justify discriminatory state legislation. Cf. *Maine* v. *Taylor*, 477 U. S., at 151; *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 956–957 (1982).

III

Iowa need not adopt the federal definition of taxable income. Nor, having chosen to follow the federal system in part, must Iowa duplicate that scheme in all respects. The adoption of the federal system in whole or in part, however, cannot shield a state tax statute from Commerce Clause scrutiny. The Iowa statute cannot withstand this scrutiny, for it facially discriminates against foreign commerce and therefore violates the Foreign Commerce Clause.[25]

The judgment of the Supreme Court of Iowa is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner in this case limits its Commerce Clause challenge to a single argument—that Iowa's taxing scheme unconstitutionally discriminates against foreign commerce. It has brought a *facial* challenge to the Iowa taxing scheme. The burden on one making a facial challenge to the constitutionality of a statute is heavy; the litigant must show that "no set of circumstances exists under which the Act would be valid. The fact that [the tax] might operate unconstitutionally under some conceivable set of circumstances is

[25] Having concluded that the Iowa statute violates the Foreign Commerce Clause, we do not reach Kraft's challenge to the statute under the Equal Protection Clause.

insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

The only case dealing with the Foreign Commerce Clause substantially relied on by the Court in its opinion upholding petitioner's challenge to the Iowa statute is *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979). It is important, therefore, to note how different are the facts in that case from those in the present one. In *Japan Line*, California had levied a nondiscriminatory ad valorem property tax on cargo containers which were owned by Japanese shipping companies based in Japan, had their home ports in Japan, and were used exclusively in foreign commerce. The containers were physically present in California for a fractional part of the year, but only as a necessary incident of their employment in foreign commerce. Japan levied no tax on similarly situated property of United States shipping companies.

In *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159 (1983), where we upheld a California franchise tax against a claim of violation of the Foreign Commerce Clause, we noted at least two distinctions between that case and our earlier decision in *Japan Line*. First, the tax there imposed was not on a foreign entity, but on a domestic corporation. Second, the United States did not file a brief urging that the tax be struck down. 463 U. S., at 196. In the present case, like *Container Corporation*, the Iowa tax is imposed on a domestic corporation, not on a foreign entity. And in the present case, the Executive Branch has not merely remained neutral, as it did in *Container Corporation*, but has filed a brief urging that the tax be sustained against the Foreign Commerce Clause challenge.

The Court agrees that the Iowa tax involved here does not favor subsidiaries incorporated in Iowa over foreign subsidiaries, but points out that the tax does favor subsidiaries incorporated in other States over foreign subsidiaries. Iowa obviously has no selfish motive to accomplish such a result,

and the absence of such a motive is strong indication that none of the local advantage which has so often characterized our Commerce Clause decisions is sought here. See, *e. g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 268 (1984). Indeed, petitioner carries on operations in Iowa, where the "State's own political processes [can] serve as a check against unduly burdensome regulations." *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662, 675 (1981).

But assuming that it is sufficient to show simply that non-Iowa domestic "commerce" enjoys a benefit not enjoyed by foreign "commerce," the Court surely errs in concluding that such a showing has been made in the present case. Because petitioner has chosen to make a facial challenge to the Iowa statute, the record is largely devoid of any evidence to suggest that Iowa's taxing scheme systematically works to discourage foreign commerce to the advantage of its domestic counterpart.

Petitioner's failures in this respect are severalfold. First, it is unclear on the present record what amount of foreign commerce is affected by the Iowa statute. The difficulty flows from our inability to make any useful generalizations about a corporation's business activity based solely on the corporation's country of incorporation. The Court recognizes that, in this era of substantial international trade, it is simple-minded to assume that a corporation's foreign domicile necessarily reflects that it is principally, or even substantially, engaged in foreign commerce. *Ante*, at 76. To the contrary, foreign domiciled corporations may engage in little or even zero foreign activity. In such cases, the suggestion that Iowa's tax has any real effect on foreign commerce is absurd; petitioner certainly has not demonstrated "by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed" in all cases. *Franchise Tax Bd.*, *supra*, at 175. In turn, Iowa's tax can hardly be found to always unconstitutionally discriminate against foreign commerce. Given that petitioner's burden is to demonstrate

that there are no circumstances in which Iowa's statute could be constitutionally applied, the existence of such a possibility should be fatal to petitioner's chances of success in this case.

The Court suggests that, even if foreign domiciled corporations are involved in no foreign trade, the dividend payments from subsidiary to parent are themselves "foreign commerce." *Ante*, at 76. Again, this may be true in certain circumstances, as the payment of a dividend may represent a real flow of capital across international boundaries. But certainly there are other situations where the "foreign" aspects of a transaction are extraordinarily attenuated, and any burdening of such transactions concomitantly would not raise Foreign Commerce Clause concerns. Consider, for example, the case of a "foreign" subsidiary—*i. e.*, one that is incorporated in a foreign country—but with operations exclusively in the United States. It has no assets in the foreign country, no operations, nothing of value whatsoever. The corporation declares a dividend payable to its United States parent. The payment in such circumstance may well be accomplished simply by debiting one New York bank account and crediting another. To characterize this as "foreign commerce" seems to me to stretch that term beyond all recognition. And again, the existence of such a possibility is sufficient to undermine petitioner's facial challenge.

The Court appears to think these problems are surmounted by the parties' stipulation that petitioner's subsidiaries operated in "foreign commerce" and that foreign subsidiaries are often established for legitimate business reasons. *Ibid.* Of course, a stipulation between parties cannot bind this Court on a question of law. Moreover, even the facts that the stipulation establishes are sparse. It tells us nothing about the ratio in modern commerce of "real" foreign subsidiaries to their domestically oriented cousins. Indeed, on the present record it is impossible even to establish the scope of operation of Kraft's subsidiaries. Compare App. to Pet. for Cert. 52a–53a (reporting foreign tax pay-

ments by 6 of petitioner's subsidiaries) with *id.*, at 76a–79a (listing petitioner's 86 nonwholly owned subsidiaries). Without some greater detail, I think it is impossible to conclude that the Iowa taxing scheme would have such real and substantial effects that it could never survive constitutional muster.

Finally, I cannot agree that, even if the dividend payments made taxable by the Iowa scheme are foreign commerce, that Iowa impermissibly discriminates against such payments. To be sure, two Iowa corporations, one with a foreign subsidiary and one with a domestic non-Iowa subsidiary will in some cases pay a different total tax. But this does not constitute unconstitutional discrimination because, as far as the record demonstrates, Iowa's taxing scheme does not result in foreign commerce being systematically subject to higher tax burdens than domestic commerce. Given that 45 of 50 States tax corporations on their net income, *ante*, at 80, n. 22, in deciding to tax only a foreign subsidiary's dividend payments, rather than the subsidiary's total income, Iowa assures that the subsidiary's tax burden is less than that faced by its domestic counterpart. The deduction that Iowa extends to domestically based dividend payments simply helps to avoid what would otherwise be the near certainty that the domestic income would be doubly taxed—once when earned as income by the subsidiary and a second time when paid to the parent corporation.

But Iowa's attempt to take account of this near certainty with respect to domestic earnings does not in turn require it to make a similar assumption with respect to income earned by foreign sources. As *amicus* United States correctly points out, "[t]he record in this case fails to indicate even the existence, much less the nature, of such local-level foreign taxes . . . . Nor is there any evidence to reflect the credits or reductions that foreign local governments would apply or allow." Brief for United States as *Amicus Curiae* 15, n. 21.

Finally, as I would reject petitioner's Foreign Commerce Clause claim, I must go on to consider whether its Equal Protection Claim fares any better. It does not. In defending a tax classification such as this, a State need only demonstrate that the classification is rationally related to legitimate state purposes. *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 195 (1983). The statute will be upheld if it could reasonably be concluded "that the challenged classification would promote a legitimate state purpose." *Id.*, at 196. Administrative efficiency is certainly a legitimate state interest and Iowa's reliance on the federal taxing scheme obviously furthers its achievement. Petitioner's claim, therefore, must fail.

I would uphold the Iowa tax statute against this facial challenge.

Syllabus

GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

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

No. 90–1676. Argued March 23, 1992—Decided June 18, 1992

Pursuant to authority contained in the Occupational Safety and Health Act of 1970 (OSH Act or Act), the Occupational Safety and Health Administration (OSHA) promulgated regulations implementing a requirement of the Superfund Amendments and Reauthorization Act of 1986 (SARA) that standards be set for the initial and routine training of workers who handle hazardous wastes. Subsequently, Illinois enacted two acts requiring the licensing of workers at certain hazardous waste facilities. Each state act has the dual purpose of protecting workers and the general public and requires workers to meet specified training and examination requirements. Claiming, among other things, that the acts were pre-empted by the OSH Act and OSHA regulations, respondent, an association of businesses involved in, *inter alia,* hazardous waste management, sought injunctive relief against petitioner Gade's predecessor as director of the state environmental protection agency to prevent enforcement of the state acts. The District Court held that the state acts were not pre-empted because they protected public safety in addition to promoting job safety, but it invalidated some provisions of the acts. The Court of Appeals affirmed in part and reversed in part, holding that the OSH Act pre-empts all state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless the Secretary of Labor has explicitly approved the law pursuant to § 18 of the OSH Act. In remanding, the court did not consider which, if any, of the provisions would be pre-empted.

Held: The judgment is affirmed.

918 F. 2d 671, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III, and IV, concluding that:

1. A state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the OSH Act regardless of whether it has another, nonoccupational purpose. In assessing a state law's impact on the federal scheme, this Court has refused to rely solely

on the legislature's professed purpose and has looked as well to the law's effects. See, *e. g.*, *Perez* v. *Campbell*, 402 U. S. 637, 651–652. State laws of general applicability, such as traffic and fire safety laws, would generally not be pre-empted, because they regulate workers simply as members of the general public. Pp. 104–108.

2. The state licensing acts are pre-empted by the OSH Act to the extent that they establish occupational safety and health standards for training those who work with hazardous wastes. The Act's saving provisions are not implicated and Illinois does not have an approved plan. Illinois' interest in establishing standards for licensing various occupations, cf., *e. g.*, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792, cannot save from OSH Act pre-emption those provisions that directly and substantially affect workplace safety, since any state law, however clearly within a State's acknowledged power, must yield if it interferes with or is contrary to federal law, *Felder* v. *Casey*, 487 U. S. 131, 138. Nor can the acts be saved from pre-emption by Gade's argument that they regulate a "pre-condition" to employment rather than occupational safety and health, since SARA makes clear that the training of employees engaged in hazardous waste operations is an occupational safety and health issue and that certification requirements before an employee may engage in such work are occupational safety and health standards. This Court does not specifically consider which of the licensing acts' provisions will be pre-empted under the foregoing analysis. Pp. 108–109.

Justice O'Connor, joined by The Chief Justice, Justice White, and Justice Scalia, concluded in Part II that the OSH Act impliedly pre-empts any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to § 18(b) of the Act. The Act as a whole demonstrates that Congress intended to promote occupational safety and health while avoiding subjecting workers and employers to duplicative regulation. Thus, it established a system of uniform federal standards, but gave States the option of pre-empting the federal regulations entirely pursuant to an approved state plan that displaces the federal standards. This intent is indicated principally in § 18(b)'s statement that a State "shall" submit a plan if it wishes to "assume responsibility" for developing and enforcing health and safety standards. Gade's interpretation of § 18(b)—that the Secretary's approval is required only if a State wishes to replace, not merely supplement, the federal regulations—would be inconsistent with the federal scheme and is untenable in light of the surrounding provisions. The language and purposes of §§ 18(a), (c), (f), and (h) all confirm the view that the States cannot assume an enforcement role without the Secretary's approval, unless no federal standard is in effect. Also unaccept-

Syllabus

able is Gade's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. Even where such laws share a common goal, a state law will be pre-empted if it interferes with the methods by which a federal statute was intended to reach that goal. *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 494. Here, the Act does not foreclose a State from enacting its own laws, but it does restrict the ways in which it can do so. Pp. 96–104.

JUSTICE KENNEDY, agreeing that the state laws are pre-empted, concluded that the result is mandated by the express terms of § 18(b) of the OSH Act and that the scope of pre-emption is also defined by the statutory text. Such a finding is not contrary to the longstanding rule that this Court will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress. Unartful though § 18(b)'s language may be, its structure and language, in conjunction with subsections (a), (c), and (f), leave little doubt that in the OSH Act Congress intended to pre-empt supplementary state regulation of an occupational safety and health issue with respect to which a federal standard exists. Pp. 109, 111–113.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 109. SOUTER, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and THOMAS, JJ., joined, *post*, p. 114.

John A. Simon, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Roland W. Burris*, Attorney General, *Rosalyn B. Kaplan*, Solicitor General, and *Tanya Solov*, Assistant Attorney General.

Donald T. Bliss argued the cause for respondent. With him on the brief were *Arthur B. Culvahouse, Jr.*, *Bruce J. Parker*, and *John T. Van Gessel.*

William K. Kelley argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Deputy Solic-*

itor General Mahoney, Allen H. Feldman, Steven J. Mandel, and *Nathaniel I. Spiller.**

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Part II in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

In 1988, the Illinois General Assembly enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat., ch. 111, ¶¶ 7701–7717 (1989), and the Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat., ch. 111, ¶¶ 7801–7815 (1989) (together, licensing acts). The stated purpose of the licensing acts is both "to promote job safety" and "to protect life, limb and property." ¶¶ 7702, 7802. In this case, we consider whether these "dual impact" statutes, which protect both workers and the general public, are pre-empted by the federal Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. § 651 *et seq.* (OSH Act), and the standards promulgated thereunder by the Occupational Safety and Health Administration (OSHA).

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *Jerry Boone,* Solicitor General, and *Jane Lauer Barker* and *Richard Corenthal,* Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Michael E. Carpenter* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Robert J. Del Tufo* of New Jersey, and *Lee Fisher* of Ohio; and for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Glen D. Nager, Robert C. Gombar, Stephen A. Bokat, Robin S. Conrad,* and *Mona C. Zeiberg;* for the Flavor & Extract Manufacturers' Association et al. by *Daniel R. Thompson* and *John P. McKenna;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

I

The OSH Act authorizes the Secretary of Labor to promulgate federal occupational safety and health standards. 29 U. S. C. § 655. In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress directed the Secretary of Labor to "promulgate standards for the health and safety protection of employees engaged in hazardous waste operations" pursuant to her authority under the OSH Act. SARA, Pub. L. 99–499, Title I, § 126, 100 Stat. 1690–1692, codified at note following 29 U. S. C. § 655. In relevant part, SARA requires the Secretary to establish standards for the initial and routine training of workers who handle hazardous wastes.

In response to this congressional directive, OSHA, to which the Secretary has delegated certain of her statutory responsibilities, see *Martin* v. *Occupational Safety and Health Review Comm'n,* 499 U. S. 144, 147, n. 1 (1991), promulgated regulations on "Hazardous Waste Operations and Emergency Response," including detailed regulations on worker training requirements. 51 Fed. Reg. 45654, 45665–45666 (1986) (interim regulations); 54 Fed. Reg. 9294, 9320–9321 (1989) (final regulations), codified at 29 CFR § 1910.120 (1991). The OSHA regulations require, among other things, that workers engaged in an activity that may expose them to hazardous wastes receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the supervision of a trained supervisor. § 1910.120(e)(3)(i). Workers who are on the site only occasionally or who are working in areas that have been determined to be under the permissible exposure limits must complete at least 24 hours of off-site instruction and one day of actual field experience. §§ 1910.120(e)(3)(ii) and (iii). On-site managers and supervisors directly responsible for hazardous waste operations must receive the same initial training as general employees, plus at least eight additional hours of specialized training on various health and safety

programs. § 1910.120(e)(4). Employees and supervisors are required to receive eight hours of refresher training annually. § 1910.120(e)(8). Those who have satisfied the training and field experience requirement receive a written certification; uncertified workers are prohibited from engaging in hazardous waste operations. § 1910.120(e)(6).

In 1988, while OSHA's interim hazardous waste regulations were in effect, the State of Illinois enacted the licensing acts at issue here. The laws are designated as acts "in relation to environmental protection," and their stated aim is to protect both employees and the general public by licensing hazardous waste equipment operators and laborers working at certain facilities. Both licensing acts require a license applicant to provide a certified record of at least 40 hours of training under an approved program conducted within Illinois, to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Rev. Stat., ch. 111, ¶¶ 7705(c) and (e), 7706(c) and (d), 7707(b), 7805(c) and (e), 7806(b). In addition, applicants for a hazardous waste crane operator's license must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours." ¶ 7705(d). Employees who work without the proper license, and employers who knowingly permit an unlicensed employee to work, are subject to escalating fines for each offense. ¶¶ 7715, 7716, 7814.

The respondent in this case, National Solid Wastes Management Association (Association), is a national trade association of businesses that remove, transport, dispose, and handle waste material, including hazardous waste. The Association's members are subject to the OSH Act and OSHA regulations, and are therefore required to train, qualify, and certify their hazardous waste remediation workers. 29 CFR § 1910.120 (1991). For hazardous waste operations conducted in Illinois, certain of the workers employed by the Association's members are also required to obtain licenses

pursuant to the Illinois licensing acts. Thus, for example, some of the Association's members must ensure that their employees receive not only the 3 days of field experience required for certification under the OSHA regulations, but also the 500 days of experience (4,000 hours) required for licensing under the state statutes.

Shortly before the state licensing acts were due to go into effect, the Association brought a declaratory judgment action in United States District Court against Bernard Killian, the former Director of the Illinois Environmental Protection Agency (IEPA); petitioner Mary Gade is Killian's successor in office and has been substituted as a party pursuant to this Court's Rule 35.3. The Association sought to enjoin IEPA from enforcing the Illinois licensing acts, claiming that the acts were pre-empted by the OSH Act and OSHA regulations and that they violated the Commerce Clause of the United States Constitution. The District Court held that state laws that attempt to regulate workplace safety and health are not pre-empted by the OSH Act when the laws have a "legitimate and substantial purpose apart from promoting job safety." App. to Pet. for Cert. 54. Applying this standard, the District Court held that the Illinois licensing acts were not pre-empted because each protected public safety in addition to promoting job safety. *Id.*, at 56–57. The court indicated that it would uphold a state regulation implementing the 4,000-hour experience requirement, as long as it did not conflict with federal regulations, because it was reasonable to conclude that workers who satisfy the requirement "will be better skilled than those who do not; and better skilled means fewer accidents, which equals less risk to public safety and the environment." *Id.*, at 59. At the same time, the District Court invalidated the requirement that applicants for a hazardous waste license be trained "within Illinois" on the ground that the provision did not contribute to Illinois' stated purpose of protecting public safety. *Id.*, at 57–58. The court declined to consider the

Association's Commerce Clause challenge for lack of ripeness. *Id.*, at 61–62.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. *National Solid Wastes Management Assn.* v. *Killian*, 918 F. 2d 671 (1990). The Court of Appeals held that the OSH Act pre-empts all state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless the Secretary has explicitly approved the state law. *Id.*, at 679. Because many of the regulations mandated by the Illinois licensing acts had not yet reached their final form, the Court of Appeals remanded the case to the District Court without considering which, if any, of the Illinois provisions would be pre-empted. *Id.*, at 684. The court made clear, however, its view that Illinois "cannot regulate worker health and safety under the guise of environmental regulation," and it rejected the District Court's conclusion that the State's 4,000-hour experience requirement could survive pre-emption simply because the rule might also enhance public health and safety. *Ibid.* Writing separately, Judge Easterbrook expressed doubt that the OSH Act pre-empts non-conflicting state laws. *Id.*, at 685–688. He concluded, however, that if the OSH Act does pre-empt state law, the majority had employed an appropriate test for determining whether the Illinois licensing acts were superseded. *Id.*, at 688.

We granted certiorari, 502 U. S. 1012 (1991), to resolve a conflict between the decision below and decisions in which other Courts of Appeals have found the OSH Act to have a much narrower pre-emptive effect on "dual impact" state regulations. See *Associated Industries of Massachusetts* v. *Snow*, 898 F. 2d 274, 279 (CA1 1990); *Environmental Encapsulating Corp.* v. *New York City*, 855 F. 2d 48, 57 (CA2 1988); *Manufacturers Assn. of Tri-County* v. *Knepper*, 801 F. 2d 130, 138 (CA3 1986), cert. denied, 484 U. S. 815 (1987); *New*

Jersey State Chamber of Commerce v. *Hughey*, 774 F. 2d 587, 593 (CA3 1985).

II

Before addressing the scope of the OSH Act's pre-emption of dual impact state regulations, we consider petitioner's threshold argument, drawn from Judge Easterbrook's separate opinion below, that the Act does not pre-empt nonconflicting state regulations at all. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone."'" *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985) (quoting *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 138 (1990); see also *FMC Corp.* v. *Holliday*, 498 U. S. 52, 56–57 (1990).

In the OSH Act, Congress endeavored "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U. S. C. § 651(b). To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce, 29 U. S. C. § 651(b)(3), and thereby brought the Federal Government into a field that traditionally had been occupied by the States. Federal regulation of the workplace was not intended to be all encompassing, however. First, Congress expressly saved two areas from federal pre-emption. Section 4(b)(4) of the OSH Act states that the Act does not "supersede or in any manner affect any workmen's compensation law or . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U. S. C. § 653(b)(4). Section 18(a) provides that the Act does not "prevent any State

agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U. S. C. § 667(a).

Congress not only reserved certain areas to state regulation, but it also, in § 18(b) of the Act, gave the States the option of pre-empting federal regulation entirely. That section provides:

> "Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.
>
> "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSH Act] shall submit a State plan for the development of such standards and their enforcement." 29 U. S. C. § 667(b).

About half the States have received the Secretary's approval for their own state plans as described in this provision. 29 CFR pts. 1952, 1956 (1991). Illinois is not among them.

In the decision below, the Court of Appeals held that § 18(b) "unquestionably" pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary's approval for its own plan. 918 F. 2d, at 677. Every other federal and state court confronted with an OSH Act pre-emption challenge has reached the same conclusion,[1] and so do we.

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[1] *E. g., Associated Industries of Massachusetts* v. *Snow*, 898 F. 2d 274, 278 (CA1 1990); *Environmental Encapsulating Corp.* v. *New York City*, 855 F. 2d 48, 55 (CA2 1988); *United Steelworkers of America* v. *Auchter*, 763 F. 2d 728, 736 (CA3 1985); *Farmworker Justice Fund, Inc.* v. *Brock*, 258 U. S. App. D. C. 271, 283–284, 811 F. 2d 613, 625–626, vacated on other grounds, 260 U. S. App. D. C. 167, 817 F. 2d 890 (1987) (en banc); *Ohio*

Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982). Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" *id.*, at 153 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)), and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Felder* v. *Casey*, 487 U. S. 131, 138 (1988); *Perez* v. *Campbell*, 402 U. S. 637, 649 (1971).

Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole. Looking to "the provisions of the whole law, and to its object and policy," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987) (internal quotation marks and citations omitted), we hold that nonapproved state regulation of occupational safety and health is-

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Mfrs. Assn. v. *City of Akron*, 801 F. 2d 824, 828 (CA6 1986), appeal dism'd, 484 U. S. 801 (1987); *Five Migrant Farmworkers* v. *Hoffman*, 136 N. J. Super. 242, 247–248, 345 A. 2d 378, 381 (1975); *Columbus Coated Fabrics* v. *Industrial Comm'n of Ohio*, 1 OSHC 1361, 1362 (SD Ohio 1973); cf. *Florida Citrus Packers* v. *California*, 545 F. Supp. 216, 219–220 (ND Cal. 1982) (State may enforce modification to an approved plan pending approval by Secretary). See also S. Bokat & H. Thompson, Occupational Safety and Health Law 686, n. 28 (1988) ("Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan").

sues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act, *Hines* v. *Davidowitz*, *supra.* The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.

The principal indication that Congress intended to preempt state law is § 18(b)'s statement that a State "shall" submit a plan if it wishes to "assume responsibility" for "development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated." The unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval, and petitioner concedes that § 18(b) would require an approved plan if Illinois wanted to "assume responsibility" for the regulation of occupational safety and health within the State. Petitioner contends, however, that an approved plan is necessary only if the State wishes completely to replace the federal regulations, not merely to supplement them. She argues that the correct interpretation of § 18(b) is that posited by Judge Easterbrook below: *i. e.*, a State may either "oust" the federal standard by submitting a state plan to the Secretary for approval or "add to" the federal standard without seeking the Secretary's approval. 918 F. 2d, at 685 (Easterbrook, J., *dubitante*).

Petitioner's interpretation of § 18(b) might be plausible were we to interpret that provision in isolation, but it simply is not tenable in light of the OSH Act's surrounding provisions. "[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Dedeaux*, *supra*, at 51 (internal quotation marks and

citations omitted). The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.

Cutting against petitioner's interpretation of § 18(b) is the language of § 18(a), which saves from pre-emption any state law regulating an occupational safety and health issue with respect to which no federal standard is in effect. 29 U. S. C. § 667(a). Although this is a saving clause, not a pre-emption clause, the natural implication of this provision is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard. Moreover, if petitioner's reading of § 18(b) were correct, and if a State were free to enact nonconflicting safety and health regulations, then § 18(a) would be superfluous: There is no possibility of conflict where there is no federal regulation. Because "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute,'" *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883)), we conclude that § 18(a)'s preservation of state authority in the absence of a federal standard presupposes a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect.

Our understanding of the implications of § 18(b) is likewise bolstered by § 18(c) of the Act, 29 U. S. C. § 667(c), which sets forth the conditions that must be satisfied before the Secretary can approve a plan submitted by a State under subsection (b). State standards that affect interstate commerce will be approved only if they "are required by compelling local conditions" and "do not unduly burden interstate commerce." § 667(c)(2). If a State could supplement federal regulations without undergoing the § 18(b) approval process, then the protections that § 18(c) offers to interstate com-

merce would easily be undercut. It would make little sense to impose such a condition on state programs intended to supplant federal regulation and not those that merely supplement it: The burden on interstate commerce remains the same.

Section 18(f) also confirms our view that States are not permitted to assume an enforcement role without the Secretary's approval, unless no federal standard is in effect. That provision gives the Secretary the authority to withdraw her approval of a state plan. 29 U. S. C. § 667(f). Once approval is withdrawn, the plan "cease[s] to be in effect" and the State is permitted to assert jurisdiction under its occupational health and safety law only for those cases "commenced before the withdrawal of the plan." *Ibid.* Under petitioner's reading of § 18(b), § 18(f) should permit the continued exercise of state jurisdiction over purely "supplemental" and nonconflicting standards. Instead, § 18(f) assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn.

The same assumption of exclusive federal jurisdiction in the absence of an approved state plan is apparent in the transitional provisions contained in § 18(h) of the Act. 29 U. S. C. § 667(h). Section 18(h) authorized the Secretary of Labor, during the first two years after passage of the Act, to enter into an agreement with a State by which the State would be permitted to continue to enforce its own occupational health and safety standards for two years or until final action was taken by the Secretary pursuant to § 18(b), whichever was earlier. Significantly, § 18(h) does not say that such an agreement is only necessary when the State wishes fully to supplant federal standards. Indeed, the original Senate version of the provision would have allowed a State to enter into such an agreement only when it wished to enforce standards "not in conflict with Federal occupational health and safety standards," a category which included "any State occupational health and safety standard which pro-

vides for more stringent health and safety regulations than do the Federal standards." S. 2193, § 17(h), reprinted in 116 Cong. Rec. 37637 (1970). Although that provision was eliminated from the final draft of the bill, thereby allowing agreements for the temporary enforcement of less stringent state standards, it is indicative of the congressional understanding that a State was required to enter into a transitional agreement even when its standards were stricter than federal standards. The Secretary's contemporaneous interpretation of § 18(h) also expresses that understanding. See 29 CFR § 1901.2 (1972) ("Section 18(h) permits the Secretary to provide an alternative to the *exclusive Federal jurisdiction* [over] occupational safety and health issue[s]. This alternative is temporary and may be considered a step toward the more permanent alternative to *exclusive Federal jurisdiction* provided by sections 18(b) and (c) following submission and approval of a plan submitted by a State for the development and enforcement of occupational safety and health standards") (emphases added).

Looking at the provisions of § 18 as a whole, we conclude that the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to § 18(b). Our review of the Act persuades us that Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation. It thus established a system of uniform federal occupational health and safety standards, but gave States the option of pre-empting federal regulations by developing their own occupational safety and health programs. In addition, Congress offered the States substantial federal grant moneys to assist them in developing their own programs. See OSH Act § 23, 29 U. S. C. §§ 672(a), (b), and (f) (for three years following enactment, the Secretary may award up to 90% of the costs to a State of developing a state occupational safety

and health plan); 29 U. S. C. § 672(g) (States that develop approved plans may receive funding for up to 50% of the costs of operating their occupational health and safety programs). To allow a State selectively to "supplement" certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.

We cannot accept petitioner's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law "stands as an obstacle" to the full implementation of a federal law, *Hines* v. *Davidowitz,* 312 U. S., at 67, "it is not enough to say that the ultimate goal of both federal and state law" is the same, *International Paper Co.* v. *Ouellette,* 479 U. S. 481, 494 (1987). "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." *Ibid.;* see also *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Bd.,* 467 U. S. 461, 477 (1984) (state statute establishing association to represent agricultural producers pre-empted even though it and the federal Agricultural Fair Practices Act "share the goal of augmenting the producer's bargaining power"); *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 286–287 (1986) (state statute preventing three-time violators of the National Labor Relations Act from doing business with the State is pre-empted even though state law was designed to reinforce requirements of federal Act). The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its

only option is to obtain the prior approval of the Secretary of Labor, as described in § 18 of the Act.[2]

III

Petitioner next argues that, even if Congress intended to pre-empt all nonapproved state occupational safety and health regulations whenever a federal standard is in effect, the OSH Act's pre-emptive effect should not be extended to state laws that address public safety as well as occupational safety concerns. As we explained in Part II, we understand

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[2] JUSTICE KENNEDY, while agreeing on the pre-emptive scope of the OSH Act, finds that its pre-emption is express rather than implied. *Post*, at 112 (KENNEDY, J., concurring in part and concurring in judgment). The Court's previous observation that our pre-emption categories are not "rigidly distinct," *English* v. *General Electric Co.*, 496 U. S. 72, 79, n. 5 (1990), is proved true by this case. We, too, are persuaded that the text of the Act provides the strongest indication that Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue, but we cannot say that it rises to the level of express pre-emption. In the end, even JUSTICE KENNEDY finds express pre-emption by relying on the negative "inference" of § 18(b), which governs when *state* law will pre-empt *federal* law. *Post*, at 112. We cannot agree that the negative implications of the text, although ultimately dispositive to our own analysis, *expressly* address the issue of federal pre-emption of state law. We therefore prefer to place this case in the category of implied pre-emption. *Supra*, at 98–99. Although we have chosen to use the term "conflict" pre-emption, we could as easily have stated that the promulgation of a federal safety and health standard "pre-empts the field" for any nonapproved state law regulating the same safety and health issue. See *English*, *supra*, at 79–80, n. 5 ("[F]ield pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation"); *post*, at 116 (SOUTER, J., dissenting). Frequently, the pre-emptive "label" we choose will carry with it substantive implications for the scope of pre-emption. In this case, however, it does not. Our disagreement with JUSTICE KENNEDY as to whether the OSH Act's pre-emptive effect is labeled "express" or "implied" is less important than our agreement that the implications of the text of the statute evince a congressional intent to pre-empt nonapproved state regulations when a federal standard is in effect.

§ 18(b) to mean that the OSH Act pre-empts all state "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated." 29 U. S. C. § 667(b). We now consider whether a dual impact law can be an "occupational safety and health standard" subject to pre-emption under the Act.

The OSH Act defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U. S. C. § 652(8). Any state law requirement designed to promote health and safety in the workplace falls neatly within the Act's definition of an "occupational safety and health standard." Clearly, under this definition, a state law that expressly declares a legislative purpose of regulating occupational health and safety would, in the absence of an approved state plan, be pre-empted by an OSHA standard regulating the same subject matter. But petitioner asserts that if the state legislature articulates a purpose other than (or in addition to) workplace health and safety, then the OSH Act loses its pre-emptive force. We disagree.

Although "part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect." *English* v. *General Electric Co.*, 496 U. S. 72, 84 (1990) (citing *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 212–213 (1983)). In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law. As we explained over two decades ago:

> "We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal

> law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez* v. *Campbell*, 402 U. S., at 651–652.

See also *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 141–142 (focus on "whether the purposes of the two laws are parallel or divergent" tends to "obscure more than aid" in determining whether state law is pre-empted by federal law) (emphasis deleted); *Hughes* v. *Oklahoma*, 441 U. S. 322, 336 (1979) ("[W]hen considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law") (quoting *Lacoste* v. *Department of Conservation of Louisiana*, 263 U. S. 545, 550 (1924)); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 612 (1926) (pre-emption analysis turns not on whether federal and state laws "are aimed at distinct and different evils" but whether they "operate upon the same object").

Our precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one. As the Court of Appeals observed, "[i]t would defeat the purpose of section 18 if a state could enact measures stricter than OSHA's and largely accomplished through regulation of worker health and safety simply by asserting a nonoccupational purpose for the legislation." 918 F. 2d, at 679.

Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field. The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted under the Act.

In *English* v. *General Electric Co.*, *supra*, we held that a state tort claim brought by an employee of a nuclear-fuels production facility against her employer was not pre-empted by a federal whistle-blower provision because the state law did not have a "direct and substantial effect" on the federal scheme. *Id.*, at 85. In the decision below, the Court of Appeals relied on *English* to hold that, in the absence of the approval of the Secretary, the OSH Act pre-empts all state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." 918 F. 2d, at 679. We agree that this is the appropriate standard for determining OSH Act pre-emption. On the other hand, state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted. Although some laws of general applicability may have a "direct and substantial" effect on worker safety, they cannot fairly be characterized as "occupational" standards, because they regulate workers simply as members of the general public. In this case, we agree with the court below that a law directed at workplace safety is not saved from pre-emption simply because the State can demonstrate some additional effect outside of the workplace.

In sum, a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act. That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis.

If the State wishes to enact a dual impact law that regulates an occupational safety or health issue for which a federal standard is in effect, § 18 of the Act requires that the State submit a plan for the approval of the Secretary.

IV

We recognize that "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975); see also *Ferguson* v. *Skrupa*, 372 U. S. 726, 731 (1963); *Dent* v. *West Virginia*, 129 U. S. 114, 122 (1889). But under the Supremacy Clause, from which our pre-emption doctrine is derived, "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder* v. *Casey*, 487 U. S., at 138 (quoting *Free* v. *Bland*, 369 U. S. 663, 666 (1962)); see also *De Canas* v. *Bica*, 424 U. S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation"). We therefore reject petitioner's argument that the State's interest in licensing various occupations can save from OSH Act pre-emption those provisions that directly and substantially affect workplace safety.

We also reject petitioner's argument that the Illinois licensing acts do not regulate occupational safety and health at all, but are instead a "pre-condition" to employment. By that reasoning, the OSHA regulations themselves would not be considered occupational standards. SARA, however, makes clear that the training of employees engaged in hazardous waste operations is an occupational safety and health issue, and that certification requirements before an employee may engage in such work are occupational safety and health standards. See *supra*, at 92. Because nei-

ther of the OSH Act's saving provisions are implicated, and because Illinois does not have an approved state plan under § 18(b), the state licensing acts are pre-empted by the OSH Act to the extent they establish occupational safety and health standards for training those who work with hazardous wastes. Like the Court of Appeals, we do not specifically consider which of the licensing acts' provisions will stand or fall under the pre-emption analysis set forth above.

The judgment of the Court of Appeals is hereby

Affirmed.

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

Though I concur in the Court's judgment and with the ultimate conclusion that the state law is pre-empted, I would find express pre-emption from the terms of the federal statute. I cannot agree that we should denominate this case as one of implied pre-emption. The contrary view of the plurality is based on an undue expansion of our implied pre-emption jurisprudence which, in my view, is neither wise nor necessary.

As both the majority and dissent acknowledge, we have identified three circumstances in which a federal statute pre-empts state law: First, Congress can adopt express language defining the existence and scope of pre-emption. Second, state law is pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. And third, "state law is pre-empted to the extent that it actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U. S. 72, 78–79 (1990); *ante*, at 98; *post*, at 115. This third form of pre-emption, so-called actual conflict pre-emption, occurs either "where it is impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Eng-*

lish, *supra*, at 79 (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). The plurality would hold today that state occupational safety and health standards regulating an issue on which a federal standard exists conflict with Congress' purpose to "subject employers and employees to only one set of regulations." *Ante*, at 99. This is not an application of our pre-emption standards, it is but a conclusory statement of pre-emption, as it assumes that Congress intended exclusive federal jurisdiction. I do not see how such a mode of analysis advances our consideration of the case.

Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982); see also *English*, *supra*, at 90 ("The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'" (quoting *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960)); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 222–223 (1983). In my view, this type of pre-emption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation.

I do not believe that supplementary state regulation of an occupational safety and health issue can be said to create the sort of actual conflict required by our decisions. The purpose of state supplementary regulation, like the federal standards promulgated by the Occupational Safety and Health Administration (OSHA), is to protect worker safety and health. Any potential tension between a scheme of federal regulation of the workplace and a concurrent, supplementary state scheme would not, in my view, rise to the level

of "actual conflict" described in our pre-emption cases. Absent the express provisions of § 18 of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U. S. C. § 667, I would not say that state supplementary regulation conflicts with the purposes of the OSH Act, or that it "'interferes with the methods by which the federal statute was designed to reach [its] goal.'" *Ante*, at 103 (quoting *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 494 (1987)).

The plurality's broad view of actual conflict pre-emption is contrary to two basic principles of our pre-emption jurisprudence. First, we begin "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see also *ante*, at 96. Second, "'[t]he purpose of Congress is the ultimate touchstone'" in all pre-emption cases. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963)). A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that preempts state law.

Nonetheless, I agree with the Court that "the OSH Act pre-empts all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" *Ante*, at 105 (quoting 29 U. S. C. § 667(b)). I believe, however, that this result is mandated by the express terms of § 18(b) of the OSH Act. It follows from this that the preemptive scope of the Act is also limited to the language of the statute. When the existence of pre-emption is evident from the statutory text, our inquiry must begin and end with the statutory framework itself.

A finding of express pre-emption in this case is not contrary to our longstanding rule that we will not infer preemption of the States' historic police powers absent a clear

statement of intent by Congress. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, at 230; *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); *English*, 496 U. S., at 79. Though most statutes creating express pre-emption contain an explicit statement to that effect, a statement admittedly lacking in § 18(b), we have never required any particular magic words in our express pre-emption cases. Our task in all pre-emption cases is to enforce the "clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, *supra*, at 230. We have held, in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 138 (1990); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). The language of the OSH statute sets forth a scheme in light of which the provisions of § 18 must be interpreted, and from which the express pre-emption that displaces state law follows.

As the plurality's analysis amply demonstrates, *ante*, at 98–103, Congress has addressed the issue of pre-emption in the OSH Act. The dissent's position that the Act does not pre-empt supplementary state regulation becomes most implausible when the language of § 18(b) is considered in conjunction with the other provisions of § 18. Section 18(b) provides as follows:

> "Any State which . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . *shall* submit a State plan . . . ." 29 U. S. C. § 667(b) (emphasis added).

The statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure ap-

proval of a state plan, it may not enforce occupational safety and health standards in that area. Any doubt that this is what Congress intended disappears when subsection (b) is considered in conjunction with subsections (a), (c), and (f). *Ante*, at 100–101. I will not reiterate the plurality's persuasive discussion on this point. Unartful though the language of § 18(b) may be, the structure and language of § 18 leave little doubt that in the OSH statute Congress intended to pre-empt supplementary state regulation of an occupational safety and health issue with respect to which a federal standard exists.

In this regard I disagree with the dissent, see *post*, p. 114, and find unconvincing its conclusion that Congress intended to allow concurrent state and federal jurisdiction over occupational safety and health issues. The dissent would give the States, rather than the Federal Government, the power to decide whether as to any particular occupational safety and health issue there will exist a single or dual regulatory scheme. Under this theory the State may choose exclusive federal jurisdiction by not regulating; or exclusive state jurisdiction by submitting a state plan; or dual regulation by adopting supplementary rules, as Illinois did here. That position undermines the authority of OSHA in many respects. For example, § 18(c)(2) of the OSH Act allows OSHA to disapprove state plans which "unduly burden interstate commerce." The dissent would eviscerate this important administrative mechanism by allowing the States to sidestep OSHA's authority through the mechanism of supplementary regulation. See *post*, at 118–121. Furthermore, concurrent state and federal jurisdiction might interfere with the enforcement of the federal regulations without creating a situation where compliance with both schemes is a physical impossibility, which the dissent would require for pre-emption. *Post*, at 121; see also Brief for Respondent 32–33. I would not attribute to Congress the intent to create such a hodgepodge scheme of authority. My views in

this regard are confirmed by the fact that OSHA has as a consistent matter, since the enactment of the OSH Act, viewed § 18 as providing it with exclusive jurisdiction in areas where it issues a standard. 29 CFR § 1901.2 (1991); 36 Fed. Reg. 7006 (1971); Brief for United States as *Amicus Curiae* 12–21. Therefore, while the dissent may be correct that as a theoretical matter the separate provisions of § 18 may be reconciled with allowing concurrent jurisdiction, it is neither a natural nor a sound reading of the statutory scheme.

The necessary implication of finding express pre-emption in this case is that the pre-emptive scope of the OSH Act is defined by the language of § 18(b). Because this provision requires federal approval of state occupational safety and health standards alone, only state laws fitting within that description are pre-empted. For that reason I agree with the Court that state laws of general applicability are not pre-empted. *Ante*, at 107. I also agree that "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act," *ibid.*, and therefore falls within the scope of pre-emption. So-called "dual impact" state regulations which meet this standard are pre-empted by the OSH Act, regardless of any additional purpose the law may serve, or effect the law may have, outside the workplace. As a final matter, I agree that the Illinois Acts are not saved because they operate through a licensing mechanism rather than through direct regulation of the workplace. I therefore join all but Part II of the Court's opinion, and concur in the judgment of the Court.

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

The Court holds today that § 18 of the Occupational Safety and Health Act of 1970 (Act), 29 U. S. C. § 667, pre-empts state regulation of any occupational safety or health issue as

to which there is a federal standard, whether or not the state regulation conflicts with the federal standard in the sense that enforcement of one would preclude application of the other. With respect, I dissent. In light of our rule that federal pre-emption of state law is only to be found in a clear congressional purpose to supplant exercises of the States' traditional police powers, the text of the Act fails to support the Court's conclusion.

I

Our cases recognize federal pre-emption of state law in three variants: express pre-emption, field pre-emption, and conflict pre-emption. Express pre-emption requires "explicit pre-emptive language." See *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n,* 461 U. S. 190, 203 (1983), citing *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law. 461 U. S., at 204. Finally, there is conflict pre-emption in either of two senses. The first is found when compliance with both state and federal law is impossible, *ibid.*, the second when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941).

The plurality today finds pre-emption of this last sort, discerning a conflict between any state legislation on a given issue as to which a federal standard is in effect, and a congressional purpose "to subject employers and employees to only one set of regulations." *Ante,* at 99. Thus, under the plurality's reading, any regulation on an issue as to which a federal standard has been promulgated has been pre-empted. As one commentator has observed, this kind of purpose-conflict pre-emption, which occurs when state law is held to

"undermin[e] a congressional decision in favor of national uniformity of standards," presents "a situation similar in practical effect to that of federal occupation of a field." L. Tribe, American Constitutional Law 486 (2d ed. 1988). Still, whether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the federal objective of single regulation, or, as JUSTICE KENNEDY describes it, as express pre-emption, see *ante*, at 111 (opinion concurring in part and concurring in judgment), the key is congressional intent, and I find the language of the statute insufficient to demonstrate an intent to pre-empt state law in this way.

II

Analysis begins with the presumption that "Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981). "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e. g.*, U. S. Const., Art. I, § 10; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 358 (1898), 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). This assumption provides assurance that the 'federal-state balance,' *United States* v. *Bass*, 404 U. S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has 'unmistakably . . . ordained,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones*, *supra*, at 525. Subject to this principle, the enquiry into the possibly pre-emptive effect of federal legislation is an exercise of statutory construction. If the statute's terms can be read sensi-

bly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.

III

At first blush, respondent's strongest argument might seem to rest on § 18(a) of the Act, 29 U. S. C. § 667(a), the full text of which is this:

> "(a) Assertion of State standards in absence of applicable Federal standards
>
> "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."

That is to say, where there is no federal standard in effect, there is no pre-emption. The plurality reasons that there must be pre-emption, however, when there is a federal standard in effect, else § 18(a) would be rendered superfluous because "[t]here is no possibility of conflict where there is no federal regulation." *Ante*, at 100.

The plurality errs doubly. First, its premise is incorrect. In the sense in which the plurality uses the term, there is the possibility of "conflict" even absent federal regulation since the mere enactment of a federal law like the Act may amount to an occupation of an entire field, preventing state regulation. Second, the necessary implication of § 18(a) is not that every federal regulation pre-empts all state law on the issue in question, but only that some federal regulations may pre-empt some state law. The plurality ignores the possibility that the provision simply rules out field pre-emption and is otherwise entirely compatible with the possibility that pre-emption will occur only when actual conflict between a federal regulation and a state rule renders compliance with both impossible. Indeed, if Congress had meant to say that any state rule should be pre-empted if it deals

with an issue as to which there is a federal regulation in effect, the text of subsection (a) would have been a very inept way of trying to make the point. It was not, however, an inept way to make the different point that Congress intended no field pre-emption of the sphere of health and safety subject to regulation, but not necessarily regulated, under the Act. Unlike the case where field pre-emption occurs, the provision tells us, absence of a federal standard leaves a State free to do as it will on the issue. Beyond this, subsection (a) does not necessarily mean anything, and the provision is perfectly consistent with the conclusion that as long as compliance with both a federal standard and a state regulation is not physically impossible, see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), each standard shall be enforceable. If, indeed, the presumption against pre-emption means anything, § 18(a) must be read in just this way.

Respondent also relies on § 18(b), 29 U. S. C. § 667(b):

> "(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards
>
> "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement."

Respondent argues that the necessary implication of this provision is clear: the only way that a state rule on a particular occupational safety and health issue may be enforced once a federal standard on the issue is also in place is by incorporating the state rule in a plan approved by the Secretary.

As both the plurality and JUSTICE KENNEDY acknowledge, however, that is not the necessary implication of § 18(b).

See *ante*, at 99 (plurality opinion); *ante*, at 112–113 (opinion concurring in part and concurring in judgment). The subsection simply does not say that unless a plan is approved, state law on an issue is pre-empted by the promulgation of a federal standard. In fact it tugs the other way, and in actually providing a mechanism for a State to "assume responsibility" for an issue with respect to which a federal standard has been promulgated (that is, to pre-empt federal law), § 18(b) is far from pre-emptive of anything adopted by the States. Its heading, enacted as part of the statute and properly considered under our canons of construction for whatever light it may shed, see, *e. g.*, *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354 (1920); *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385 (1959), speaks expressly of the "development and enforcement of State standards to preempt applicable Federal standards." The provision does not in any way provide that absent such state pre-emption of federal rules, the State may not even supplement the federal standards with consistent regulations of its own. Once again, nothing in the provision's language speaks one way or the other to the question whether promulgation of a federal standard preempts state regulation, or whether, in the absence of a plan, consistent federal and state regulations may coexist. The provision thus makes perfect sense on the assumption that a dual regulatory scheme is permissible but subject to state pre-emption if the State wishes to shoulder enough of the federal mandate to gain approval of a plan.

Nor does the provision setting out conditions for the Secretary's approval of a plan indicate that a state regulation on an issue federally addressed is never enforceable unless incorporated in a plan so approved. Subsection (c)(2) requires the Secretary to approve a plan when in her judgment, among other things, it will not "unduly burden interstate commerce." 29 U. S. C. § 667(c)(2). Respondent argues, and the plurality concludes, that if state regulations were not pre-empted, this provision would somehow suggest

that States acting independently could enforce regulations that did burden interstate commerce unduly. Brief for Respondent 17; see *ante*, at 100–101. But this simply does not follow. The subsection puts a limit on the Secretary's authority to approve a plan that burdens interstate commerce, thus capping the discretion that might otherwise have been read into the congressional delegation of authority to the Secretary to approve state plans. From this restriction applying only to the Secretary's federal authority it is clearly a non sequitur to conclude that pre-emption must have been intended to avoid the equally objectionable undue burden that independent state regulation might otherwise impose. Quite the contrary; the dormant Commerce Clause can take care of that, without any need to assume pre-emption.

The final provision that arguably suggests pre-emption merely by promulgation of a federal standard is § 18(h), 29 U. S. C. § 667(h):

> "(h) Temporary enforcement of State standards
>
> "The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier."

This provision of course expired in 1972, but its language may suggest something about the way Congress understood the rest of § 18. Since, all are agreed, a State would not have had reason to file a plan unless a federal standard was in place, § 18(h) necessarily refers to a situation in which there is a federal standard. Respondent argues that the provision for agreements authorizing continued enforcement of a state standard following adoption of a federal standard on the issue it addresses implies that, absent such agree-

ment, a State would have been barred from enforcing any standard of its own.

Once again, however, that is not the necessary implication of the text. A purely permissive provision for enforcement of state regulations does not imply that all state regulations are otherwise unenforceable. All it necessarily means is that the Secretary could agree to permit the State for a limited time to enforce whatever state regulations would otherwise have been pre-empted, as would have been true when they actually so conflicted with the federal standard that an employer could not comply with them and still comply with federal law as well. Thus, in the case of a State wishing to submit a plan, the provision as I read it would have allowed for the possibility of just one transition, from the pre-Act state law to the post-Act state plan. Read as the Court reads it, however, employers and employees in such a State would have been subjected first to state law on a given issue; then, after promulgation of a federal standard, to that standard; and then, after approval of the plan, to a new state regime. One enforced readjustment would have been better than two, and the statute is better read accordingly.*

IV

In sum, our rule is that the traditional police powers of the State survive unless Congress has made a purpose to

*The plurality also relies on § 18(f), 29 U. S. C. § 667(f), which deals with withdrawal of approval of a state plan. See *ante*, at 101. The section provides that "the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan." The plurality is mistaken in concluding that § 18(f) "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn." *Ibid.* At most it assumes that the State loses its capacity to enforce the plan (except for pending cases). It says nothing about state law that may remain on the books exclusive of the plan's authority, or about new law enacted after withdrawal of the Secretary's approval.

pre-empt them clear. See *Rice*, 331 U. S., at 230. The Act does not, in so many words, pre-empt all state regulation of issues on which federal standards have been promulgated, and respondent's contention at oral argument that reading subsections (a), (b), and (h) could leave no other "logical" conclusion but one of pre-emption is wrong. Each provision can be read consistently with the others without any implication of pre-emptive intent. See *National Solid Wastes Management Assn.* v. *Killian*, 918 F. 2d 671, 685–688 (CA7 1990) (Easterbrook, J., *dubitante*). They are in fact just as consistent with a purpose and objective to permit overlapping state and federal regulation as with one to guarantee that employers and employees would be subjected to only one regulatory regime. Restriction to one such regime by precluding supplemental state regulation might or might not be desirable. But in the absence of any clear expression of congressional intent to pre-empt, I can only conclude that, as long as compliance with federally promulgated standards does not render obedience to Illinois' regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause. I respectfully dissent.

Syllabus

FORSYTH COUNTY, GEORGIA *v.* NATIONALIST MOVEMENT

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

No. 91–538. Argued March 31, 1992—Decided June 19, 1992

Petitioner county's Ordinance 34 mandates permits for private demonstrations and other uses of public property; declares that the cost of protecting participants in such activities exceeds the usual and normal cost of law enforcement and should be borne by the participants; requires every permit applicant to pay a fee of not more than $1,000; and empowers the county administrator to adjust the fee's amount to meet the expense incident to the ordinance's administration and to the maintenance of public order. After the county attempted to impose such a fee for respondent's proposed demonstration in opposition to the Martin Luther King, Jr., federal holiday, respondent filed this suit, claiming that the ordinance violates the free speech guarantees of the First and Fourteenth Amendments. The District Court denied relief, ruling that the ordinance was not unconstitutional as applied in this case. The Court of Appeals reversed, holding that an ordinance which charges more than a nominal fee for using public forums for public issue speech is facially unconstitutional.

Held: The ordinance is facially invalid. Pp. 129–137.

(a) In order to regulate competing uses of public forums, government may impose a permit requirement on those wishing to hold a march, parade, or rally, if, *inter alia*, the permit scheme does not delegate overly broad licensing discretion to a government official, *Freedman* v. *Maryland*, 380 U. S. 51, 56, and is not based on the content of the message, see *United States* v. *Grace*, 461 U. S. 171, 177. Pp. 129–130.

(b) An examination of the county's implementation and authoritative constructions of the ordinance demonstrates the absence of the constitutionally required "narrowly drawn, reasonable and definite standards," *Niemotko* v. *Maryland*, 340 U. S. 268, 271, to guide the county administrator's hand when he sets a permit fee. The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the unbridled discretion of the administrator, who is not required to rely on objective standards or provide any explanation for his decision. Pp. 130–133.

(c) The ordinance is unconstitutionally content based because it requires that the administrator, in order to assess accurately the cost of

security for parade participants, must examine the content of the message conveyed, estimate the public response to that content, and judge the number of police necessary to meet that response. *Cox* v. *New Hampshire*, 312 U. S. 569, distinguished. Pp. 133–136.

(d) Neither the $1,000 cap on the permit fee, nor even some lower "nominal" cap, could save the ordinance. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116, distinguished. The level of the fee is irrelevant in this context, because no limit on the fee's size can remedy the ordinance's constitutional infirmities. Pp. 136–137.

913 F. 2d 885 and 934 F. 2d 1482, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE, SCALIA, and THOMAS, JJ., joined, *post*, p. 137.

Robert S. Stubbs III argued the cause for petitioner. With him on the briefs was *Gordon A. Smith.*

Richard Barrett argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First and Fourteenth Amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.

I

Petitioner Forsyth County is a primarily rural Georgia county approximately 30 miles northeast of Atlanta. It has

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**Jody M. Litchford* filed a brief for the city of Orlando et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Eric Neisser*, *Steven R. Shapiro*, *John A. Powell*, and *Elliot M. Mincberg;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* and for Public Citizen by *David C. Vladeck* and *Alan B. Morrison.*

had a troubled racial history. In 1912, in one month, its entire African-American population, over 1,000 citizens, was driven systematically from the county in the wake of the rape and murder of a white woman and the lynching of her accused assailant.[1] Seventy-five years later, in 1987, the county population remained 99% white.[2]

Spurred by this history, Hosea Williams, an Atlanta city councilman and civil rights personality, proposed a Forsyth County "March Against Fear and Intimidation" for January 17, 1987. Approximately 90 civil rights demonstrators attempted to parade in Cumming, the county seat. The marchers were met by members of the Forsyth County Defense League (an independent affiliate of respondent, The Nationalist Movement), of the Ku Klux Klan, and other Cumming residents. In all, some 400 counterdemonstrators lined the parade route, shouting racial slurs. Eventually, the counterdemonstrators, dramatically outnumbering police officers, forced the parade to a premature halt by throwing rocks and beer bottles.

Williams planned a return march the following weekend. It developed into the largest civil rights demonstration in the South since the 1960's. On January 24, approximately 20,000 marchers joined civil rights leaders, United States Senators, Presidential candidates, and an Assistant United States Attorney General in a parade and rally.[3] The 1,000 counterdemonstrators on the parade route were contained

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[1] The 1910 census counted 1,098 African-Americans in Forsyth County. U. S. Dept. of Commerce, Bureau of Census, Negro Population 1790–1915, p. 779 (1918). For a description of the 1912 events, see generally Hackworth, "Completing the Job" in Forsyth County, 8 Southern Exposure 26 (1980).

[2] See J. Clements, Georgia Facts 184 (1989); Hackworth, 8 Southern Exposure, at 26 ("[O]ther than an occasional delivery truck driver or visiting government official, there are currently no black faces anywhere in the county").

[3] See Chicago Tribune, Jan. 25, 1987, p. 1; Los Angeles Times, Jan. 25, 1987, p. 1, col. 2; App. to Pet. for Cert. 89–91.

by more than 3,000 state and local police and National Guardsmen. Although there was sporadic rock throwing and 60 counterdemonstrators were arrested, the parade was not interrupted. The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion.[4] See App. to Pet. for Cert. 75–94; Los Angeles Times, Jan. 28, 1987, Metro section, p. 5, col. 1.

"As a direct result" of these two demonstrations, the Forsyth County Board of Commissioners enacted Ordinance 34 on January 27, 1987. See Brief for Petitioner 6. The ordinance recites that it is "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." See App. to Pet. for Cert. 98. The board of commissioners justified the ordinance by explaining that "the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible." *Id.*, at 100. The ordinance required the permit applicant to defray these costs by paying a fee, the amount of which was to be fixed "from time to time" by the Board. *Id.*, at 105.

Ordinance 34 was amended on June 8, 1987, to provide that every permit applicant "'shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place.'" *Id.*, at 119.[5] In addition, the county

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[4] Petitioner Forsyth County does not indicate what portion of these costs it paid. Newspaper articles reported that the State of Georgia paid an estimated $579,148. Other government entities paid an additional $29,759. Figures were not available for the portion paid by the city of Atlanta for the police it sent. See *id.*, at 95–97.

[5] The ordinance was amended at other times, too, but those amendments are not under challenge here.

administrator was empowered to "'adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.'" *Ibid.*

In January 1989, respondent The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. In Forsyth County, the Movement sought to "conduct a rally and speeches for one and a half to two hours" on the courthouse steps on a Saturday afternoon. *Nationalist Movement* v. *City of Cumming*, 913 F. 2d 885, 887 (CA11 1990).[6] The county imposed a $100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application. Tr. 135–139.

The Movement did not pay the fee and did not hold the rally. Instead, it instituted this action on January 19, 1989, in the United States District Court for the Northern District of Georgia, requesting a temporary restraining order and permanent injunction prohibiting Forsyth County from interfering with the Movement's plans.

The District Court denied the temporary restraining order and injunction. It found that, although "the instant ordinance vests much discretion in the County Administrator in determining an appropriate fee," the determination of the fee was "based solely upon content-neutral criteria; namely,

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[6] The demonstration proposed was to consist of assembling at the Forsyth County High School, marching down a public street in Cumming to the courthouse square, and there conducting a rally. Only the rally was to take place on property under the jurisdiction of the county. The parade and assembly required permits from the city of Cumming and the Forsyth County Board of Education. Their permit schemes are not challenged here.

the actual costs incurred investigating and processing the application." App. to Pet. for Cert. 13–14. Although it expressed doubt about the constitutionality of that portion of the ordinance that permits fees to be based upon the costs incident to maintaining public order, the District Court found that "the county ordinance, as applied in this case, is not unconstitutional." *Id.*, at 14.

The United States Court of Appeals for the Eleventh Circuit reversed this aspect of the District Court's judgment. *Nationalist Movement* v. *City of Cumming*, 913 F. 2d 885 (1990). Relying on its prior opinion in *Central Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F. 2d 1515, 1521 (CA11 1985), cert. denied, 475 U. S. 1120 (1986), the Court of Appeals held: "An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment." 913 F. 2d, at 891 (internal quotation marks omitted). The court determined that a permit fee of up to $1,000 a day exceeded this constitutional threshold. *Ibid.* One judge concurred specially, calling for *Central Florida* to be overruled. 913 F. 2d, at 896.

The Court of Appeals then voted to vacate the panel's opinion and to rehear the case en banc. 921 F. 2d 1125 (1990). After further briefing, the court issued a *per curiam* opinion reinstating the panel opinion in its entirety. 934 F. 2d 1482, 1483 (1991). Two judges, concurring in part and dissenting in part, agreed that any fee imposed on the exercise of First Amendment rights in a traditional public forum must be nominal if it is to survive constitutional scrutiny. Those judges, however, did not believe that the county ordinance swept so broadly that it was facially invalid, and would have remanded the case for the District Court to determine whether the fee was nominal.[7] *Ibid.* Three judges

[7] These judges also found that the ordinance contained sufficiently tailored standards for the administrator to use in reviewing permit applications. 934 F. 2d 1482, 1487–1489 (1991). This issue was raised by respondent, but the panel did not reach it.

dissented, arguing that this Court's cases do not require that fees be nominal. *Id.*, at 1493.

We granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum.[8] 502 U. S. 1023 (1991).

II

Respondent mounts a facial challenge to the Forsyth County ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. See, *e. g.*, *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 798–799, and n. 15 (1984); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987). This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. See, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 772 (1982); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503 (1985). Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, see *Thornhill* v. *Ala-*

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[8] Compare the Eleventh Circuit's opinions in this litigation, 913 F. 2d 885, 891 (1990), and 934 F. 2d 1482, 1483 (1991), with *Stonewall Union* v. *Columbus*, 931 F. 2d 1130, 1136 (CA6) (permitting greater than nominal fees that are reasonably related to expenses incident to the preservation of public safety and order), cert. denied, 502 U. S. 899 (1991); *Eastern Conn. Citizens Action Group* v. *Powers*, 723 F. 2d 1050, 1056 (CA2 1983) (licensing fees permissible only to offset expenses associated with processing applications for public property); *Fernandes* v. *Limmer*, 663 F. 2d 619, 632–633 (CA5 1981) ($6 flat fee for permit was unconstitutional), cert. dism'd, 458 U. S. 1124 (1982).

bama, 310 U. S. 88, 97 (1940); *Freedman* v. *Maryland*, 380 U. S. 51, 56 (1965); *Taxpayers for Vincent*, 466 U. S., at 798, n. 15, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected, see *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973); *Jews for Jesus*, 482 U. S., at 574–575.

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in "the archetype of a traditional public forum," *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988), is a prior restraint on speech, see *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969); *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951). Although there is a "heavy presumption" against the validity of a prior restraint, *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963), the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, see *Cox* v. *New Hampshire*, 312 U. S. 569, 574–576 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. See *Freedman* v. *Maryland*, *supra*. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. See *United States* v. *Grace*, 461 U. S. 171, 177 (1983).

A

Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981). To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U. S., at 150–151; see also *Niemotko*, 340 U. S., at 271. The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 553 (1975).

In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 795–796 (1989); *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 770, n. 11 (1988); *Gooding* v. *Wilson*, 405 U. S. 518, 524–528 (1972). In the present litigation, the county has made clear how it interprets and implements the ordinance. The ordinance can apply to any activity on public property—from parades, to street corner speeches, to bike races—and the fee assessed may reflect the county's police and administrative costs. Whether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses is decided by the county administrator.[9]

[9] In pertinent part, the ordinance, as amended, states that the administrator "*shall* adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order." §3(6) (emphasis added), App. to Pet. for Cert. 119. This could suggest that the administrator has no authority to reduce or waive these expenses. It has not been so understood, however, by the county. See 934 F. 2d, at 1488, n. 12 (opinion concurring in part and dissenting in part). In its February 23, 1987, amendments to the ordinance, the board of commissioners changed the permit form from "Have you paid *the* application fee?" to "Have you paid *any* application fee?," see App. to

In this case, according to testimony at the District Court hearing, the administrator based the fee on his own judgment of what would be reasonable. Although the county paid for clerical support and staff as an "expense incident to the administration" of the permit, the administrator testified that he chose in this instance not to include that expense in the fee. The administrator also attested that he had deliberately kept the fee low by undervaluing the cost of the time he spent processing the application. Even if he had spent more time on the project, he claimed, he would not have charged more. He further testified that, in this instance, he chose not to include any charge for expected security expense. Tr. 135–139.

The administrator also explained that the county had imposed a fee pursuant to a permit on two prior occasions. The year before, the administrator had assessed a fee of $100 for a permit for the Movement. The administrator testified that he charged the same fee the following year (the year in question here), although he did not state that the Movement was seeking the same use of county property or that it required the same amount of administrative time to process. *Id.*, at 138. The administrator also once charged bike-race organizers $25 to hold a race on county roads, but he did not explain why processing a bike-race permit demanded less administrative time than processing a parade permit or why he had chosen to assess $25 in that instance. *Id.*, at 143–144. At oral argument in this Court, counsel for Forsyth County stated that the administrator had levied a $5 fee on the Girl Scouts for an activity on county property. Tr. of Oral Arg. 26. Finally, the administrator testified that in other cases the county required neither a permit nor a fee for activities in other county facilities or on county land. Tr. 146.

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any

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Pet. for Cert. 115 (emphasis added), thus acknowledging the administrator's authority to charge no fee.

"narrowly drawn, reasonable and definite standards," *Niemotko*, 340 U. S., at 271, guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.[10] The First Amendment prohibits the vesting of such unbridled discretion in a government official.[11]

B

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As

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[10] The District Court's finding that in this instance the Forsyth County administrator applied legitimate, content-neutral criteria, even if correct, is irrelevant to this facial challenge. Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. See *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 770 (1988). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940). Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

[11] Petitioner also claims that *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), excuses the administrator's discretion in setting the fee. Reliance on *Cox* is misplaced. Although the discretion granted to the administrator under the language in this ordinance is the same as in the statute at issue in *Cox*, the interpretation and application of that language are different. Unlike this case, there was in *Cox* no testimony or evidence that the statute granted unfettered discretion to the licensing authority. *Id.*, at 576–577.

construed by the county, the ordinance often requires that the fee be based on the content of the speech.

The county envisions that the administrator, in appropriate instances, will assess a fee to cover "the cost of necessary and reasonable protection of persons participating in or observing said . . . activit[y]." See App. to Pet. for Cert. 100. In order to assess accurately the cost of security for parade participants, the administrator "'must necessarily examine the content of the message that is conveyed,'" *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987), quoting *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 383 (1984), estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

Although petitioner agrees that the cost of policing relates to content, see Tr. of Oral Arg. 15 and 24, it contends that the ordinance is content neutral because it is aimed only at a secondary effect—the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "'ha[s] nothing to do with content.'" *Ward*, 491 U. S., at 792, quoting *Boos* v. *Barry*, 485 U. S. 312, 320 (1988) (opinion of O'Connor, J.).

The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. See *id.*, at 321 (opinion of O'Connor, J.); *id.*, at 334 (opinion of Brennan, J.); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116 (1943); cf. *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 162 (1939) (fact that city is financially burdened when listeners throw leaflets on the street does not justify restriction on distribution of leaflets). Speech cannot be financially

burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.[12] See *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

This Court has held time and again: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984); *Simon & Schuster, Inc.* v. *Member of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991); *Arkansas Writers' Project*, 481 U. S., at 230. The county offers only one

[12] The dissent prefers a remand because there are no lower court findings on the question whether the county plans to base parade fees on hostile crowds. See *post*, at 142. We disagree. A remand is unnecessary because there is no question that petitioner intends the ordinance to recoup costs that are related to listeners' reaction to the speech. Petitioner readily admits it did not charge for police protection for the 4th of July parades, although they were substantial parades, which required the closing of streets and drew large crowds. Petitioner imposed a fee only when it became necessary to provide security for parade participants from angry crowds opposing their message. Brief for Petitioner 6. The ordinance itself makes plain that the costs at issue are those needed for "necessary and reasonable protection of persons participating in or observing" the speech. See App. to Pet. for Cert. 100. Repayment for police protection is the "[m]ost importan[t]" purpose underlying the ordinance. Brief for Petitioner 6–7.

In this Court, petitioner specifically urges reversal because the lower court has "taken away the right of local government to obtain reimbursement for administration and *policing costs which are incurred in protecting those using government property for expression.*" *Id.*, at 17 (emphasis added). When directly faced with the Court of Appeals' concern about "the enhanced cost associated with policing expressive activity which would generate potentially violent reactions," *id.*, at 36, petitioner responded not by arguing that it did not intend to charge for police protection, but that such a charge was permissible because the ordinance provided a cap. See *id.*, at 36–37; Tr. of Oral Arg. 24. At no point, in any level of proceedings, has petitioner intimated that it did not construe the ordinance consistent with its language permitting fees to be charged for the cost of police protection from hostile crowds. We find no disputed interpretation of the ordinance necessitating a remand.

justification for this ordinance: raising revenue for police services. While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee. See *id.*, at 229–231.

Petitioner insists that its ordinance cannot be unconstitutionally content based because it contains much of the same language as did the state statute upheld in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). Although the Supreme Court of New Hampshire had interpreted the statute at issue in *Cox* to authorize the municipality to charge a permit fee for the "maintenance of public order," no fee was actually assessed. See *id.*, at 577. Nothing in this Court's opinion suggests that the statute, as interpreted by the New Hampshire Supreme Court, called for charging a premium in the case of a controversial political message delivered before a hostile audience. In light of the Court's subsequent First Amendment jurisprudence, we do not read *Cox* to permit such a premium.

C

Petitioner, as well as the Court of Appeals and the District Court, all rely on the maximum allowable fee as the touchstone of constitutionality. Petitioner contends that the $1,000 cap on the fee ensures that the ordinance will not result in content-based discrimination. The ordinance was found unconstitutional by the Court of Appeals because the $1,000 cap was not sufficiently low to be "nominal." Neither the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax.

The lower courts derived their requirement that the permit fee be "nominal" from a sentence in the opinion in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). In *Murdock*, the Court invalidated a flat license fee levied on distributors of religious literature. In distinguishing the case from *Cox*,

where the Court upheld a permit fee, the Court stated: "And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." 319 U. S., at 116. This sentence does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible. It reflects merely one distinction between the facts in *Murdock* and those in *Cox*.

The tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size. Similarly, the provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

We granted certiorari in this case to consider the following question:

> "Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of $1,000.00 per day of the activity." Pet. for Cert. i.

The Court's discussion of this question is limited to an ambiguous and noncommittal paragraph toward the very end of the opinion. *Supra* this page. The rest of the opinion

takes up and decides other perceived unconstitutional defects in the Forsyth County ordinance. None of these claims were passed upon by the Court of Appeals; that court decided only that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets. Since that was the question decided by the Court of Appeals below, the question which divides the Courts of Appeals, and the question presented in the petition for certiorari, one would have thought that the Court would at least authoritatively decide, if not limit itself to, that question.

I

The answer to this question seems to me quite simple, because it was authoritatively decided by this Court more than half a century ago in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). There we confronted a state statute which required payment of a license fee of up to $300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." *Id.*, at 577 (internal quotation marks omitted). Under the state court's construction, the fee provision was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." *Ibid.* (internal quotation marks omitted). This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying:

> "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule

> to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.
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> "There is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require." *Ibid.*

Two years later, in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), this Court confronted a municipal ordinance that required payment of a flat license fee for the privilege of canvassing door-to-door to sell one's wares. Pursuant to that ordinance, the city had levied the flat fee on a group of Jehovah's Witnesses who sought to distribute religious literature door-to-door for a small price. *Id.*, at 106–107. The Court held that the flat license tax, as applied against the hand distribution of religious tracts, was unconstitutional on the ground that it was "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Id.*, at 113. In making this ruling, the Court distinguished *Cox* by stating that "the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." 319 U. S., at 116. This language, which suggested that the fee involved in *Cox* was only nominal, led the Court of Appeals for the Eleventh Circuit in the present case to conclude that a city is prohibited from charging any more than a nominal fee for a parade permit. 913 F. 2d 885, 890–891, and n. 6 (1990). But the clear holding of *Cox* is to the contrary. In that case, the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee, as it stated that the fee provision "had a permissible range from $300 to a nominal amount." *Cox* v. *New Hampshire*, *supra*, at 576. The use of the word "nominal" in *Murdock* was thus unfortunate, as

it represented a mistaken characterization of the fee statute in *Cox*. But a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case. The situations in *Cox* and *Murdock* were clearly different; the first involved a sliding fee to account for administrative and security costs incurred as a result of a parade on public property, while the second involved a flat tax on protected religious expression. I believe that the decision in *Cox* squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

II

Instead of deciding the particular question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. *Ante*, at 130–137. But, because the lower courts did not pass on these issues, the Court is forced to rely on its own interpretation of the ordinance in making these rulings. The Court unnecessarily reaches out to interpret the ordinance on its own at this stage, even though there are no lower court factual findings on the scope or administration of the ordinance. Because there are no such factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a "heckler's veto," but would instead remand the case to the lower courts to initially consider these issues.

The Court first finds fault with the alleged standardless discretion possessed by the county administrator. The ordinance provides that the administrator "shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." App. to Pet. for

Cert. 119. In this regard, the ordinance clearly parallels the construction of the statute we upheld in *Cox*. 312 U. S., at 577 (statute did not impose "a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed" (internal quotation marks omitted)). The Court worries, however, about the possibility that the administrator has the discretion to set fees based upon his approval of the message sought to be conveyed, and concludes that "the county's authoritative constructio[n] of the ordinance" allows for such a possibility. *Ante*, at 131. The Court apparently envisions a situation where the administrator would impose a $1,000 parade fee on a group whose message he opposed, but would waive the fee entirely for a similarly situated group with whom he agreed. But the county has never rendered any "authoritative construction" indicating that officials have "unbridled discretion," *ante*, at 133, in setting parade fees, nor has any lower court so found. In making its own factual finding that the ordinance does allow for standardless fee setting, this Court simply cites four situations in which the administrator set permit fees—two fees of $100, one of $25, and one of $5. *Ante*, at 132. On the basis of this evidence, the Court finds that the administrator has unbridled discretion to set permit fees. The mere fact that the permit fees differed in amount does not invalidate the ordinance, however, as our decision in *Cox* clearly allows a governmental entity to adopt an adjustable permit fee scheme. See *Cox* v. *New Hampshire*, *supra*, at 577 ("[W]e perceive no constitutional ground for denying to local governments th[e] flexibility of adjustment of fees"). It is true that the Constitution does not permit a system in which the county administrator may vary fees at his pleasure, but there has been no lower court finding that that is what this fledgling ordinance creates. And, given the opportunity, the District Court might find that the county has a policy that precludes the administrator from arbitrarily imposing fees. Of course, the District

Court might find that the administrator does possess too much discretion. In either case, I believe findings by the District Court on the issue would be preferable.

The Court relies on *Ward* v. *Rock Against Racism*, 491 U. S. 781, 795–796 (1989), for the proposition that the county's interpretation of the ordinance must be considered. In that case, however, we relied upon District Court findings concerning New York City's limiting interpretation of a noise regulation. *Id.*, at 795. I would prefer to remand this case so that the Court might rely on such express findings here as well.

The Court's second reason for invalidating the ordinance is its belief that any fee imposed will be based in part on the cost of security necessary to control those who *oppose* the message endorsed by those marching in a parade. Assuming 100 people march in a parade and 10,000 line the route in protest, for example, the Court worries that, under this ordinance, the county will charge a premium to control the hostile crowd of 10,000, resulting in the kind of "heckler's veto" we have previously condemned. *Ante*, at 133–136. But there have been no lower court findings on the question whether or not the county plans to base parade fees on anticipated hostile crowds. It has not done so in any of the instances where it has so far imposed fees. *Ante*, at 132. And it most certainly did not do so in this case. The District Court below noted that:

> "[T]he instant ordinance alternatively permits fees to be assessed based upon 'the expense incident to . . . the maintenance of public order.' If the county had applied this portion of the statute, the phrase might run afoul of . . . constitutional concerns. . . .
>
> "However, in the instant case, plaintiff did not base their *[sic]* argument upon this phrase, but contended that the mere fact that a $100 fee was imposed is unconstitutional, especially in light of the organization's financial circumstances. *The evidence was clear that the*

> *fee was based solely upon the costs of processing the application and plaintiff produced no evidence to the contrary.*" App. to Pet. for Cert. 14 (emphasis added).

The Court's analysis on this issue rests on an assumption that the county will interpret the phrase "maintenance of public order" to support the imposition of fees based on opposition crowds. There is nothing in the record to support this assumption, however, and I would remand for a hearing on this question.

For the foregoing reasons, I dissent.

Syllabus

NEW YORK *v.* UNITED STATES ET AL.

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

No. 91–543. Argued March 30, 1992—Decided June 19, 1992*

Faced with a looming shortage of disposal sites for low level radioactive waste in 31 States, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other things, imposes upon States, either alone or in "regional compacts" with other States, the obligation to provide for the disposal of waste generated within their borders, and contains three provisions setting forth "incentives" to States to comply with that obligation. The first set of incentives—the monetary incentives—works in three steps: (1) States with disposal sites are authorized to impose a surcharge on radioactive waste received from other States; (2) the Secretary of Energy collects a portion of this surcharge and places it in an escrow account; and (3) States achieving a series of milestones in developing sites receive portions of this fund. The second set of incentives—the access incentives—authorizes sited States and regional compacts gradually to increase the cost of access to their sites, and then to deny access altogether, to waste generated in States that do not meet federal deadlines. The so-called third "incentive"—the take title provision—specifies that a State or regional compact that fails to provide for the disposal of all internally generated waste by a particular date must, upon the request of the waste's generator or owner, take title to and possession of the waste and become liable for all damages suffered by the generator or owner as a result of the State's failure to promptly take possession. Petitioners, New York State and two of its counties, filed this suit against the United States, seeking a declaratory judgment that, *inter alia*, the three incentives provisions are inconsistent with the Tenth Amendment—which declares that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States"—and with the Guarantee Clause of Article IV, § 4—which directs the United States to "guarantee to every State . . . a Republican Form of Government." The District Court dismissed the complaint, and the Court of Appeals affirmed.

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*Together with No. 91–558, *County of Allegany, New York* v. *United States et al.*, and No. 91–563, *County of Cortland, New York* v. *United States et al.*, also on certiorari to the same court.

Syllabus

Held:

1. The Act's monetary incentives and access incentives provisions are consistent with the Constitution's allocation of power between the Federal and State Governments, but the take title provision is not. Pp. 155–183.

(a) In ascertaining whether any of the challenged provisions oversteps the boundary between federal and state power, the Court must determine whether it is authorized by the affirmative grants to Congress contained in Article I's Commerce and Spending Clauses or whether it invades the province of state sovereignty reserved by the Tenth Amendment. Pp. 155–159.

(b) Although regulation of the interstate market in the disposal of low level radioactive waste is well within Congress' Commerce Clause authority, cf. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623, and Congress could, if it wished, pre-empt entirely state regulation in this area, a review of this Court's decisions, see, *e. g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288, and the history of the Constitutional Convention, demonstrates that Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals. Pp. 159–166.

(c) Nevertheless, there are a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. As relevant here, Congress may, under its spending power, attach conditions on the receipt of federal funds, so long as such conditions meet four requirements. See, *e. g.*, *South Dakota* v. *Dole*, 483 U. S. 203, 206–208, and n. 3. Moreover, where Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of "cooperative federalism," offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. See, *e. g.*, *Hodel*, *supra*, at 288, 289. Pp. 166–169.

(d) This Court declines petitioners' invitation to construe the Act's provision obligating the States to dispose of their radioactive wastes as a separate mandate to regulate according to Congress' instructions. That would upset the usual constitutional balance of federal and state powers, whereas the constitutional problem is avoided by construing the Act as a whole to comprise three sets of incentives to the States. Pp. 169–170.

(e) The Act's monetary incentives are well within Congress' Commerce and Spending Clause authority and thus are not inconsistent with the Tenth Amendment. The authorization to sited States to impose surcharges is an unexceptionable exercise of Congress' power to enable

the States to burden interstate commerce. The Secretary's collection of a percentage of the surcharge is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Finally, in conditioning the States' receipt of federal funds upon their achieving specified milestones, Congress has not exceeded its Spending Clause authority in any of the four respects identified by this Court in *Dole*, *supra*, at 207–208. Petitioners' objection to the *form* of the expenditures as nonfederal is unavailing, since the Spending Clause has never been construed to deprive Congress of the power to collect money in a segregated trust fund and spend it for a particular purpose, and since the States' ability largely to control whether they will pay into the escrow account or receive a share was expressly provided by Congress as a method of encouraging them to regulate according to the federal plan. Pp. 171–173.

(f) The Act's access incentives constitute a conditional exercise of Congress' commerce power along the lines of that approved in *Hodel*, *supra*, at 288, and thus do not intrude on the States' Tenth Amendment sovereignty. These incentives present nonsited States with the choice either of regulating waste disposal according to federal standards or having their waste-producing residents denied access to disposal sites. They are not compelled to regulate, expend any funds, or participate in any federal program, and they may continue to regulate waste in their own way if they do not accede to federal direction. Pp. 173–174.

(g) Because the Act's take title provision offers the States a "choice" between the two unconstitutionally coercive alternatives—either accepting ownership of waste or regulating according to Congress' instructions—the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment. On the one hand, either forcing the transfer of waste from generators to the States or requiring the States to become liable for the generators' damages would "commandeer" States into the service of federal regulatory purposes. On the other hand, requiring the States to regulate pursuant to Congress' direction would present a simple unconstitutional command to implement legislation enacted by Congress. Thus, the States' "choice" is no choice at all. Pp. 174–177.

(h) The United States' alternative arguments purporting to find limited circumstances in which congressional compulsion of state regulation is constitutionally permissible—that such compulsion is justified where the federal interest is sufficiently important; that the Constitution does, in some circumstances, permit federal directives to state governments; and that the Constitution endows Congress with the power

to arbitrate disputes between States in interstate commerce—are rejected. Pp. 177–180.

(i) Also rejected is the sited state respondents' argument that the Act cannot be ruled an unconstitutional infringement of New York sovereignty because officials of that State lent their support, and consented, to the Act's passage. A departure from the Constitution's plan for the intergovernmental allocation of authority cannot be ratified by the "consent" of state officials, since the Constitution protects state sovereignty for the benefit of individuals, not States or their governments, and since the officials' interests may not coincide with the Constitution's allocation. Nor does New York's prior support estop it from asserting the Act's unconstitutionality. Pp. 180–183.

(j) Even assuming that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out a claim that the Act's money incentives and access incentives provisions are inconsistent with that Clause. Neither the threat of loss of federal funds nor the possibility that the State's waste producers may find themselves excluded from other States' disposal sites can reasonably be said to deny New York a republican form of government. Pp. 183–186.

2. The take title provision is severable from the rest of the Act, since severance will not prevent the operation of the rest of the Act or defeat its purpose of encouraging the States to attain local or regional self-sufficiency in low level radioactive waste disposal; since the Act still includes two incentives to encourage States along this road; since a State whose waste generators are unable to gain access to out-of-state disposal sites may encounter considerable internal pressure to provide for disposal, even without the prospect of taking title; and since any burden caused by New York's failure to secure a site will not be borne by other States' residents because the sited regional compacts need not accept New York's waste after the final transition period. Pp. 186–187.

942 F. 2d 114, affirmed in part and reversed in part.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, Souter, and Thomas, JJ., joined, and in Parts III–A and III–B of which White, Blackmun, and Stevens, JJ., joined. White, J., filed an opinion concurring in part and dissenting in part, in which Blackmun and Stevens, JJ., joined, *post*, p. 188. Stevens, J., filed an opinion concurring in part and dissenting in part, *post*, p. 210.

Counsel

Peter H. Schiff, Deputy Solicitor General of New York, argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 91–543 were *Robert Abrams*, Attorney General, *Jerry Boone*, Solicitor General, and *John McConnell*, Assistant Attorney General. *Edward F. Premo II* filed briefs for petitioner in No. 91–558. *Michael B. Gerrard*, *Deborah Goldberg,* and *Patrick M. Snyder* filed briefs for petitioner in No. 91–563.

Deputy Solicitor General Wallace argued the cause for the federal respondents in all cases. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Hartman*, *Ronald J. Mann*, *Anne S. Almy*, *Louise F. Milkman*, and *Jeffrey P. Kehne.* *William B. Collins*, Senior Assistant Attorney General of Washington, argued the cause for the state respondents in Nos. 91–543 and 91–563. On the brief were *Kenneth O. Eikenberry*, Attorney General of Washington, *T. Travis Medlock*, Attorney General of South Carolina, and *James Patrick Hudson*, Deputy Attorney General, *Frankie Sue Del Papa*, Attorney General of Nevada, and *Allen T. Miller*, *Jr.*, Assistant Attorney General.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, and *James O. Payne, Jr.*, *Mary Kay Smith,* and *Patricia A. Delaney,* Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Elizabeth Barrett-Anderson* of Guam, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Chris Gorman* of Kentucky, *Michael E. Carpenter* of Maine, *Scott Harshbarger* of Massachusetts, *Don Stenberg* of Nebraska, *Robert J. Del Tufo* of New Jersey, *Ernest D. Preate, Jr.,* of Pennsylvania, *James E. O'Neil* of Rhode Island, *Mark W. Barnett* of South Dakota, *Dan Morales* of Texas, *Mario Palumbo* of West Virginia, and *James E. Doyle* of Wisconsin; and for the Council of State Governments by *Stewart Abercrombie Baker.*

Briefs of *amici curiae* urging affirmance were filed for the American College of Nuclear Physicians et al. by *Harold F. Reis;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg*, *David Silberman*, and *Laurence Gold;* and for the Rocky

JUSTICE O'CONNOR delivered the opinion of the Court.

These cases implicate one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In these cases, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99–240, 99 Stat. 1842, 42 U. S. C. § 2021b *et seq.* The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

I

We live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time,

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Mountain Low-Level Radioactive Waste Compact et al. by *Rex E. Lee*, *Carter G. Phillips*, *Richard D. Bernstein*, and *David K. Rees*.

Briefs of *amici curiae* were filed for the State of Connecticut by *Richard Blumenthal*, Attorney General, and *Aaron S. Bayer*, Deputy Attorney General; for the State of Michigan by *Frank J. Kelley*, Attorney General, *Gay Secor Hardy*, Solicitor General, and *Thomas L. Casey*, *A. Michael Leffler*, and *John C. Scherbarth*, Assistant Attorneys General; and for US Ecology, Inc., by *Irwin Goldbloom*.

often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year. See App. 110a–111a; Berkovitz, Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?, 11 Harv. Envtl. L. Rev. 437, 439–440 (1987).

Our Nation's first site for the land disposal of commercial low level radioactive waste opened in 1962 in Beatty, Nevada. Five more sites opened in the following decade: Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971). Between 1975 and 1978, the Illinois site closed because it was full, and water management problems caused the closure of the sites in Kentucky and New York. As a result, since 1979 only three disposal sites—those in Nevada, Washington, and South Carolina—have been in operation. Waste generated in the rest of the country must be shipped to one of these three sites for disposal. See Low-Level Radioactive Waste Regulation 39–40 (M. Burns ed. 1988).

In 1979, both the Washington and Nevada sites were forced to shut down temporarily, leaving South Carolina to shoulder the responsibility of storing low level radioactive waste produced in every part of the country. The Governor of South Carolina, understandably perturbed, ordered a 50% reduction in the quantity of waste accepted at the Barnwell site. The Governors of Washington and Nevada announced plans to shut their sites permanently. App. 142a, 152a.

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the Low-Level Radioactive Waste Policy Act, Pub. L. 96–573, 94 Stat. 3347. Relying largely on a report submitted by the National Governors' Association, see App. 105a–141a, Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State

for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently . . . on a regional basis." § 4(a)(1), 94 Stat. 3348. The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States. § 4(a)(2)(B), 94 Stat. 3348. The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities; not surprisingly, these were the compacts formed around South Carolina, Nevada, and Washington, the three sited States. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal. The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The 1985 Act was again based largely on a proposal submitted by the National Governors' Association. In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate. The Act directs: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State," 42 U. S. C. § 2021c(a)(1)(A), with the exception of certain waste generated by the Federal Government, §§ 2021c(a)(1)(B), 2021c(b). The Act authorizes States to

"enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." § 2021d(a)(2). For an additional seven years beyond the period contemplated by the 1980 Act, from the beginning of 1986 through the end of 1992, the three existing disposal sites "shall make disposal capacity available for low-level radioactive waste generated by any source," with certain exceptions not relevant here. § 2021e(a)(2). But the three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact—in 1986–1987, $10 per cubic foot; in 1988–1989, $20 per cubic foot; and in 1990–1992, $40 per cubic foot. § 2021e(d)(1). After the 7-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region. § 2021d(c).

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

1. *Monetary incentives.* One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy. § 2021e (d)(2)(A). The Secretary then makes payments from this account to each State that has complied with a series of deadlines. By July 1, 1986, each State was to have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State. §§ 2021e (e)(1)(A), 2021e(d)(2)(B)(i). By January 1, 1988, each unsited compact was to have identified the State in which its facility would be located, and each compact or stand-alone State was to have developed a siting plan and taken other identified steps. §§ 2021e(e)(1)(B), 2021e(d)(2)(B)(ii). By January 1, 1990, each State or compact was to have filed a complete application for a license to operate a disposal facility, or the Governor of any State that had not filed an application was to have certified that the State would be capable of disposing

of all waste generated in the State after 1992. §§ 2021e (e)(1)(C), 2021e(d)(2)(B)(iii). The rest of the account is to be paid out to those States or compacts able to dispose of all low level radioactive waste generated within their borders by January 1, 1993. § 2021e(d)(2)(B)(iv). Each State that has not met the 1993 deadline must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received. § 2021e(d)(2)(C).

2. *Access incentives.* The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter. § 2021e(e)(2)(A). States that fail to meet the 1988 deadline may be charged double surcharges for the first half of 1988 and quadruple surcharges for the second half of 1988, and may be denied access thereafter. § 2021e(e)(2)(B). States that fail to meet the 1990 deadline may be denied access. § 2021e(e)(2)(C). Finally, States that have not filed complete applications by January 1, 1992, for a license to operate a disposal facility, or States belonging to compacts that have not filed such applications, may be charged triple surcharges. §§ 2021e(e)(1)(D), 2021e(e)(2)(D).

3. *The take title provision.* The third type of incentive is the most severe. The Act provides:

> "If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession

> of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment." § 2021e(d)(2)(C).

These three incentives are the focus of petitioners' constitutional challenge.

In the seven years since the Act took effect, Congress has approved nine regional compacts, encompassing 42 of the States. All six unsited compacts and four of the unaffiliated States have met the first three statutory milestones. Brief for United States 10, n. 19; *id.*, at 13, n. 25.

New York, a State whose residents generate a relatively large share of the Nation's low level radioactive waste, did not join a regional compact. Instead, the State complied with the Act's requirements by enacting legislation providing for the siting and financing of a disposal facility in New York. The State has identified five potential sites, three in Allegany County and two in Cortland County. Residents of the two counties oppose the State's choice of location. App. 29a–30a, 66a–68a.

Petitioners—the State of New York and the two counties—filed this suit against the United States in 1990. They sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution. The States of Washington, Nevada, and South Carolina intervened as defendants. The District Court dismissed the complaint. 757 F. Supp. 10 (NDNY 1990). The Court of Appeals affirmed. 942 F. 2d 114 (CA2 1991). Petitioners have abandoned their due process and Eleventh Amendment claims on their way up the appellate ladder; as the cases stand before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause.

II

A

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); and while the Tenth Amendment makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, *e. g., Perez* v. *United States*, 402 U. S. 146 (1971); *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, *e. g., Garcia* v. *San Antonio Metropolitan Transit Au-*

thority, 469 U. S. 528 (1985); *Lane County* v. *Oregon,* 7 Wall. 71 (1869). In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See *United States* v. *Oregon,* 366 U. S. 643, 649 (1961); *Case* v. *Bowles,* 327 U. S. 92, 102 (1946); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U. S. 508, 534 (1941).

It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby,* 312 U. S. 100, 124 (1941). As Justice Story put it, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). This has been the Court's consistent understanding: "The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia* v. *San Antonio Metropolitan Transit Authority, supra,* at 549 (internal quotation marks omitted).

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed,

is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

The benefits of this federal structure have been extensively cataloged elsewhere, see, *e. g.*, *Gregory* v. *Ashcroft*, *supra*, at 457–460; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 3–10 (1988); McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987), but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States* v. *Butler*, 297 U. S. 1, 63 (1936).

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. Among the provisions of the Constitution that have been particularly important in this regard, three concern us here.

First, the Constitution allocates to Congress the power "[t]o regulate Commerce . . . among the several States."

Art. I, § 8, cl. 3. Interstate commerce was an established feature of life in the late 18th century. See, *e. g.*, The Federalist No. 42, p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power. See, *e. g.*, *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

Second, the Constitution authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, § 8, cl. 1. As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). Compare, *e. g.*, *United States* v. *Butler*, *supra*, at 72–75 (spending power does not authorize Congress to subsidize farmers), with *South Dakota* v. *Dole*, 483 U. S. 203 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). While the spending power is "subject to several general restrictions articulated in our cases," *id.*, at 207, these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget.

The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause, which

authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U. S. Const., Art. I, § 8, cl. 18. See, *e. g., Legal Tender Case*, 110 U. S. 421, 449–450 (1884); *McCulloch* v. *Maryland*, 4 Wheat., at 411–421.

Finally, the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2. As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted. See, *e. g., Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983). We have observed that the Supremacy Clause gives the Federal Government "a decided advantage in th[e] delicate balance" the Constitution strikes between state and federal power. *Gregory* v. *Ashcroft*, 501 U. S., at 460.

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

B

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold

by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Cf. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623 (1978); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 359 (1992). Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path. See *Maryland* v. *Wirtz*, 392 U. S. 183 (1968) (state schools and hospitals are subject to Fair Labor Standards Act); *National League of Cities* v. *Usery*, 426 U. S. 833 (1976) (overruling *Wirtz*) (state employers are *not* subject to Fair Labor Standards Act); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (overruling *National League of Cities*) (state employers are once again subject to Fair Labor Standards Act). See also *New York* v. *United States*, 326 U. S. 572 (1946); *Fry* v. *United States*, 421 U. S. 542 (1975); *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982); *EEOC* v. *Wyoming*, 460 U. S. 226 (1983); *South Carolina* v. *Baker*, 485 U. S. 505 (1988); *Gregory* v. *Ashcroft*, *supra*. This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. Cf. *FERC* v. *Mississippi*, 456 U. S. 742, 758–759 (1982).

This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

1

As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981). In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did *not* "commandeer" the States into regulating mining. The Court found that "the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Ibid.*

The Court reached the same conclusion the following year in *FERC* v. *Mississippi*, *supra*. At issue in *FERC* was the Public Utility Regulatory Policies Act of 1978, a federal statute encouraging the States in various ways to develop programs to combat the Nation's energy crisis. We observed that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*, at 761–762. As in *Hodel*, the Court upheld the statute at issue because it did not view the statute as such a command. The Court emphasized: "Titles I and III of [the Public Utility Regulatory Policies Act of 1978 (PURPA)] require *only consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal

proposals." 456 U. S., at 764 (emphasis in original). Because "[t]here [wa]s nothing in PURPA 'directly compelling' the States to enact a legislative program," the statute was not inconsistent with the Constitution's division of authority between the Federal Government and the States. *Id.*, at 765 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 288). See also *South Carolina* v. *Baker*, *supra*, at 513 (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests"); *Garcia* v. *San Antonio Metropolitan Transit Authority*, *supra*, at 556 (same).

These statements in *FERC* and *Hodel* were not innovations. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See *Coyle* v. *Smith*, 221 U. S. 559, 565 (1911). The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane County* v. *Oregon*, 7 Wall., at 76 (emphasis added). The Court has made the same point with more rhetorical flourish, although perhaps with less precision, on a number of occasions. In Chief Justice Chase's much-quoted words, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 7 Wall. 700, 725 (1869). See also *Metcalf & Eddy* v. *Mitchell*, 269

U. S. 514, 523 (1926) ("[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers"); *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government"); *Gregory* v. *Ashcroft*, 501 U. S., at 461 ("[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress "could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such." Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1447 (1987).

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, p. 108 (C. Rossiter ed. 1961). As Hamilton saw it, "we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government." *Id.*, at 109. The new National Government "must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations . . . . The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals." *Id.*, No. 16, at 116.

The Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. 1 Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911). Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation. 1 *id.*, at 243–244. These two plans underwent various revisions as the Convention progressed, but they remained the two primary options discussed by the delegates. One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. As Randolph explained the distinction, "[t]he true question is whether we shall adhere to the federal plan [*i. e.*, the New Jersey Plan], or introduce the national plan. The insufficiency of the former has been fully displayed . . . . There are but two modes, by which the end of a Gen[eral] Gov[ernment] can be attained: the 1st is by coercion as proposed by Mr. P[aterson's] plan[, the 2nd] by real legislation as prop[osed] by the other plan. Coercion [is] *impracticable, expensive, cruel to individuals.* . . . We must resort therefore to a national *Legislation over individuals.*" 1 *id.*, at 255–256 (emphasis in original). Madison echoed this view: "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." 2 *id.*, at 9.

Under one preliminary draft of what would become the New Jersey Plan, state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in these cases: "[T]he laws of the United States ought, as far as may be consistent with the common interests of the Union, to be carried into execution by the judiciary and executive officers of the respective states, wherein the exe-

cution thereof is required." 3 *id.*, at 616. This idea apparently never even progressed so far as to be debated by the delegates, as contemporary accounts of the Convention do not mention any such discussion. The delegates' many descriptions of the Virginia and New Jersey Plans speak only in general terms about whether Congress was to derive its authority from the people or from the States, and whether it was to issue directives to individuals or to States. See 1 *id.*, at 260–280.

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. 1 *id.*, at 313. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State's convention: "This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. . . . But this legal coercion singles out the . . . individual." 2 J. Elliot, Debates on the Federal Constitution 197 (2d ed. 1863). Charles Pinckney, another delegate at the Constitutional Convention, emphasized to the South Carolina House of Representatives that in Philadelphia "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." 4 *id.*, at 256. Rufus King, one of Massachusetts' delegates, returned home to support ratification by recalling the Commonwealth's unhappy experience under the Articles of Confederation and arguing: "Laws, to be effective, therefore, must not be laid on states, but upon individuals." 2 *id.*, at 56. At New York's convention, Hamilton (another delegate in Philadelphia) exclaimed: "But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Then we are brought to this dilemma—either a federal

standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." 2 *id.*, at 233. At North Carolina's convention, Samuel Spencer recognized that "all the laws of the Confederation were binding on the states in their political capacities, . . . but now the thing is entirely different. The laws of Congress will be binding on individuals." 4 *id.*, at 153.

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *E. g.*, *FERC* v. *Mississippi*, 456 U. S., at 762–766; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 288–289; *Lane County* v. *Oregon*, 7 Wall., at 76. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

2

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U. S., at 206. Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, *id.*, at 207–208, and n. 3; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices. See Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 874–881 (1979). *Dole* was one such case: The Court found no constitutional flaw in a federal statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age. Similar examples abound. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S. 448, 478–480 (1980); *Massachusetts* v. *United States*, 435 U. S. 444, 461–462 (1978); *Lau* v. *Nichols*, 414 U. S. 563, 568–569 (1974); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U. S. 127, 142–144 (1947).

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 288. See also *FERC* v. *Mississippi*, *supra*, at 764–765. This arrangement, which has been termed "a program of cooperative federalism," *Hodel*, *supra*, at 289, is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, see *Arkansas* v. *Oklahoma*, 503 U. S. 91, 101 (1992) (Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective"); the Occupational Safety and Health Act of 1970,

84 Stat. 1590, 29 U. S. C. § 651 *et seq.*, see *Gade* v. *National Solid Wastes Management Assn.*, *ante*, at 97; the Resource Conservation and Recovery Act of 1976, 90 Stat. 2796, as amended, 42 U. S. C. § 6901 *et seq.*, see *Department of Energy* v. *Ohio*, 503 U. S. 607, 611–612 (1992); and the Alaska National Interest Lands Conservation Act, 94 Stat. 2374, 16 U. S. C. § 3101 *et seq.*, see *Kenaitze Indian Tribe* v. *Alaska*, 860 F. 2d 312, 314 (CA9 1988), cert. denied, 491 U. S. 905 (1989).

By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. See Merritt, 88 Colum. L. Rev., at 61–62; La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 Nw. U. L. Rev. 577, 639–665 (1985).

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

III

The parties in these cases advance two quite different views of the Act. As petitioners see it, the Act imposes a requirement directly upon the States that they regulate in the field of radioactive waste disposal in order to meet Congress' mandate that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 42 U. S. C. § 2021c(a)(1)(A). Petitioners understand this provision as a direct command from Congress, enforceable independent of the three sets of incentives provided by the Act. Respondents, on the other hand, read this provision together with the incentives, and see the Act as affording the States three sets of choices. According to respondents, the Act permits a State to choose first between regulating pursuant to federal standards and losing the right to a share of the Secretary of Energy's escrow account; to choose second between regulating pursuant to federal standards and progressively losing access to disposal sites in other States; and to choose third between regulating pursuant to federal standards and taking title to the waste generated within the State.

Respondents thus interpret § 2021c(a)(1)(A), despite the statute's use of the word "shall," to provide no more than an option which a State may elect or eschew.

The Act could plausibly be understood either as a mandate to regulate or as a series of incentives. Under petitioners' view, however, § 2021c(a)(1)(A) of the Act would clearly "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 288. We must reject this interpretation of the provision for two reasons. First, such an outcome would, to say the least, "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U. S., at 460. "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance," *ibid.* (internal quotation marks omitted), but the Act's amenability to an equally plausible alternative construction prevents us from possessing such certainty. Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). This rule of statutory construction pushes us away from petitioners' understanding of § 2021c (a)(1)(A) of the Act, under which it compels the States to regulate according to Congress' instructions.

We therefore decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act. Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

A

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, see, *e. g.*, *Wyoming* v. *Oklahoma*, 502 U. S. 437, 454–455 (1992); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Society for Relief of Distressed Pilots*, 12 How. 299 (1852), that limit may be lifted, as it has been here, by an expression of the "unambiguous intent" of Congress. *Wyoming*, *supra*, at 458; *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427–431 (1946). Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress' approval, the States can clearly do so *with* Congress' approval, which is what the Act gives them.

The second step, the Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Cf. *United States* v. *Sanchez*, 340 U. S. 42, 44–45 (1950); *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 581–583 (1937).

The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. See generally *South Dakota* v. *Dole*, 483 U. S., at 207–208. The expenditure is for the general

welfare, *Helvering* v. *Davis,* 301 U. S. 619, 640–641 (1937); the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. 42 U. S. C. § 2021e(d)(2)(E). The conditions imposed are unambiguous, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S., at 17; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure, *Massachusetts* v. *United States*, 435 U. S., at 461; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition. *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 269–270 (1985).

Petitioners contend nevertheless that the *form* of these expenditures removes them from the scope of Congress' spending power. Petitioners emphasize the Act's instruction to the Secretary of Energy to "deposit all funds received in a special escrow account. The funds so deposited shall not be the property of the United States." 42 U. S. C. § 2021e(d)(2)(A). Petitioners argue that because the money collected and redisbursed to the States is kept in an account separate from the general treasury, because the Secretary holds the funds only as a trustee, and because the States themselves are largely able to control whether they will pay into the escrow account or receive a share, the Act "in no manner calls for the spending of federal funds." Reply Brief for Petitioner State of New York 6.

The Constitution's grant to Congress of the authority to "pay the Debts and provide for the . . . general Welfare" has never, however, been thought to mandate a particular form of accounting. A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose. See, *e. g.*, 23 U. S. C. § 118 (Highway Trust Fund);

42 U. S. C. § 401(a) (Federal Old-Age and Survivors Insurance Trust Fund); 42 U. S. C. § 401(b) (Federal Disability Insurance Trust Fund); 42 U. S. C. § 1395t (Federal Supplementary Medical Insurance Trust Fund). The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner. Petitioners' argument regarding the States' ability to determine the escrow account's income and disbursements ignores the fact that Congress specifically provided the States with this ability as a method of encouraging the States to regulate according to the federal plan. That the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power.

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. See *Northeast Bancorp, Inc.* v. *Board of Governors, FRS*, 472 U. S. 159, 174–175 (1985). Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to fed-

eral standards or having state law pre-empted by federal regulation. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 288; *FERC* v. *Mississippi*, 456 U. S., at 764–765.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Cf. *Hodel*, *supra*, at 288. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste

generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

We must initially reject respondents' suggestion that, because the take title provision will not take effect until January 1, 1996, petitioners' challenge thereto is unripe. It takes many years to develop a new disposal site. All parties agree that New York must take action now in order to avoid the take title provision's consequences, and no party suggests that the State's waste generators will have ceased producing waste by 1996. The issue is thus ripe for review. Cf. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 201 (1983); *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 144–145 (1974).

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pur-

suant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., supra,* at 288, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, however, only underscores the critical alternative a

State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

IV

Respondents raise a number of objections to this understanding of the limits of Congress' power.

A

The United States proposes three alternative views of the constitutional line separating state and federal authority. While each view concedes that Congress *generally* may not compel state governments to regulate pursuant to federal direction, each purports to find a limited domain in which such coercion is permitted by the Constitution.

First, the United States argues that the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. This argument contains a kernel of truth: In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State. See, *e. g.*, *EEOC* v.

Wyoming, 460 U. S., at 242, n. 17; *Transportation Union* v. *Long Island R. Co.*, 455 U. S., at 684, n. 9; *National League of Cities* v. *Usery*, 426 U. S., at 853. The Court has more recently departed from this approach. See, *e. g.*, *South Carolina* v. *Baker*, 485 U. S., at 512–513; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S., at 556–557. But whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Second, the United States argues that the Constitution does, in some circumstances, permit federal directives to state governments. Various cases are cited for this proposition, but none support it. Some of these cases discuss the well established power of Congress to pass laws enforceable in state courts. See *Testa* v. *Katt*, 330 U. S. 386 (1947); *Palmore* v. *United States*, 411 U. S. 389, 402 (1973); see also *Second Employers' Liability Cases*, 223 U. S. 1, 57 (1912); *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876). These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the supreme Law of the Land," enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Suprem-

acy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.

Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law. See *Puerto Rico* v. *Branstad*, 483 U. S. 219, 228 (1987); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 695 (1979); *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 106–108 (1972); see also *Cooper* v. *Aaron*, 358 U. S. 1, 18–19 (1958); *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955); *Ex parte Young*, 209 U. S. 123, 155–156 (1908). Again, however, the text of the Constitution plainly confers this authority on the federal courts, the "judicial Power" of which "shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ; [and] to Controversies between two or more States; [and] between a State and Citizens of another State." U. S. Const., Art. III, § 2. The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply. See *Puerto Rico* v. *Branstad*, *supra*, at 227–228 (overruling *Kentucky* v. *Dennison*, 24 How. 66 (1861)).

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation.

Third, the United States, supported by the three sited regional compacts as *amici*, argues that the Constitution envisions a role for Congress as an arbiter of interstate disputes. The United States observes that federal courts, and this Court in particular, have frequently resolved conflicts among States. See, *e. g.*, *Arkansas* v. *Oklahoma*, 503 U. S. 91

(1992); *Wyoming* v. *Oklahoma*, 502 U. S. 437 (1992). Many of these disputes have involved the allocation of shared resources among the States, a category perhaps broad enough to encompass the allocation of scarce disposal space for radioactive waste. See, *e. g.*, *Colorado* v. *New Mexico*, 459 U. S. 176 (1982); *Arizona* v. *California*, 373 U. S. 546 (1963). The United States suggests that if the Court may resolve such interstate disputes, Congress can surely do the same under the Commerce Clause. The regional compacts support this argument with a series of quotations from The Federalist and other contemporaneous documents, which the compacts contend demonstrate that the Framers established a strong National Legislature for the purpose of resolving trade disputes among the States. Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as *Amici Curiae* 17, and n. 16.

While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation. The Constitution established Congress as "a superintending authority over the reciprocal trade" among the States, The Federalist No. 42, p. 268 (C. Rossiter ed. 1961), by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments. As Madison and Hamilton explained, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." *Id.*, No. 20, at 138.

B

The sited state respondents focus their attention on the process by which the Act was formulated. They correctly

observe that public officials representing the State of New York lent their support to the Act's enactment. A Deputy Commissioner of the State's Energy Office testified in favor of the Act. See Low-Level Waste Legislation: Hearings on H. R. 862, H. R. 1046, H. R. 1083, and H. R. 1267 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess., 97–98, 190–199 (1985) (testimony of Charles Guinn). Senator Moynihan of New York spoke in support of the Act on the floor of the Senate. 131 Cong. Rec. 38423 (1985). Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman* v. *Thompson*, 501 U. S. 722, 759 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ash-*

croft, 501 U. S., at 458. See The Federalist No. 51, p. 323 (C. Rossiter ed. 1961).

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment. In *Buckley* v. *Valeo*, 424 U. S. 1, 118–137 (1976), for instance, the Court held that Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. See *National League of Cities* v. *Usery*, 426 U. S., at 842, n. 12. In *INS* v. *Chadha*, 462 U. S. 919, 944–959 (1983), we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Presidents' approval of hundreds of statutes containing a legislative veto provision. See *id.*, at 944–945. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If

a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Nor does the State's prior support for the Act estop it from asserting the Act's unconstitutionality. While New York has received the benefit of the Act in the form of a few more years of access to disposal sites in other States, New York has never joined a regional radioactive waste compact. Any estoppel implications that might flow from membership in a compact, see *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 35–36 (1951) (Jackson, J., concurring), thus do not concern us here. The fact that the Act, like much federal legislation, embodies a compromise among the States does not elevate the Act (or the antecedent discussions among representatives of the States) to the status of an interstate agreement requiring Congress' approval under the Compact Clause. Cf. *Holmes* v. *Jennison*, 14 Pet. 540, 572 (1840) (plurality opinion). That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.

V

Petitioners also contend that the Act is inconsistent with the Constitution's Guarantee Clause, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U. S. Const., Art. IV, § 4. Because we have found the take title provision of the Act

irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government, we need only address the applicability of the Guarantee Clause to the Act's other two challenged provisions.

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the "political question" doctrine. See, *e. g.*, *City of Rome* v. *United States*, 446 U. S. 156, 182, n. 17 (1980) (challenge to the preclearance requirements of the Voting Rights Act); *Baker* v. *Carr*, 369 U. S. 186, 218–229 (1962) (challenge to apportionment of state legislative districts); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, 140–151 (1912) (challenge to initiative and referendum provisions of state constitution).

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther* v. *Borden*, 7 How. 1 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to decide what government is the established one in a State." *Id.*, at 42. Over the following century, this limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts." *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946) (plurality opinion).

This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. See *At-*

torney General of Michigan ex rel. Kies v. *Lowrey*, 199 U. S. 233, 239 (1905); *Forsyth* v. *Hammond*, 166 U. S. 506, 519 (1897); *In re Duncan*, 139 U. S. 449, 461–462 (1891); *Minor* v. *Happersett*, 21 Wall. 162, 175–176 (1875). See also *Plessy* v. *Ferguson*, 163 U. S. 537, 563–564 (1896) (Harlan, J., dissenting) (racial segregation "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See *Reynolds* v. *Sims*, 377 U. S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. See, *e. g.*, L. Tribe, American Constitutional Law 398 (2d ed. 1988); J. Ely, Democracy and Distrust: A Theory of Judicial Review 118, n., and 122–123 (1980); W. Wiecek, The Guarantee Clause of the U. S. Constitution 287–289, 300 (1972); Merritt, 88 Colum. L. Rev., at 70–78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513, 560–565 (1962).

We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. As we have seen, these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate. The twin threats

imposed by the first two challenged provisions of the Act—that New York may miss out on a share of federal spending or that those generating radioactive waste within New York may lose out-of-state disposal outlets—do not pose any realistic risk of altering the form or the method of functioning of New York's government. Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in these cases.

VI

Having determined that the take title provision exceeds the powers of Congress, we must consider whether it is severable from the rest of the Act.

"The standard for determining the severability of an unconstitutional provision is well established: 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." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause, . . . Congress' silence is just that—silence—and does not raise a presumption against severability." *Id.*, at 686. Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated. As the Court has observed, "it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its

enactment." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 396 (1894). See also *United States* v. *Jackson*, 390 U. S. 570, 585–586 (1968).

It is apparent in light of these principles that the take title provision may be severed without doing violence to the rest of the Act. The Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste. It still includes two incentives that coax the States along this road. A State whose radioactive waste generators are unable to gain access to disposal sites in other States may encounter considerable internal pressure to provide for the disposal of waste, even without the prospect of taking title. The sited regional compacts need not accept New York's waste after the 7-year transition period expires, so any burden caused by New York's failure to secure a disposal site will not be borne by the residents of other States. The purpose of the Act is not defeated by the invalidation of the take title provision, so we may leave the remainder of the Act in force.

VII

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional

government with each issue of comparable gravity would, in the long run, be far worse.

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them. The judgment of the Court of Appeals is accordingly

Affirmed in part and reversed in part.

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

The Court today affirms the constitutionality of two facets of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), Pub. L. 99–240, 99 Stat. 1842, 42 U. S. C. § 2021b *et seq.* These provisions include the monetary in-

centives from surcharges collected by States with low-level radioactive waste storage sites and rebated by the Secretary of Energy to States in compliance with the 1985 Act's deadlines for achieving regional or in-state disposal, see §§ 2021e(d)(2)(A) and 2021e(d)(2)(B)(iv), and the "access incentives," which deny access to disposal sites for States that fail to meet certain deadlines for low-level radioactive waste disposal management, § 2021e(e)(2). The Court strikes down and severs a third component of the 1985 Act, the "take title" provision, which requires a noncomplying State to take title to or to assume liability for its low-level radioactive waste if it fails to provide for the disposal of such waste by January 1, 1996. § 2021e(d)(2)(C). The Court deems this last provision unconstitutional under principles of federalism. Because I believe the Court has mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision, I can only join Parts III–A and III–B, and I respectfully dissent from the rest of its opinion and the judgment reversing in part the judgment of the Court of Appeals.

I

My disagreement with the Court's analysis begins at the basic descriptive level of how the legislation at issue in these cases came to be enacted. The Court goes some way toward setting out the bare facts, but its omissions cast the statutory context of the take title provision in the wrong light. To read the Court's version of events, see *ante*, at 150–151, one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), Pub. L. 96–573, 94 Stat. 3347, and its amendatory 1985 Act, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but

rather congressional sanction of interstate compromises they had reached.

The two signal events in 1979 that precipitated movement toward legislation were the temporary closing of the Nevada disposal site in July 1979, after several serious transportation-related incidents, and the temporary shutting of the Washington disposal site because of similar transportation and packaging problems in October 1979. At that time the facility in Barnwell, South Carolina, received approximately three-quarters of the Nation's low-level radioactive waste, and the Governor ordered a 50 percent reduction in the amount his State's plant would accept for disposal. National Governors' Association Task Force on Low-Level Radioactive Waste Disposal, Low-Level Waste: A Program for Action 3 (Nov. 1980) (lodged with the Clerk of this Court) (hereinafter A Program for Action). The Governor of Washington threatened to shut down the Hanford, Washington, facility entirely by 1982 unless "some meaningful progress occurs toward" development of regional solutions to the waste disposal problem. *Id.*, at 4, n. Only three sites existed in the country for the disposal of low-level radioactive waste, and the "sited" States confronted the undesirable alternatives either of continuing to be the dumping grounds for the entire Nation's low-level waste or of eliminating or reducing in a constitutional manner the amount of waste accepted for disposal.

The imminence of a crisis in low-level radioactive waste management cannot be overstated. In December 1979, the National Governors' Association convened an eight-member task force to coordinate policy proposals on behalf of the States. See Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing before the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 8 (1983). In May 1980, the State Planning Council on Radioactive Waste Management submitted the following unanimous recommendation to President Carter:

> "The national policy of the United States on low-level radioactive waste shall be that every State is responsible for the disposal of the low-level radioactive waste generated by nondefense related activities within its boundaries and that States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility." 126 Cong. Rec. 20135 (1980).

This recommendation was adopted by the National Governors' Association a few months later. See A Program for Action 6–7; H. R. Rep. No. 99–314, pt. 2, p. 18 (1985). The Governors recognized that the Federal Government could assert its preeminence in achieving a solution to this problem, but requested instead that Congress oversee state-developed regional solutions. Accordingly, the Governors' Task Force urged that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to the low-level waste disposal problem." A Program for Action 6.

The Governors went further, however, in recommending that "Congress should authorize the states to enter into interstate compacts to establish regional disposal sites" and that "[s]uch authorization should include the power to exclude waste generated outside the region from the regional disposal site." *Id.*, at 7. The Governors had an obvious incentive in urging Congress not to add more coercive measures to the legislation should the States fail to comply, but they nevertheless anticipated that Congress might eventually have to take stronger steps to ensure compliance with long-range planning deadlines for low-level radioactive waste management. Accordingly, the Governors' Task Force

> "recommend[ed] that Congress defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of com-

> pact consent legislation. States are already confronting the diminishing capacity of present sites and an unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves." *Id.*, at 8–9.

Such concerns would have been mooted had Congress enacted a "federal" solution, which the Senate considered in July 1980. See S. 2189, 96th Cong., 2d Sess. (1980); S. Rep. No. 96–548 (1980) (detailing legislation calling for federal study, oversight, and management of radioactive waste). This "federal" solution, however, was opposed by one of the sited State's Senators, who introduced an amendment to adopt and implement the recommendations of the State Planning Council on Radioactive Waste Management. See 126 Cong. Rec. 20136 (1980) (statement of Sen. Thurmond). The "state-based" solution carried the day, and as enacted, the 1980 Act announced the "policy of the Federal Government that . . . each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders." Pub. L. 96–573, § 4(a)(1), 94 Stat. 3348. The 1980 Act further authorized States to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste," § 4(a)(2)(A), compacts to which Congress would have to give its consent. § 4(a)(2)(B). The 1980 Act also provided that, beginning on January 1, 1986, an approved compact could reserve access to its disposal facilities for those States which had joined that particular regional compact. *Ibid.*

As well described by one of the *amici*, the attempts by States to enter into compacts and to gain congressional ap-

proval sparked a new round of political squabbling between elected officials from unsited States, who generally opposed ratification of the compacts that were being formed, and their counterparts from the sited States, who insisted that the promises made in the 1980 Act be honored. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 12–14. In its effort to keep the States at the forefront of the policy amendment process, the National Governors' Association organized more than a dozen meetings to achieve a state consensus. See H. Brown, The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985, p. iv (Nov. 1986) (describing "the states' desire to influence any revisions of the 1980 Act").

These discussions were not merely academic. The sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act. Thus, as the end of 1985 approached, the sited States viewed the January 1, 1986, deadline established in the 1980 Act as a "drop-dead" date, on which the regional compacts could begin excluding the entry of out-of-region waste. See 131 Cong. Rec. 35203 (1985). Since by this time the three disposal facilities operating in 1980 were still the only such plants accepting low-level radioactive waste, the unsited States perceived a very serious danger if the three existing facilities actually carried out their threat to restrict access to the waste generated solely within their respective compact regions.

A movement thus arose to achieve a compromise between the sited and the unsited States, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States' assurances that they would develop alternative disposal facilities. As Representative Derrick explained, the compromise 1985 legislation "gives nonsited

States more time to develop disposal sites, but also establishes a very firm timetable and sanctions for failure to live up [to] the agreement." *Id.*, at 35207. Representative Markey added that "[t]his compromise became the basis for our amendments to the Low-Level Radioactive Waste Policy Act of 1980. In the process of drafting such amendments, various concessions have been made by all sides in an effort to arrive at a bill which all parties could accept." *Id.*, at 35205. The bill that in large measure became the 1985 Act "represent[ed] the diligent negotiating undertaken by" the National Governors' Association and "embodied" the "fundamentals of their settlement." *Id.*, at 35204 (statement of Rep. Udall). In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.

There is no need to resummarize the essentials of the 1985 legislation, which the Court does *ante*, at 151–154. It does, however, seem critical to emphasize what is accurately described in one *amicus* brief as the assumption by Congress of "the role of arbiter of disputes among the several States." Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as *Amici Curiae* 9. Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

II

To justify its holding that the take title provision contravenes the Constitution, the Court posits that "[i]n this provision, Congress has crossed the line distinguishing encouragement from coercion." *Ante*, at 175. Without attempting to understand properly the take title provision's place in the

interstate bargaining process, the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion. The Court candidly begins with an argument respondents do *not* make: that "the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments." *Ibid.* "Such a forced transfer," it continues, "standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Ibid.* Since this is *not* an argument respondents make, one naturally wonders why the Court builds its analysis that the take title provision is unconstitutional around this opening premise. But having carefully built its straw man, the Court proceeds impressively to knock him down. "As we have seen," the Court teaches, "the Constitution does not empower Congress to subject state governments to this type of instruction." *Ante,* at 176.

Curiously absent from the Court's analysis is any effort to place the take title provision within the overall context of the legislation. As the discussion in Part I of this opinion suggests, the 1980 and 1985 statutes were enacted against a backdrop of national concern over the availability of additional low-level radioactive waste disposal facilities. Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses, but instead it *unanimously* assented to the States' request for congressional ratification of agreements to which they had acceded. See 131 Cong. Rec. 35252 (1985); *id.*, at 38425. As the floor statements of Members of Congress reveal, see *supra,* at 193–194, the States wished to take the lead in achieving a solution to this problem and agreed among themselves to the various incentives and penalties implemented by Congress to ensure

adherence to the various deadlines and goals.[1] The chief executives of the States proposed this approach, and I am unmoved by the Court's vehemence in taking away Congress' authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States' concessions.

A

In my view, New York's actions subsequent to enactment of the 1980 and 1985 Acts fairly indicate its approval of the interstate agreement process embodied in those laws within the meaning of Art. I, § 10, cl. 3, of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." First, the States—including New York—worked through their Governors to petition Congress for the 1980 and 1985 Acts. As I have attempted to demonstrate, these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. Second, New York acted in compliance with the requisites of both statutes in key respects, thus signifying its assent to the agreement achieved among the States as codified in these laws. After enactment of the 1980 Act and pursuant to its provision in § 4(a)(2), 94 Stat. 3348, New York entered into compact negotiations with several other northeastern States before withdrawing from them to "go it alone." Indeed, in 1985, as the January 1, 1986, deadline crisis approached and Congress considered the 1985 legislation that is the subject of this lawsuit, the Deputy Commissioner for Policy and Planning of the New

[1] As Senator McClure pointed out: "[T]he actions taken in the Committee on Energy and Natural Resources met the objections and the objectives of the States point by point; and I want to underscore what the Senator from Louisiana has indicated—that it is important that we have real milestones. It is important to note that the discussions between staffs and principals have produced a[n] agreement that does have some real teeth in it at some points." 131 Cong. Rec. 38415 (1985).

York State Energy Office testified before Congress that "New York State supports the efforts of Mr. Udall and the members of this Subcommittee to resolve the current impasse over Congressional consent to the proposed LLRW compacts and provide interim access for states and regions without sites. *New York State has been participating with the National Governors' Association and the other large states and compact commissions in an effort to further refine the recommended approach in HR 1083 and reach a consensus between all groups.*" See Low-Level Waste Legislation: Hearings on H. R. 862, H. R. 1046, H. R. 1083, and H. R. 1267 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess., 197 (1985) (testimony of Charles Guinn) (emphasis added).

Based on the assumption that "other states will [not] continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York," 1986 N. Y. Laws, ch. 673, § 2, the state legislature enacted a law providing for a waste disposal facility to be sited in the State. *Ibid.* This measure comported with the 1985 Act's proviso that States which did not join a regional compact by July 1, 1986, would have to establish an in-state waste disposal facility. See 42 U. S. C. § 2021e (e)(1)(A). New York also complied with another provision of the 1985 Act, § 2021e(e)(1)(B), which provided that by January 1, 1988, each compact or independent State would identify a facility location and develop a siting plan, or contract with a sited compact for access to that region's facility. By 1988, New York had identified five potential sites in Cortland and Allegany Counties, but public opposition there caused the State to reconsider where to locate its waste disposal facility. See Office of Environmental Restoration and Waste Management, U. S. Dept. of Energy, Report to Congress in Response to Public Law 99–240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress 32–35

(1991) (lodged with the Clerk of this Court). As it was undertaking these initial steps to honor the interstate compromise embodied in the 1985 Act, New York continued to take full advantage of the import concession made by the sited States, by exporting its low-level radioactive waste for the full 7-year extension period provided in the 1985 Act. By gaining these benefits and complying with certain of the 1985 Act's deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangement—including the take title provision.

Although unlike the 42 States that compose the nine existing and approved regional compacts, see Brief for United States 10, n. 19, New York has never formalized its assent to the 1980 and 1985 statutes, our cases support the view that New York's actions signify assent to a constitutional interstate "agreement" for purposes of Art. I, § 10, cl. 3. In *Holmes* v. *Jennison,* 14 Pet. 540 (1840), Chief Justice Taney stated that "[t]he word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, *and upon which both are acting,* it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; . . . and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." *Id.,* at 572. (emphasis added). In my view, New York acted in a manner to signify its assent to the 1985 Act's take title provision as part of the elaborate compromise reached among the States.

The State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act,

New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act. Cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 35–36 (1951), Jackson, J., concurring: "West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact . . . . Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. *After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant*, West Virginia should be estopped from repudiating her act." (Emphasis added.)

B

Even were New York not to be estopped from challenging the take title provision's constitutionality, I am convinced that, seen as a term of an agreement entered into between the several States, this measure proves to be less constitutionally odious than the Court opines. First, the practical effect of New York's position is that because it is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, *other* States with such plants *must accept* New York's waste, whether they wish to or not. Otherwise, the many economically and socially beneficial producers of such waste in the State would have to cease their operations. The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by it being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.

Moreover, it is utterly reasonable that, in crafting a delicate compromise between the three overburdened States that provided low-level radioactive waste disposal facilities and the rest of the States, Congress would have to ratify some punitive measure as the ultimate sanction for noncompliance. The take title provision, though surely onerous, does *not* take effect if the generator of the waste does not request such action, or if the State lives up to its bargain of providing a waste disposal facility either within the State or in another State pursuant to a regional compact arrangement or a separate contract. See 42 U. S. C. § 2021e(d)(2)(C).

Finally, to say, as the Court does, that the incursion on state sovereignty "cannot be ratified by the 'consent' of state officials," *ante*, at 182, is flatly wrong. In a case involving a congressional ratification statute to an interstate compact, the Court upheld a provision that Tennessee and Missouri had waived their immunity from suit. Over their objection, the Court held that "[t]he States who are parties to the compact by accepting it *and acting under it assume the conditions* that Congress under the Constitution attached." *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 281–282 (1959) (emphasis added). In so holding, the Court determined that a State may be found to have waived a fundamental aspect of its sovereignty—the right to be immune from suit—in the formation of an interstate compact even when in subsequent litigation it expressly denied its waiver. I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases. Hard public policy choices sometimes require strong measures, and the Court's holding, while not irremediable, essentially misunderstands that the 1985 take title provision was part of a complex interstate agreement about which New York should not now be permitted to complain.

III

The Court announces that it has no occasion to revisit such decisions as *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991); *South Carolina* v. *Baker*, 485 U. S. 505 (1988); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985); *EEOC* v. *Wyoming*, 460 U. S. 226 (1983); and *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); see *ante*, at 160, because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *Ibid.* Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is unpersuasive. I have several difficulties with the Court's analysis in this respect: It builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality.

The Court's distinction between a federal statute's regulation of States and private parties for general purposes, as opposed to a regulation solely on the activities of States, is unsupported by our recent Tenth Amendment cases. In no case has the Court rested its holding on such a distinction. Moreover, the Court makes no effort to explain why this purported distinction should affect the analysis of Congress' power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible theory. Certainly one would be hard pressed to read the spirited exchanges between the Court and dissenting Justices in *National League of Cities*, *supra*, and in *Garcia* v. *San Antonio Metropolitan Transit Authority*, *supra*, as having been based on the distinction now drawn by the Court. An incursion on state sovereignty

hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.

Even were such a distinction to be logically sound, the Court's "anticommandeering" principle cannot persuasively be read as springing from the two cases cited for the proposition, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981), and *FERC* v. *Mississippi*, 456 U. S. 742, 761–762 (1982). The Court purports to draw support for its rule against Congress "commandeer-[ing]" state legislative processes from a solitary statement in dictum in *Hodel*. See *ante*, at 161: "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" (quoting *Hodel*, *supra*, at 288). That statement was not necessary to the decision in *Hodel*, which involved the question whether the Tenth Amendment interfered with Congress' authority to pre-empt a field of activity that could also be subject to state regulation and not whether a federal statute could dictate certain actions by States; the language about "commandeer-[ing]" States was classic dicta. In holding that a federal statute regulating the activities of private coal mine operators was constitutional, the Court observed that "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." 452 U. S., at 292.

The Court also claims support for its rule from our decision in *FERC*, and quotes a passage from that case in which we stated that "'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.'" *Ante*, at 161 (quoting 456 U. S., at

761–762). In so reciting, the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning. In full, the passage reads: "*While* this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA* v. *Brown*, 431 U. S. 99 (1977), *there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.*" *Ibid.* (citing *Fry* v. *United States*, 421 U. S. 542 (1975) (emphasis added)).[2] The phrase highlighted by the Court merely means that we have not had the occasion to address whether Congress may "command" the States to enact a certain law, and as I have argued in Parts I and II of this opinion, these cases do not raise that issue. Moreover, it should go without saying that the *absence* of any on-point precedent from this Court has no bearing on the question whether Congress has properly exercised its constitutional authority under Article I. Silence by this Court on a subject is not authority for anything.

The Court can scarcely rest on a distinction between federal laws of general applicability and those ostensibly directed solely at the activities of States, therefore, when the decisions from which it derives the rule not only made no such distinction, but validated federal statutes that constricted state sovereignty in ways greater than or similar to

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[2] It is true that under the majority's approach, *Fry* is distinguishable because it involved a statute generally applicable to both state governments and private parties. The law at issue in that case was the Economic Stabilization Act of 1970, which imposed wage and salary limitations on private and state workers alike. In *Fry*, the Court upheld this statute's application to the States over a Tenth Amendment challenge. In my view, *Fry* perfectly captures the weakness of the majority's distinction, because the law upheld in that case involved a far more pervasive intrusion on state sovereignty—the authority of state governments to pay salaries and wages to its employees below the federal minimum—than the take title provision at issue here.

the take title provision at issue in these cases. As *Fry*, *Hodel*, and *FERC* make clear, our precedents prior to *Garcia* upheld provisions in federal statutes that directed States to undertake certain actions. "[I]t cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way," we stated in *FERC*, "or even to 'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of "integral governmental functions."'" 456 U. S., at 766. I thus am unconvinced that either *Hodel* or *FERC* supports the rule announced by the Court.

And if those cases do stand for the proposition that in certain circumstances Congress may not dictate that the States take specific actions, it would seem appropriate to apply the test stated in *FERC* for determining those circumstances. The crucial threshold inquiry in that case was whether the subject matter was pre-emptible by Congress. See 456 U. S., at 765. "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement *in a pre-emptible field*—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." *Id.*, at 771 (emphasis added). The *FERC* Court went on to explain that if Congress is legislating in a pre-emptible field—as the Court concedes it was doing here, see *ante*, at 173–174—the proper test before our decision in *Garcia* was to assess whether the alleged intrusions on state sovereignty "do not threaten the States' 'separate and independent existence,' *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869); *Coyle* v. *Smith*, 221 U. S. 559, 580 (1911), and do not impair the ability of the States 'to function effectively in a federal system.' *Fry* v. *United States*, 421 U. S., at 547, n. 7; *National League of Cities* v. *Usery*, 426 U. S., at 852." *FERC*, *supra*, at 765–766. On

neither score does the take title provision raise constitutional problems. It certainly does not threaten New York's independent existence nor impair its ability to function effectively in the system, all the more so since the provision was enacted pursuant to compromises reached among state leaders and then ratified by Congress.

It is clear, therefore, that even under the precedents selectively chosen by the Court, its analysis of the take title provision's constitutionality in these cases falls far short of being persuasive. I would also submit, in this connection, that the Court's attempt to carve out a doctrinal distinction for statutes that purport solely to regulate state activities is especially unpersuasive after *Garcia.* It is true that in that case we considered whether a federal statute of general applicability—the Fair Labor Standards Act—applied to state transportation entities but our most recent statements have explained the appropriate analysis in a more general manner. Just last Term, for instance, JUSTICE O'CONNOR wrote for the Court that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system)." *Gregory* v. *Ashcroft,* 501 U. S., at 464. Indeed, her opinion went on to state that "this Court in *Garcia* has left primarily to the *political process* the protection of the States against intrusive exercises of Congress' Commerce Clause powers." *Ibid.* (emphasis added).

Rather than seek guidance from *FERC* and *Hodel,* therefore, the more appropriate analysis should flow from *Garcia,* even if these cases do not involve a congressional law generally applicable to both States and private parties. In *Garcia,* we stated the proper inquiry: "[W]e are convinced that

the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" 469 U. S., at 554 (quoting *EEOC* v. *Wyoming*, 460 U. S., at 236). Where it addresses this aspect of respondents' argument, see *ante*, at 180–183, the Court tacitly concedes that a failing of the political process cannot be shown in these cases because it refuses to rebut the unassailable arguments that the States were well able to look after themselves in the legislative process that culminated in the 1985 Act's passage. Indeed, New York acknowledges that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." Pet. for Cert. in No. 91–543, p. 7. The Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights.

Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste, and Congress has acceded to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington. New York itself participated and supported passage of this legislation at both the gubernatorial and federal representative levels, and then enacted state laws specifically to comply with the deadlines and timetables agreed upon by the States in the 1985 Act. For

me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.[3]

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[3] With selective quotations from the era in which the Constitution was adopted, the majority attempts to bolster its holding that the take title provision is tantamount to federal "commandeering" of the States. In view of the many Tenth Amendment cases decided over the past two decades in which resort to the kind of historical analysis generated in the majority opinion was not deemed necessary, I do not read the majority's many invocations of history to be anything other than elaborate window dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 56–59 (1927); H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (1973); Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1 (1950); Wiecek, The Reconstruction of Federal Judicial Power, 1863–1875, 13 Am. J. Legal Hist. 333 (1969); Scheiber, State Law and "Industrial Policy" in American Development, 1790–1987, 75 Calif. L. Rev. 415 (1987); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L. J. 453 (1989). While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress' powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature's authority than may have existed in the late 18th century.

Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congres-

IV

Though I disagree with the Court's conclusion that the take title provision is unconstitutional, I do not read its opinion to preclude Congress from adopting a similar measure through its powers under the Spending or Commerce Clauses. The Court makes clear that its objection is to the alleged "commandeer[ing]" quality of the take title provision. See *ante*, at 175. As its discussion of the surcharge and rebate incentives reveals, see *ante*, at 171–172, the spending power offers a means of enacting a take title provision under the Court's standards. Congress could, in other words, condition the payment of funds on the State's willingness to take title if it has not already provided a waste disposal facility. Under the scheme upheld in these cases, for example, moneys collected in the surcharge provision might be withheld or disbursed depending on a State's willingness to take title to or otherwise accept responsibility for the low-level radioactive waste generated in state after the statutory deadline for establishing its own waste disposal facility has passed. See *ibid.; South Dakota* v. *Dole*, 483 U. S. 203, 208–209 (1987); *Massachusetts* v. *United States*, 435 U. S. 444, 461 (1978).

Similarly, should a State fail to establish a waste disposal facility by the appointed deadline (under the statute as presently drafted, January 1, 1996, § 2021e(d)(2)(C)), Congress has the power pursuant to the Commerce Clause to regulate directly the producers of the waste. See *ante*, at 174. Thus, as I read it, Congress could amend the statute to say that if a State fails to meet the January 1, 1996, deadline for

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sional statutes that impose clear directives on state officials, including those enacted pursuant to the Extradition Clause, see, *e. g.*, *Puerto Rico* v. *Branstad*, 483 U. S. 219, 227–228 (1987), the post-Civil War Amendments, see, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 319–320, 334–335 (1966), as well as congressional statutes that require state courts to hear certain actions, see, *e. g.*, *Testa* v. *Katt*, 330 U. S. 386, 392–394 (1947).

achieving a means of waste disposal, and has not taken title to the waste, no low-level radioactive waste may be shipped out of the State of New York. See, *e. g.*, *Hodel*, 452 U. S., at 288. As the legislative history of the 1980 and 1985 Acts indicates, faced with the choice of federal pre-emptive regulation and self-regulation pursuant to interstate agreement with congressional consent and ratification, the States decisively chose the latter. This background suggests that the threat of federal pre-emption may suffice to induce States to accept responsibility for failing to meet critical time deadlines for solving their low-level radioactive waste disposal problems, especially if that federal intervention also would strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities. And should Congress amend the statute to meet the Court's objection and a State refuse to act, the National Legislature will have ensured at least a federal solution to the waste management problem.

Finally, our precedents leave open the possibility that Congress may create federal rights of action in the generators of low-level radioactive waste against persons acting under color of state law for their failure to meet certain functions designated in federal-state programs. Thus, we have upheld 42 U. S. C. § 1983 suits to enforce certain rights created by statutes enacted pursuant to the Spending Clause, see, *e. g.*, *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498 (1990); *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987), although Congress must be cautious in spelling out the federal right clearly and distinctly, see, *e. g.*, *Suter* v. *Artist M.*, 503 U. S. 347 (1992) (not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous). In addition to compensating injured parties for the State's failure to act, the exposure to liability established by such suits also potentially serves as an inducement to compliance with the program mandate.

V

The ultimate irony of the decision today is that in its formalistically rigid obeisance to "federalism," the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. This legislation was a classic example of Congress acting as arbiter among the States in their attempts to accept responsibility for managing a problem of grave import. The States urged the National Legislature not to impose from Washington a solution to the country's low-level radioactive waste management problems. Instead, they sought a reasonable level of local and regional autonomy consistent with Art. I, § 10, cl. 3, of the Constitution. By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. Because the Court's justifications for undertaking this step are unpersuasive to me, I respectfully dissent.

JUSTICE STEVENS, concurring in part and dissenting in part.

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. See Arts. VIII, IX. Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.

The notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress," *ante*, at 176, is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment [1] surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I.[2] Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.

The Constitution gives this Court the power to resolve controversies between the States. Long before Congress

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[1] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[2] In *United States* v. *Darby*, 312 U. S. 100 (1941), we explained:

"The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e. g., II Elliot's Debates, 123, 131, III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767–768; Story, Commentaries on the Constitution, §§ 1907–1908.

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Id.*, at 124; see also *ante*, at 155–157.

enacted pollution-control legislation, this Court crafted a body of "'interstate common law,'" *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 106 (1972), to govern disputes between States involving interstate waters. See *Arkansas* v. *Oklahoma*, 503 U. S. 91, 98–99 (1992). In such contexts, we have not hesitated to direct States to undertake specific actions. For example, we have "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Colorado* v. *New Mexico*, 459 U. S. 176, 185 (1982) (citing *Wyoming* v. *Colorado*, 259 U. S. 419 (1922)). Thus, we unquestionably have the power to command an upstream State that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command.

With respect to the problem presented by the cases at hand, if litigation should develop between States that have joined a compact, we would surely have the power to grant relief in the form of specific enforcement of the take title provision.[3] Indeed, even if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power

[3] Even if § 2021e(d)(2)(C) is "invalidated" insofar as it applies to the State of New York, it remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect. Congress' consent to the compacts was "granted subject to the provisions of the [Act] . . . and only for so long as the [entities] established in the compact comply with all the provisions of [the] Act." Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. 100–319, 102 Stat. 471. Thus the compacts incorporated the provisions of the Act, including the take title provision. These compacts, the product of voluntary interstate cooperation, unquestionably survive the "invalidation" of § 2021e(d)(2)(C) as it applies to New York. Congress did not "direc[t]" the States to enter into these compacts and the decision of each compacting State to enter into a compact was not influenced by the existence of the take title provision: Whether a State went its own way or joined a compact, it was still subject to the take title provision.

to command the offending State to take remedial action. Cf. *Illinois* v. *City of Milwaukee*, *supra*. If this Court has such authority, surely Congress has similar authority.

For these reasons, as well as those set forth by JUSTICE WHITE, I respectfully dissent.

Syllabus

WISCONSIN DEPARTMENT OF REVENUE *v.* WILLIAM WRIGLEY, JR., CO.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 91–119. Argued January 22, 1992—Decided June 19, 1992

During 1973–1978, respondent chewing gum manufacturer, which is based in Chicago, sold its products in Wisconsin through a sales force consisting of a regional manager and various "field" representatives, all of whom engaged in various activities in addition to requesting orders from customers. Wisconsin orders were sent to Chicago for acceptance, and were filled by shipment through common carrier from outside the State. In 1980, petitioner Wisconsin Department of Revenue concluded that respondent's in-state business activities during the years in question had been sufficient to support imposition of a franchise tax. Respondent objected to the assessment of that tax, maintaining that it was immune under 15 U. S. C. § 381(a), which prohibits a State from taxing the income of a corporation whose only business activities within the State consist of "solicitation of orders" for tangible goods, provided that the orders are sent outside the State for approval and the goods are delivered from out of state. Ultimately, the State Supreme Court disallowed the imposition of the tax.

Held: Respondent's activities in Wisconsin fell outside the protection of § 381(a). Pp. 220–235.

(a) In addition to any speech or conduct that explicitly or implicitly proposes a sale, "solicitation of orders" as used in § 381(a) covers those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders. The statutory phrase should not be interpreted narrowly to cover only actual requests for purchases or the actions that are absolutely essential to making those requests, but includes the entire process associated with inviting an order. Thus, providing a car and a stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. On the other hand, the statutory phrase should not be interpreted broadly to include all activities that are routinely, or even closely, associated with solicitation or customarily performed by salesmen. Those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force are not covered. For example, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is

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good reason to get that done whether or not the company has a sales force. Pp. 223–231.

(b) There is a *de minimis* exception to the activities that forfeit § 381 immunity. Whether a particular activity is sufficiently *de minimis* to avoid loss of § 381 immunity depends upon whether that activity establishes a nontrivial additional connection with the taxing State. Pp. 231–232.

(c) Respondent's Wisconsin business activities were not limited to those specified in § 381. Although the regional manager's recruitment, training, and evaluation of employees and intervention in credit disputes, as well as the company's use of hotels and homes for sales-related meetings, must be viewed as ancillary to requesting purchases, the sales representatives' practices of replacing retailers' stale gum without cost, of occasionally using "agency stock checks" to sell gum to retailers who had agreed to install new display racks, and of storing gum for these purposes at home or in rented space cannot be so viewed, since those activities constituted independent business functions quite separate from the requesting of orders and respondent had a business purpose for engaging in them whether or not it employed a sales force. Moreover, the nonimmune activities, when considered together, are not *de minimis.* While their relative magnitude was not large compared to respondent's other Wisconsin operations, they constituted a nontrivial additional connection with the State. Pp. 232–235.

160 Wis. 2d 53, 465 N. W. 2d 800, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which WHITE, STEVENS, SOUTER, and THOMAS, JJ., joined, and in Parts I and II of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 236. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and BLACKMUN, J., joined, *post,* p. 236.

F. Thomas Creeron III, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was *James E. Doyle*, Attorney General.

E. Barrett Prettyman, Jr., argued the cause for respondent. With him on the brief were *Andre M. Saltoun*, *H. Randolph Williams*, *Barbara J. Janaszek*, and *Richard J. Sankovitz.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Iowa et al. by *Bonnie J. Campbell*, Attorney General of Iowa, *Harry M. Griger*, Special Assistant Attorney General, and *Marcia Mason*, Assistant Attorney

JUSTICE SCALIA delivered the opinion of the Court.

Section 101(a) of Public Law 86–272, 73 Stat. 555, 15 U. S. C. § 381, prohibits a State from taxing the income of a corporation whose only business activities within the State consist of "solicitation of orders" for tangible goods, provided that the orders are sent outside the State for approval and the goods are delivered from out of state. The issue in this case is whether respondent's activities in Wisconsin fell outside the protection of this provision.

I

Respondent William Wrigley, Jr., Co., is the world's largest manufacturer of chewing gum. Based in Chicago, it sells gum nationwide through a marketing system that divides the country into districts, regions, and territories. During the relevant period (1973–1978), the midwestern district included a Milwaukee region, covering most of Wisconsin and

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General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Warren Price III* of Hawaii, *Larry EchoHawk* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Frederic J. Cowan* of Kentucky, *William J. Guste, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Scott Harshbarger* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Don Stenberg* of Nebraska, *Tom Udall* of New Mexico, *Robert Abrams* of New York, and *Lacy H. Thornburg* of North Carolina; for the State of New Jersey et al. by *Robert J. Del Tufo,* Attorney General of New Jersey, and *Mary R. Hamill* and *Sarah T. Darrow,* Deputy Attorneys General, *Charles E. Cole,* Attorney General of Alaska, and *Winston Bryant,* Attorney General of Arkansas; for the City of New York by *O. Peter Sherwood, Edward F. X. Hart,* and *Stanley Buchsbaum;* and for the Multistate Tax Commission by *Paull Mines.*

Briefs of *amici curiae* urging affirmance were filed for the Committee on State Taxation of the Council of State Chambers of Commerce by *Amy Eisenstadt* and *Paul H. Frankel;* and for the Direct Selling Association by *Mario Brossi, Joseph N. Mariano, M. Douglas Adkins, Neil J. O'Brien,* and *Camille R. Comeau.*

parts of other States, which was subdivided into several geographic territories.

The district manager for the midwestern district had his residence and company office in Illinois, and visited Wisconsin only six to nine days each year, usually for a sales meeting or to call on a particularly important account. The regional manager of the Milwaukee region resided in Wisconsin, but Wrigley did not provide him with a company office. He had general responsibility for sales activities in the region, and would typically spend 80-to-95% of his time working with the sales representatives in the field or contacting certain "key" accounts. The remainder of his time was devoted to administrative activities, including writing and reviewing company reports, recruiting new sales representatives, making recommendations to the district manager concerning the hiring, firing, and compensation of sales representatives, and evaluating their performance. He would preside at full-day sales strategy meetings for all regional sales representatives once or twice a year. The manager from 1973 to 1976, John Kroyer, generally held these meetings in the "office" he maintained in the basement of his home, whereas his successor, Gary Hecht, usually held them at a hotel or motel. (Kroyer claimed income tax deductions for this office, but Wrigley did not reimburse him for it, though it provided a filing cabinet.) Mr. Kroyer also intervened two or three times a year to help arrange a solution to credit disputes between the Chicago office and important local accounts. Mr. Hecht testified that he never engaged in such activities, although Wrigley's formal position description for regional sales manager continued to list as one of the assigned duties "[r]epresent[ing] the company on credit problems as necessary."

The sales or "field" representatives in the Milwaukee region, each of whom was assigned his own territory, resided in Wisconsin. They were provided with company cars, but not with offices. They were also furnished a stock of gum

(with an average wholesale value of about $1,000), a supply of display racks, and promotional literature. These materials were kept at home, except that one salesman, whose apartment was too small, rented storage space at about $25 per month, for which he was reimbursed by Wrigley.

On a typical day, the sales representative would load up the company car with a supply of display racks and several cases of gum, and would visit accounts within his territory. In addition to handing out promotional materials and free samples, and directly requesting orders of Wrigley products, he would engage in a number of other activities which Wrigley asserts were designed to promote sales of its products. He would, for example, provide free display racks to retailers (perhaps several on any given day), and would seek to have these new racks, as well as pre-existing ones, prominently located. The new racks were usually filled from the retailer's existing stock of Wrigley gum, but it would sometimes happen—perhaps once a month—that the retailer had no Wrigley products on hand and did not want to wait until they could be ordered from the wholesaler. In that event, the rack would be filled from the stock of gum in the salesman's car. This gum, which would have a retail value of $15 to $20, was not provided without charge. The representative would issue an "agency stock check" to the retailer, indicating the quantity supplied; he would send a copy of this to the Chicago office or to the wholesaler, and the retailer would ultimately be billed (by the wholesaler) in the proper amount.

When visiting a retail account, Wrigley's sales representative would also check the retailer's stock of gum for freshness, and would replace stale gum at no cost to the retailer. This was a regular part of a representative's duties, and at any given time up to 40% of the stock of gum in his possession would be stale gum that had been removed from retail stores. After accumulating a sufficient amount of stale product, the representative either would ship it back to

Wrigley's Chicago office or would dispose of it at a local Wisconsin landfill.

Wrigley did not own or lease real property in Wisconsin, did not operate any manufacturing, training, or warehouse facility, and did not have a telephone listing or bank account. All Wisconsin orders were sent to Chicago for acceptance, and were filled by shipment through common carrier from outside the State. Credit and collection activities were similarly handled by the Chicago office. Although Wrigley engaged in print, radio, and television advertising in Wisconsin, the purchase and placement of that advertising was managed by an independent advertising agency located in Chicago.

Wrigley had never filed tax returns or paid taxes in Wisconsin; indeed, it was not licensed to do business in that State. In 1980, petitioner Wisconsin Department of Revenue concluded that the company's in-state business activities during the years 1973–1978 had been sufficient to support imposition of a franchise tax, and issued a tax assessment on a percentage of the company's apportionable income for those years. Wrigley objected to the assessment, maintaining that its Wisconsin activities were limited to "solicitation of orders" within the meaning of 15 U. S. C. § 381, and that it was therefore immune from Wisconsin franchise taxes. After an evidentiary hearing, the Wisconsin Tax Appeals Commission unanimously upheld the imposition of the tax. CCH Wis. Tax Rep. ¶ 202–792 (1986). It later reaffirmed this decision, with one commissioner dissenting, after the County Circuit Court vacated the original order on procedural grounds. CCH Wis. Tax Rep. ¶ 202–926 (1987). The County Circuit Court then reversed on the merits, CCH Wis. Tax Rep. ¶ 203–000 (1988), but that decision was in turn reversed by the Wisconsin Court of Appeals, with one judge dissenting. 153 Wis. 2d 559, 451 N. W. 2d 444 (1989). The Wisconsin Supreme Court, in a unanimous opinion, reversed yet once again, thus finally disallowing the Wisconsin tax.

160 Wis. 2d 53, 465 N. W. 2d 800 (1991). We granted the State's petition for certiorari, 502 U. S. 807 (1991).

II

In *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 454 (1959), we considered Minnesota's imposition of a properly apportioned tax on the net income of an Iowa cement corporation whose "activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the sale of its products, each order being subject to acceptance, filling and delivery by it from its plant [in Iowa]." The company's salesmen, operating out of a three-room office in Minneapolis rented by their employer, solicited purchases by cement dealers and by customers of cement dealers. They also received complaints about goods that had been lost or damaged in shipment, and forwarded these back to Iowa for further instructions. *Id.*, at 454–455. The cement company's contacts with Minnesota were otherwise very limited; it had no bank account, real property, or warehoused merchandise in the State. We nonetheless rejected Commerce Clause and due process challenges to the tax:

> "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Id.*, at 452.

The opinion in *Northwestern States* was handed down in February 1959. Less than a week later, we granted a motion to dismiss (apparently on mootness grounds) the appeal of a Louisiana Supreme Court decision that had rejected due process and Commerce Clause challenges to the imposition of state net-income taxes based on local solicitation of orders that were sent out of state for approval and shipping. *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234

La. 651, 101 So. 2d 70 (1958), appeal dism'd, 359 U. S. 28 (1959). That decision was particularly significant because, unlike the Iowa cement company in *Northwestern States*, the Kentucky liquor company in *Brown-Forman* did *not* lease (or own) any real estate in the taxing State. Rather, its activities were limited to

> "the presence of 'missionary men' who call upon wholesale dealers [in Louisiana] and who, on occasion, accompany the salesmen of these wholesalers to assist them in obtaining a suitable display of appellant's merchandise at the business establishments of said retailers . . . ." 234 La., at 653–654, 101 So. 2d, at 70.

Two months later, we denied certiorari in another Louisiana case upholding the imposition of state tax on the income of an out-of-state corporation that neither leased nor owned real property in Louisiana and whose only activities in that State "consist[ed] of the regular and systematic solicitation of orders for its product by fifteen salesmen." *International Shoe Co.* v. *Fontenot*, 236 La. 279, 280, 107 So. 2d 640 (1958), cert. denied, 359 U. S. 984 (1959).

Although our refusals to disturb the Louisiana Supreme Court's decisions in *Brown-Forman* and *International Shoe* did not themselves have any legal significance, see *Hopfmann* v. *Connolly*, 471 U. S. 459, 460–461 (1985); *United States* v. *Carver*, 260 U. S. 482, 490 (1923), our actions in those cases raised concerns that the broad language of *Northwestern States* might ultimately be read to suggest that a company whose only contacts with a State consisted of sending "drummers" or salesmen into that State could lawfully be subjected to (properly apportioned) income taxation based on the interstate sales those representatives generated. In *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275 (1972), we reviewed the history of § 381 and noted that the complaints of the business community over

the uncertainty created by these cases were the driving force behind the enactment of § 381:

> " 'Persons engaged in interstate commerce are in doubt as to the amount of local activities within a State that will be regarded as forming a sufficient . . . connectio[n] with the State to support the imposition of a tax on net income from interstate operations and 'properly apportioned' to the State.' " *Id.*, at 280, n. 5 (quoting S. Rep. No. 658, 86th Cong., 1st Sess., 2–3 (1959)).[1]

Within months after our actions in these three cases, Congress responded to the concerns that had been expressed by enacting Public Law 86–272, which established what the relevant section heading referred to as a "minimum standard" for imposition of a state net-income tax based on solicitation of interstate sales:

> "No State . . . shall have power to impose, for any taxable year . . . , a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the

[1] See also H. R. Rep. No. 936, 86th Cong., 1st Sess., 2 (1959) ("While it is true that the denial of certiorari is not a decision on the merits, and although grounds other than the preceden[t] of the *Northwestern [States]* cas[e] were advanced as a basis for sustaining the *Brown-Forman* and *International Shoe* decisions, the fact that a tax was successfully imposed in those cases has given strength to the apprehensions which had already been generated among small and moderate size businesses").

> benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." 73 Stat. 555, 15 U. S. C. § 381(a).

Although we have stated that § 381 was "designed to define clearly a lower limit" for the exercise of state taxing power, and that "Congress' primary goal" was to provide "[c]larity that would remove [the] uncertainty" created by *Northwestern States*, see *Heublein*, *supra*, at 280, experience has proved § 381's "minimum standard" to be somewhat less than entirely clear. The primary sources of confusion, in this case as in others, have been two questions: (1) what is the scope of the crucial term "solicitation of orders"; and (2) whether there is a *de minimis* exception to the activity (beyond "solicitation of orders") that forfeits § 381 immunity. We address these issues in turn.

A

Section 381(a)(1) confers immunity from state income taxes on any company whose "only business activities" in that State consist of "solicitation of orders" for interstate sales. "Solicitation," commonly understood, means "[a]sking" for, or "enticing" to, something, see Black's Law Dictionary 1393 (6th ed. 1990); Webster's Third New International Dictionary 2169 (1981) ("solicit" means "to approach with a request or plea (as in selling or begging)"). We think it evident that in this statute the term includes, not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in "solicitation" even if he does not come right out and ask the retailer to buy some. The key question in this case is whether, and to what extent, "solicitation of orders" covers activities that neither explicitly nor implicitly propose a sale.

In seeking the answer to that question, we reject the proposition put forward by Wisconsin and its *amici* that we must construe § 381 narrowly because we said in *Heublein* that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance,'" 409 U. S., at 281–282 (citation omitted). That principle—which we applied in *Heublein* to reject a suggested inference from § 381 that States cannot regulate solicitation in a manner that might cause an out-of-state company to forfeit its tax immunity—has no application in the present case. Because § 381 unquestionably *does* limit the power of States to tax companies whose only in-state activity is "the solicitation of orders," our task is simply to ascertain the fair meaning of that term. *FMC Corp.* v. *Holliday*, 498 U. S. 52, 57 (1990).

Wisconsin views some courts as having adopted the position that an out-of-state company forfeits its § 381 immunity if it engages in "any activity other than requesting the customer to purchase the product." Brief for Petitioner 21; see also *id.*, at 19, n. 8 (citing *Hervey* v. *AMF Beaird, Inc.*, 250 Ark. 147, 464 S. W. 2d 557 (1971); *Clairol, Inc.* v. *Kingsley*, 109 N. J. Super. 22, 262 A. 2d 213, aff'd, 57 N. J. 199, 270 A. 2d 702 (1970), appeal dism'd, 402 U. S. 902 (1971)).[2] Arguably supporting this interpretation is subsection (c) of § 381,

[2] *Amici* New Jersey et al. contend that our summary disposition of *Clairol* binds us to this narrow construction of § 381(a). Though *Clairol* is frequently cited for this construction, the opinion in the case does not in fact recite it. In any event, our summary disposition affirmed only the *judgment* below, and cannot be taken as adopting the reasoning of the lower court. *Anderson* v. *Celebrezze*, 460 U. S. 780, 784, n. 5 (1983); *Fusari* v. *Steinberg*, 419 U. S. 379, 391–392 (1975) (Burger, C. J., concurring). The judgment in *Clairol* would have been the same even under a broader construction of "solicitation of orders," since the company's in-state activities included sending nonsales representatives to provide customers technical assistance in the use of Clairol products. 109 N. J. Super., at 29–30, 262 A. 2d, at 217. See *United States Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 136–137, 386 A. 2d 471, 476–477, cert. denied, 439 U. S. 880 (1978); *Gillette Co.* v. *State Tax Comm'n*, 56 App. Div. 2d 475, 479, 393 N. Y. S. 2d 186, 189 (1977), aff'd, 45 N. Y. 2d 846, 382 N. E. 2d 764 (1978).

which expands the immunity of subsection (a) when the out-of-state seller does its marketing through independent contractors, to include not only solicitation of orders for sales, but also actual sales, and *in addition* "the maintenance . . . of an office . . . by one or more independent contractors whose activities . . . consist solely of making sales, or soliciting orders for sales . . . ."[3] The plain implication of this is that without that separate indulgence the maintenance of an office for the exclusive purpose of conducting the exempted solicitation and sales would have provided a basis for taxation—*i. e.*, that the phrase "solicitation of orders" does not embrace the maintenance of an office for the exclusive purpose of soliciting orders. Of course the phrase "solicitation of orders" ought to be accorded a consistent meaning within the section, see *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986), and if it does not embrace maintaining an office for soliciting in subsection (c), it does not do so in subsection (a) either. One might argue that the necessity of special permission for an office establishes that the phrase "solicitation of orders" covers only the actual requests for purchases or, at most, the actions absolutely essential to making those requests.

We think, however, that would be an unreasonable reading of the text. That the statutory phrase uses the term "solicitation" in a more general sense that includes not merely the ultimate act of inviting an order but the entire process associated with the invitation is suggested by the fact that § 381

[3] Title 15 U. S. C. § 381(c) reads in its entirety as follows:

"For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or *[sic]* tangible personal property."

describes "the solicitation of orders" as a subcategory, not of in-state *acts*, but rather of in-state "*business activities*"—a term that more naturally connotes courses of conduct. See Webster's Third New International Dictionary 22 (1981) (defining "activity" as "an occupation, pursuit, or recreation in which a person is active—often used in pl. <business *activities*>"). Moreover, limiting "solicitation of orders" to actual requests for purchases would reduce § 381(a)(1) to a nullity. (It is obviously impossible to make a request without some accompanying action, such as placing a phone call or driving a car to the customer's location.) And limiting it to acts "essential" for making requests would engender endless uncertainty, contrary to the whole purpose of the statute. (Is it "essential" to use a company car, or to take a taxi, in order to conduct in-person solicitation? For that matter, is it "essential" to solicit in person?) It seems to us evident that "solicitation of orders" embraces request-related activity that is not even, strictly speaking, essential, or else it would not cover salesmen's driving on the State's roads, spending the night in the State's hotels, or displaying within the State samples of their product. We hardly think the statute had in mind only day-trips into the taxing jurisdiction by empty-handed drummers on foot. See *United States Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 140, 386 A. 2d 471, 478 ("Congress could hardly have intended to exempt only walking solicitors"), cert. denied, 439 U. S. 880 (1978). And finally, this extremely narrow interpretation of "solicitation" would cause § 381 to leave virtually unchanged the law that existed before its enactment. Both *Brown-Forman* (where the salesman assisted wholesalers in obtaining suitable displays for whiskey at retail stores) and *International Shoe* (where hotel rooms were used to display shoes) would be decided as they were before, upholding the taxation.

At the other extreme, Wrigley urges that we adopt a broad interpretation of "solicitation" which it describes as having been adopted by the Wisconsin Supreme Court based on that

court's reading of cases in Pennsylvania and New York, see 160 Wis. 2d, at 82, 465 N. W. 2d, at 811–812 (citing *United States Tobacco Co.* v. *Commonwealth, supra; Gillette Co.* v. *State Tax Comm'n*, 56 App. Div. 2d 475, 393 N. Y. S. 2d 186 (1977), aff'd, 45 N. Y. 2d 846, 382 N. E. 2d 764 (1978)). See also *Indiana Dept. of Revenue* v. *Kimberly-Clark Corp.*, 275 Ind. 378, 384, 416 N. E. 2d 1264, 1268 (1981). According to Wrigley, this would treat as "solicitation of orders" any activities that are "ordinary and necessary 'business activities' accompanying the solicitation process" or are "routinely associated with deploying a sales force to conduct the solicitation, so long as there is no office, plant, warehouse or inventory in the State." Brief for Respondent 9, 19–20; see also J. Hellerstein, State Taxation ¶ 6.11[2], p. 245 (1983) ("[S]olicitation ought to be held to embrace other normal incidents of activities of salesmen" or the "customary functions of sales representatives of out-of-state merchants"). We reject this "routinely-associated-with-solicitation" or "customarily-performed-by-salesmen" approach, since it converts a standard embracing only a particular activity ("solicitation") into a standard embracing all activities routinely conducted by those who engage in that particular activity ("salesmen"). If, moreover, the approach were to be applied (as respondent apparently intends) on an industry-by-industry basis, it would render the limitations of § 381(a) toothless, permitting "solicitation of orders" to be whatever a particular industry wants its salesmen to do.[4]

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[4] The dissent explicitly agrees with our rejection of the "ordinary and necessary" standard advocated by Wrigley. *Post*, at 236. It then proceeds, however, to adopt that very standard. It states that the test should be whether a given activity is one that "reasonable buyers would consider . . . to be a part of the solicitation itself and not a significant and independent service or component of value." *Post*, at 237. It is obvious that those activities that a reasonable buyer would consider "part of the solicitation itself" rather than an "independent service" are those that are *customarily* performed in connection with solicitation. Any doubt that this is what the dissent intends is removed by its later elaboration of its

In any case, we do not regard respondent's proposed approach to be an accurate characterization of the Wisconsin Supreme Court's opinion. The Wisconsin court construed "solicitation of orders" to reach only those activities that are "closely associated" with solicitation, industry practice being only one factor to be considered in judging the "close[ness]" of the connection between the challenged activity and the actual requests for orders. 160 Wis. 2d, at 82, 465 N. W. 2d, at 811–812. The problem with that standard, it seems to us, is that it merely reformulates rather than answers the crucial question. "What constitutes the 'solicitation of orders'?" becomes "What is 'closely related' to a solicitation request?" This fails to provide the "[c]larity that would remove uncertainty" which we identified as the primary goal of § 381. *Heublein*, 409 U. S., at 280.

We proceed, therefore, to describe what we think the proper standard to be. Once it is acknowledged, as we have concluded it must be, that "solicitation of orders" covers more than what is strictly *essential* to making requests for purchases, the next (and perhaps the only other) clear line is the one between those activities that are *entirely ancillary* to requests for purchases—those that serve no independent

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test in the context of the facts of this case. The dissent repeatedly inquires whether an activity is a "*normal* ac[t] of courtesy from seller to buyer," *post*, at 242 (emphasis added); whether it is a "*common* solicitation practic[e]," *post*, at 244 (emphasis added); and whether Wrigley "exceed[ed] the *normal* scope of solicitation," *post*, at 242 (emphasis added). Of course, given Wrigley's significant share of the Wisconsin chewing gum market, *most* activities it chooses to "conduc[t] in the course of solicitation," *post*, at 246, will be viewed as a normal part of the solicitation process itself. Had Wrigley's sales representatives routinely approved orders on the spot; or accepted payments on past-due accounts; or even made outright sales of gum, it is difficult to see how a reasonable buyer would have thought that was *not* "part of the solicitation itself"—it certainly has no "independent value" to *him*. Nothing in the text of the statute suggests that it was intended to confer tax immunity on whatever activities are engaged in by sales agents in a particular industry.

business function apart from their connection to the soliciting of orders—and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.[5] Cf. *National Tires, Inc.* v. *Lindley*, 68 Ohio App. 2d 71, 78–79, 426 N. E. 2d 793, 798 (1980) (company's activities went beyond solicitation to "functions more commonly related to maintaining an on-going business"). Providing a car and a stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen. See, *e. g.*, *Herff Jones Co.* v. *State Tax Comm'n*, 247 Ore. 404, 412, 430 P. 2d 998, 1001–1002

[5] The dissent states that ancillarity should be judged, not from the perspective of the seller, but from the persective of the *buyer*. *Post*, at 237 (test is whether "reasonable *buyers* would consider [the activities] to be a part of the solicitation itself") (emphasis added); *post*, at 243 ("The test I propose . . . requires an objective assessment from the vantage point of a reasonable *buyer*") (emphasis added); *post*, at 246 (question is whether the activities "possess independent value to the *customer*") (emphasis added). As explained earlier, see n. 4, *supra*, this rule inevitably results in a whatever-the-industry-wants standard, despite the dissent's unequivocal disavowal of such a test.

The dissent also suggests that ancillarity should be judged by asking whether a particular challenged activity is "*related* to a *particular* sales call or to a particular sales solicitation," *post*, at 244 (emphasis added). This standard, besides being amorphous, cannot be correct. Those activities that are most clearly *not* immunized by the statute—*e. g.*, actual sales, collection of funds—would seem to be the ones *most* closely "related" to particular acts of actual solicitation. And activities the dissent finds immunized in the present case—maintenance of a storage facility and use of a home office—are extremely remote.

(1967) (no § 381 immunity for sales representatives' collection activities).[6]

As we have discussed earlier, the text of the statute (the "office" exception in subsection (c)) requires one exception to this principle: Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the State, by the company or on its behalf, would go beyond the "solicitation of orders." We would not make any more generalized exception to our immunity standard on the basis of the "office" provision. It seemingly represents a judgment that a company office within a State is such a significant manifestation of company "presence" that, absent a specific exemption, income taxation should always be allowed. *Jantzen, Inc.* v. *District of Columbia*, 395 A. 2d 29, 32 (D. C. 1978); see generally Hellerstein, State Taxation ¶ 6.4.

Wisconsin urges us to hold that no *postsale* activities can be included within the scope of covered "solicitation." We decline to do so. Activities that take place after a sale will ordinarily not be entirely ancillary in the sense we have described, see, *e. g.*, *Miles Laboratories* v. *Department of Revenue*, 274 Ore. 395, 400, 546 P. 2d 1081, 1083 (1976) (replacing damaged goods), but we are not prepared to say that will invariably be true. Moreover, the presale/postsale distinction is hopelessly unworkable. Even if one disregards the confusion that may exist concerning when a sale takes place, cf. Uniform Commercial Code § 2–401, 1A U. L. A. 675 (1989), manufacturers and distributors ordinarily have ongoing relationships that involve continuous sales, making it often im-

[6] Contrary to the dissent's suggestion, *post*, at 242, 246, both *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), and *International Shoe Co.* v. *Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), would have been decided differently under these principles. The various activities at issue in those cases (renting a room for temporary display of sample products; assisting wholesalers in obtaining suitable product display in retail shops) would be considered merely ancillary to either wholesale solicitation or downstream (consumer or retailer) solicitation.

possible to determine whether a particular incidental activity was related to the sale that preceded it or the sale that followed it.

B

The Wisconsin Supreme Court also held that a company does not necessarily forfeit its tax immunity under § 381 by performing *some* in-state business activities that go beyond "solicitation of orders"; rather, it said, "[c]ourts should also analyze" whether these additional activities were "'deviations from the norm'" or "*de minimis* activities." 160 Wis. 2d, at 82, 465 N. W. 2d, at 811 (citation omitted). Wisconsin asserts that the plain language of the statute bars this recognition of a *de minimis* exception, because the immunity is limited to situations where "the *only* business activities within [the] State" are those described, 15 U. S. C. § 381 (emphasis added). This ignores the fact that the venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. See, *e. g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 618 (1992); *Hudson* v. *McMillian*, 503 U. S. 1, 8–9 (1992); *Ingraham* v. *Wright*, 430 U. S. 651, 674 (1977); *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 18 (1976); *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 84 (1925). It would be especially unreasonable to abandon normal application of the *de minimis* principle in construing § 381, which operates in such stark, all-or-nothing fashion: A company either has complete net-income tax immunity or it has none at all, even for its solicitation activities. Wisconsin's reading of the statute renders a company liable for hundreds of thousands of dollars in taxes if one of its salesmen sells a 10-cent item in state. Finally, Wisconsin is wrong in asserting that application of the *de minimis* principle "excise[s] the word 'only' from the statute." Brief for Petitioner 27. The word "only" places

a strict limit upon the *categories* of activities that are covered by § 381, not upon their *substantiality.* See, *e. g.*, *Drackett Prods. Co.* v. *Conrad*, 370 N. W. 2d 723, 726 (N. D. 1985); *Kimberly Clark*, 275 Ind., at 383–384, 416 N. E. 2d, at 1268.

Whether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard. Section 381 was designed to increase—beyond what *Northwestern States* suggested was required by the Constitution—the connection that a company could have with a State before subjecting itself to tax. Accordingly, whether in-state activity other than "solicitation of orders" is sufficiently *de minimis* to avoid loss of the tax immunity conferred by § 381 depends upon whether that activity establishes a nontrivial additional connection with the taxing State.

III

Wisconsin asserts that at least six activities performed by Wrigley within its borders went beyond the "solicitation of orders": the replacement of stale gum by sales representatives; the supplying of gum through "agency stock checks"; the storage of gum, racks, and promotional materials; the rental of space for storage; the regional managers' recruitment, training, and evaluation of employees; and the regional managers' intervention in credit disputes.[7] Since none of

[7] Wisconsin has also argued that the scope of the regional managers' activities caused their residences to be, "[in] economic reality," Wrigley offices in the State. Brief for Petitioner 32. If this means that having resident salesmen without offices can sometimes be as commercially effective as having nonresident salesmen with offices, perhaps it is true. But it does not establish that Wrigley "maintained an office" in the sense necessary to come within the exception to the "entirely ancillary" standard we have announced. See *supra*, at 230. Nor does the regional managers' occasional use of their homes for meetings with salesmen, or Kroyer's uncompensated dedication of a portion of his home basement to his own office. The maintenance of an office necessary to trigger the exception

these activities can reasonably be viewed as requests for orders covered by § 381, Wrigley was subject to tax unless they were either ancillary to requesting orders or *de minimis.*

We conclude that the replacement of stale gum, the supplying of gum through "agency stock checks," and the storage of gum were not ancillary. As to the first: Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force. Because that activity serves an independent business function quite separate from requesting orders, it does not qualify for § 381 immunity. *Miles Laboratories*, 274 Ore., at 400, 546 P. 2d, at 1083. Although Wrigley argues that gum replacement was a "promotional necessity" designed to ensure continued sales, Brief for Respondent 31, it is not enough that the activity facilitate *sales;* it must facilitate the *requesting of sales*, which this did not.[8]

The provision of gum through "agency stock checks" presents a somewhat more complicated question. It appears from the record that this activity occurred only in connection with the furnishing of display racks to retailers, so that it was arguably ancillary to a form of *consumer* solicitation. Section 381(a)(2) shields a manufacturer's "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order's being filled by a § 381 "*customer*" of the manufac-

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must be more formally attributed to the out-of-state company itself, or to the agents of that company in their agency capacity—as was, for example, the rented office in *Northwestern States.*

[8] The dissent argues that this activity must be considered part of "solicitation" because, *inter alia,* it was "minimal," and not "significant." *Post,* at 243. We disagree. It was not, as the dissent suggests, a practice that involved simple "acts of courtesy" that occurred only because a salesman happened to be on the scene and did not wish to "harm the company." *Post,* at 242, 244. Wrigley deliberately chose to use its sales force to engage in regular and systematic replacement of stale product on a level that amounted to several thousand dollars per year, which is a lot of chewing gum.

turer, *i. e.*, by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state. Cf. *Gillette*, 56 App. Div. 2d, at 482, 393 N. Y. S. 2d, at 191 ("Advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation . . ."). It might seem, therefore, that setting up gum-filled display racks, like Wrigley's general advertising in Wisconsin, would be immunized by § 381(a)(2). What destroys this analysis, however, is the fact that Wrigley *made the retailers pay for the gum*, thereby providing a business purpose for supplying the gum quite independent from the purpose of soliciting consumers. Since providing the gum was not entirely ancillary to requesting purchases, it was not within the scope of "solicitation of orders."[9] And because the vast majority of the gum stored by Wrigley in Wisconsin was used in connection with stale gum swaps and agency stock checks, that storage (and the indirect rental of space for that storage) was in no sense ancillary to "solicitation."

By contrast, Wrigley's in-state recruitment, training, and evaluation of sales representatives and its use of hotels and homes for sales-related meetings served no purpose apart from their role in facilitating solicitation. The same must be said of the instances in which Wrigley's regional sales manager contacted the Chicago office about "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicat-

[9] The dissent speculates, without any basis in the record, that Wrigley might have chosen to charge for the gum, not for the profit, but because giving it away would "lower the per unit cost of all goods purchased," which "could create either the fact or the perception that retailers were not receiving the same price." *Post*, at 245. Though Wrigley's *motive* for choosing to make a profit on these items seems to us irrelevant in any event, we cannot avoid observing how unlikely it is that this was the reason Wrigley did not include free gum in its (per-unit-cost-distorting) free racks, although it did, as the record shows, regularly give away *other* (presumably per-unit-cost-distorting) free gum. Wrigley itself did not have the temerity to make this argument.

ing." App. 71, 72. It hardly appears likely that this mediating function between the customer and the central office would have been performed by some other employee—some company ombudsman, so to speak—if the on-location sales staff did not exist. The purpose of the activity, in other words, was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.

Finally, Wrigley argues that the various nonimmune activities, considered singly or together, are *de minimis*. In particular, Wrigley emphasizes that the gum sales through "agency stock checks" accounted for only 0.00007% of Wrigley's annual Wisconsin sales, and in absolute terms amounted to only several hundred dollars a year. We need not decide whether any of the nonimmune activities was *de minimis* in isolation; taken together, they clearly are not. Wrigley's sales representatives exchanged stale gum, as a matter of regular company policy, on a continuing basis, and Wrigley maintained a stock of gum worth several thousand dollars in the State for this purpose, as well as for the less frequently pursued (but equally unprotected) purpose of selling gum through "agency stock checks." Although the relative magnitude of these activities was not large compared to Wrigley's other operations in Wisconsin, we have little difficulty concluding that they constituted a nontrivial additional connection with the State. Because Wrigley's business activities within Wisconsin were not limited to those specified in § 381, the prohibition on net-income taxation contained in that provision was inapplicable.

* * *

Accordingly, the judgment of the Supreme Court of Wisconsin is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring in Parts I and II, and concurring in the judgment.

I join Parts I and II of the Court's opinion. I do not agree, however, that the replacement of stale gum served an independent business function. The replacement of stale gum by the sales representatives was part of ensuring the product was available to the public in a form that may be purchased. Making sure that one's product is available and properly displayed serves no independent business function apart from requesting purchases; one cannot offer a product for sale if it is not available. I agree, however, that the storage of gum in the State and the use of agency stock checks were not ancillary to solicitation and were not *de minimis.* On that basis, I would hold that Wrigley's income is subject to taxation by Wisconsin.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

Congress prohibits the States from imposing taxes on income derived from "business activities" in interstate commerce and limited to the "solicitation of orders" under certain conditions. 15 U. S. C. § 381(a). The question we face is whether Wrigley has this important tax immunity for its business activities in the State of Wisconsin. I agree with the Court that the statutory phrase "solicitation of orders" is but a subset of the phrase "business activities." *Ibid.; ante,* at 225–226. I submit with all respect, though, that the Court does not allow its own analysis to take the proper course. The Court instead devises a test that excludes business activities with a close relation to the solicitation of orders, activities that advance the purpose of the statute and its immunity.

The Court is correct, in my view, to reject the two polar arguments urged upon us: one, that ordinary and necessary business activities surrounding the solicitation of orders are

part of the exempt solicitation itself; and the other, that the only exempt activities are those essential to the sale. *Ante*, at 225, 227. Having done so, however, the Court exits a promising avenue of analysis and adopts a test with little relation to the practicalities of solicitation. The Court's rule will yield results most difficult to justify or explain. My submission is that the two polarities suggest the proper analysis and that the controlling standard lies between. It is difficult to formulate a complete test in one case, but the general rule ought to be that the statute exempts business activities performed in connection with solicitation if reasonable buyers would consider them to be a part of the solicitation itself and not a significant and independent service or component of value.

I begin with the statute. Section 381(a) provides as follows:

> "No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." 15 U. S. C. § 381(a).

The key phrases, as recognized by the Court, are "business activities" and "solicitation of orders." *Ante*, at 225–226. By using "solicitation of orders" to define a subset of "business activities," the text suggests that the immunity to be conferred encompasses more than a specific request for a purchase; it includes the process of solicitation, as distinguished from manufacturing, warehousing, or distribution. Congress could have written § 381(a) to exempt "acts" of "solicitation" or "solicitation of orders," but it did not. The decision to use the phrase "business activities," while not unambiguous, suggests that the statute must be read to accord with the practical realities of interstate sales solicitations, which, after all, Congress acted to protect.

The textual implication I find draws support from legal and historical context. Even those who approach legislative history with much trepidation must acknowledge that the statute was a response to three specific court decisions: *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), *International Shoe Co.* v. *Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U. S. 984 (1959), and *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), appeal dism'd, 359 U. S. 28 (1959). S. Rep. No. 658, 86th Cong., 1st Sess., 2–3 (1959) (hereinafter S. Rep.); H. R. Rep. No. 936, 86th Cong., 1st Sess., 1–2 (1959) (hereinafter H. R. Rep.). See *ante*, at 220–223, and n. 1. These decisions departed from what had been perceived as a well-settled rule, stated in *Norton Co.* v. *Department of Revenue of Ill.*, 340 U. S. 534 (1951), that solicitation in interstate commerce was protected from taxation in the State where the solicitation took place.

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident oc-

> curs sufficient to bring the transaction within its taxing power, the vendor is not taxable." *Id.*, at 537.

Firm expectations within the business community were built upon the rule as restated in *Norton.* Companies engaging in interstate commerce conformed their activities to the limits our cases seemed to have endorsed. To be sure, the decision to stay at home might have derived in some respects from independent business concerns. The expense and commitment of an in-state sales office, for example, might have informed a decision to send salesmen into a State without further staff support. Some interstate operations, though, carried the unmistakable mark of a legal, rather than business, justification. The technical requirement that orders be approved at the home office, unless approval required judgment or expertise (for example, if the order depended on an ancillary decision to give credit or to name an official retailer), was no doubt the product of the legal rule.

These settled expectations were upset in 1959, their continuing vitality put in doubt by *Northwestern States, International Shoe,* and *Brown-Forman.* In *Northwestern States,* the Court upheld state income taxation against two companies whose in-state operations included a sales staff and sales office. 358 U. S., at 454–455. Our disposition was consistent with prior law, since both companies maintained offices within the taxing State. *Ibid.* But the Court's opinion was broader than the holding itself and marked a departure from prior law.

> "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Id.*, at 452.

In the absence of case law giving meaning to "sufficient nexus," the Court's use of this indeterminate phrase cre-

ated concern and apprehension in the business community. S. Rep., at 2–4; H. R. Rep., at 1. Apprehension increased after our denial of certiorari in *International Shoe* and *Brown-Forman,* where the Louisiana Supreme Court upheld the taxation of companies whose business activities within the State were limited to solicitation by salespeople. S. Rep., at 3; H. R. Rep., at 2. The concern stemmed not only from the prospect for tax liability in an increasing number of States, but also from the uncertainty of its amount and apportionment, the burdens of compliance, a lack of uniformity under state law, the withdrawal of small businesses from States where the cost and complexity of compliance would be great, and the extent of liability for back taxes. S. Rep., at 2–4.

As first drafted by the Senate Finance Committee, § 381(a) would have addressed the decisions in *Northwestern States, International Shoe,* and *Brown-Forman.* S. Rep., at 2–3; H. R. Rep., at 3; 105 Cong. Rec. 16378, 16934 (1959). The Committee recommended a bill defining "business activities" in three subsections, with one subsection corresponding to the facts in each of the three cases. S. 2524, 86th Cong., 1st Sess. (1959). Before the bill was enacted, however, the Senate rejected the third of these subsections, corresponding to *Northwestern States,* which would have extended protection to companies with in-state sales offices. 105 Cong. Rec. 16469–16477 (1959) (Senate debate on an amendment proposed by Sen. Talmadge (Ga.)). But the other two subsections, those dealing with the state-court decisions in *International Shoe* and *Brown-Forman,* were retained. 105 Cong. Rec., at 16367, 16376, 16471, 16934; H. R. Rep., at 3. Thus, while *Northwestern States* provided the first impetus for the enactment of § 381(a), it does not explain the statute in its final form. By contrast, the history of enactment makes clear that § 381(a) exempts from state income taxation at least those business activities at issue in *International*

Shoe and *Brown-Forman*. These cases must inform any attempt to give meaning to § 381(a).

International Shoe manufactured shoes in St. Louis, Missouri. Its only activity within the State of Louisiana consisted of regular and systematic solicitation by 15 salespeople. No office or warehouse was maintained inside Louisiana, and orders were accepted and shipped from outside the State. The salespeople carried product samples, drove in company-owned automobiles, and rented hotel rooms or rooms of public buildings in order to make displays. *International Shoe*, 236 La., at 280, 107 So. 2d, at 640; Hartman, "Solicitation" and "Delivery" Under Public Law 86–272: An Uncharted Course, 29 Vand. L. Rev. 353, 358 (1976).

Brown-Forman distilled and packaged whiskey in Louisville, Kentucky, for sale in Louisiana and elsewhere. It solicited orders in Louisiana with the assistance of an in-state sales staff. All orders were approved and shipped from outside the State. There was no in-state office of any kind. Brown-Forman salespeople performed two functions: they solicited orders from wholesalers, who were direct customers of Brown-Forman; and they accompanied the wholesalers' own sales force on visits to retailers, who were solicited by the wholesalers. The Brown-Forman salespeople did not solicit orders at all when visiting retailers, nor could they sell direct to them. They did assist in arranging suitable displays of the distiller's merchandise in the retail establishments. *Brown-Forman*, 234 La., at 653–654, 101 So. 2d, at 70.

The activities in *International Shoe* and *Brown-Forman* extended beyond specific acts of entreaty; they included merchandising and display, as well as other simple acts of courtesy from buyer to seller, such as arranging product displays and calling on the customer of a customer. The activities considered in *International Shoe* and *Brown-Forman* are by no means exceptional. Checking inventories, displaying products, replacing stale product, and verifying credit are all

normal acts of courtesy from seller to buyer. J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes ¶ 6.11[2], p. 245 (1983). A salesperson cannot solicit orders with any degree of effectiveness if he is constrained from performing small acts of courtesy. Note, State Taxation of Interstate Commerce: Public Law 86–272, 46 Va. L. Rev. 297, 315 (1960).

The business activities of Wrigley within Wisconsin have substantial parallels to those considered in *International Shoe* and *Brown-Forman*. Wrigley has no manufacturing facility in the State. It maintains no offices or warehouses there. The only product it owns in the State is the small amount necessary for its salespeople to call upon their accounts. All orders solicited by its salespeople are approved or rejected outside of the State. All orders are shipped from outside of the State. Other activities, such as intervening in credit disputes, hiring salespeople, or holding sales meetings in hotel rooms, do not exceed the scope of § 381(a); I agree with the Court that these too are the business activities of solicitation. *Ante*, at 234–235; App. 10–13.

The Department of Revenue, in an apparent concession of the point, does not contend that the business activities of Wrigley exceed the normal scope of solicitation; instead the Department relies on a distinction between business activities undertaken before and after the sale. Brief for Petitioner 18, 21. Under the Department's submission, acts leading to the sale are within the statutory safe harbor, while any act following the sale is beyond it. *Ibid.* I agree with the Court, as well as with the Supreme Court of Wisconsin, that this distinction is unworkable in the context of a continuing business relation with many repeat sales. *Ante*, at 230–231; App. to Pet. for Cert. A–41.

As the Court indicates, the case really turns upon our assessment of two practices: replacing stale product and providing gum in display racks. *Ante*, at 233. If the retailers relied on the Wrigley sales force to replace all stale product

and that service was itself significant, say on the magnitude of routine deliveries of fresh bread, then a separate service would seem to be involved. But my understanding of the record is that replacement of stale gum took place only during the course of regular solicitation. App. 27–28, 41, 58, 117–118. There was no contract to perform this service. There is no indication in the record that this was the only method dealers relied upon to remove stale product. It is not plausible to believe that by enacting § 381(a) Congress insisted that every sales representative in every industry would be prohibited from doing just what Wrigley did.

Acceptance of the stale gum replacement does not allow industry practices to replace objective statutory inquiry. The existence of a contract to perform this service, or an indication in the record that this service provided an independent component of significant value, would alter the case's disposition, regardless of the seller's intentions. The test I propose does not depend on the sellers' intentions or motives whatsoever; rather it requires an objective assessment from the vantage point of a reasonable buyer. If a reasonable buyer would consider the replacement of stale gum to provide significant independent value, then this service would subject Wrigley to taxation. The majority appears to concede the point in part when it observes Wrigley replaced stale gum free of charge, *ante*, at 234, n. 9, which provides a strong indication that the replacement of stale gum is valuable to Wrigley, not its customers, as an assurance of quality given in the course of an ongoing solicitation.

I agree with the Court's approach, which is to provide guidance by some general rule that is faithful to the precise language of the statute. But it ought not to do so without recognition of some of the most essential aspects of solicitation techniques. No responsible company would expect its sales force to decline giving minimal assistance to a retailer in replacing damaged or stale product. In enacting § 381(a), Congress recognized the importance of interstate solicitation

to the strength of our national economy. The statute must not to be interpreted to repeal the rules of good sales techniques or to forbid common solicitation practices under the threat of forfeiting this important tax exemption. Congress acted to protect interstate solicitation, not to mandate inefficiency.

Even accepting the majority's test on its own terms, the business activities which the Court finds to be within the safe harbor of the federal statute are less ancillary to a real sales solicitation than are the activities it condemns. The credit adjustment techniques and the training sessions the Court approves are not related to a particular sales call or to a particular sales solicitation, but the condemned display and replacement practices are. I do not understand why the Court thinks that a credit dispute over an old transaction, handled by telephone weeks or months later is exempt because it "ingratiate[s] the salesman with the customer, thereby facilitating requests for purchases," *ante,* at 235, but that this same process of ingratiation does not occur when a salesperson who is on the spot to solicit an order refuses to harm the company by leaving the customer with bad product on the shelf. If there were any distinction between the two, I should think we would approve the replacement and condemn the credit adjustment. The majority fails to address this anomaly under its test, responding instead that my observation of it suggests ambiguity in my own. *Ante,* at 229, n. 5. In my view, both the gum replacement and credit adjustment are within the scope of solicitation.

I would agree with the Court that the furnishing of racks with gum that is sold to the customer presents a problem of a different order, *ante,* at 233, but here too I think it adds no independent value apart from the solicitation itself. To begin with, I think it rather well accepted that the setting up of display racks and the giving of advice on sales presentation is central to the salesperson's role in cultivating customers. There are dangers for the manufacturer, however,

if the salesperson spends the time to set up a display and then stocks it with free goods, because this could create either the fact or the perception that retailers were not receiving the same price. Free goods lower the per unit cost of all goods purchased. The simplest policy to avoid this problem is to charge for the goods displayed, and that is what occurred here. Moreover, I cannot ignore, as the Court appears to do, that a minuscule amount of gum, no more than 0.00007% (seven one-hundred thousands of one percent) of Wrigley's in-state sales, was stocked into display racks in this fashion. Brief for Respondent 5; App. to Pet. for Cert. A–43. Indeed, the testimony is that Wrigley salespeople would stock these display racks out of their own supply of samples only as a matter of last resort, in instances where the retailer possessed an inadequate supply of gum and could not await delivery in the normal course.

> "Q Well, I take it that if you put in the stand and it was a new stand, you took the gum out of your vehicle and transferred it to him there; is that correct?
>
> "A No, I would not say that's correct.
>
> "Q Well, did you ever stock new stands from your vehicle?
>
> "A I would say possibly on some—on a few occasions.
>
> "Q And how many few occasions were there during your tenure as a field representative in 1978?
>
> "A Boy. I would just be guessing. Maybe a dozen times.
>
> "Q And just what would—what all happened in that circumstance that you wound up putting in a new stand and taking the gum out of your vehicle and transferring it to the retailer?
>
> "A Well, like I said, primarily I wanted to get a stand in and then he wanted to get that order through his wholesaler; but if he couldn't wait, if he said my wholesaler was just in yesterday or something or he was not going to be in for a week, he didn't want a stand

> sitting around, so we would then fill it and then bill the wholesaler. . . ." App. 37–38.

Under the circumstances described here, I fail to see why the stocking of a gum display does not "ingratiate the salesman with the customer, thereby facilitating requests for purchases," *ante*, at 235, as is required under the rule formulated by the Court. The small amount of gum involved in stocking a display rack, no more than $15–$20 worth, belies any speculation, *ante*, at 234, n. 9, that Wrigley was driven by a profit motive in charging customers for this gum. App. 38.

The Court pursues a laudable effort to state a workable rule, but in the attempt condemns business activities that are bound to solicitation and do not possess independent value to the customer apart from what often accompanies a successful solicitation. The business activities of Wrigley in Wisconsin, just as those considered in *International Shoe* and *Brown-Forman*, are the solicitation of orders. The swapping of stale gum and the infrequent stocking of fresh gum into new displays are not services that Wrigley was under contract to perform; they are not activities that can be said to have provided their own component of significant value; rather they are activities conducted in the course of solicitation and whose legal effect should be the same. My examination of the language of the statute, considered in the context of its enactment, demonstrates that the concerns to which § 381(a) was directed, and for which its language was drafted, are misapprehended by the Court's decision today.

I would affirm the judgment of the Wisconsin Supreme Court.

Syllabus

AMERICAN NATIONAL RED CROSS *v.* S. G. ET AL.

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

No. 91–594. Argued March 3, 1992—Decided June 19, 1992

In a state-court tort action, respondents alleged that one of them had contracted AIDS from a transfusion of contaminated blood supplied by petitioner American National Red Cross. The Red Cross removed the suit to the Federal District Court, claiming federal jurisdiction based on, *inter alia*, the provision in its federal charter authorizing it "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." The court rejected respondents' motion to remand the case to state court, holding that the charter provision conferred original federal jurisdiction. The Court of Appeals reversed.

Held: The charter's "sue and be sued" provision confers original federal-court jurisdiction. Pp. 250–265.

(a) A congressional charter's "sue and be sued" provision may be read to confer federal-court jurisdiction if, but only if, it specifically mentions the federal courts. The charter must contain an express authorization, such as "in all state courts . . . and in any circuit court of the United States," *Osborn* v. *Bank of United States*, 9 Wheat. 738, 818, or "'in any court of law or equity, State or Federal,'" *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 455–456, rather than a mere grant of general corporate capacity to sue, such as "'in courts of record, or any other place whatsoever,'" *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 85–86, or "in all courts of law and equity within the United States," *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295, 304–305. The Red Cross Charter provision has an express authorization and thus should be read to confer jurisdiction. Pp. 250–257.

(b) Respondents' several arguments against this conclusion—that the well-pleaded complaint rule bars the removal; that language in congressional charters enacted closely in time to the 1947 amendment of the Red Cross Charter incorporating the provision in dispute show a coherent drafting pattern that casts doubt on congressional intent to confer federal jurisdiction over Red Cross cases; and that the 1947 amendment was meant not to confer jurisdiction, but to clarify the Red Cross' capacity to sue in federal courts where an independent jurisdictional basis exists—are all unavailing. Pp. 257–263.

(c) The holding in this case leaves the jurisdiction of the federal courts well within Article III's limits. This Court has consistently held

that Article III's "arising under" jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations. Pp. 264–265.

938 F. 2d 1494, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post,* p. 265.

Roy T. Englert, Jr., argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller*, *Bruce M. Chadwick*, *Karen Shoos Lipton*, and *Edward L. Wolf.*

Ronald J. Mann argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, and *Deputy Solicitor General Roberts.*

Gilbert Upton argued the cause for respondents. With him on the brief were *Gary B. Richardson* and *David P. Slawsky.**

JUSTICE SOUTER delivered the opinion of the Court.

The Charter of the American National Red Cross authorizes the organization "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 33 Stat. 600, as amended, 36 U. S. C. § 2. In this case we consider whether that "sue and be sued" provision confers original jurisdiction on federal courts over all cases to which the Red Cross is a party, with the consequence that the organization is thereby authorized to remove from state to federal court any state-law action it is defending. We hold that the clause does confer such jurisdiction.

I

In 1988 respondents filed a state-law tort action in a court of the State of New Hampshire, alleging that one of respond-

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**Christopher V. Tisi* and *Bob Gibbins* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

ents had contracted AIDS from a transfusion of contaminated blood during surgery, and naming as defendants the surgeon and the manufacturer of a piece of medical equipment used during the procedure. After discovering that the Red Cross had supplied the tainted blood, respondents sued it, too, again in state court, and moved to consolidate the two actions. Before the state court decided that motion, the Red Cross invoked the federal removal statute, 28 U. S. C. § 1441, to remove the latter suit to the United States District Court for the District of New Hampshire. The Red Cross claimed federal jurisdiction based both on the diversity of the parties and on the "sue and be sued" provision of its charter, which it argued conferred original federal jurisdiction over suits involving the organization. The District Court rejected respondents' motion to remand the case to state court, holding that the charter provision conferred original federal jurisdiction. See District Court order of May 24, 1990, reprinted at App. to Pet. for Cert. 18a–25a.

On interlocutory appeal, the United States Court of Appeals for the First Circuit reversed. 938 F. 2d 1494 (1991). The Court of Appeals compared the Red Cross Charter's "sue and be sued" provision with analogous provisions in federal corporate charters previously examined by this Court, and concluded that the relevant language in the Red Cross Charter was similar to its cognates in the charter of the first Bank of the United States, construed in *Bank of the United States* v. *Deveaux*, 5 Cranch 61 (1809), and in that of the federally chartered railroad construed in *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295 (1916), in neither of which cases did we find a grant of federal jurisdiction. The Court of Appeals distinguished *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), where we reached the opposite result under the charter of the second Bank of the United States, the Court of Appeals finding it significant that the second Bank's authorization to sue and be sued spoke of a particular federal court and of state courts already possessed

of jurisdiction. The Court of Appeals also discounted the Red Cross's reliance on our opinion in *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447 (1942), concluding that in that case we had "not[ed] only incidentally" that federal jurisdiction was based on the "sue and be sued" clause in the FDIC's charter. See 938 F. 2d, at 1497–1499. The Court of Appeals found support for its conclusion in the location of the Red Cross Charter's "sue and be sued" provision in the section "denominat[ing] standard corporate powers," *id.*, at 1499, as well as in legislative history of the amendment to the Red Cross Charter adding the current "sue and be sued" language, and in the different form of analogous language in other federal corporate charters enacted contemporaneously with that amendment, see *id.*, at 1499–1500.

We granted certiorari, 502 U. S. 976 (1991), to answer this difficult and recurring question.[1]

II

Since its founding in 1881 as part of an international effort to ameliorate soldiers' wartime suffering, the American Red Cross has expanded its activities to include, among others, the civilian blood-supply services here at issue. The organization was reincorporated in 1893, and in 1900 received its first federal charter, which was revised in 1905. See American National Red Cross, Report of the Advisory Committee on Organization 4 (1946) (hereinafter Advisory Report), reprinted at App. to Brief for Appellants in No. 90–1873 (CA1), pp. 94, 101.

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[1] Although more than 40 District Court cases have considered this issue, no result clearly predominates. Compare Pet. for Cert. 10, n. 4 (listing cases finding jurisdictional grant in Red Cross Charter's "sue and be sued" provision), with *id.*, at 11, n. 5 (listing cases reaching opposite conclusion). Reflecting this confusion, the only other Court of Appeals to consider this issue decided differently from the First Circuit. See *Kaiser* v. *Memorial Blood Center of Minneapolis, Inc.*, 938 F. 2d 90 (CA8 1991).

The 1905 charter empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. At that time the provision would not have had the jurisdictional significance of its modern counterpart, since the law of the day held the involvement of a federally chartered corporation sufficient to render any case one "arising under" federal law for purposes of general statutory federal-question jurisdiction. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14 (1885). In 1925, however, Congress restricted the reach of this jurisdictional theory to federally chartered corporations in which the United States owned more than one-half of the capital stock. Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941; codified as amended at 28 U. S. C. § 1349.[2] Since the effect of the 1925 law on nonstock corporations like the Red Cross is unclear, see, *e. g.*, *C. H.* v. *American Red Cross*, 684 F. Supp. 1018, 1020–1022 (ED Mo. 1987) (noting split in authority over whether § 1349 applies to nonstock corporations),[3] its enactment invested the charter's "sue and be sued" clause with a potential jurisdiction significance previously unknown to it.

Its text, nevertheless, was left undisturbed for more than 20 years further, until its current form, authorizing the Red Cross "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," took shape with the addition of the term "State or Federal" to the 1905 language, as part of an overall revision of the organization's charter and bylaws. See Act of May 8, 1947,

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[2] Congress had previously overruled much of *Pacific Railroad Removal Cases*, 115 U. S. 1 (1885), by withdrawing federal jurisdiction over cases involving federally chartered railroads based solely on the railroad's federal incorporation, see Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803, 804, a limitation irrelevant for our purposes.

[3] We do not address this question, as we hold that the "sue and be sued" provision of the Red Cross's Charter suffices to confer federal jurisdiction independently of the organization's federal incorporation.

Pub. L. 80–47, § 3, 61 Stat. 80, 81. It is this language upon which the Red Cross relies, and which the Court of Appeals held to have conferred no federal jurisdiction.

III

A

As indicated earlier, we do not face a clean slate. Beginning with Chief Justice Marshall's opinion in 1809, we have had several occasions to consider whether the "sue and be sued" provision of a particular federal corporate charter conferred original federal jurisdiction over cases to which that corporation was a party, and our readings of those provisions not only represented our best efforts at divining congressional intent retrospectively, but have also placed Congress on prospective notice of the language necessary and sufficient to confer jurisdiction. See, *e. g.*, *United States* v. *Merriam*, 263 U. S. 179, 186 (1923) (Congress presumed to intend judicially settled meaning of terms); *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–698 (1979) (presuming congressional knowledge of interpretation of similarly worded earlier statute). Those cases therefore require visitation with care.

In *Deveaux*, we considered whether original federal jurisdiction over suits by or against the first Bank of the United States was conferred by its charter. The language in point authorized the Bank "'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever,'" 5 Cranch, at 85. In the opinion written by Chief Justice Marshall, the Court held this language to confer no federal jurisdiction, reading it as a mere grant to the bank of the normal corporate capacity to sue, *id.*, at 85–86. The Court contrasted the charter's "sue and be sued" provision with one authorizing the institution of certain suits against the bank's officers "in any court of record of the United States, or of

[sic] either of them," a provision the Court described as "expressly authoriz[ing] the bringing of that action in the federal or state courts," *id.*, at 86. The Chief Justice concluded that this latter provision "evince[d] the opinion of congress, that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed," *ibid.*

The same issue came to us again 15 years later in *Osborn.* By this time Congress had established the second Bank of the United States, by a charter that authorized it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269. In its interpretation of this language, the Court, again speaking through Chief Justice Marshall, relied heavily on its *Deveaux* analysis, and especially on the contrast developed there between the first bank charter's "sue and be sued" provision and its provision authorizing suits against bank officers. See *Osborn*, 9 Wheat., at 818. Holding that the language of the second bank's charter "could not be plainer by explanation," *ibid.*, in conferring federal jurisdiction, the *Osborn* Court distinguished *Deveaux* as holding that "a general capacity in the Bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts," 9 Wheat., at 818.

With the basic rule thus established, our next occasion to consider the issue did not arise until *Bankers Trust*, nearly a century later. The federal charter considered in that case authorized a railroad corporation "to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." Act of Mar. 3, 1871, ch. 122, § 1, 16 Stat. 573, 574. Testing this language against that construed in *Deveaux* and *Osborn*, we concluded that it "d[id] not literally follow" its analogues considered in either of the earlier cases, 241 U. S., at 304, but held, never-

theless, that it had "the same generality and natural import" as the clause contained in the first Bank charter. Thus, we followed *Deveaux* and found in the failure to authorize federal court litigation expressly no grant of federal jurisdiction. 241 U. S., at 304–305.

Last came *D'Oench, Duhme*, where we held that the FDIC's charter granted original federal jurisdiction. That jurisdiction was not, we explained, "based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or Federal.'" 315 U. S., at 455–456 (citation and footnote omitted). It is perfectly true, as respondents stressed in argument, that in an accompanying footnote we quoted without comment another part of the same statute, providing that "'[a]ll suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: *Provided*, That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States.'" *Id.*, at 455–456, n. 2.[4] The footnote did not, however, raise any doubt that the Court held federal jurisdiction to rest on the terms of the "sue and be sued" clause. Quite the contrary, the footnote's treatment naturally expressed the subordinate importance of the provision it quoted. While as a state bank's receiver the FDIC might lose the benefit of the deemer clause as a grant of federal

[4] The "sue and be sued" language was originally enacted in the statute creating the FDIC, see Banking Act of 1933, ch. 89, § 8, 48 Stat. 162, 172, and was reenacted in the 1935 amendments to that statute, see Banking Act of 1935, ch. 614, § 101, 49 Stat. 684, 692. The 1935 amendments also enacted for the first time the deemer provision we quoted in footnote 2 of our opinion in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 455 (1942). See 49 Stat. 684, 692.

jurisdiction, the "sue and be sued" clause would settle the jurisdictional question conclusively, in any case.[5]

B

These cases support the rule that a congressional charter's "sue and be sued" provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts. In *Deveaux*, the Court found a "conclusive argument" against finding a jurisdictional grant in the "sue and be sued" clause in the fact that another provision of the same document authorized suits by and against bank officers "in any court of record of the United States, or of *[sic]* either of them . . . ." See 5 Cranch, at 86. In contrasting these two provisions the *Deveaux* Court plainly intended to indicate the degree of specificity required for a jurisdictional grant.[6] That is certainly how the *Osborn* Court understood *Deveaux*, as it described the latter provision as an "express grant of jurisdiction," 9 Wheat., at 818, in contrast to the first Bank charter's "sue and be sued" provision, which, "without men-

[5] Respondents argue that the parties in *D'Oench, Duhme* did not litigate the jurisdictional issue. See Brief for Respondents 18–22. But the parties' failure to challenge jurisdiction is irrelevant to the force of our holding on that issue. See, *e. g., FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990) (federal courts have independent obligation to examine their own jurisdiction); see also *Ex parte Bollman*, 4 Cranch 75, 100 (1807) (Marshall, C. J.) (giving controlling weight to previous jurisdictional holding by Court even though parties to previous case had not raised jurisdictional issue).

[6] The dissent reads *Deveaux* as distinguishing between these two provisions not on this basis, but rather on the ground that the provision authorizing suits against bank officers allowed the bringing of a particular cause of action. See *post*, at 270. That reading might be possible if Chief Justice Marshall had not nipped it in the bud. He did not explain the difference between the jurisdictional significance of the two clauses in question by saying that jurisdiction may be granted only in provisions referring to courts in which causes of action could be brought. He explained it simply by inferring, from the drafting contrasts, "the opinion of congress that the right to sue does not imply the right to sue in the courts of the union *unless it be expressed.*" *Deveaux*, 5 Cranch, at 86 (emphasis added).

tioning the courts of the Union," *ibid.*, was held merely to give the Bank "a general capacity . . . to sue [but not] a right to sue in those courts," *ibid.*[7] The *Osborn* Court thus found a jurisdictional grant sufficiently stated in the second Bank charter's "sue and be sued" provision, with its express federal reference, remarking that "[t]o infer from *[Deveaux]* that words expressly conferring a right to sue in those courts do not give the right, is surely a conclusion which the premises do not warrant." *Ibid.*[8]

Applying the rule thus established, in *Bankers Trust* we described the railroad charter's "sue and be sued" provision, with its want of any reference to federal courts, and, holding it up against its analogues in *Deveaux* and *Osborn*, we found

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[7] The dissent accuses us of repeating what it announces as Chief Justice Marshall's misunderstanding, in *Osborn*, of his own previous opinion in *Deveaux*. See *post*, at 271. We are honored.

[8] Contrary to respondents' argument, our cases do not support a requirement that federal jurisdiction under a "sue and be sued" clause requires mention of the specific federal court on which it is conferred. *D'Oench, Duhme*, of course, bars any such reading. Nor would *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), require such a specification even if *D'Oench, Duhme* were not on the books. When the second Bank was chartered, two sets of federal courts, the Circuit Courts and the District Courts, shared overlapping original federal jurisdiction. See, *e. g.*, E. Surrency, History of the Federal Courts 61 (1987). If (as apparently was the case) the framers of the second Bank's charter wished to provide that all suits in federal court involving the Bank be brought in one set of courts, it would have been necessary for any jurisdictional grant to specify which set of federal trial courts was being invested with jurisdiction. This need no longer exists, and the means chosen by the drafters of the early charters to resolve that problem should not be thought significant in resolving the very different issue before us today. Moreover, the larger part of the Court's analysis in *Osborn* speaks only of the charter's mention of federal courts, not its specification of the Circuit Courts in particular. See 9 Wheat., at 817–818. The charter's specification of those courts would have made it natural for the *Osborn* Court to indicate its reliance on that narrower ground, had it believed such specificity to be required. The fact that it did not so indicate is strong evidence that the Court thought it unnecessary.

it closer to the former.[9] Finally, in *D'Oench, Duhme* we based our finding of jurisdiction on the "sue and be sued" provision of the FDIC charter, which mentioned the federal courts in general, but not a particular federal court.

The rule established in these cases makes it clear that the Red Cross Charter's "sue and be sued" provision should be read to confer jurisdiction. In expressly authorizing the organization to sue and be sued in federal courts, using language resulting in a "sue and be sued" provision in all relevant respects identical to one on which we based a holding of federal jurisdiction just five years before, the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction.

IV

Respondents offer several arguments against this conclusion, none of which we find availing.

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[9] The dissent is playful in manufacturing a conflict between our synthesis of the cases and the opinion in *Bankers Trust Co.* v. *Texas and Pacific R. Co.*, 241 U. S. 295 (1916). See *post*, at 272. The dissent first quotes the Court's construction in the *Bankers Trust* opinion, that the clause at issue there implied no jurisdictional grant, but simply rendered the corporation "'capable of suing and being sued by its corporate name in any court of law or equity—Federal, state or territorial—whose jurisdiction as otherwise competently defined was adequate to the occasion.'" *Post*, at 272 (emphasis omitted) (quoting 241 U. S., at 303). The dissent then concludes that "[t]hat paraphrasing of the railroad charter, in terms that would spell jurisdiction under the key the Court adopts today, belies any notion that *Bankers Trust* was using the same code book." *Post*, at 273. The dissent thus attempts to set up a conflict between our analysis and the result in *Bankers Trust*, by suggesting that that Court's interpretation of the provision (*i. e.*, to confer capacity to sue in courts including federal ones) should itself be subject to a second-order interpretation, which under our analysis might require a holding of jurisdiction, the conclusion rejected by the *Bankers Trust* Court. This "interpretation of an interpretation" methodology is simply illegitimate, originating not in our opinion but in the dissent's whimsy. Like our predecessors, we are construing a charter, not a paraphrase.

A

First, we can make short work of respondents' argument that the charter's conferral of federal jurisdiction is nevertheless subject to the requirements of the "well-pleaded complaint" rule (that the federal question must appear on the face of a well-pleaded complaint) limiting the removal of cases from state to federal court. See Brief for Respondents 38–46. Respondents erroneously invoke that rule outside the realm of statutory "arising under" jurisdiction, *i. e.*, jurisdiction based on 28 U. S. C. § 1331, to jurisdiction based on a separate and independent jurisdictional grant, in this case, the Red Cross Charter's "sue and be sued" provision. The "well-pleaded complaint" rule applies only to statutory "arising under" cases, see *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 494 (1983); see also 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3566, pp. 82–83 (2d ed. 1984); Chemerinsky & Kramer, Defining the Role of the Federal Courts, 1990 B. Y. U. L. Rev. 67, 75, n. 17; it has no applicability here.

B

Respondents also claim that language used in congressional charters enacted closely in time to the 1947 amendment casts doubt on congressional intent thereby to confer federal jurisdiction over cases involving the Red Cross. Respondents argue that the 1948 amendment to the charter of the Commodity Credit Corporation (CCC), the 1947 amendment to the charter of the Federal Crop Insurance Corporation (FCIC), and the 1935 amendment to the FDIC's charter, each of which includes explicit grants of federal jurisdiction, together demonstrate "a practice of using clear and explicit language to confer federal jurisdiction over corporations [Congress] had created." Brief for Respondents 27.

The argument does not hold up. The CCC amendment is irrelevant to this enquiry, as it conferred exclusive, rather than concurrent, federal jurisdiction. See Act of June 29,

1948, ch. 704, § 4, 62 Stat. 1070. There is every reason to expect Congress to take great care in its use of explicit language when it wishes to confer exclusive jurisdiction, given our longstanding requirement to that effect.[10] Its employment of explicitly jurisdictional language in the CCC's case thus raises no suggestion that its more laconic Red Cross amendment was not meant to confer concurrent federal jurisdiction.

Nor do the other two enactments support respondents' argument. The statutes were passed 12 years apart and employed verbally and doctrinally distinct formulations. Compare Banking Act of 1935, ch. 614, § 101, 49 Stat. 684, 692 (providing that suits involving FDIC "shall be deemed to arise under the laws of the United States"), with Act of Aug. 1, 1947, ch. 440, § 7, 61 Stat. 719 (providing that FCIC "may sue and be sued in its corporate name in any court of record of a State having general jurisdiction, or in any United States district court, and [that] jurisdiction is hereby conferred upon such district court to determine such controversies without regard to the amount in controversy").[11] These differences are not merely semantic: the jurisdictional effect of the FDIC's provision depends on the 28 U. S. C. § 1331 grant of general federal-question jurisdiction, while the

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[10] See *Claflin* v. *Houseman*, 93 U. S. 130, 136 (1876) ("[O]ur judgment [has] been . . . to affirm [concurrent state-court] jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"); see also *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 508 (1962) (*Claflin*'s analysis of this question "has remained unmodified through the years").

[11] Respondents do not repeat the Court of Appeals's argument that the original language of the FCIC charter tracked in all relevant respects that in the Red Cross's post-1947 charter, and that Congress's later amendment of the FCIC charter to make jurisdiction more explicit thus implicitly suggests that Congress considered that language insufficient to confer jurisdiction. See 938 F. 2d 1494, 1500 (CA1 1991). We note here only that the Red Cross adequately rebuts that argument. See Brief for Petitioner 42–43.

FCIC's provision functions independently of § 1331. These differences of both form and substance belie respondents' claim of a coherent drafting pattern against which to judge the ostensible intent behind the Red Cross amendment.

If, indeed, respondents' argument could claim any plausibility, it would have to be at the cost of ignoring the 1942 *D'Oench, Duhme* opinion citing the FDIC charter's "sue and be sued" provision as the source of federal jurisdiction in that case. See 315 U. S., at 455. If the "sue and be sued" clause is sufficient for federal jurisdiction when it occurs in the same charter with the language respondents claim to be at odds with its jurisdictional significance, it is certainly sufficient standing alone. In any event, the fact that our opinion in *D'Oench, Duhme* was handed down before the 1947 amendment to the Red Cross Charter indicates that Congress may well have relied on that holding to infer that amendment of the Red Cross Charter's "sue and be sued" provision to make it identical to the FDIC's would suffice to confer federal jurisdiction. See, *e. g.*, *Cannon*, 441 U. S., at 696–697. Congress was, in any event, entitled to draw the inference.

C

Respondents would have us look behind the statute to find quite a different purpose when they argue that the 1947 amendment may have been meant not to confer jurisdiction, but to clarify the Red Cross's capacity to sue in federal courts where an independent jurisdictional basis exists. See Brief for Respondents 23–27. The suggestion is that Congress may have thought such a clarification necessary after passage of the 1925 statute generally bringing an end to federal incorporation as a jurisdictional basis. See 28 U. S. C. § 1349.[12] But this suggestion misconstrues § 1349 as

[12] See Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (currently codified at 28 U. S. C. § 1349). The exception, for federally chartered corporations over one-half owned by the United States, is irrelevant to our enquiry. See n. 3, *supra*.

somehow affecting a federally chartered corporation's capacity to sue, when by its own terms it speaks only to jurisdiction. If, then, respondents are correct that the enactment of § 1349 motivated the 1947 amendment, that motivation cuts against them, given that § 1349 affected only jurisdiction.

The legislative history of the 1947 amendment cuts against them, as well, to the extent it points in any direction.[13] Congress's revision of the charter was prompted by, and followed, the recommendations of a private advisory committee of the Red Cross. See H. R. Rep. No. 337, 80th Cong., 1st Sess., 6 (1947) ("[The 1947 amendment] was drafted as the result of recommendations made by [the Advisory committee] . . . . [They] incorporat[e] the recommendations of th[at] advisory committee . . ."); S. Rep. No. 38, 80th Cong., 1st Sess., 1 (1947) ("The present legislation incorporates, in the main, the recommendations of the [A]dvisory committee"). The Advisory Report had recommended that "[t]he charter should make it clear that the Red Cross can sue and be sued in the Federal Courts," reasoning that "[t]he Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts, it seems desirable that this right be clearly stated in the Charter." Advisory Report 35–36, reprinted at App. to Brief for Appellants in No. 90–1873, at 132–133.

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[13] The only debate on the 1947 amendment to the charter's "sue and be sued" provision occurred at a Senate Committee hearing. See Hearings on S. 591 before the Senate Committee on Foreign Relations, 80th Cong., 1st Sess., 10 (1947). The only two relevant comments, both made by Senator George, appear to be mutually contradictory on the matter at issue here. At one point Senator George said: "I think the purpose of the bill is very clear, and that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there," *ibid.* Later, however, he stated: "I think there might be some question about the right of a Federal corporation to be sued in a State court. I thought that was, and I still think it is, the purpose of this provision," *id.*, at 11.

The Advisory Report's explicit concern with the limited jurisdiction of the federal courts indicates that the recommended change, which prompted the amendment to the "sue and be sued" provision, spoke to jurisdiction rather than capacity to sue. Against this, respondents argue only that the Advisory Report's use of the words "can" and "power" indicate concern with the latter, not the former. See Brief for Respondents 25. This is fine parsing, too fine to overcome the overall jurisdictional thrust of the Report's recommendation.

In a final look toward the text, respondents speculate that the 1947 amendment can be explained as an attempt to clarify the Red Cross's capacity to enter the federal courts under their diversity jurisdiction. See Brief for Respondents 25–26, 29. The argument turns on the theory that federally chartered corporations are not citizens of any particular State, and thus may not avail themselves of diversity jurisdiction. See *id.*, at 26 (quoting *Walton* v. *Howard University*, 683 F. Supp. 826, 829 (DC 1987)). Respondents completely fail, however, to explain how the addition of the words "State or Federal" to the "sue and be sued" provision might address this claimed jurisdictional problem. Indeed, the 1947 amendment, by specifying the particular courts open to the Red Cross, as opposed to the Red Cross's status as a party, seems particularly ill-suited to rectifying an asserted party-based jurisdictional deficiency.[14]

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[14] At oral argument respondents carried the suggestion a further step by speculating that the 1947 amendment could be explained as an attempt to ensure the Red Cross's access to federal courts when diversity jurisdiction existed, due to concern, presumably present until our 1949 decision in *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, about the constitutionality of the 1940 statute giving District of Columbia-chartered corporations the same rights to sue in diversity as state-chartered corporations. See Tr. of Oral Arg. 30–31. But the speculation, if sound, would prove too much. For on this theory Congress would have been hedging against a constitutional problem of diversity jurisdiction by resorting to a special grant of jurisdiction to cover the Red Cross, which is

Perhaps most obviously, respondents' argument violates the ordinary sense of the language used, as well as some basic canons of statutory construction. The 1905 charter, authorizing the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States," simply cannot be read as failing to empower the Red Cross to sue in federal courts having jurisdiction. That fact, when combined with the Advisory Report's justification of the 1947 amendment by reference to federal courts' limited jurisdiction, see *supra*, leaves it extremely doubtful that capacity to sue *simpliciter* motivated that amendment. Indeed, the Red Cross's clear preamendment capacity to sue in federal courts calls into play the canon of statutory construction requiring a change in language to be read, if possible, to have some effect, see, *e. g.*, *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930); 2A N. Singer, Sutherland on Statutory Construction § 46.06 (5th rev. ed. 1992), a rule which here tugs hard toward a jurisdictional reading of the 1947 amendment.[15]

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exactly what the Red Cross maintains was intended by following *D'Oench, Duhme* and *Osborn*.

Respondents complain that the Red Cross's theory is of recent vintage, citing a 1951 case in which the Red Cross removed a suit against it from state to federal court based not on any independent jurisdictional grant implicit in the "sue and be sued" provision, but rather on party diversity. See Brief for Respondents 29 (citing *Patterson* v. *American National Red Cross*, 101 F. Supp. 655 (SD Fla. 1951)). However, the Red Cross's failure in one 40-year-old case to base its removal petition on the theory it advances today adds nothing to respondents' attack on the Red Cross's current interpretation.

[15] The dissent adopts and refines respondents' argument, see Brief for Respondents 16, that the 1947 amendment's parallel treatment of federal and state courts counsels against reading that amendment as conferring jurisdiction, see *post*, at 267–268. The short answer is that *D'Oench, Duhme* forecloses the argument, since the charter language we held to confer federal jurisdiction in that case made exactly the same parallel mention of federal and state courts. But going beyond that, the reference to state as well as federal courts presumably was included lest a mention of federal courts alone (in order to grant jurisdiction to them) be taken as motivated by an intent to confer exclusive federal jurisdiction. Moreover, the Red Cross Charter's "sue and be sued" provision, like its counterparts

V

Our holding leaves the jurisdiction of the federal courts well within Article III's limits. As long ago as *Osborn*, this Court held that Article III's "arising under" jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations. See 9 Wheat., at 823–828.[16] We have consistently reaffirmed the breadth of that holding. See *Pacific R. Removal Cases*, 115 U. S., at 11–14; *In re Dunn*, 212 U. S. 374, 383–384 (1909); *Bankers Trust*, 241 U. S., at 305–306; *Puerto*

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construed in *Osborn* and *D'Oench, Duhme*, confers both capacity to sue and jurisdiction. While capacity to sue in both federal and state courts was already clearly established before the 1947 amendment, it may have been feared that the addition of the word "Federal" to confer federal jurisdiction would be misread to limit the Red Cross's capacity to sue in state courts, if it were not reaffirmed by explicit inclusion of the word "State."

It is the dissent's conclusion that the 1947 amendment was meant to "eliminat[e] the possibility that the language 'courts of law and equity within the jurisdiction of the United States' that was contained in the original charter might be read to limit the grant of capacity to sue in federal court," *post*, at 275 (emphasis and citation omitted); that is difficult to justify. Such a motivation is nowhere even hinted at in the Advisory Report, the document both Houses of Congress acknowledged as the source for the amendment, see *supra*, at 261 (quoting congressional reports); indeed, the relevant part of the Advisory Report does not even mention state courts, see Advisory Report 35–36, reprinted at App. to Brief for Appellants in No. 90–1873, at 132–133. It is hardly a "reasonable construction," *post*, at 275, of the amendment to view it as granting something the Advisory Report never requested. While the dissent notes one of Senator George's comments supporting its hypothesis, it ignores the other, which explicitly notes a federal jurisdiction-conferring motivation behind the amendment. See *supra*, at 261, n. 13.

Neither party reads the 1947 amendment to clarify the Red Cross's capacity to sue in state courts, and, as there is no evidence of such an intent, we do not embrace that reading here.

[16] Again, it should be pointed out that statutory jurisdiction in this case is not based on the Red Cross's federal incorporation, but rather upon a specific statutory grant. In contrast, the constitutional question asks whether Article III's provision for federal jurisdiction over cases "arising under federal law" is sufficiently broad to allow that grant.

Rico v. *Russell & Co.*, 288 U. S. 476, 485 (1933); *Verlinden*, 461 U. S., at 492. We would be loath to repudiate such a longstanding and settled rule, on which Congress has surely been entitled to rely, cf. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 34–35 (1989) (SCALIA, J., concurring in part and dissenting in part), and this case gives us no reason to contemplate overruling it.

VI

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

The Court today concludes that whenever a statute granting a federally chartered corporation the "power to sue and be sued" specifically mentions the federal courts (as opposed to merely embracing them within general language), the law will be deemed not only to confer on the corporation the capacity to bring and suffer suit (which is all that the words say), but also to confer on federal district courts *jurisdiction* over any and all controversies to which that corporation is a party. This wonderland of linguistic confusion—in which words are sometimes read to mean only what they say and other times read also to mean what they do not say—is based on the erroneous premise that our cases in this area establish a "magic words" jurisprudence that departs from ordinary rules of English usage. In fact, our cases simply reflect the fact that the natural reading of *some* "sue and be sued" clauses is that they confer both capacity and jurisdiction. Since the natural reading of the Red Cross Charter is that it confers only capacity, I respectfully dissent.

I

Section 2 of the Red Cross Charter, 36 U. S. C. §2, sets forth the various powers of the corporation, such as the

power "to have and to hold . . . real and personal estate"; "to adopt a seal"; "to ordain and establish bylaws and regulations"; and to "do all such acts and things as may be necessary to . . . promote [its] purposes."[1] The second item on this list is "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Ibid.* The presence of this language amidst a list of more or less ordinary corporate powers confirms what the words themselves suggest: It merely establishes that the Red Cross is a juridical person which may be party to a lawsuit in an American court, and that the Red Cross—despite its status as a federally chartered corporation—does not share the Government's general immunity from suit. Cf. Fed. Rule Civ. Proc. 17(b) ("The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized"); 4 Thompson on Corporations

[1] Section 2, as amended, provides in its entirety:

"The name of this corporation shall be 'The American National Red Cross', and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2 to 6, 8, and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority." 36 U. S. C. § 2.

§ 3161, p. 975 (3d ed. 1927) ("[The power to sue and be sued] is expressly conferred in practically every incorporating act"); *Loeffler* v. *Frank*, 486 U. S. 549, 554–557 (1988) ("sue and be sued" clause waives sovereign immunity).

It is beyond question that nothing in the language of this provision suggests that it has anything to do with regulating the jurisdiction of the federal courts. The grant of corporate power to sue and be sued in no way implies a grant of federal-court jurisdiction; it merely places the corporation on the same footing as a natural person, who must look elsewhere to establish grounds for getting his case into court. Words conferring *authority* upon a *corporation* are a most illogical means of conferring *jurisdiction* upon a *court*, and would not normally be understood that way. Moreover, it would be extraordinary to confer a new subject-matter jurisdiction upon "federal courts" in general, rather than upon a particular federal court or courts.

The Court apparently believes, see *ante*, at 256, n. 8, that the language of § 2 is functionally equivalent to a specific reference to the district courts, since no other court could reasonably have been intended to be the recipient of the jurisdictional grant. Perhaps so, but applying that intuition requires such a random butchering of the text that it is much more reasonable to assume that *no* court was the intended recipient. The Red Cross is clearly granted the *capacity* to sue and be sued in *all* federal courts, so that it could appear, for example, as a party in a third-party action in the Court of International Trade, see 28 U. S. C. § 1583, and in an action before the United States Claims Court, see Claims Court Rule 14(a) (Mar. 15, 1991). There is simply no textual basis, and no legal basis except legal intuition, for saying that it must *in addition* establish an independent basis of jurisdiction to proceed in those courts, though it does *not* in the district courts.

In fact, the language of this provision not only does not distinguish among federal courts, it also does not treat fed-

eral courts differently from state courts; the Red Cross is granted the "power" to sue in both. This parallel treatment of state and federal courts even further undermines a jurisdictional reading of the statute, since the provision cannot reasonably be read as allowing the Red Cross to enter a state court without establishing the independent basis of jurisdiction appropriate under state law. Such a reading would present serious constitutional questions. Cf. *Brown* v. *Gerdes*, 321 U. S. 178, 188 (1944) (Frankfurter, J., concurring); *Howlett* v. *Rose*, 496 U. S. 356, 372 (1990); *Herb* v. *Pitcairn*, 324 U. S. 117, 120–121 (1945); *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 222–223 (1916); but cf. Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 207, n. 84. Since the language of the Red Cross Charter cannot fairly be read to create federal jurisdiction but not state jurisdiction, we should not construe it as creating either. *Edward J. DeBartolo Corp.* v. *NLRB*, 463 U. S. 147, 157 (1983); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979).

I therefore conclude—indeed, I do not think it seriously contestable—that the natural reading of the "sue and be sued" clause of 36 U. S. C. § 2 confers upon the Red Cross only the *capacity* to "sue and be sued" in state and federal courts; it does not confer jurisdiction upon any court, state or federal.

II

I do not understand the Court to disagree with my analysis of the ordinary meaning of the statutory language. Its theory is that, regardless of ordinary meaning, our cases have created what might be termed a "phrase of art," whereby a "sue and be sued" clause confers federal jurisdiction "if, but only if, it specifically mentions the federal courts." *Ante*, at 255. Thus, while the uninitiated would consider the phrase "sue and be sued in any court in the United States" to mean the same thing as "sue and be sued

in any court, state or federal," the Court believes that our cases have established the latter (but not the former) as a shorthand for "sue and be sued in any court, state or federal, *and the federal district courts shall have jurisdiction over any such action.*" Congress is assumed to have used this cleverly crafted code in enacting the charter provision at issue here. *Ante*, at 251–252. In my view, our cases do not establish the cryptology the Court attributes to them. Rather, the four prior cases in which we have considered the jurisdictional implications of "sue and be sued" clauses are best understood as simply applications of conventional rules of statutory construction.

In *Bank of the United States* v. *Deveaux*, 5 Cranch 61 (1809), we held that a provision of the Act establishing the first Bank of the United States which stated that the Bank was "made able and capable in law . . . to sue and be sued . . . in courts of record, or any other place whatsoever," 1 Stat. 192, did not confer jurisdiction on the federal courts to adjudicate suits brought by the Bank. Construing the statutory terms in accordance with their ordinary meaning, we concluded (as I conclude with respect to the Red Cross Charter) that the provision merely gave "a *capacity* to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals." 5 Cranch, at 85–86 (emphasis added). We expressly noted (as I have in this case) that the Act's undifferentiated mention of all courts compelled the conclusion that the provision was not jurisdictional: "*If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be.*" *Id.*, at 86 (emphasis added). That statement is immediately followed by contrasting this provision with another section of the Act which provided that certain actions against the directors of the Bank "may . . . be brought . . . in any court of record of the United States, or of either of them." 1 Stat. 194. *That* provision, we said,

"expressly authorizes the bringing of that action in the federal or state courts," which "evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." 5 Cranch, at 86. It is clear, I think, that the reason the Court thought the right to have been "expressed" under the directors-suit provision, but not "expressed" under the provision before it, was *not* that the former happened to mention courts "of the United States." For that would have provided no contrast to the argument against jurisdiction (italicized above) that the Court had just made. Reference to suits "in any court of record of the United States, or of either of them," is no less universal in its operative scope than reference to suits "in courts of record," and hence is subject to the *same* objection (to which the Court was presumably giving a contrasting example) that jurisdiction was indiscriminately conferred on all courts of original jurisdiction and for any and all amounts.

Deveaux establishes not, as the Court claims, the weird principle that mention of the federal courts *in a "sue and be sued" clause* confers jurisdiction; but rather, the quite different (and quite reasonable) proposition that mention of the federal courts in a provision *allowing a particular cause of action to be brought* does so. The contrast between the "sue and be sued" clause and the provision authorizing certain suits against the directors lay, not in the mere substitution of one broad phrase for another, but in the fact that the latter provision, by authorizing particular actions to be *brought* in federal court, could not reasonably be read *not* to confer jurisdiction. A provision merely conferring a general *capacity* to bring actions, however, cannot reasonably be read to *confer* jurisdiction.[2]

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[2] The Court believes that *Deveaux*'s statement that "the right to sue does not imply the right to sue in the courts of the union *unless it be expressed*," *Bank of United States* v. *Deveaux*, 5 Cranch 61, 86 (1809) (emphasis added), is somehow inconsistent with my analysis. *Ante*, at

This reading of *Deveaux* is fully consistent with our subsequent decision in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), which construed the "sue and be sued" clause of the second Bank's charter as conferring jurisdiction on federal circuit courts. The second charter provided that the Bank was "made able and capable, in law . . . to sue and be sued . . . in all state courts having competent jurisdiction, and in any circuit court of the United States," 3 Stat. 269. By granting the Bank power to sue, not in all courts generally (as in *Deveaux*), but in *particular* federal courts, this suggested a grant of jurisdiction rather than merely of capacity to sue. And that suggestion was strongly confirmed by the fact that the Bank was empowered to sue in state courts "having competent jurisdiction," but in federal circuit courts *simpliciter*. If the statute had jurisdiction in mind as to the one, it must as to the other as well. Our opinion in *Osborn* did not invoke the "magic words" approach adopted by the Court today, but concluded that the charter language "admit[ted] of but one interpretation" and could not "be made plainer by explanation." 9 Wheat., at 817.

In distinguishing *Deveaux*, *Osborn* noted, and apparently misunderstood as the Court today does, that case's contrast between the "express grant of jurisdiction to the federal courts" over suits against directors and the "general words" of the "sue and be sued" clause, "which [did] not mention those courts." 9 Wheat., at 818. All it concluded from that, however, was that *Deveaux* established that "a general capacity in the bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts." 9 Wheat., at 818. There does not logically follow from that the rule which the Court announces today: that *any* grant of a general capacity to sue *with* mention of federal courts will

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255, n. 6. Quite the opposite is true: The Court's simple statement that the grant of jurisdiction must "be expressed" is obviously a call, not to reach for the cryptograph, but to discern the plain meaning of the statutory language.

suffice to confer jurisdiction. The Court's reading of this language from *Osborn* as giving talismanic significance to any "mention" of federal courts is simply inconsistent with the fact that *Osborn* (like *Deveaux*) did not purport to confer on the words of the clause any meaning other than that suggested by their natural import.

This reading of *Deveaux* and *Osborn* is confirmed by our later decision in *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295 (1916). There we held it to be "plain" that a railroad charter provision stating that the corporation "shall be able to sue and be sued . . . in all courts of law and equity within the United States," 16 Stat. 574, did not confer jurisdiction on any court. 241 U. S., at 303. Had our earlier cases stood for the "magic words" rule adopted by the Court today, we could have reached that conclusion simply by noting that the clause at issue did not contain a specific reference to the federal courts. That is not, however, what we did. Indeed, the absence of such specific reference *was not even mentioned* in the opinion. See *id.*, at 303–305. Instead, as before, we sought to determine the sense of the provision by considering the ordinary meaning of its language in context. We concluded that "Congress would have expressed [a] purpose [to confer jurisdiction] in altogether different words" than these, *id.*, at 303, which had "the same generality and *natural import* as did those in the earlier bank act [in *Deveaux*]," *id.*, at 304 (emphasis added). Considered in their context of a listing of corporate powers, these words established that

> "Congress was not then concerned with the jurisdiction of courts but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name *in any court of law or equity—Federal, state, or territorial*—whose jurisdiction as otherwise competently defined was adequate to the occasion." *Id.*, at 303 (emphasis added).

That paraphrasing of the railroad charter, in terms that would spell jurisdiction under the key the Court adopts today, belies any notion that *Bankers Trust* was using the same code book.[3]

The fourth and final case relied upon by the Court is *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447 (1942). In that case, we granted certiorari to consider whether a federal court in a nondiversity action must apply the conflict-of-laws rules of the forum State. We ultimately did not address that question (because we concluded that the rule of decision was provided by federal, rather than state, law, see *id.*, at 456), but in the course of setting forth the question presented, we noted that, as all parties had conceded, the jurisdiction of the federal district court did not rest on diversity:

> "Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or Federal.' Sec. 12 B, Federal Reserve Act; 12 U. S. C. § 264(j).[2]
>
> "[2] That subdivision of the Act further provides: 'All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States . . . .'"

Id., at 455–456.

The Court relies heavily on this case, which it views as holding that a statute granting a corporation the power "'to sue or be sued "in any court of law or equity, State or Federal"'" establishes jurisdiction in federal district courts. *Ante*, at 254–255. Even if the quoted language did say that,

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[3] The Court's protest, *ante*, at 257, n. 9, that its interpretive rule should not be applied to *Bankers Trust*'s paraphrase of the railroad charter at issue in that case is a frank confession that that rule has no relation to ordinary principles for discerning meaning in the English language—*i. e.*, it has no relation to the very principles that we have consistently purported to apply in this area.

it would be remarkable to attribute such great significance to a passing comment on a conceded point. But in my view it does not say that anyway, since the footnote must be read together with the text as explaining the single basis of jurisdiction (rather than, as the Court would have it, explaining two separate bases of jurisdiction in a case where even the explanation of one is *obiter*). The language quoted in the footnote is not, as the Court says, from "another part of the same statute," *ante*, at 254, but is the continuation of the provision quoted in the text, see 12 U. S. C. § 264(j) (1940 ed.). And the complaint in *D'Oench, Duhme* expressly predicated jurisdiction on the fact that the action was one "aris[ing] under the laws of the United States." Tr. of Record in *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, O. T. 1941, No. 206, p. 3. The language in this case is a thin reed upon which to rest abandonment of the rudimentary principle (followed even in other "sue and be sued" cases) that a statute should be given the meaning suggested by the "natural import" of its terms. *Bankers Trust*, *supra*, at 304.

III

Finally, the Court argues that a jurisdictional reading of the Red Cross Charter is required by the canon of construction that an amendment to a statute ordinarily should not be read as having no effect. *Ante*, at 263. The original "sue and be sued" clause in the Red Cross Charter did not contain the phrase "State or Federal," and the Court argues that its reading—which gives decisive weight to that addition—is therefore strongly to be preferred. *Ibid.* I do not agree. Even if it were the case that my reading of the clause rendered this phrase superfluous, I would consider that a small price to pay for adhering to the competing (and more important) canon that statutory language should be construed in accordance with its ordinary meaning. And it would seem particularly appropriate to run the risk of surplusage here, since the amendment in question was one of a number of

technical changes in a comprehensive revision. Ch. 50, § 3, 61 Stat. 80, 81 (1947).

But in any event, a natural-meaning construction of the "sue and be sued" clause does not render the 1947 amendment superfluous. The addition of the words "State or Federal" eliminates the possibility that the language "courts of law and equity *within the jurisdiction* of the United States" that was contained in the original charter, see ch. 23, § 2, 33 Stat. 600 (emphasis added), might be read to limit the grant of capacity to sue in *federal court.* State courts are not within the "jurisdiction" of the United States unless "jurisdiction" is taken in the relatively rare sense of referring to territory rather than power. The addition of the words "State or Federal" removes this ambiguity.

The Court rejects this argument on the ground that there is "no evidence of such an intent." *Ante,* at 264, n. 15. The best answer to that assertion is that it is irrelevant: To satisfy the canon the Court has invoked, it is enough that there be a reasonable construction of the old and amended statutes that would explain why the amendment is not superfluous. Another answer to the assertion is that it is wrong. As the Court notes elsewhere in its opinion, *ante,* at 261, n. 13, one of the only comments made by a Member of Congress on this amendment was Senator George's statement, during the hearings, that the purpose of the provision was to confirm the Red Cross' capacity to sue in *state* court. See Hearings on S. 591 before the Senate Committee on Foreign Relations, 80th Cong., 1st Sess., 11 (1947).[4]

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[4] The Court points out that Senator George also stated, in response to a question whether foreign courts should be covered by the amendment, that the purpose of the bill was "'to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there.'" *Ante,* at 261, n. 13. Rather than concluding (as seems obvious) that Senator George was speaking with imprecision in using the phrase "give the jurisdiction," the Court draws the far less likely conclusion that Senator George was flatly contradicting himself in what he said only a few minutes later. *Ibid.*

* * *

Because the Red Cross Charter contains no language suggesting a grant of jurisdiction, I conclude that it grants only the capacity to "sue or be sued" in a state or federal court of appropriate jurisdiction. In light of this conclusion, I find it unnecessary to reach the constitutional question addressed in Part V of the Court's opinion. I would affirm the judgment of the Court of Appeals.

Syllabus

WRIGHT, WARDEN, ET AL. *v.* WEST

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

No. 91–542. Argued March 24, 1992—Decided June 19, 1992

A few weeks after a Virginia home was burglarized, over 15 of the missing items were recovered from respondent West's home. At his trial on grand larceny charges, he admitted to a prior felony conviction, but denied having stolen the items, explaining that he frequently bought and sold merchandise at different flea markets. He offered no explanation for how he had acquired any of the stolen items until cross-examination, when he gave vague, evasive, and even contradictory answers; could not remember how he acquired several major items, including a television set and a coffee table; and failed to produce any evidence corroborating his story. West was convicted. The State Supreme Court affirmed the conviction and denied his petition for a writ of habeas corpus, both times rejecting, *inter alia*, West's contention that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. On federal habeas, the District Court also rejected that contention. The Court of Appeals reversed on the ground that the standard of *Jackson* v. *Virginia*, 443 U. S. 307, 319—that evidence is sufficient to support a conviction as a matter of due process if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"—had not been met.

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

931 F. 2d 262, reversed and remanded.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded that regardless of whether a federal habeas court should review state-court applications of law to fact deferentially or *de novo*, the trial record contains more than enough evidence to support West's conviction. *Jackson* repeatedly emphasizes the deference owed the trier of fact and the sharply limited nature of constitutional sufficiency review. The case against West was strong. The jury was entitled to disbelieve his uncorroborated and confused testimony, discount his credibility on account of his prior felony conviction, and take his demeanor into account. The jury was also permitted to consider what it concluded to be perjured testimony as affirmative evidence of guilt. Pp. 295–297.

Syllabus

JUSTICE WHITE concluded that there was enough evidence to support West's conviction under the *Jackson* standard. P. 297.

JUSTICE O'CONNOR, joined by JUSTICE BLACKMUN and JUSTICE STEVENS, concluded that the evidence supported West's conviction and that there was no need to decide the standard of review issue to decide this case. Pp. 297, 305–306.

JUSTICE KENNEDY concluded that the evidence was sufficient to convince a rational factfinder of guilt beyond a reasonable doubt and that *Teague* v. *Lane*, 489 U. S. 288, should not be interpreted as calling into question the settled principle that mixed questions are subject to *de novo* review on federal habeas corpus. Pp. 306–310.

JUSTICE SOUTER concluded that West sought the benefit of a "new rule," and thus his claim was barred by *Teague* v. *Lane*, 489 U. S. 288. The Court of Appeals misapplied *Teague*'s commands, since, while the *Jackson* rule was "old" enough to have predated the finality of West's conviction, it was not specific enough to dictate the rule on which the conviction was held unlawful. Although the State Supreme Court was not entitled to disregard *Jackson*, it does not follow from *Jackson*'s rule that the insufficiency of the evidence to support West's conviction was apparent. Virginia has long recognized a rule that evidence of falsely explained possession of recently stolen property is sufficient to sustain a finding that the possessor took the goods, and the jury's rejection of West's explanation implies a finding that his explanation was false. Virginia's rule is reasonable and has been accepted as good law against the backdrop of a general state sufficiency standard no less stringent than the *Jackson* rule. Thus, it is not possible to say that reasonable jurists could not have considered Virginia's rule compatible with the *Jackson* standard. Pp. 310–316.

THOMAS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA, J., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 297. O'CONNOR, J., filed an opinion concurring in the judgment, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 297. KENNEDY, J., *post*, p. 306, and SOUTER, J., *post*, p. 310, filed opinions concurring in the judgment.

Donald R. Curry, Senior Assistant Attorney General of Virginia, argued the cause for petitioners. With him on the briefs were *Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *Stephen D. Rosenthal*, Deputy Attorney General, and *Jerry P. Slonaker*, Senior Assistant Attorney General.

Counsel

Maureen E. Mahoney, Deputy Solicitor General, argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Roberts*.

Steven H. Goldblatt argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, and *Richard B. Martell*, Assistant Attorney General, *Charles E. Cole*, Attorney General of Alaska, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Gale A. Norton*, Attorney General of Colorado, *Richard N. Palmer*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Warren Price III*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Robert T. Stephen*, Attorney General of Kansas, *Chris Gorman*, Attorney General of Kentucky, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Michael C. Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Susan B. Loving*, Attorney General of Oklahoma, *Charles S. Crookham*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Mark Barnett*, Attorney General of South Dakota, *Dan Morales*, Attorney General of Texas, *Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Kenneth O. Eikenberry*, Attorney General of Washington, *Mario J. Palumbo*, Attorney General of West Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Leslie A. Harris, *Steven R. Shapiro*, and *John A. Powell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Lee Fisher*, Attorney

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE SCALIA joined.

In this case, we must determine whether the Court of Appeals for the Fourth Circuit correctly applied our decision in *Jackson* v. *Virginia,* 443 U. S. 307 (1979), in concluding that the evidence against respondent Frank West was insufficient, as a matter of due process, to support his state-court conviction for grand larceny.

I

Between December 13 and December 26, 1978, someone broke into the Westmoreland County, Virginia, home of Angelo Cardova and stole items valued at approximately $3,500. On January 10, 1979, police conducted a lawful search of the Gloucester County, Virginia, home of West and his wife. They discovered several of the items stolen from the Cardova home, including various electronic equipment (two television sets and a record player); articles of clothing (an imitation mink coat with the name "Esther" embroidered in it, a silk jacket emblazoned "Korea 1970," and a pair of shoes); decorations (several wood carvings and a mounted lobster); and miscellaneous household objects (a mirror framed with seashells, a coffee table, a bar, a sleeping bag, and some silverware). These items were valued at approximately $800, and the police recovered other, unspecified items of Cardova's property with an approximate value of $300.

West was charged with grand larceny. Testifying at trial on his own behalf, he admitted to a prior felony conviction, but denied having taken anything from Cardova's house.

General of Ohio, *Jerry Boone,* Solicitor General of New York, *Peter H. Schiff,* Deputy Solicitor General, and *Martin A. Hotvet,* Assistant Attorney General; for Senator Biden et al. by *William F. Sheehan* and *Christopher E. Palmer;* for the American Bar Association by *Talbot D'Alemberte* and *Seth P. Waxman;* for Benjamin R. Civiletti et al. by *Douglas G. Robinson* and *James S. Liebman;* and for Gerald Gunther et al. by *Larry W. Yackle.*

He explained that he had bought and sold "a lot of . . . merchandise" from "several guys" at "flea bargain places" where, according to West, "a lot of times you buy things . . . that are stolen" although "you never know it." App. 21. On cross-examination, West said that he had bought many of the stolen items from a Ronnie Elkins, whom West claimed to have known for years. West testified that he purchased one of the wood carvings, the jacket, mounted lobster, mirror, and bar from Elkins for about $500. West initially guessed, and then twice positively asserted, that this sale occurred before January 1, 1979. In addition, West claimed to have purchased the coat from Elkins for $5 around January 1, 1979. His testimony did not make clear whether he was describing one transaction or two, whether there were any other transactions between himself and Elkins, where the transactions occurred, and whether the transactions occurred at flea markets.[1] West testified further that he had purchased one of

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[1] The quality of West's testimony on these matters can best be appreciated by example:

"Q Are those items that you bought at a flea market?
"A Well, I didn't buy these items at a flea market, no sir.
"Q Whose items are they?
"A They are some items that I got from a Ronnie Elkins.
"Q All of the items you bought from him?
"A I can't say all.
"Q Which ones did you buy from him?
"A I can't say, because I don't have an inventory.
"Q Can you tell me the ones you bought from Ronnie Elkins?
"A Yes, I am sure I can.
"Q Which ones?
"A I would say the platter.
"Q How about the sea shell mirror?
"A Yes, sir, I think so.
"Q Where did you buy that?
"A In Newport News at a flea market." App. 21–22.

"Q I want to know about your business transactions with Ronnie Elkins.

[Footnote 1 is continued on p. 282]

the television sets in an entirely separate transaction in Goochland County, from an individual whose name he had forgotten. Finally, West testified that he did not remember how he had acquired the second television, the coffee table, and the silverware.

Under then-applicable Virginia law, grand larceny was defined as the wrongful and nonconsensual taking of property worth at least $100, with the intent to deprive the owner of it permanently. See Va. Code Ann. § 18.2–95 (1975); *Skeeter* v. *Commonwealth*, 217 Va. 722, 725, 232 S. E. 2d 756, 758 (1977). Virginia law permits an inference that a person who fails to explain, or falsely explains, his exclusive possession of recently stolen property is the thief. See, *e. g.*, *Moehring* v. *Commonwealth*, 223 Va. 564, 568, 290 S. E. 2d 891, 893 (1982); *Best* v. *Commonwealth*, 222 Va. 387, 389, 282 S. E. 2d 16, 17 (1981). The trial court instructed the jurors about this permissive inference, but warned that the inference did not compromise their constitutional obligation to acquit unless they found that the State had established every element

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"A I buy and sell different items from different individuals at flea markets.

"Q Tell us where that market is.

"A In Richmond. You have them in Gloucester.

"Q Where is Ronnie Elkins' flea market?

"A He does not have one.

"Q Didn't you say you bought some items from Ronnie Elkins?

"A At a flea market.

"Q Tell the jury where that is at *[sic]*.

"A In Gloucester.

"Q Tell the jury about this flea market and Ronnie Elkins, some time around January 1, and these items, not the other items.

"A Ronnie Elkins does not own a flea market.

"Q Tell the jury, if you will, where Ronnie Elkins was on the day that you bought the items?

"A I don't remember. It was before January 1.

"Q Where was it?

"A I bought stuff from him in Richmond, Gloucester, and Newport News." *Id.*, at 26–27.

of the crime beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358 (1970).[2]

The jury returned a guilty verdict, and West received a 10-year prison sentence. West petitioned for an appeal, contending (among other things) that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. In May 1980, the Supreme Court of Virginia refused the petition—a disposition indicating that the court found the petition without merit, see *Saunders* v. *Reynolds*, 214 Va. 697, 700, 204 S. E. 2d 421, 424 (1974). Seven years later, West filed a petition for a writ of habeas corpus in the same court, supported by an affidavit executed by Ronnie Elkins in April 1987. West renewed his claim that the original trial record contained insufficient evidence to support the conviction, and he argued in the alternative that Elkins' affidavit, which tended to corroborate West's trial testimony in certain respects, constituted new evidence entitling him to a new trial. The Supreme Court of Virginia again denied relief. West then filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Virginia, which rejected both claims and denied relief.

The Court of Appeals for the Fourth Circuit reversed. 931 F. 2d 262 (1991). As the court correctly recognized, a

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[2] The instruction on the permissive inference read:

"If you belie[ve] from the evidence beyond a reasonable doubt that property of a value of $100.00 or more was stolen from Angelo F. C[a]rdova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty." App. 34.

Several other instructions emphasized that despite the permissive inference, "[t]he burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant." *Ibid.*

claim that evidence is insufficient to support a conviction as a matter of due process depends on "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U. S., at 319 (emphasis in original). Five considerations led the court to conclude that this standard was not met: first, the items were recovered no sooner than two weeks after they had been stolen; second, only about a third of the items stolen from Cardova (measured by value) were recovered from West; third, the items were found in West's house in plain view, and not hidden away as contraband; fourth, West's explanation of his possession was not so "inherently implausible," even if it were disbelieved, that it could "fairly be treated as positive evidence of guilt"; and fifth, there was no corroborating evidence (such as fingerprints or eyewitness testimony) beyond the fact of mere possession. See 931 F. 2d, at 268–270. The court viewed West's testimony as "at most, a neutral factor," *id.*, at 270, despite noting his "confusion" about the details of his alleged purchases, *id.*, at 269, and despite conceding that his testimony "at first blush . . . may itself seem incredible," *id.*, at 270, n. 7. In holding that the *Jackson* standard was not met, the court did not take into consideration the fact that the Supreme Court of Virginia had twice previously concluded otherwise.

After the Fourth Circuit denied rehearing en banc by an equally divided court, see App. to Pet. for Cert. 34–35, the warden and the State Attorney General sought review in this Court on, among other questions, whether the Court of Appeals had applied *Jackson* correctly in this case. We granted certiorari, 502 U. S. 1012 (1991), and requested additional briefing on the question whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case, 502 U. S. 1021 (1991). We now reverse.

II

The habeas corpus statute permits a federal court to entertain a petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). The court must "dispose of the matter as law and justice require." § 2243. For much of our history, we interpreted these bare guidelines and their predecessors to reflect the common-law principle that a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody. See, *e. g.*, *In re Wood*, 140 U. S. 278, 285–287 (1891) (Harlan, J.); *Ex parte Watkins*, 3 Pet. 193, 202 (1830) (Marshall, C. J.). Gradually, we began to expand the category of claims deemed to be jurisdictional for habeas purposes. See, *e. g.*, *Ex parte Siebold*, 100 U. S. 371, 377 (1880) (court without jurisdiction to impose sentence under unconstitutional statute); *Ex parte Lange*, 18 Wall. 163, 176 (1874) (court without jurisdiction to impose sentence not authorized by statute). Next, we began to recognize federal claims by state prisoners if no state court had provided a full and fair opportunity to litigate those claims. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91–92 (1923); *Frank* v. *Mangum*, 237 U. S. 309, 335–336 (1915). Before 1953, however, the inverse of this rule also remained true: Absent an alleged jurisdictional defect, "habeas corpus would not lie for a [state] prisoner . . . if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts." *Fay* v. *Noia*, 372 U. S. 391, 459–460 (1963) (Harlan, J., dissenting). See generally Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 478–499 (1963). In other words, the state-court judgment was entitled to "*absolute* respect," *Kuhlmann* v. *Wil-*

son, 477 U. S. 436, 446 (1986) (opinion of Powell, J.) (emphasis added), and a federal habeas court could not review it even for reasonableness.[3]

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[3] JUSTICE O'CONNOR offers three criticisms of our summary of the history of habeas corpus before 1953, none of which we find convincing. First, she contends that the full-and-fair litigation standard in *Frank* v. *Mangum*, 237 U. S. 309 (1915), and *Moore* v. *Dempsey*, 261 U. S. 86 (1923), served no purpose other than to define the scope of the underlying alleged constitutional violation. See *post*, at 297–299. *Frank* and *Moore* involved claims, rejected by the state appellate courts, that a trial had been so dominated by a mob as to violate due process. In *Frank*, we denied relief not because the state appellate court had decided the federal claim *correctly* (the relevant question on direct review), and not even because the state appellate court had decided the federal claim *reasonably*, but only "because Frank's federal claims had been considered by a competent and unbiased state tribunal," *Stone* v. *Powell*, 428 U. S. 465, 476 (1976). In *Moore*, which reaffirmed *Frank* expressly, see 261 U. S., at 90–91, we ordered the District Court to consider the mob domination claim on the merits because the state appellate court's "perfunctory treatment" of it "was not in fact acceptable corrective process." *Noia*, 372 U. S., at 458 (Harlan, J., dissenting); see also Bator, 76 Harv. L. Rev., at 488–489. In both cases, a claim that the habeas petitioner had been denied due process *at trial* was not cognizable on habeas unless the petitioner *also* had been denied a full and fair opportunity to raise that claim *on appeal*.

Second, JUSTICE O'CONNOR states that we mischaracterize the views of Justice Powell about the history of habeas law between 1915 and 1953. See *post*, at 299. In fact, however, Justice Powell has often recounted exactly the same familiar history that we summarize above. In *Rose* v. *Mitchell*, 443 U. S. 545 (1979), for example, he described *Frank* as having "modestly expanded" the "scope of the writ" in order to "encompass those cases where the defendant's federal constitutional claims had not been considered in the state-court proceeding." 443 U. S., at 580 (opinion concurring in judgment). Similarly, in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), he described *Frank* as having extended "[t]he scope of federal habeas corpus" to permit consideration of "whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims." 412 U. S., at 255–256 (concurring opinion). In neither case, nor in *Kuhlmann*, did Justice Powell even suggest that federal habeas was available before 1953 to a prisoner who had received a full and fair opportunity to litigate his federal claim in state court.

Third, JUSTICE O'CONNOR criticizes our failure to acknowledge *Salinger* v. *Loisel*, 265 U. S. 224 (1924), which she describes as the first case ex-

We rejected the principle of absolute deference in our landmark decision in *Brown* v. *Allen*, 344 U. S. 443 (1953). There, we held that a state-court judgment of conviction "is not *res judicata*" on federal habeas with respect to federal constitutional claims, *id.*, at 458, even if the state court has rejected all such claims after a full and fair hearing. Instead, we held, a district court must determine whether the state-court adjudication "has resulted in a satisfactory conclusion." *Id.*, at 463. We had no occasion to explore in detail the question whether a "satisfactory" conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*, because we concluded that the constitutional claims advanced in *Brown* itself would fail even if the state courts' rejection of them were reconsidered *de novo*. See *id.*, at 465–476. Nonetheless, we indicated that the federal courts enjoy at least the discretion to take into consideration the fact that a state court has previously rejected the federal claims asserted on habeas. See *id.*, at 465 ("As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been

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plicitly to hold that "*res judicata* is not strictly followed on federal habeas." *Post*, at 299. *Salinger*, however, involved the degree of preclusive effect of a habeas judgment upon *subsequent* habeas petitions filed by a *federal* prisoner. This case, of course, involves the degree of preclusive effect of a criminal conviction upon an *initial* habeas petition filed by a *state* prisoner. We cannot fault ourselves for limiting our focus to the latter context. But even assuming its relevance, *Salinger* hardly advances the position advocated by JUSTICE O'CONNOR that a habeas court must exercise *de novo* review with respect to mixed questions of law and fact. Despite acknowledging that a prior habeas judgment is not entitled to absolute preclusive effect under the doctrine of res judicata, *Salinger* also indicated that the prior habeas judgment "*may* be considered, and even given controlling weight." 265 U. S., at 231 (emphasis added).

determined, on the facts presented, by the highest state court with jurisdiction").[4]

In an influential separate opinion endorsed by a majority of the Court, Justice Frankfurter also rejected the principle of absolute deference to fairly litigated state-court judgments. He emphasized that a state-court determination of federal constitutional law is not "binding" on federal habeas, *id.*, at 506, regardless of whether the determination involves a pure question of law, *ibid.*, or a "so-called mixed questio[n]" requiring the application of law to fact, *id.*, at 507. Nonetheless, he stated quite explicitly that a "prior State determination may guide [the] discretion [of the district court] in deciding upon the appropriate course to be followed in disposing of the application." *Id.*, at 500. Discussing mixed questions specifically, he noted further that "there is no need for the federal judge, if he could, to shut his eyes to the State consideration." *Id.*, at 508.[5]

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[4] JUSTICE O'CONNOR contends that the inclusion of this passage in a section of our opinion entitled "Right to a Plenary Hearing" makes clear that we were discussing only the resolution of *factual* questions. See *post,* at 300–301. In our introduction to that section, however, we indicated that both factual and legal questions were at issue. See 344 U. S., at 460 (noting contentions "that the District Court committed error when it took no evidence *and heard no argument on the federal constitutional issues*" (emphasis added)). Indeed, if only factual questions were at issue, we would have authorized a denial of the writ not whenever the state-court proceeding "has resulted in a satisfactory *conclusion*" (as we did), *id.*, at 463 (emphasis added), but only whenever the state-court proceeding has resulted in satisfactory *factfinding.*

[5] JUSTICE O'CONNOR quotes Justice Frankfurter for the proposition that a district judge on habeas "'*must exercise his own judgment*'" with respect to mixed questions. *Post,* at 300 (quoting 344 U. S., at 507). Although we agree with JUSTICE O'CONNOR that this passage by itself suggests a *de novo* standard, it is not easily reconciled with Justice Frankfurter's later statement that "there is no need for the federal judge, if he could, to shut his eyes to the State consideration" of the mixed question, *id.*, at 508. These statements can be reconciled, of course, on the assumption that the habeas judge must review the state-court determination for reasonableness. But we need not attempt to defend that conclusion in detail, for

In subsequent cases, we repeatedly reaffirmed *Brown*'s teaching that mixed constitutional questions are "open to review on collateral attack," *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980), without ever explicitly considering whether that "review" should be *de novo* or deferential. In some of these cases, we would have denied habeas relief even under *de novo* review, see, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984) (facts make it "clear" that habeas petitioner did not receive ineffective assistance of counsel); *Neil* v. *Biggers*, 409 U. S. 188, 201 (1972) (facts disclose "no substantial likelihood" that habeas petitioner was subjected to unreliable pretrial lineup); in others, we would have awarded habeas relief even under deferential review, see, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 405 (1977) (facts provide "no reasonable basis" for finding valid waiver of right to counsel); *Irvin* v. *Dowd*, 366 U. S. 717, 725 (1961) (facts show "clear and convincing" evidence of biased jury); and in yet others, we remanded for application of a proper legal rule without addressing that standard of review question, see, *e. g.*, *Cuyler*, *supra*, at 342, 350. Nonetheless, because these cases never qualified our early citation of *Brown* for the proposition that a federal habeas court *must* reexamine mixed constitutional questions "independently," *Townsend* v. *Sain*, 372 U. S. 293, 318 (1963) (dictum), we have gradually come to treat as settled the rule that mixed constitutional questions are "subject to plenary federal review" on habeas, *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985).[6]

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we conclude not that *Brown* v. *Allen* establishes deferential review for reasonableness, but only that *Brown* does not squarely foreclose it.

[6] We have no disagreement with JUSTICE O'CONNOR that *Brown* v. *Allen* quickly came to be cited for the proposition that a habeas court should review mixed questions "independently"; that several of our cases since *Brown* have applied a *de novo* standard with respect to pure and mixed legal questions; and that the *de novo* standard thus appeared well settled with respect to both categories by the time the Court decided *Miller* v. *Fenton* in 1985. See *post*, at 301–302. Despite her extended discussion of the leading cases from *Brown* through *Miller*, however, JUSTICE O'CON-

Jackson itself contributed to this trend. There, we held that a conviction violates due process if supported only by evidence from which "no rational trier of fact could find guilt beyond a reasonable doubt." 443 U. S., at 317. We stated explicitly that a state-court judgment applying the *Jackson* rule in a particular case "is of course entitled to deference" on federal habeas. *Id.*, at 323; see also *id.*, at 336, n. 9 (STEVENS, J., concurring in judgment) ("State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims"). Notwithstanding these principles, however, we then indicated that the habeas court itself should apply the *Jackson* rule, see *id.*, at 324, rather than merely reviewing the state courts' application of it for reasonableness. Ultimately, though, we had no occasion to resolve our conflicting statements on the standard of review question, because we concluded that the habeas petitioner was not entitled to relief even under our own *de novo* application of *Jackson*. See *id.*, at 324–326.[7]

NOR offers nothing to refute those of our limited observations with which she evidently disagrees—that an unadorned citation to *Brown* should not have been enough, at least as an original matter, to establish *de novo* review with respect to mixed questions; and that in none of our leading cases was the choice between a *de novo* and a deferential standard outcome determinative.

[7] JUSTICE O'CONNOR asserts that *Jackson* "expressly rejected" a "deferential standard of review" that she characterizes as "very much like the one" urged on us by petitioners. *Post*, at 303 (citing 443 U. S., at 323). What *Jackson* expressly rejected, however, was a proposal that habeas review "should be foreclosed" if the state courts provide "appellate review of the sufficiency of the evidence." *Ibid.* That rule, of course, would permit *no* habeas review of a state-court sufficiency determination. As we understand it, however, petitioners' proposal would permit limited review for reasonableness, a standard surely consistent with our own statement that that state-court determination "is of course entitled to deference." *Ibid.* We agree with JUSTICE O'CONNOR that *Jackson* itself applied a *de novo* standard. See *post*, at 303. Nonetheless, given our statement

Despite our apparent adherence to a standard of *de novo* habeas review with respect to mixed constitutional questions, we have implicitly questioned that standard, at least with respect to pure legal questions, in our recent retroactivity precedents. In *Penry* v. *Lynaugh*, 492 U. S. 302, 313–314 (1989), a majority of this Court endorsed the retroactivity analysis advanced by JUSTICE O'CONNOR for a plurality in *Teague* v. *Lane*, 489 U. S. 288 (1989). Under *Teague*, a habeas petitioner generally cannot benefit from a new rule of criminal procedure announced after his conviction has become final on direct appeal. See *id.*, at 305–310 (opinion of O'CONNOR, J.). *Teague* defined a "new" rule as one that was "not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.*, at 301 (emphasis in original). In *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), we explained that the definition includes all rules "susceptible to debate among reasonable minds." Thus, if a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a "new" rule under *Butler*, and is therefore not cognizable on habeas under *Teague*. In other words, a federal habeas court "must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." *Butler*, *supra*, at 422 (Brennan, J., dissenting).[8]

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expressly endorsing a notion of at least limited deference, and given that the *Jackson* petitioner would have lost under either a *de novo* standard or a reasonableness standard, we cannot agree that the case "expressly rejected" the latter. *Post*, at 303.

[8] JUSTICE O'CONNOR suggests that *Teague* and its progeny "did not establish a standard of review at all." *Post*, at 303–304. Instead, she contends, these cases merely prohibit the retroactive application of new rules on habeas, *ibid.*, and establish the criterion for distinguishing new rules from old ones, *ibid.* We have no difficulty with describing *Teague* as a case about retroactivity, rather than standards of review, although we do not dispute JUSTICE O'CONNOR's suggestion that the difference, at least in practice, might well be "only 'a matter of phrasing.'" *Post*, at 304 (cita-

Teague was premised on the view that retroactivity questions in habeas corpus proceedings must take account of the nature and function of the writ, which we described as "'a *collateral* remedy . . . not designed as a substitute for direct review.'" 489 U. S., at 306 (opinion of O'CONNOR, J.) (quoting *Mackey* v. *United States*, 401 U. S. 667, 682–683 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)) (emphasis in *Mackey*). JUSTICE STEVENS reasoned similarly in *Jackson*, where he stressed that habeas corpus "is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials," but only "to guard against extreme malfunctions in the state criminal justice systems." 443 U. S., at 332, n. 5 (opinion concurring in judgment); see also *Greer* v. *Miller*, 483 U. S. 756, 768–769 (1987) (STEVENS, J., concurring in judgment). Indeed, the notion that different standards should apply on direct and collateral review runs throughout our recent habeas jurisprudence. We have said, for example, that new rules always have retroactive application to

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tion omitted). We do disagree, however, with JUSTICE O'CONNOR's definition of what constitutes a "new rule" for *Teague* purposes. A rule is new, she contends, if it "can be meaningfully distinguished from that established by binding precedent at the time [the] state court conviction became final." *Post*, at 304. This definition leads her to suggest that a habeas court must determine whether the state courts have interpreted old precedents "properly." *Post*, at 305. Our precedents, however, require a different standard. We have held that a rule is "new" for *Teague* purposes whenever its validity under existing precedents is subject to debate among "reasonable minds," *Butler*, 494 U. S., at 415, or among "reasonable jurists," *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990). Indeed, each of our last four relevant precedents has indicated that *Teague* insulates on habeas review the state courts' "'reasonable, good-faith interpretations of existing precedents.'" *Ibid.* (quoting *Butler*, *supra*, at 414); *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990) (citing *Butler*); see *Stringer* v. *Black*, 503 U. S. 222, 237 (1992) ("The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents"). Thus, *Teague* bars habeas relief whenever the state courts have interpreted old precedents *reasonably*, not only when they have done so "properly." *Post*, at 305.

criminal cases pending on direct review, see *Griffith* v. *Kentucky*, 479 U. S. 314, 320–328 (1987), but that they generally do not have retroactive application to criminal cases pending on habeas, see *Teague*, *supra*, at 305–310 (opinion of O'CONNOR, J.). We have held that the Constitution guarantees the right to counsel on a first direct appeal, see, *e. g.*, *Douglas* v. *California*, 372 U. S. 353, 355–358 (1963), but that it guarantees no right to counsel on habeas, see, *e. g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987). On direct review, we have announced and enforced the rule that state courts must exclude evidence obtained in violation of the Fourth Amendment. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 654–660 (1961). We have also held, however, that claims under *Mapp* are not cognizable on habeas as long as the state courts have provided a full and fair opportunity to litigate them at trial or on direct review. See *Stone* v. *Powell*, 428 U. S. 465, 489–496 (1976).

These differences simply reflect the fact that habeas review "entails significant costs." *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982). Among other things, "'[i]t disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Duckworth* v. *Eagan*, 492 U. S. 195, 210 (1989) (O'CONNOR, J., concurring) (quoting *Harris* v. *Reed*, 489 U. S. 255, 282 (1989) (KENNEDY, J., dissenting)). In various contexts, we have emphasized that these costs, as well as the countervailing benefits, must be taken into consideration in defining the scope of the writ. See, *e. g.*, *Coleman* v. *Thompson*, 501 U. S. 722, 738–739 (1991) (procedural default); *McCleskey* v. *Zant*, 499 U. S. 467, 490–493 (1991) (abuse of the writ); *Teague*, *supra*, at 308–310 (opinion of O'CONNOR, J.) (retroactivity); *Kuhlmann* v. *Wilson*, 477 U. S., at 444–455 (opinion of Powell, J.) (successive petitions); *Stone* v. *Powell*, *supra*, at 491–492, n. 31 (cognizability of particular claims).

In light of these principles, petitioners ask that we reconsider our statement in *Miller* v. *Fenton* that mixed constitutional questions are "subject to plenary federal review" on habeas, 474 U. S., at 112. By its terms, *Teague* itself is not directly controlling, because West sought federal habeas relief under *Jackson*, which was decided a year before his conviction became final on direct review. Nonetheless, petitioners contend, the logic of *Teague* makes our statement in *Miller* untenable. Petitioners argue that if deferential review for reasonableness strikes an appropriate balance with respect to purely legal claims, then it must strike an appropriate balance with respect to mixed questions as well. Moreover, they note that under the habeas statute itself, a state-court determination of a purely factual question must be "presumed correct," and can be overcome only by "convincing evidence," unless one of eight statutorily enumerated exceptions is present. 28 U. S. C. § 2254(d). It makes no sense, petitioners assert, for a habeas court generally to review factual determinations and legal determinations deferentially, but to review applications of law to fact *de novo*. Finally, petitioners find the prospect of deferential review for mixed questions at least implicit in our recent statement that *Teague* concerns are fully implicated "by the *application* of an old rule in a manner that was not dictated by precedent." *Stringer* v. *Black*, 503 U. S. 222, 228 (1992) (emphasis added). For these reasons, petitioners invite us to reaffirm that a habeas judge need not—and indeed may not—"shut his eyes" entirely to state-court applications of law to fact. *Brown* v. *Allen*, 344 U. S., at 508 (opinion of Frankfurter, J.). West develops two principal counterarguments: first, that Congress implicitly codified a *de novo* standard with respect to mixed constitutional questions when it amended the habeas statute in 1966; and second, that

de novo federal review is necessary to vindicate federal constitutional rights.[9]

We need not decide such far-reaching issues in this case. As in both *Brown* and *Jackson*, the claim advanced by the habeas petitioner must fail even assuming that the state court's rejection of it should be reconsidered *de novo*. Whatever the appropriate standard of review, we conclude that there was more than enough evidence to support West's conviction.

The case against West was strong. Two to four weeks after the Cardova home had been burglarized, over 15 of the items stolen were recovered from West's home. On direct examination at trial, West said nothing more than that he frequently bought and sold items at different flea markets. He failed to offer specific information about how he had come to acquire any of the stolen items, and he did not even mention Ronnie Elkins by name. When pressed on cross-examination about the details of his purchases, West contradicted himself repeatedly about where he supposedly had bought the stolen goods, and he gave vague, seemingly eva-

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[9] JUSTICE O'CONNOR criticizes our failure to highlight in text the fact that Congress has considered, but failed to enact, several bills introduced during the last 25 years to prohibit *de novo* review explicitly. See *post*, at 305; see also Brief for Senator Biden et al. as *Amici Curiae* 10–16 (discussing various proposals). Our task, however, is not to construe bills that Congress has failed to enact, but to construe statutes that Congress has enacted. The habeas corpus statute was last amended in 1966. See 80 Stat. 1104–1105. We have grave doubts that post-1966 legislative history is of any value in construing its provisions, for we have often observed that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117 (1980), quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960). Compare also *Sullivan* v. *Finkelstein*, 496 U. S. 617, 628, n. 8 (1990) (acknowledging "all the usual difficulties inherent in relying on subsequent legislative history"), with *id.*, at 632 (SCALIA, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously").

sive answers to various other questions. See n. 1, *supra.* He said further that he could not remember how he had acquired such major household items as a television set and a coffee table, and he failed to offer any explanation whatsoever about how he had acquired Cardova's record player, among other things. Moreover, he testified that he had acquired Cardova's second television set from a seller other than Elkins (who remained unidentified) in an entirely unrelated (but roughly contemporaneous) transaction. Finally, he failed to produce any other supporting evidence, such as testimony from Elkins, whom he claimed to have known for years and done business with on a regular basis.

As the trier of fact, the jury was entitled to disbelieve West's uncorroborated and confused testimony. In evaluating that testimony, moreover, the jury was entitled to discount West's credibility on account of his prior felony conviction, see Va. Code Ann. § 19.2–269 (1990); *Sadoski* v. *Commonwealth*, 219 Va. 1069, 254 S. E. 2d 100 (1979), and to take into account West's demeanor when testifying, which neither the Court of Appeals nor we may review. And if the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt, see, *e. g., Wilson* v. *United States*, 162 U. S. 613, 620–621 (1896); *United States* v. *Zafiro*, 945 F. 2d 881, 888 (CA7 1991) (Posner, J.), cert. granted on other grounds, 503 U. S. 935 (1992); *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (CA2 1952) (L. Hand, J.).

In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "*all of the evidence* is to be considered in the light most favorable to the prosecution," 443 U. S., at 319 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," *id.*, at 326; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if

it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution," *ibid.* Under these standards, we think it clear that the trial record contained sufficient evidence to support West's conviction.

Having granted relief on West's *Jackson* claim, the Court of Appeals declined to address West's additional claim that he was entitled to a new trial, as a matter of due process, on the basis of newly discovered evidence. See 931 F. 2d, at 271, n. 9. As that claim is not properly before us, we decline to address it here. 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 White, concurring in the judgment.

Jackson v. *Virginia*, 443 U. S. 307 (1979), required the federal courts to deny the requested writ of habeas corpus if, under the *Jackson* standard, there was sufficient evidence to support West's conviction, which, as the principal opinion amply demonstrates, see *ante*, at 295–296 and this page, there certainly was.

Justice O'Connor, with whom Justice Blackmun and Justice Stevens join, concurring in the judgment.

I agree that the evidence sufficiently supported respondent's conviction. I write separately only to express disagreement with certain statements in Justice Thomas' extended discussion, *ante*, at 285–295, of this Court's habeas corpus jurisprudence.

First, Justice Thomas errs in describing the pre-1953 law of habeas corpus. *Ante*, at 285. While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of

other federal claims, because, with rare exceptions, there *were* no other federal claims available at the time. During the period JUSTICE THOMAS discusses, the guarantees of the Bill of Rights were not yet understood to apply in state criminal prosecutions. The only protections the Constitution afforded to state prisoners were those for which the text of the Constitution explicitly limited the authority of the States, most notably the Due Process Clause of the Fourteenth Amendment. And in the area of criminal procedure, the Due Process Clause was understood to guarantee no more than a full and fair hearing in the state courts. See, *e. g.*, *Ponzi* v. *Fessenden*, 258 U. S. 254, 260 (1922) ("One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that").

Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus. This is evident from the fact that the Court did not just apply this rule on habeas, but also in cases on direct review. See, *e. g.*, *Snyder* v. *Massachusetts*, 291 U. S. 97, 107–108 (1934) ("[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only"); *Twining* v. *New Jersey*, 211 U. S. 78, 110–111 (1908) ("Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, . . . this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law") (citations omitted). As long as a state criminal prosecution was fairly conducted by a court of competent jurisdiction according to state law, no constitutional question was presented, whether

on direct *or* habeas review. *Caldwell* v. *Texas*, 137 U. S. 692, 698 (1891); *Brown* v. *New Jersey*, 175 U. S. 172, 175 (1899).

The cases cited by Justice Thomas—*Moore* v. *Dempsey*, 261 U. S. 86 (1923), and *Frank* v. *Mangum*, 237 U. S. 309 (1915)—demonstrate that the absence of a full and fair hearing in the state courts was *itself* the relevant violation of the Constitution; it was not a prerequisite to a federal court's consideration of some other federal claim. Both cases held that a trial dominated by an angry mob was inconsistent with due process. In both, the Court recognized that the State could nevertheless afford due process if the state appellate courts provided a fair opportunity to correct the error. The state courts had provided such an opportunity in *Frank;* in *Moore*, they had not. In neither case is the "full and fair hearing" rule cited as a deferential standard of review applicable to habeas cases; the rule instead defines the constitutional claim itself, which was reviewed *de novo.* See *Moore*, *supra*, at 91–92.

Second, Justice Thomas quotes Justice Powell's opinion in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), out of context. *Ante*, at 285–286. Justice Powell said only that the judgment of a committing court of competent jurisdiction was accorded "absolute respect" on habeas in the 19th century, when the habeas inquiry was limited to the jurisdiction of the court. *Kuhlmann*, *supra*, at 446 (opinion of Powell, J.). Justice Powell was not expressing the erroneous view which Justice Thomas today ascribes to him, that state court judgments were entitled to complete deference before 1953.

Third, Justice Thomas errs in implying that *Brown* v. *Allen*, 344 U. S. 443 (1953), was the first case in which the Court held that the doctrine of res judicata is not strictly followed on federal habeas. *Ante*, at 287. In fact, the Court explicitly reached this holding for the first time in *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). Even *Salinger* did not break new ground: The *Salinger* Court observed that such had been the rule at common law, and that the Court had

implicitly followed it in *Carter* v. *McClaughry*, 183 U. S. 365, 378 (1902), and *Ex parte Spencer*, 228 U. S. 652, 658 (1913). *Salinger*, *supra*, at 230. The Court reached the same conclusion in at least two other cases between *Salinger* and *Brown*. See *Waley* v. *Johnston*, 316 U. S. 101, 105 (1942); *Darr* v. *Burford*, 339 U. S. 200, 214 (1950). *Darr* and *Spencer*, like this case, involved the initial federal habeas filings of state prisoners.

Fourth, JUSTICE THOMAS understates the certainty with which *Brown* v. *Allen* rejected a deferential standard of review of issues of law. *Ante*, at 287–288. The passages in which the *Brown* Court stated that a district court should determine whether the state adjudication had resulted in a "satisfactory conclusion," and that the federal courts had discretion to give some weight to state court determinations, *ante*, at 287, were passages in which the Court was discussing how federal courts should resolve questions of *fact*, not issues of law. This becomes apparent from a reading of the relevant section of *Brown*, 344 U. S., at 460–465, a section entitled "Right to a Plenary Hearing." When the Court then turned to the primary *legal* question presented—whether the Fourteenth Amendment permitted the restriction of jury service to taxpayers—the Court answered that question in the affirmative without any hint of deference to the state courts. *Id.*, at 467–474. The proper standard of review of issues of law was also discussed in Justice Frankfurter's opinion, which a majority of the Court endorsed. After recognizing that state court factfinding need not always be repeated in federal court, Justice Frankfurter turned to the quite different question of determining the law. He wrote: "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, *the District Judge must exercise his own judgment* on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication

with the federal judge." *Id.*, at 507 (emphasis added; citation omitted). Justice Frankfurter concluded: "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.*, at 508.

Fifth, Justice Thomas incorrectly states that we have never considered the standard of review to apply to mixed questions of law and fact raised on federal habeas. *Ante*, at 289. On the contrary, we did so in the very cases cited by Justice Thomas. In *Irvin* v. *Dowd*, 366 U. S. 717 (1961), we stated quite clearly that " 'mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate [the issue of jury prejudice]." *Id.*, at 723 (quoting *Brown* v. *Allen*, *supra*, at 507 (opinion of Frankfurter, J.)). We then proceeded to employ precisely the same legal analysis as in cases on direct appeal. 366 U. S., at 723–728.

In *Townsend* v. *Sain*, 372 U. S. 293 (1963), we again said that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." *Id.*, at 318.

In *Neil* v. *Biggers*, 409 U. S. 188 (1972), we addressed *de novo* the question whether the state court pretrial identification procedures were unconstitutionally suggestive by using the same standard used in cases on direct appeal: " 'a very substantial likelihood of irreparable misidentification.' " *Id.*, at 198 (quoting *Simmons* v. *United States*, 390 U. S. 377, 384 (1968)).

In *Brewer* v. *Williams*, 430 U. S. 387 (1977), we reviewed *de novo* a state court's finding that a defendant had waived his right to counsel. We held that "the question of waiver

was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found . . . .'" *Id.*, at 403 (quoting *Brown* v. *Allen*, *supra*, at 507 (opinion of Frankfurter, J.)). We then employed the same legal analysis used on direct review. 430 U. S., at 404.

In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we explicitly considered the question whether the Court of Appeals had exceeded the proper scope of review of the state court's decision. *Id.*, at 341. We concluded that because the issue presented was not one of historical fact entitled to a presumption of correctness under 28 U. S. C. § 2254(d), the Court of Appeals was correct in reconsidering the state court's "application of legal principles to the historical facts of this case." 446 U. S., at 342. Although we held that the Court of Appeals had erred in stating the proper legal principle, we remanded to have it consider the case under the same legal principles as in cases on direct review. *Id.*, at 345–350.

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), we held that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. . . . [N]o special standards ought to apply to ineffectiveness claims made in habeas proceedings." *Id.*, at 697–698. We distinguished state court determinations of mixed questions of fact and law, to which federal courts should not defer, from state court findings of historical fact, to which federal courts should defer. *Id.*, at 698.

Finally, in *Miller* v. *Fenton*, 474 U. S. 104 (1985), we recognized that "an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." *Id.*, at 112.

To this list of cases cited by JUSTICE THOMAS, one could add the following, all of which applied a standard of *de novo* review. *Leyra* v. *Denno*, 347 U. S. 556, 558–561 (1954); *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276, 277 (1959); *Rogers* v. *Richmond*, 365 U. S. 534, 546 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335, 339–345 (1963); *Pate* v. *Robinson*, 383 U. S. 375, 384–386 (1966); *Sheppard* v. *Maxwell*, 384 U. S. 333, 349–363 (1966); *McMann* v. *Richardson*, 397 U. S. 759, 766–774 (1970); *Lego* v. *Twomey*, 404 U. S. 477, 482–490 (1972); *Barker* v. *Wingo*, 407 U. S. 514, 522–536 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471, 480–490 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 781–791 (1973); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222–249 (1973); *Manson* v. *Brathwaite*, 432 U. S. 98, 109–117 (1977); *Watkins* v. *Sowders*, 449 U. S. 341, 345–349 (1981); *Jones* v. *Barnes*, 463 U. S. 745, 750–754 (1983); *Berkemer* v. *McCarty*, 468 U. S. 420, 435–442 (1984); *Moran* v. *Burbine*, 475 U. S. 412, 420–434 (1986); *Kimmelman* v. *Morrison*, 477 U. S. 365, 383–387 (1986); *Maynard* v. *Cartwright*, 486 U. S. 356, 360–365 (1988); *Duckworth* v. *Eagan*, 492 U. S. 195, 201–205 (1989). There have been many others.

Sixth, JUSTICE THOMAS misdescribes *Jackson* v. *Virginia*, 443 U. S. 307 (1979). *Ante*, at 290. In *Jackson*, the respondents proposed a deferential standard of review, very much like the one JUSTICE THOMAS discusses today, that they thought appropriate for addressing constitutional claims of insufficient evidence. 443 U. S., at 323. We expressly rejected this proposal. *Ibid.* Instead, we adhered to the general rule of *de novo* review of constitutional claims on habeas. *Id.*, at 324.

Seventh, JUSTICE THOMAS mischaracterizes *Teague* v. *Lane*, 489 U. S. 288 (1989), and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), as "question[ing] th[e] standard [of *de novo* review] with respect to pure legal questions." *Ante*, at 291. *Teague* did not establish a "deferential" standard of review of state court determinations of federal law. It did not es-

tablish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. *Penry*, *supra*, at 314; *Teague*, *supra*, at 301. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules.

To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. Cf. *Mackey* v. *United States*, 401 U. S. 667, 695 (1971) (inquiry is "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is *closely analogous to those which have been previously considered* in the prior case law") (Harlan, J., concurring in judgments in part and dissenting in part) (internal quotation marks omitted; emphasis added). Even though we have characterized the new rule inquiry as whether "reasonable jurists" could disagree as to whether a result is dictated by precedent, see *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), the standard for determining when a case establishes a new rule is "objective," and the mere existence of conflicting authority does not necessarily mean a rule is new. *Stringer* v. *Black*, 503 U. S. 222, 237 (1992). If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.

So, while JUSTICE THOMAS says that we "defer" to state courts' determinations of federal law, the statement is misleading. Although in practice, it may seem only "a matter of phrasing" whether one calls the *Teague* inquiry a standard of review or not, "phrasing mirrors thought, [and] it is impor-

tant that the phrasing not obscure the true issue before a federal court." *Brown* v. *Allen*, 344 U. S., at 501 (opinion of Frankfurter, J.). As Justice Kennedy convincingly demonstrates, the duty of the federal court in evaluating whether a rule is "new" is not the same as deference; federal courts must make an independent evaluation of the precedent existing at the time the state conviction became final in order to determine whether the case under consideration is meaningfully distinguishable. *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly.

Eighth, though Justice Thomas suggests otherwise, *ante*, at 293, *de novo* review is not incompatible with the maxim that federal courts should "give great weight to the considered conclusions of a coequal state judiciary," *Miller* v. *Fenton*, 474 U. S., at 112, just as they do to persuasive, well-reasoned authority from district or circuit courts in other jurisdictions. A state court opinion concerning the legal implications of precisely the same set of facts is the closest one can get to a "case on point," and is especially valuable for that reason. But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Finally, in his one-sentence summary of respondent's arguments, *ante*, at 294, Justice Thomas fails to mention that Congress has considered habeas corpus legislation during 27 of the past 37 years, and on 13 occasions has considered adopting a deferential standard of review along the lines suggested by Justice Thomas. Congress has rejected each proposal. In light of the case law and Congress' position, a move away from *de novo* review of mixed questions of law

and fact would be a substantial change in our construction of the authority conferred by the habeas corpus statute. As JUSTICE THOMAS acknowledges, to change the standard of review would indeed be "far-reaching," *ante*, at 295, and we need not decide whether to do so in order to resolve this case.

JUSTICE KENNEDY, concurring in the judgment.

I do not enter the debate about the reasons that took us to the point where mixed constitutional questions are subject to *de novo* review in federal habeas corpus proceedings. Whatever the answer to that difficult historical inquiry, all agree that, at least prior to the Court's adoption of the retroactivity analysis of *Teague* v. *Lane*, 489 U. S. 288 (1989), see *Penry* v. *Lynaugh*, 492 U. S. 302, 313–314 (1989), the matter was settled. It seems that the real issue dividing my colleagues is whether the retroactivity analysis of *Teague* casts doubt upon the rule of *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985). Even petitioner State of Virginia and the United States as *amicus curiae*, both seeking a deferential standard with respect to mixed questions, recognize that this is how the standard of review question arises. See Brief for Petitioners 11 ("The notion that a state prisoner has a right to *de novo* federal collateral review of his constitutional claims . . . surely has not survived this Court's decisions in *Teague*" and its progeny); Brief for United States as *Amicus Curiae* 12 ("Prior to the rule established by *Teague* [and later cases applying *Teague*], this Court often treated mixed questions of law and fact as subject to independent review in federal habeas corpus").

If vindication of the principles underlying *Teague* did require that state-court rulings on mixed questions must be given deference in a federal habeas proceeding, then indeed it might be said that the *Teague* line of cases is on a collision course with the *Miller* v. *Fenton* line. And in the proper case we would have to select one at the expense of the other. But in my view neither the purpose for which *Teague* was

adopted nor the necessary means for implementing its holding creates any real conflict with the requirement of *de novo* review of mixed questions.

In my view, it would be a misreading of *Teague* to interpret it as resting on the necessity to defer to state-court determinations. *Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity. See *Teague* v. *Lane*, *supra*, at 310 ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review"). To be sure, the fact that our standard for distinguishing old rules from new ones turns on the reasonableness of a state court's interpretation of then existing precedents suggests that federal courts do in one sense defer to state-court determinations. But we should not lose sight of the purpose of the reasonableness inquiry where a *Teague* issue is raised: The purpose is to determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations existing at the time of the prisoner's conviction.

As we explained earlier this Term:

> "When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, *Teague* and our subsequent decisions interpreting it require a federal court to answer an initial question, and in some cases a second. First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes and neither exception applies, the decision is not available to the petitioner. If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent. The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not

> dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Stringer* v. *Black*, 503 U. S. 222, 227–228 (1992) (citation omitted).

The comity interest is not, however, in saying that since the question is close the state-court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference. We see that principle at work in the statutory requirement that, except in limited circumstances, the federal habeas court must presume the correctness of state-court factual findings. See 28 U. S. C. § 2254(d). See also *Rushen* v. *Spain*, 464 U. S. 114, 120 (1983) *(per curiam)* (noting that "the state courts were in a far better position than the federal courts to answer" a factual question). Deference of this kind may be termed a comity interest, but it is not the comity interest that underlies *Teague*. The comity interest served by *Teague* is in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought correct but now understood to be deficient on its own terms. It is in recognition of this principle that we ask whether the decision in question was dictated by precedent. See, *e. g.*, *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990).

Teague does bear on applications of law to fact which result in the announcement of a new rule. Whether the prisoner seeks the application of an old rule in a novel setting, see *Stringer*, *supra*, at 228, depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of *Jackson* v. *Virginia*, 443 U. S. 307 (1979), is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all

the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Although as a general matter "new rules will not be applied or announced" in habeas proceedings, *Penry*, 492 U. S., at 313, there is no requirement that we engage in the threshold *Teague* inquiry in a case in which it is clear that the prisoner would not be entitled to the relief he seeks even if his case were pending on direct review. See *Collins* v. *Youngblood*, 497 U. S. 37 (1990). Therefore, it is not necessary to the resolution of this case to consider the oddity that reversing respondent's conviction because of the quite fact-specific determination that there was insufficient evidence would have the arguable effect of undercutting the well-established general principle in Virginia and elsewhere that the trier of fact may infer theft from unexplained or falsely denied possession of recently stolen goods. Whether a holding that there was insufficient evidence would constitute one of those unusual cases in which an application of *Jackson* would create a new rule need not be addressed.

On these premises, the existence of *Teague* provides added justification for retaining *de novo* review, not a reason to abandon it. *Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction that conformed to rules then existing. With this safeguard in place, recognizing the importance of finality, *de novo* review can be exercised within its proper sphere.

For the foregoing reasons, I would not interpret *Teague* as calling into question the settled principle that mixed questions are subject to plenary review on federal habeas corpus. And, for the reasons I have mentioned, I do not think it necessary to consider whether the respondent brings one of those unusual *Jackson* claims which is *Teague*-barred.

I agree that the evidence in this case was sufficient to convince a rational factfinder of guilt beyond a reasonable doubt; and I concur in the judgment of the Court.

JUSTICE SOUTER, concurring in the judgment.

While I could not disagree with the majority that sufficient evidence supported West's conviction, see, *e. g.*, *ante*, at 295–297, I do not think the Court should reach that issue. We have often said that when the principles first developed in *Teague* v. *Lane*, 489 U. S. 288 (1989), pose a threshold question on federal habeas review, it is only after an answer favorable to the prisoner that a court should address the merits. See, *e. g.*, *Collins* v. *Youngblood*, 497 U. S. 37, 40–41 (1990); *Penry* v. *Lynaugh*, 492 U. S. 302, 313, 329 (1989); *Teague*, *supra*, at 300 (plurality opinion). This habeas case begins with a *Teague* question, and its answer does not favor West. I would go no further.[1]

I

Under cases in the line of *Teague* v. *Lane*, *supra*, with two narrow exceptions not here relevant, federal courts conducting collateral review may not announce or apply a "new" rule for a state prisoner's benefit, *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990); *Teague*, *supra*, at 310 (plurality opinion), a new rule being one that was "not '*dictated* by precedent existing at the time the defendant's conviction became final,'" *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990) (quoting *Teague*, *supra*, at 301 (plurality opinion)) (emphasis in original). Put differently, the new-rule enquiry asks "whether a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution." *Saffle* v. *Parks*, 494 U. S. 484, 488

[1] Because my analysis ends the case for me without reaching historical questions, I do not take a position in the disagreement between JUSTICE THOMAS and JUSTICE O'CONNOR.

(1990). Or, put differently yet again, if "reasonable jurists [might have] disagree[d]" about the steps the law would take next, its later development will not be grounds for relief. *Sawyer* v. *Smith*, *supra*, at 234; see also *Butler*, *supra*, at 415 ("susceptible to debate among reasonable minds").

The *Teague* line of cases reflects recognition of important "interests of comity and finality." *Teague*, *supra*, at 308 (plurality opinion). One purpose of federal collateral review of judgments rendered by state courts in criminal cases is to create an incentive for state courts to "'"conduct their proceedings in a manner consistent with established constitutional standards," '" *Butler*, *supra*, at 413 (quoting *Teague*, *supra*, at 306 (plurality opinion)), and "[t]he 'new rule' principle" recognizes that purpose by "validat[ing] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, *supra*, at 414 (citing *United States* v. *Leon*, 468 U. S. 897, 918–919 (1984)).

The crux of the analysis when *Teague* is invoked, then, is identification of the rule on which the claim for habeas relief depends. To survive *Teague*, it must be "old" enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held to be unlawful. A rule old enough for *Teague* may of course be too general, and while identifying the required age of the rule of relief is a simple matter of comparing dates, passing on its requisite specificity calls for analytical care.

The proper response to a prisoner's invocation of a rule at too high a level of generality is well illustrated by our cases. In *Butler*, *supra*, for example, the prisoner relied on the rule of *Arizona* v. *Roberson*, 486 U. S. 675 (1988), which we announced after Butler's conviction had become final. We held in *Roberson* that the Fifth Amendment forbids police interrogation about a crime after the suspect requests counsel, even if his request occurs in the course of investigating a

different, unrelated crime. *Id.*, at 682. Butler argued that he could invoke *Roberson*'s rule because it was "merely an application of *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)]," in which we held that, if a person is in custody on suspicion of a crime, the police must stop questioning him about that crime once he invokes his right to counsel, *id.*, at 484–485, "to a slightly different set of facts." 494 U. S., at 414. We rejected this argument, saying that it "would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*." *Id.*, at 415.

Likewise, in *Sawyer*, *supra*, the petitioner sought the benefit of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), which had been announced after Sawyer's conviction was final. We held in *Caldwell* that the Eighth Amendment prohibits resting "a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at 328–329. Sawyer argued that he was entitled to the benefit of *Caldwell*'s rule as having been "dictated by the principle of reliability in capital sentencing," *Sawyer*, *supra*, at 236, which, he said, had been established by cases announced before his conviction became final, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978), among them. We rejected the argument, saying that

> "the *[Teague]* test would be meaningless if applied at this level of generality. Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) ('[I]f the test of "clearly established law" were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights')." 497 U. S., at 236 (internal quotation brackets in original).

Although the principle that Sawyer invoked certainly "lent general support to the conclusion reached in *Caldwell*," *ibid.*, we said that "'it does not follow that [*Eddings* and *Lockett*] compel the rule that [petitioner] seeks,'" *ibid.* (second set of brackets in original) (quoting *Saffle*, *supra*, at 491).

In sum, our cases have recognized that "[t]he interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Stringer* v. *Black*, 503 U. S. 222, 228 (1992). This does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own. But it does mean that, in light of authority extant when his conviction became final, its unlawfulness must be apparent. Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

II

In this case, the Court of Appeals overruled the Commonwealth's *Teague* objection by saying that West merely claimed that the evidence had been insufficient to support his conviction, so that the result he sought was dictated by *Jackson* v. *Virginia*, 443 U. S. 307 (1979), a case announced before petitioner's conviction became final for *Teague* purposes in 1980. 931 F. 2d 262, 265–267 (CA4 1991). Having thus surmounted *Teague*'s time hurdle, the court went on to say that "the evidence here consisted entirely of . . . the . . . facts . . . that about one-third in value of goods stolen between December 13 and December 26, 1978, were found on January 10, 1979, in the exclusive possession of . . . West, coupled with [West's] own testimony explaining his possession as having come about by purchases in the interval." 931 F. 2d, at 268. Applied in this context, the court held, the unadorned *Jackson* norm translated into the more specific rule announced in *Cosby* v. *Jones*, 682 F. 2d 1373 (CA11

1982), which held that the evidence of unexplained or unconvincingly explained possession of recently stolen goods was not, without more, sufficient to prove theft, but must be weighed more exactly after asking five questions: (1) Was "the possession . . . recent, relative to the crime"? (2) Was a large majority of the stolen items found in the defendant's possession? (3) Did the defendant attempt to conceal the stolen items? (4) Was the defendant's explanation, "even if discredited by the jury, . . . 'so implausible or demonstrably false as to give rise to positive evidence in favor of the government' "? and (5) Was there corroborating evidence supporting the conviction? 931 F. 2d, at 268 (quoting *Cosby*, *supra*, at 1383, n. 19).

Applying *Cosby* to the facts of this case, the Court of Appeals found that all five factors were either neutral or advantageous to West: (1) Two to four weeks elapsed between the theft and the possession described in testimony,[2] a time period consistent with West's explanation that he had bought the goods in the interval; (2) measured by value, a mere third of Cardova's belongings surfaced in West's possession; (3) the stolen items were found in plain view in West's home; (4) while "there was no third person testimony corroborating [West's] explanation and on cross-examination West exhibited confusion about the exact circumstances of some of the purchases[,] . . . he maintained his general explanation that he had purchased all the items at flea markets, and there was nothing inherently implausible about this explanation"; and, finally, (5) there was no evidence corroborating theft by West. 931 F. 2d, at 269–270. The Court of Appeals concluded that "the evidence here, assessed in its entirety and in the light most favorable to the prosecution, was not sufficient to persuade any rational trier of fact of [West's] guilt . . . ." *Id.*, at 270.

[2] The Court of Appeals overlooked that West testified that he came into possession of Cardova's goods around January 1. See App. 25–27. Thus, a more accurate estimate of the time lapse would be one to three weeks.

It is clear that the Court of Appeals misapplied the commands of *Teague* by defining the rule from which West sought to benefit at an unduly elevated level of generality. There can, of course, be no doubt that, in reviewing West's conviction, the Supreme Court of Virginia was not entitled to disregard *Jackson*, which antedated the finality of West's conviction. But from *Jackson*'s rule, that sufficiency depends on whether a rational trier, viewing the evidence most favorably to the prosecution, could find all elements beyond a reasonable doubt, it does not follow that the insufficiency of the evidence to support West's conviction was apparent. Virginia courts have long recognized a rule that evidence of unexplained or falsely explained possession of recently stolen goods is sufficient to sustain a finding that the possessor took the goods. See, *e. g.*, *Montgomery* v. *Commonwealth*, 221 Va. 188, 190, 269 S. E. 2d 352, 353 (1980); *Henderson* v. *Commonwealth*, 215 Va. 811, 812–813, 213 S. E. 2d 782, 783–784 (1975); *Bazemore* v. *Commonwealth*, 210 Va. 351, 352, 170 S. E. 2d 774, 776 (1969); *Bright* v. *Commonwealth*, 4 Va. App. 248, 251, 356 S. E. 2d 443, 444 (1987). In this case, we are concerned only with the Virginia rule's second prong. West took the stand and gave an explanation that the jury rejected, thereby implying a finding that the explanation was false.[3] Thus, the portion of the state rule under attack here is that falsely explained recent possession suffices to identify the possessor as the thief. The rule has the virtue of much common sense. It is utterly reasonable to conclude that a possessor of recently stolen goods who lies about where he got them is the thief who took them, and it should come as no surprise that the rule had been accepted as good law against the backdrop of a general state sufficiency standard no less stringent than that of *Jackson*. See, *e. g.*, *Bishop* v. *Commonwealth*, 227 Va. 164, 169, 313 S. E. 2d 390, 393 (1984);

[3] The jury's finding must of course be accepted under the *Jackson* v. *Virginia*, 443 U. S. 307 (1979), requirement to judge sufficiency by viewing the evidence "in the light most favorable to the prosecution." *Id.*, at 319.

Inge v. *Commonwealth*, 217 Va. 360, 366, 228 S. E. 2d 563, 568 (1976). It is simply insupportable, then, to say that reasonable jurists could not have considered this rule compatible with the *Jackson* standard. There can be no doubt, therefore, that in the federal courts West sought the benefit of a "new rule," and that his claim was barred by *Teague*.

On this ground, I respectfully concur in the judgment of the Court.

Syllabus

UNITED STATES *v.* SALERNO ET AL.

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

No. 91–872. Argued April 20, 1992—Decided June 19, 1992

The respondents were indicted on a variety of federal charges, including fraud and racketeering in connection with the allocation of construction contracts among a so-called "Club" of companies in exchange for a share of the proceeds. Witnesses DeMatteis and Bruno, owners of the Cedar Park Construction Corporation, testified before the grand jury under a grant of immunity that neither they nor Cedar Park had participated in the Club. At trial, however, the United States used other evidence to show that Cedar Park was a Club member. The respondents subpoenaed DeMatteis and Bruno, but they invoked their Fifth Amendment privilege against self-incrimination and refused to testify. The District Court denied the respondents' request to admit the transcripts of DeMatteis' and Bruno's grand jury testimony pursuant to Federal Rule of Evidence 804(b)(1)—which permits admission of an unavailable declarant's testimony from a former hearing if the party against whom it is now offered had a "similar motive to develop the testimony by direct, cross, or redirect examination"—reasoning that a prosecutor's motive in questioning a witness before the grand jury is different from his motive in conducting the trial. The respondents were convicted, but the Court of Appeals reversed, holding that the District Court had erred in excluding the grand jury testimony. It ruled that, to maintain "adversarial fairness," Rule 804(b)(1)'s similar motive element should evaporate when the Government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial.

Held:

1. Former testimony may not be introduced under Rule 804(b)(1) without a showing of "similar motive." Nothing in Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. The respondents err in arguing that the Rule contains an implicit limitation permitting the "similar motive" requirement to be waived in the interest of adversarial fairness. Also rejected is the respondents' argument that the United States forfeited its right to object to the testimony's admission when it introduced contradictory evidence about Cedar Park. Here, the United States never revealed what DeMatteis and Bruno said to the grand jury, but, rather, attempted to show Cedar Park's involvement using other evidence. In

addition, the respondents mistakenly argue that adversarial fairness prohibits the suppression of exculpatory evidence produced in grand jury proceedings. *Dennis* v. *United States*, 384 U. S. 855, distinguished. Pp. 320–324.

2. This case is remanded for consideration of whether the United States had a "similar motive." Since the Court of Appeals erroneously concluded that the respondents did not have to demonstrate such a motive, it did not consider fully the parties' arguments on this issue. Pp. 324–325.

937 F. 2d 797 and 952 F. 2d 623, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 325. STEVENS, J., filed a dissenting opinion, *post*, p. 326.

James A. Feldman argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson.*

Michael E. Tigar argued the cause for respondents. With him on the brief was *Gustave H. Newman.**

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Evidence 804(b)(1) states an exception to the hearsay rule that allows a court, in certain instances, to admit the former testimony of an unavailable witness. We must decide in this case whether the Rule permits a criminal defendant to introduce the grand jury testimony of a witness who asserts the Fifth Amendment privilege at trial.

I

The seven respondents, Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore, allegedly took part in the activities of a criminal organization known as the

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**Jed S. Rakoff* filed a brief for the New York Council of Defense Lawyers as *amicus curiae* urging affirmance.

Genovese Family of La Cosa Nostra (Family) in New York City. In 1987, a federal grand jury in the Southern District of New York indicted the respondents and four others on the basis of these activities. The indictment charged the respondents with a variety of federal offenses, including 41 acts constituting a "pattern of illegal activity" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1962(b).

Sixteen of the alleged acts involved fraud in the New York construction industry in the 1980's. According to the indictment and evidence later admitted at trial, the Family used its influence over labor unions and its control over the supply of concrete to rig bidding on large construction projects in Manhattan. The Family purportedly allocated contracts for these projects among a so-called "Club" of six concrete companies in exchange for a share of the proceeds.

Much of the case concerned the affairs of the Cedar Park Concrete Construction Corporation (Cedar Park). Two of the owners of this firm, Frederick DeMatteis and Pasquale Bruno, testified before the grand jury under a grant of immunity. In response to questions by the United States, they repeatedly stated that neither they nor Cedar Park had participated in the Club. At trial, however, the United States attempted to show that Cedar Park, in fact, had belonged to the Club by calling two contractors who had taken part in the scheme and by presenting intercepted conversations among the respondents. The United States also introduced documents indicating that the Family had an ownership interest in Cedar Park.

To counter the United States' evidence, the respondents subpoenaed DeMatteis and Bruno as witnesses in the hope that they would provide the same exculpatory testimony that they had presented to the grand jury. When both witnesses invoked their Fifth Amendment privilege against self-incrimination and refused to testify, the respondents asked the District Court to admit the transcripts of their

grand jury testimony. Although this testimony constituted hearsay, see Rule 801(c), the respondents argued that it fell within the hearsay exception in Rule 804(b)(1) for former testimony of unavailable witnesses.

The District Court refused to admit the grand jury testimony. It observed that Rule 804(b)(1) permits admission of former testimony against a party at trial only when that party had a "similar motive to develop the testimony by direct, cross, or redirect examination." The District Court held that the United States did not have this motive, stating that the "motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." App. to Pet. for Cert. 51a. A jury subsequently convicted the respondents of the RICO counts and other federal offenses.

The United States Court of Appeals for the Second Circuit reversed, holding that the District Court had erred in excluding DeMatteis' and Bruno's grand jury testimony. 937 F. 2d 797 (1991). Although the Court of Appeals recognized that "the government may have had no motive . . . to impeach . . . Bruno or DeMatteis" before the grand jury, it concluded that "the government's motive in examining the witnesses . . . was irrelevant." *Id.*, at 806. The Court of Appeals decided that, in order to maintain "adversarial fairness," Rule 804(b)(1)'s similar motive element should "evaporat[e]" when the Government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial. *Ibid.* We granted certiorari, 502 U. S. 1056 (1992), and now reverse and remand.

II

The hearsay rule prohibits admission of certain statements made by a declarant other than while testifying at trial. See Rules 801(c) (hearsay definition), 802 (hearsay rule). The parties acknowledge that the hearsay rule, standing by itself,

would have blocked introduction at trial of DeMatteis' and Bruno's grand jury testimony. Rule 804(b)(1), however, establishes an exception to the hearsay rule for former testimony. This exception provides:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> "(1) Former Testimony.—Testimony given as a witness at another hearing . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

We must decide whether the Court of Appeals properly interpreted Rule 804(b)(1) in this case.

The parties agree that DeMatteis and Bruno were "unavailable" to the defense as witnesses, provided that they properly invoked the Fifth Amendment privilege and refused to testify. See Rule 804(a)(1). They also agree that DeMatteis' and Bruno's grand jury testimony constituted "testimony given as . . . witness[es] at another hearing." They disagree, however, about whether the "similar motive" requirement in the final clause of Rule 804(b)(1) should have prevented admission of the testimony in this case.

A

Nothing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. The United States thus asserts that, unless it had a "similar motive," we must conclude that the District Court properly excluded DeMatteis' and Bruno's testimony as hearsay. The respondents, in contrast, urge us not to read Rule 804(b)(1) in a "slavishly literal fashion." Brief for Respondents 31. They contend that "adversarial fairness" prevents the United States from relying on the similar motive requirement in this case. We agree with the United States.

When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. The respondents, as a result, had no right to introduce DeMatteis' and Bruno's former testimony under Rule 804(b)(1) without showing a "similar motive." This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases. See *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 524 (1989).

The respondents' argument for a different result takes several forms. They first assert that adversarial fairness requires us to infer that Rule 804(b)(1) contains implicit limitations. They observe, for example, that the Advisory Committee Note to Rule 804 makes clear that the former testimony exception applies only to statements made under oath or affirmation, even though the Rule does not state this restriction explicitly. See Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 788, subd. (b), except. (1). The respondents maintain that we likewise may hold that Rule 804(b)(1) does not require a showing of similar motive in all instances.

The respondents' example does not persuade us to change our reading of Rule 804(b)(1). If the Rule applies only to sworn statements, it does so not because adversarial fairness implies a limitation, but simply because the word "testimony" refers only to statements made under oath or affirmation. See Black's Law Dictionary 1476 (6th ed. 1990). We see no way to interpret the text of Rule 804(b)(1) to mean that defendants sometimes do not have to show "similar motive."

The respondents also assert that courts often depart from the Rules of Evidence to prevent litigants from presenting only part of the truth. For example, citing *United States* v.

Miller, 600 F. 2d 498 (CA5 1979), the respondents maintain that, although parties may enjoy various testimonial privileges, they can forfeit these privileges by "opening the door" to certain subjects. In the respondents' view, the United States is attempting to use the hearsay rule like a privilege to keep DeMatteis' and Bruno's grand jury testimony away from the jury. They contend, however, that adversarial fairness requires us to conclude that the United States forfeited its right to object to admission of the testimony when it introduced contradictory evidence about Cedar Park.

This argument also fails. Even assuming that we should treat the hearsay rule like the rules governing testimonial privileges, we would not conclude that a forfeiture occurred here. Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict. See 8 J. Wigmore, Evidence § 2327, p. 636 (McNaughton rev. 1961); M. Larkin, Federal Testimonial Privileges § 2.06, pp. 2–103, 2–104, 2–120 (1991). In *Miller*, for example, the court held that a litigant, "after giving the jury his version of a privileged communication, [could not] prevent the cross-examiner from utilizing *the communication itself* to get at the truth." 600 F. 2d, at 501 (emphasis added). In this case, by contrast, the United States never presented to the jury any version of what DeMatteis and Bruno had said in the grand jury proceedings. Instead, it attempted to show Cedar Park's participation in the Club solely through other evidence available to the respondents. The United States never exposed the jury to anything analogous to a "privileged communication." The respondents' argument, accordingly, fails on its own terms.

The respondents finally argue that adversarial fairness may prohibit suppression of exculpatory evidence produced in grand jury proceedings. They note that, when this Court required disclosure of a grand jury transcript in *Dennis* v. *United States*, 384 U. S. 855 (1966), it stated that "it is rarely justifiable for the prosecution to have exclusive access" to

relevant facts. *Id.*, at 873. They allege that the United States nevertheless uses the following tactics to develop evidence in a one-sided manner: If a witness inculpates a defendant during the grand jury proceedings, the United States immunizes him and calls him at trial; however, if the witness exculpates the defendant, as Bruno and DeMatteis each did here, the United States refuses to immunize him and attempts to exclude the testimony as hearsay.* The respondents assert that dispensing with the "similar motive" requirement would limit these tactics.

We again fail to see how we may create an exception to Rule 804(b)(1). The *Dennis* case, unlike this one, did not involve a question about the admissibility of evidence. Rather, it concerned only the need to disclose a transcript to the defendants. See 384 U. S., at 873. Moreover, in *Dennis*, we did not hold that adversarial fairness required the United States to make the grand jury transcript available. Instead, we ordered disclosure under the specific language of Federal Rule of Criminal Procedure 6(e). See 384 U. S., at 869–870, 872. In this case, the language of Rule 804(b)(1) does not support the respondents. Indeed, the respondents specifically ask us to ignore it. Neither *Dennis* nor anything else that the respondents have cited provides us with this authority.

B

The question remains whether the United States had a "similar motive" in this case. The United States asserts that the District Court specifically found that it did not and that we should not review its factual determinations. It also argues that a prosecutor generally will not have the same motive to develop testimony in grand jury proceedings as he does at trial. A prosecutor, it explains, must maintain

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*The respondents also suggest that, in the event that a witness chooses to testify at trial without immunity, the United States can impeach him with his grand jury testimony. See Fed. Rules Evid. 607, 801(d)(1)(A).

secrecy during the investigatory stages of the criminal process and therefore may not desire to confront grand jury witnesses with contradictory evidence. It further states that a prosecutor may not know, prior to indictment, which issues will have importance at trial and accordingly may fail to develop grand jury testimony effectively.

The respondents disagree with both of the United States' arguments. They characterize the District Court's ruling as one of law, rather than fact, because the District Court essentially ruled that a prosecutor's motives at trial always differ from his motives in grand jury proceedings. The respondents contend further that the grand jury transcripts in this case actually show that the United States thoroughly attempted to impeach DeMatteis and Bruno. They add that, despite the United States' stated concern about maintaining secrecy, the United States revealed to DeMatteis and Bruno the identity of the major witnesses who testified against them at trial.

The Court of Appeals, as noted, erroneously concluded that the respondents did not have to demonstrate a similar motive in this case to make use of Rule 804(b)(1). It therefore declined to consider fully the arguments now presented by the parties about whether the United States had such a motive. Rather than to address this issue here in the first instance, we think it prudent to remand the case for further consideration. Cf. *Denton* v. *Hernandez*, 504 U. S. 25, 32–35 (1992).

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion with the understanding that it does not pass upon the weighty concerns, expressed by JUSTICE STEVENS, underlying the interpretation of Federal Rule of Evidence 804(b)(1)'s similar-motive requirement. The District Court appeared to hold *as a matter of law* that "the motive of a prosecutor in questioning a witness before

the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." App. to Pet. for Cert. 51a. Because "similar motive" does not mean "identical motive," the similar-motive inquiry, in my view, is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury questioning. It cannot be that the prosecution either *always* or *never* has a similar motive for questioning a particular witness with respect to a particular issue before the grand jury as at trial. Moreover, like other inquiries involving the admission of evidence, the similar-motive inquiry appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial—not broad policy concerns favoring either the Government in the conduct of grand jury proceedings or the defendant in overcoming the refusal of other witnesses to testify. Because this case involves factual issues unusual in complexity and in number and because neither the District Court nor the Court of Appeals apparently engaged in the type of factual inquiry appropriate for resolution of the similar-motive inquiry, I join the majority in remanding the case for further consideration.

JUSTICE STEVENS, dissenting.

Because I believe that the Government clearly had an "opportunity and similar motive" to develop by direct or cross-examination the grand jury testimony of Pasquale Bruno and Frederick DeMatteis, I would affirm the judgment of the Court of Appeals on the ground that the transcript of their grand jury testimony was admissible under the plain language of Federal Rule of Evidence 804(b)(1). As the Court explains, *ante*, at 319, the grand jury testimony of Bruno and DeMatteis was totally inconsistent with the Government's theory of the alleged RICO conspiracy to rig bids on large construction projects in Manhattan. Bruno and DeMatteis were principals in Cedar Park Construction Corporation

(Cedar Park), which, according to the Government, was a member of the so-called "Club" of concrete companies that submitted rigged bids on construction projects in accordance with the orders of the Genovese Family of La Cosa Nostra. But notwithstanding the fact that they had been given grants of immunity, Bruno and DeMatteis repeatedly testified before the grand jury that they had not participated in either the Club or the alleged bid-rigging conspiracy. As the Court of Appeals explained, Cedar Park was "one of the largest contractors in the metropolitan New York City concrete industry," and it is arguable that without Cedar Park's participation, "there could be no 'club' of concrete contractors." 937 F. 2d 797, 808 (CA2 1991). And without the "Club," the allegations of fraud in the construction industry—which "formed the core of the RICO charges"—"simply dissolv[e]." *Ibid.*

It is therefore clear that before the grand jury the Government had precisely the same interest in establishing that Bruno's and DeMatteis' testimony was false as it had at trial. Thus, when the prosecutors doubted Bruno's and DeMatteis' veracity before the grand jury—as they most assuredly did—they unquestionably had an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" within the meaning of Rule 804(b)(1).[1]

The Government disagrees, asserting that it "typically does not have the same motive to cross-examine hostile witnesses in the grand jury that it has to cross-examine them at trial." Brief for United States 11. This is so, the Gov-

[1] Rule 804(b)(1) provides:

"Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

"(1) Former Testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

ernment maintains, because (1) cross-examining the witness might indirectly undermine the secrecy of the grand jury proceedings,[2] (2) the Government might decide to discredit the witness through means other than cross-examination, and (3) the issues before the grand jury are typically quite different from those at trial. See *id.*, at 11–14; Reply Brief for United States 9–12. In my view, the first two reasons—even assuming that they are true—do not justify holding that the Government lacks a "similar motive" in the two proceedings. And although the third reason could justify the conclusion that the Government's motives are not "similar," it is not present on the facts of this case.

Even if one does not completely agree with Wigmore's assertion that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth,"[3] one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.[4] For that reason, a party has a motive to

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[2] "If the government exposes the extent of its knowledge to an individual who, by his willingness to commit perjury, has shown himself to be allied with the investigation's targets, the effect may be to provide information to the targets that can be used to threaten witnesses, destroy evidence, fabricate a defense, or otherwise obstruct the investigation." Brief for United States 12.

[3] 5 J. Wigmore, Evidence § 1367, p. 32 (J. Chadbourn rev. 1974).

[4] Indeed, the lack of an opportunity to cross-examine the absent declarant has been the principal justification for the Anglo-American tradition of excluding hearsay statements. See, *e. g.*, E. Cleary, McCormick on Evidence § 245, p. 728 (3d ed. 1984); 5 Wigmore, § 1367, at 32. This concern is diminished, however, when the party against whom the hearsay statement is offered had an opportunity to cross-examine the absent declarant at the time the statement was made. Accordingly, the common law developed an exception to the hearsay rule that permitted the introduction of prior testimony if the opponent had an adequate opportunity to cross-examine the declarant. See, *e. g.*, *id.*, § 1386, at 90. Rule 804(b)(1) codified, with a few changes, that common-law rule. See Advisory Committee's Notes on Fed. Rule Evid. 804(b)(1), 28 U. S. C. App., pp. 788–789.

cross-examine any witness who, in her estimation, is giving false or inaccurate testimony about a fact that is material to the legal question at issue in the proceeding.

Of course, the party might decide—for tactical reasons or otherwise—not to engage in a rigorous cross-examination, or even in any cross-examination at all.[5] In such a case, however, I do not believe that it is accurate to say that the party lacked a similar motive to cross-examine the witness; instead, it is more accurate to say that the party had a similar motive to cross-examine the witness (*i. e.*, to undermine the false or misleading testimony) but chose not to act on that motive. Although the Rules of Evidence allow a party to make that choice about whether to engage in cross-examination, they also provide that she must accept the consequences of that decision—including the possibility that the testimony might be introduced against her in a subsequent proceeding.[6]

Thus neither the fact that the prosecutors might decline to cross-examine a grand jury witness whom they fear will talk to the target of the investigation nor the fact that they

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[5] For example, the party might not want to run the risk of appearing to harass or upset a vulnerable witness—such as a young child or the victim of a terrible crime—with rigorous cross-examination if there are other, less confrontational means of undermining the suspect testimony.

[6] As the Advisory Committee explained, the question whether prior testimony should be admitted is, in essence, the question "whether fairness allows imposing, upon the party against whom now offered, the handling of a witness on the earlier occasion." *Id.*, at 788. When, as in this case, the testimony is offered against the party by whom it was previously offered, the party obviously did not have an opportunity to develop the testimony through *cross*-examination. But, the Advisory Committee recognized, the opportunity to engage in "direct and redirect examination of one's own witness [is] the equivalent of cross-examining an opponent's witness." *Id.*, at 789. In either case, as long as the party had a similar motive to develop the testimony in the prior proceeding, there is no unfairness in requiring the party against whom the testimony is now offered to accept her prior decision to develop or not develop the testimony fully. *Ibid.*

might choose to undermine the witness' credibility other than through rigorous cross-examination alters the fact that they had an opportunity and similar motive to challenge the allegedly false testimony through questioning before the grand jury. Although those might be reasons for declining to take advantage of the opportunity to cross-examine a witness, neither undermines the principal motive for engaging in cross-examination, *i. e.*, to shake the witness' allegedly false or misleading testimony. Indeed, other courts have found the "opportunity and similar motive" requirement of Rule 804(b)(1) satisfied—and hence the prior testimony admissible in a subsequent trial—in many similar situations.[7]

That leaves the Government's third reason, its contention that it lacks a similar motive to question grand jury wit-

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[7] See, *e. g.*, *United States* v. *Miller*, 284 U. S. App. D. C. 245, 258, 904 F. 2d 65, 68 (1990) (prior grand jury testimony admissible against the Government because "as several circuits have recognized, the government had the same motive and opportunity to question [the witness] when it brought him before the grand jury as it does at trial. . . . Before the grand jury and at trial, [the witness'] testimony was to be directed to the same issue—the guilt or innocence of [the defendants]"); *United States* v. *Pizarro*, 717 F. 2d 336, 349–350 (CA7 1983) (initial trial testimony of one defendant which exculpated the second defendant was admissible during the retrial of the second defendant even though the Government may have declined to cross-examine the first defendant about an issue for fear that it would have resulted in a severance of the trials of the two defendants); *United States* v. *Poland*, 659 F. 2d 884, 895–896 (CA9) (identification testimony of witness at suppression hearing admissible in subsequent trial because defendant would have a similar motive at both proceedings to show that the identification was unreliable), cert. denied, 454 U. S. 1059 (1981); *Glenn* v. *Dallman*, 635 F. 2d 1183, 1186–1187 (CA6 1980) (identification testimony of eyewitness at preliminary hearing admissible against defendant at trial even though defendant declined to cross-examine the witness fully), cert. denied, 454 U. S. 843 (1981); *United States* v. *Zurosky*, 614 F. 2d 779, 791–793 (CA1 1979) (suppression hearing testimony of codefendant which inculpated defendant admissible against defendant at trial even though defendant declined to cross-examine codefendant at the hearing), cert. denied, 446 U. S. 967 (1980).

nesses because the issues before the grand jury may not be the same issues that are important at trial. If that were true in a particular case, I would agree that the Government lacked a similar motive for developing the witness' grand jury testimony. Because the scope of questioning is necessarily limited by the scope of the legal and factual issues in a given proceeding, a party has little motive, and indeed may not be permitted, to ask questions about other issues. Thus if those other issues become important in a subsequent proceeding, the testimony from the prior proceeding may properly be excluded on the ground that the party against whom it is offered lacked a similar motive for developing the testimony at the prior proceeding.[8]

That did not occur in this case, however. After reviewing the sealed transcripts of Bruno's and DeMatteis' grand jury testimony, the Court of Appeals concluded that "[v]ery generally stated, their grand jury testimony denied any awareness of, let alone participation in," the "Club" of concrete contractors, the existence of which was crucial to the RICO counts dealing with fraud in the construction industry. 937

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[8] As Wigmore explained, the common law required identity of issues as a means of ensuring that the cross-examination in the two proceedings would have been directed at the same material points. 5 Wigmore, § 1386, at 90. Rule 804(b)(1) slightly modified the prior testimony exception to the hearsay rule by substituting the "opportunity and similar motive" requirement for the identity-of-issues requirement. The drafters of the Rule reasoned that "[s]ince identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable." Advisory Committee's Notes on Rule 804(b)(1), at 789. Nevertheless, for the reasons discussed in the text, "[i]n determining whether a similar motive to develop the testimony existed at the time of the elicitation of the former testimony the courts will search for some substantial identity of issues." 11 J. Moore & H. Bendix, Moore's Federal Practice § 804.04[3], p. VIII–266 (2d ed. 1989).

F. 2d, at 808.[9] Moreover, the transcripts reveal that the prosecutors did challenge some of the witnesses' denials of knowledge of criminal activity by questioning which included probing the basis of their statements and confronting them with contrary statements from other people.

I am therefore satisfied that the Government had an "opportunity and similar motive" to develop the grand jury testimony of witnesses Bruno and DeMatteis; consequently, the transcript of that testimony was admissible against the Government at respondents' trial under Rule 804(b)(1). For that reason, I would affirm the judgment of the Court of Appeals.

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[9] "Indeed," the Court of Appeals explained, "the central importance of the 'club's' existence is probably why the government felt obligated to identify Bruno and DeMatteis as sources of exculpatory testimony under *Brady* v. *Maryland*[, 373 U. S. 83 (1963)]." 937 F. 2d, at 808.

Syllabus

SAWYER *v.* WHITLEY, WARDEN

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

No. 91–6382. Argued February 25, 1992—Decided June 22, 1992

A Louisiana jury convicted petitioner Sawyer and sentenced him to death for a murder in which the victim was beaten, scalded with boiling water, and set afire. His conviction and sentence were upheld on appeal, and his petitions for state postconviction relief, as well as his first petition for federal habeas relief, were denied. In a second federal habeas petition, the District Court barred as abusive or successive Sawyer's claims, *inter alia,* that the police failed to produce exculpatory evidence—evidence challenging a prosecution witness' credibility and a child witness' statements that Sawyer had tried to prevent an accomplice from setting fire to the victim—in violation of his due process rights under *Brady* v. *Maryland,* 373 U. S. 83; and that his trial counsel's failure to introduce mental health records as mitigating evidence in his trial's sentencing phase constituted ineffective assistance of counsel. The Court of Appeals affirmed, holding that Sawyer had not shown cause for failure to raise his claims in his earlier petition, and that it could not otherwise reach the claims' merits because he had not shown that he was "actually innocent" of the death penalty under Louisiana law.

Held:

1. To show "actual innocence" one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. Pp. 338–347.

(a) Generally, a habeas petitioner must show cause and prejudice before a court will reach the merits of a successive, abusive, or defaulted claim. Even if he cannot meet this standard, a court may hear the merits of such claims if failure to hear them would result in a miscarriage of justice. See, *e. g.*, *Kuhlmann* v. *Wilson,* 477 U. S. 436. The miscarriage of justice exception applies where a petitioner is "actually innocent" of the crime of which he was convicted or the penalty which was imposed. While it is not easy to define what is meant by "actually innocent" of the death penalty, the exception is very narrow and must be determined by relatively objective standards. Pp. 338–341.

(b) In order to avoid arbitrary and capricious impositions of the death sentence, States have adopted narrowing factors to limit the class of offenders upon which the death penalty may be imposed, as evidenced

by Louisiana's definition of capital murder as something more than intentional killing and its requirement that before a jury may recommend death, it must determine that at least one of a list of statutory aggravating factors exists. Once eligibility for the death penalty is established, however, the emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant by the introduction of mitigating evidence. Within this framework, the Court of Appeals applied the proper standard to determine "actual innocence" when it required Sawyer to base his showing that no reasonable juror would have found him eligible for the death penalty under Louisiana law on the elements of the crime itself and the existence of aggravating circumstances, but not the existence of additional mitigating evidence that was not introduced as a result of a claimed constitutional error. This standard hones in on the objective factors that must be shown to exist before a defendant is eligible to have the death penalty imposed. The adoption of a stricter definition, which would limit any showing to the elements of the crime, is rejected, since, by stating in *Smith* v. *Murray,* 477 U. S. 527, 537, that actual innocence could mean innocent of the death penalty, this Court suggested a more expansive meaning than simply innocence of the capital offense itself. Also rejected is a more lenient definition, which would allow the showing to extend beyond the elements of the crime and the aggravating factors, to include mitigating evidence which bears, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between that penalty and life imprisonment. Including mitigating factors would make actual innocence mean little more than what is already required to show prejudice for purposes of securing habeas relief and would broaden the inquiry beyond what is a narrow exception to the principle of finality. Pp. 341–347.

2. Sawyer has failed to show that he is actually innocent of the death penalty to which he has been sentenced. The psychological evidence allegedly kept from the jury does not relate to his guilt or innocence of the crime or to the aggravating factors found by the jury—that the murder was committed in the course of an aggravated arson, and that it was especially cruel, atrocious, or heinous—which made him eligible for the death penalty. Nor can it be said that had this evidence been before the jury a reasonable juror would not have found both of the aggravating factors. The evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show actual innocence. Latter-day impeachment evidence seldom, if ever, makes a clear and convincing showing that no reasonable juror would have believed the heart of the witness' account. While the statement that Sawyer did not set fire to the victim goes to the jury's finding of aggravated arson and, thus, to

his guilt or innocence and the first aggravating circumstance, it fails to show that no rational juror would find both of the aggravating factors. The murder was especially cruel, atrocious, and heinous quite apart from the arson, and, even crediting the hearsay statement, it cannot be said that no reasonable juror would have found that he was guilty of the arson for his participation under Louisiana law. Pp. 347–350.

945 F. 2d 812, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 350. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 360.

R. Neal Walker argued the cause for petitioner. With him on the briefs were *Nicholas J. Trenticosta* and *Sarah L. Ottinger.*

Dorothy A. Pendergast argued the cause for respondent. With her on the brief was *John M. Mamoulides.*

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Roberts*, and *Associate Deputy Attorney General McBride.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim. Robert Wayne Sawyer, the petitioner in this case, filed a second

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**Douglas G. Robinson*, *Julius L. Chambers*, *George H. Kendall*, and *Larry W. Yackle* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

Kent Scheidegger and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

federal habeas petition containing successive and abusive claims. The Court of Appeals for the Fifth Circuit refused to examine the merits of Sawyer's claims. It held that Sawyer had not shown cause for failure to raise these claims in his earlier petition, and that he had not shown that he was "actually innocent" of the crime of which he was convicted or the penalty which was imposed. 945 F. 2d 812 (1991). We affirm the Court of Appeals and hold that to show "actual innocence" one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

In 1979—13 years ago—petitioner and his accomplice, Charles Lane, brutally murdered Frances Arwood, who was a guest in the home petitioner shared with his girlfriend, Cynthia Shano, and Shano's two young children. As we recounted in our earlier review of this case, *Sawyer* v. *Smith*, 497 U. S. 227 (1990), petitioner and Lane returned to petitioner's home after a night of drinking and argued with Arwood, accusing her of drugging one of the children. Petitioner and Lane then attacked Arwood, beat her with their fists, kicked her repeatedly, submerged her in the bathtub, and poured scalding water on her before dragging her back into the living room, pouring lighter fluid on her body and igniting it. Arwood lost consciousness sometime during the attack and remained in a coma until she died of her injuries approximately two months later. Shano and her children were in the home during the attack, and Shano testified that petitioner prevented them from leaving.[1]

At trial, the jury failed to credit petitioner's "toxic psychosis" defense, and convicted petitioner of first-degree murder. At the sentencing phase, petitioner testified that he was intoxicated at the time of the murder and remembered

[1] The facts are more fully recounted in the opinion of the Louisiana Supreme Court affirming petitioner's conviction and sentence. *State* v. *Sawyer*, 422 So. 2d 95, 97–98 (1982).

only bits and pieces of the events. Petitioner's sister, Glenda White, testified about petitioner's deprived childhood, about his affection and care for her children, and that as a teenager petitioner had been confined to a mental hospital for "no reason," where he had undergone shock therapy. 2 App. 505–516. The jury found three statutory aggravating factors and no statutory mitigating factors and sentenced petitioner to death.[2]

Sawyer's conviction and sentence were affirmed on appeal by the Louisiana Supreme Court. *State* v. *Sawyer*, 422 So. 2d 95 (1982). We granted certiorari, and vacated and remanded with instructions to reconsider in light of *Zant* v. *Stephens*, 462 U. S. 862 (1983). *Sawyer* v. *Louisiana*, 463 U. S. 1223 (1983). On remand, the Louisiana Supreme Court reaffirmed the sentence. *Sawyer* v. *State*, 442 So. 2d 1136 (1983), cert. denied, 466 U. S. 931 (1984). Petitioner's first petition for state postconviction relief was denied. *Louisiana ex rel. Sawyer* v. *Maggio*, 479 So. 2d 360, reconsideration denied, 480 So. 2d 313 (La. 1985).[3] In 1986, Sawyer filed his first federal habeas petition, raising 18 claims, all of which were denied on the merits. See *Sawyer* v. *Butler*, 848 F. 2d 582 (CA5 1988), aff'd on rehearing en banc, 881 F. 2d 1273 (CA5 1989). We again granted certiorari and affirmed the Court of Appeals' denial of relief. *Sawyer* v. *Smith*, *supra*.[4]

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[2] The jury found the following statutory aggravating factors: "(1) that [Sawyer] was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that [Sawyer] had previously been convicted of an unrelated murder." *Id.*, at 100. The Louisiana Supreme Court held that the last aggravating circumstance was not supported by the evidence. *Id.*, at 101.

[3] The Louisiana Supreme Court twice remanded to the trial court for hearings on petitioner's ineffective-assistance-of-counsel claim. *Louisiana ex rel. Sawyer* v. *Maggio*, 450 So. 2d 355 (1984); *Louisiana ex rel. Sawyer* v. *Maggio*, 468 So. 2d 554 (1985).

[4] In this earlier review, we held that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), could not be applied retroactively to petitioner's case under *Teague* v. *Lane*, 489 U. S. 288 (1989).

Petitioner next filed a second motion for state postconviction relief. The state trial court summarily denied this petition as repetitive and without merit, and the Louisiana Supreme Court denied discretionary review. See 945 F. 2d, at 815.

The present petition before this Court arises out of Sawyer's second petition for federal habeas relief. After granting a stay and holding an evidentiary hearing, the District Court denied one of Sawyer's claims on the merits and held that the others were barred as either abusive or successive. 772 F. Supp. 297 (ED La. 1991). The Court of Appeals granted a certificate of probable cause on the issue whether petitioner had shown that he is actually "innocent of the death penalty" such that a court should reach the merits of the claims contained in this successive petition. 945 F. 2d, at 814. The Court of Appeals held that petitioner had failed to show that he was actually innocent of the death penalty because the evidence he argued had been unconstitutionally kept from the jury failed to show that Sawyer was ineligible for the death penalty under Louisiana law. For the third time we granted Sawyer's petition for certiorari, 502 U. S. 965 (1991), and we now affirm.

Unless a habeas petitioner shows cause and prejudice, see *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), a court may not reach the merits of: (a) *successive claims* that raise grounds identical to grounds heard and decided on the merits in a previous petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986); (b) new claims, not previously raised, which constitute an *abuse of the writ*, *McCleskey* v. *Zant*, 499 U. S. 467 (1991); or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims, *Murray* v. *Carrier*, 477 U. S. 478 (1986). These cases are premised on our concerns for the finality of state judgments of conviction and the "significant costs of federal habeas review." *McCleskey*, *supra*, at 490–491; see, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 126–128 (1982).

We have previously held that even if a state prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." In a trio of 1986 decisions, we elaborated on the miscarriage of justice, or "actual innocence," exception. As we explained in *Kuhlmann* v. *Wilson*, *supra*, the exception developed from the language of the federal habeas statute, which, prior to 1966, allowed successive claims to be denied without a hearing if the judge were "satisfied that the *ends of justice will not be served by such inquiry.*" *Id.*, at 448. We held that despite the removal of this statutory language from 28 U. S. C. § 2244(b) in 1966, the miscarriage of justice exception would allow successive claims to be heard if the petitioner "establish[es] that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann*, *supra*, at 454.[5] In the second of these cases we held that the actual innocence exception also applies to procedurally defaulted claims. *Murray* v. *Carrier*, *supra*.[6]

In *Smith* v. *Murray*, 477 U. S. 527 (1986), we found no miscarriage of justice in the failure to examine the merits of procedurally defaulted claims in the capital sentencing context. We emphasized that the miscarriage of justice exception is concerned with actual as compared to legal innocence,

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[5] Our standard for determining actual innocence was articulated in *Kuhlmann* as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'" 477 U. S., at 455, n. 17, quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

[6] We stated that the merits of a defaulted claim could be reached "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . ." *Murray* v. *Carrier*, 477 U. S., at 496.

and acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Id.*, at 537. We decided that the habeas petitioner in that case had failed to show actual innocence of the death penalty because the "alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.*, at 538.

In subsequent cases, we have emphasized the narrow scope of the fundamental miscarriage of justice exception. In *Dugger* v. *Adams*, 489 U. S. 401 (1989), we rejected the petitioner's claim that his procedural default should be excused because he had shown that he was actually innocent. Without endeavoring to define what it meant to be actually innocent of the death penalty, we stated that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." *Id.*, at 412, n. 6. Just last Term in *McCleskey* v. *Zant*, *supra*, at 502, we held that the "narrow exception" for miscarriage of justice was of no avail to the petitioner because the constitutional violation, if it occurred, "resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination."

The present case requires us to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident

that the law has made a mistake. In the context of a noncapital case, the concept of "actual innocence" is easy to grasp.

It is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death. The phrase "innocent of death" is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a noncapital defendant. In defining this analog, we bear in mind that the exception for "actual innocence" is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. In the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the "actual innocence" exception if such a claim is made.[7]

Since our decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972), our Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence. See, *e. g., Gregg* v. *Georgia,* 428 U. S. 153 (1976); *Proffitt* v. *Florida,* 428 U. S. 242 (1976); *Jurek* v. *Texas,* 428 U. S. 262 (1976). In response, the States have adopted various narrowing factors that limit the

[7] While we recognize this as a fact on the basis of our own experience with applications for stays of execution in capital cases, we regard it as a regrettable fact. We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.,* 503 U. S. 653 (1992) *(per curiam).*

class of offenders upon which the sentencer is authorized to impose the death penalty. For example, the Louisiana statute under which petitioner was convicted defines first-degree murder, a capital offense, as something more than intentional killing.[8] In addition, after a defendant is found guilty in Louisiana of capital murder, the jury must also find at the sentencing phase beyond a reasonable doubt at least one of a list of statutory aggravating factors before it may recommend that the death penalty be imposed.[9]

But once eligibility for the death penalty has been established to the satisfaction of the jury, its deliberations assume a different tenor. In a series of cases beginning with *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), we have held that the

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[8] Louisiana Rev. Stat. Ann. § 14:30 (West 1986 and Supp. 1992) defines first-degree murder:

"First degree murder is the killing of a human being:

"(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, first degree robbery or simple robbery;

"(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

"(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

"(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

. . . . .

"Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

[9] At the time of petitioner's trial La. Code Crim. Proc. Ann., Art. 905.3 (West 1984), provided: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed."

defendant must be permitted to introduce a wide variety of mitigating evidence pertaining to his character and background. The emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant. Consideration of aggravating factors together with mitigating factors, in various combinations and methods dependent upon state law, results in the jury's or judge's ultimate decision as to what penalty shall be imposed.

Considering Louisiana law as an example, then, there are three possible ways in which "actual innocence" might be defined. The strictest definition would be to limit any showing to the elements of the crime which the State has made a capital offense. The showing would have to negate an essential element of that offense. The Solicitor General, filing as *amicus curiae* in support of respondent, urges the Court to adopt this standard. We reject this submission as too narrow, because it is contrary to the statement in *Smith* that the concept of "actual innocence" could be applied to mean "innocent" of the death penalty. 477 U. S., at 537. This statement suggested a more expansive meaning to the term of "actual innocence" in a capital case than simply innocence of the capital offense itself.

The most lenient of the three possibilities would be to allow the showing of "actual innocence" to extend not only to the elements of the crime, but also to the existence of aggravating factors, and to mitigating evidence that bore not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment. This, in effect, is what petitioner urges upon us. He contends that actual innocence of the death penalty exists where "there is a 'fair probability' that the admission of false evidence, or the preclusion of true mitigating evidence, [caused by a constitutional error] resulted in a sentence of death." Brief for Petitioner 18 (cita-

tion and footnote omitted).[10] Although petitioner describes his standard as narrower than that adopted by the Eighth and Ninth Circuits,[11] in reality it is only more closely related to the facts of his case in which he alleges that constitutional error kept true mitigating evidence from the jury. The crucial consideration, according to petitioner, is whether due to constitutional error the sentencer was presented with "'a *factually inaccurate sentencing profile*'" of the petitioner. Brief for Petitioner 15, n. 21, quoting *Johnson* v. *Singletary*, 938 F. 2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J., dissenting).

Insofar as petitioner's standard would include not merely the elements of the crime itself, but the existence of aggravating circumstances, it broadens the extent of the inquiry but not the type of inquiry. Both the elements of the crime and statutory aggravating circumstances in Louisiana are

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[10] Petitioner's standard derives from language in *Smith* v. *Murray*, 477 U. S. 527 (1986). Petitioner maintains that *Smith* holds that if one can show that the error precludes the development of true mitigating evidence, actual innocence has been shown. Brief for Petitioner 21. By emphasizing that in *Smith* the fundamental miscarriage of justice exception had not been met because, *inter alia*, the constitutional error did not lead the jury to consider any false evidence, we did not hold its converse, that an error which leads to the consideration of "false" mitigating evidence amounts to a miscarriage of justice.

[11] In *Deutscher* v. *Whitley*, 946 F. 2d 1443 (1991), the Ninth Circuit phrased its test as follows: "To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination. This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for constitutional error, the sentence of death would not have been imposed." *Id.*, at 1446 (citations omitted).

The Eighth Circuit has adopted a similar test: "'In the penalty-phase context, this exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" *Stokes* v. *Armontrout*, 893 F. 2d 152, 156 (1989), quoting *Smith* v. *Armontrout*, 888 F. 2d 530, 545 (1989).

used to narrow the class of defendants eligible for the death penalty. And proof or disproof of aggravating circumstances, like proof of the elements of the crime, is confined by the statutory definitions to a relatively obvious class of relevant evidence. Sensible meaning is given to the term "innocent of the death penalty" by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.[12]

But we reject petitioner's submission that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that "actual innocence" amounts to little more than what is already required to show "prejudice," a necessary showing for habeas relief for many constitutional errors. See, *e. g.*, *United States* v. *Bagley*, 473 U. S. 667, 682 (1985); *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.[13]

But, more importantly, petitioner's standard would so broaden the inquiry as to make it anything but a "narrow" exception to the principle of finality that we have previously described it to be. A federal district judge confronted with

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[12] Louisiana narrows the class of those eligible for the death penalty by limiting the type of offense for which it may be imposed, and by requiring a finding of at least one aggravating circumstance. See *supra*, at 342. Statutory provisions for restricting eligibility may, of course, vary from State to State.

[13] If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive, or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases. *McCleskey* v. *Zant*, 499 U. S. 467, 494–495 (1991); *Carrier*, 477 U. S., at 493.

a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative, and admissible evidence negating the element of intent. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider.[14]

The Court of Appeals in this case took the middle ground among these three possibilities for defining "actual innocence" of the death penalty, and adopted this test:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F. 2d, at 820 (footnotes omitted).

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[14] The "clearly-erroneous" standard suggested by JUSTICE STEVENS' opinion concurring in the judgment suffers from this weakness and others as well. The term "clearly erroneous" derives from Federal Rule of Civil Procedure 52(a), which provides that "findings of fact [in actions tried without a jury] shall not be set aside unless clearly erroneous." JUSTICE STEVENS wrenches the term out of this context—where it applies to written factual findings made by a trial judge—and would apply it to the imposition of the death sentence by a jury or judge. Not only is the latter determination different both quantitatively and qualitatively from a finding of fact in a bench trial, but JUSTICE STEVENS would not even bring with the term its established meaning in reviewing factfindings in bench trials. We held in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), and reaffirmed in *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985), that "'[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" But JUSTICE STEVENS would apparently equate it with the standard traditionally used for review of jury verdicts—that no reasonable sentencer could have imposed the death penalty. *Post*, at 371. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 316–318 (1979).

The Court of Appeals standard therefore hones in on the objective factors or conditions that must be shown to exist before a defendant is eligible to have the death penalty imposed. The Eleventh Circuit has adopted a similar "eligibility" test for determining actual innocence. *Johnson* v. *Singletary*, 938 F. 2d 1166 (1991), cert. pending, No. 91–6576.[15] We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the "actual innocence" requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error.

In the present petition, Sawyer advances two claims, arising from two distinct groups of evidentiary facts that were not considered by the jury that convicted and sentenced Sawyer. The first group of evidence relates to petitioner's role in the offense and consists of affidavits attacking the credibility of Cynthia Shano and an affidavit claiming that one of Shano's sons told a police officer that Sawyer was not responsible for pouring lighter fluid on Arwood and lighting it, and that in fact Sawyer tried to prevent Charles Lane from lighting Arwood on fire. Sawyer claims that the police failed to produce this exculpatory evidence in violation of his due process rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963). The second group consists of medical records from Sawyer's stays as a teenager in two different mental health

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[15] The Eleventh Circuit articulated the following test:

"Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson* v. *Singletary*, 938 F. 2d, at 1183 (emphasis in original).

institutions. Sawyer alleges ineffective assistance of counsel in trial counsel's failure to introduce these records in the sentencing phase of his trial.

The Court of Appeals held that petitioner's failure to assert his *Brady* claim in his first petition constituted an abuse of the writ, and that he had not shown cause for failing to raise the claim earlier under *McCleskey*. 945 F. 2d, at 824. The ineffective-assistance claim was held by the Court of Appeals to be a successive claim because it was rejected on the merits in Sawyer's first petition, and petitioner failed to show cause for not bringing all the evidence in support of this claim earlier. *Id.*, at 823. Petitioner does not contest these findings of the Court of Appeals. Tr. of Oral Arg. 7. Therefore, we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

Under Louisiana law, petitioner is eligible for the death penalty because he was convicted of first-degree murder—that is, an intentional killing while in the process of committing an aggravated arson—and because at the sentencing phase the jury found two valid aggravating circumstances: that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious, and heinous. The psychological evidence petitioner alleges was kept from the jury due to the ineffective assistance of counsel does not relate to petitioner's guilt or innocence of the crime.[16] Neither does it relate to either of the aggravating factors found by the jury that made petitioner eligible for the death penalty. Even if this evidence had been before the jury, it cannot be said that a reasonable juror would not have found both of the aggravating factors that

[16] Petitioner does not allege that his mental condition was such that he could not form criminal intent under Louisiana law. Tr. of Oral Arg. 10.

make petitioner eligible for the death penalty.[17] Therefore, as to this evidence, petitioner has not shown that there would be a fundamental miscarriage of justice for the Court to fail to reexamine the merits of this successive claim.

We are convinced that the evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show that the petitioner is actually innocent of the death penalty to which he has been sentenced. Much of the evidence goes to the credibility of Shano, suggesting, *e. g.*, that contrary to her testimony at trial she knew Charles Lane prior to the day of the murder; that she was drinking the day before the murder; and that she testified under a grant of immunity from the prosecutor. 2 App. 589–608. This sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions.

The final bit of evidence petitioner alleges was unconstitutionally kept from the jury due to a *Brady* violation was a statement made by Shano's then 4-year-old son, Wayne, to a police officer the day after the murder. Petitioner has submitted an affidavit from one Diane Thibodeaux stating that she was present when Wayne told a police detective who asked who had lit Arwood on fire that "Daddy [Sawyer] tried to help the lady" and that the "other man" had pushed Sawyer back into a chair. 2 App. 587. The affidavit also states that Wayne showed the officer where to find a cigarette lighter and a can of lighter fluid in the trash. *Ibid.* Because this evidence goes to the jury's finding of aggravated arson, it goes both to petitioner's guilt or innocence of the crime of first-degree murder and the aggravating circumstance of a murder committed in the course of an aggravated arson. However, we conclude that this affidavit, in view of

[17] In the same category are the affidavits from petitioner's family members attesting to the deprivation and abuse suffered by petitioner as a child. 2 App. 571–584.

all the other evidence in the record, does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury. The murder was especially cruel, atrocious, and heinous based on the undisputed evidence of torture before the jury quite apart from the arson (*e. g.*, beating, scalding with boiling water). As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit,[18] it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.[19]

We therefore hold that petitioner has failed to show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under Louisiana law. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BLACKMUN, concurring in the judgment.

I cannot agree with the majority that a federal court is absolutely barred from reviewing a capital defendant's abu-

[18] Wayne Shano apparently has no clear memory of the crime today. *Id.*, at 602–603. This fact, together with his tender years at the time of the occurrence, suggests that Wayne himself would not corroborate the affidavit of Diane Thibodeaux, thus suggesting an independent basis for refusing to find that the affidavit showed anything by clear and convincing evidence.

[19] Louisiana Rev. Stat. Ann. § 14:24 (West 1986) defines principals as: "All persons concerned in the commission of a crime . . . and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

Even considering the affidavit of Wayne Shano, it cannot be said that no reasonable juror would have found that petitioner committed the aggravated arson, given Cynthia Shano's testimony as to petitioner's statements to Lane on the day of the murder and petitioner's fingerprints on the can of lighter fluid.

sive, successive, or procedurally defaulted claim unless the defendant can show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Ante*, at 336. For the reasons stated by JUSTICE STEVENS in his separate opinion, *post*, p. 360, which I join, I believe that the Court today adopts an unduly cramped view of "actual innocence." I write separately not to discuss the specifics of the Court's standard, but instead to reemphasize my opposition to an implicit premise underlying the Court's decision: that the only "fundamental miscarriage of justice" in a capital proceeding that warrants redress is one where the petitioner can make out a claim of "actual innocence." I also write separately to express my ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment.

I

The Court repeatedly has recognized that principles of fundamental fairness underlie the writ of habeas corpus. See *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982); *Sanders* v. *United States*, 373 U. S. 1, 17–18 (1963). Even as the Court has erected unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims that state prisoners failed properly to present to the state courts, or failed to raise in their first federal habeas petitions, or previously presented to the federal courts for resolution, it consistently has acknowledged that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness. See *Engle*, 456 U. S., at 135 (principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration"). Thus, the Court has held, federal courts may review procedurally defaulted, abusive, or successive claims absent a showing of cause and

prejudice if the failure to do so would thwart the "ends of justice," see *Kuhlmann* v. *Wilson*, 477 U. S. 436, 455 (1986) (plurality opinion), or work a "fundamental miscarriage of justice," see *Murray* v. *Carrier*, 477 U. S. 478, 495–496 (1986); *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989); *McCleskey* v. *Zant*, 499 U. S. 467, 493–494 (1991).

By the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right. See 28 U. S. C. § 2254(a) (federal courts "shall entertain" habeas petitions from state prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States"); *Smith*, 477 U. S., at 543–544 (STEVENS, J., dissenting). Justice Holmes explained that the concern of a federal court in reviewing the validity of a conviction and death sentence on a writ of habeas corpus is "solely the question whether [the petitioner's] constitutional rights have been preserved." *Moore* v. *Dempsey*, 261 U. S. 86, 88 (1923).

In a trio of 1986 decisions, however, the Court ignored these traditional teachings and, out of a purported concern for state sovereignty, for the preservation of state resources, and for the finality of state-court judgments, shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt. See *Wilson*, 477 U. S., at 454 (plurality opinion) ("[T]he 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *Carrier*, 477 U. S., at 496 ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default");

Smith, 477 U. S., at 537 (applying *Carrier* standard to constitutional error at sentencing phase of capital trial). See also *McCleskey*, 499 U. S., at 493 (applying *Carrier* standard in "abuse of the writ" context).

The Court itself has acknowledged that "the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U. S., at 537. Undaunted by its own illogic, however, the Court adopted just such an approach in *Smith*. There, the Court was confronted with a claim that the introduction at sentencing of inculpatory statements made by Smith to a court-appointed psychiatrist violated the Fifth Amendment because Smith had not been informed that his statements might be used against him or that he had the right to remain silent and to have counsel present. Although the Court assumed the validity of Smith's Fifth Amendment claim[1] and recognized the potential impact of the statement on the jury, which found the aggravating circumstance of "future dangerousness" satisfied, see *id.*, at 538, it nonetheless concluded, remarkably and summarily, that admission of the statement did not "pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society," *ibid.* (emphasis in original). Because Michael Smith could not demonstrate cause for his procedural default, and because, in the Court's view, he had not made a substantial showing that the alleged constitutional violation "undermined the accuracy of the guilt or sentencing determination," *id.*, at 539, his Fifth Amendment claim went unaddressed and he was executed on July 31, 1986.

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[1] JUSTICE STEVENS explained in his dissenting opinion in *Smith*, 477 U. S., at 551–553, that the introduction of the inculpatory statement clearly violated Smith's rights as established in *Estelle* v. *Smith*, 451 U. S. 454 (1981).

In *Dugger* v. *Adams*, the Court continued to equate the notion of a "fundamental miscarriage of justice" in a capital trial with the petitioner's ability to show that he or she "probably is 'actually innocent' of the sentence he or she received," 489 U. S., at 412, n. 6, but appeared to narrow the inquiry even further. Adams' claim, that the trial judge repeatedly had misinformed the jurors, in violation of the Eighth Amendment and *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), that their sentencing vote was strictly advisory in nature (when in fact Florida law permitted the judge to overturn the jury's sentencing decision only upon a clear and convincing showing that its choice was erroneous), surely satisfied the standard articulated in *Smith:* whether petitioner can make out a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U. S., at 539. In a cryptic discussion relegated to a footnote at the end of its opinion, the Court in *Adams* rejected this obvious application of the *Smith* standard, apparently for no other reason than its belief that Adams' ability to demonstrate a "fundamental miscarriage of justice" in this case somehow would convert an "extraordinary" exception into an "ordinary" one. See 489 U. S., at 412, n. 6. In rejecting the *Smith* standard, the Court did not even bother to substitute another in its place. See 489 U. S., at 412, n. 6 ("We do not undertake here to define what it means to be 'actually innocent' of a death sentence"). The Court refused to address Aubrey Adams' claim of constitutional error, and he was executed on May 4, 1989.

Just last Term, in *McCleskey* v. *Zant*, the Court again described the "fundamental miscarriage of justice" exception as a "'safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,'" 499 U. S., at 495 (quoting *Stone* v. *Powell*, 428 U. S. 465, 491–492, n. 31 (1976)). Although the District Court granted relief to McCleskey on his claim that state authorities deliberately had elicited inculpatory admissions from him in violation of his Sixth

Amendment right to counsel, see *Massiah* v. *United States*, 377 U. S. 201 (1964), and excused his failure to present the claim in his first federal habeas petition because the State had withheld documents and information establishing that claim, see 499 U. S., at 475–476, the Court concluded that McCleskey lacked cause for failing to raise the claim earlier, *id.*, at 502. More important for our purposes, the Court concluded that the "narrow exception" by which federal courts may "exercise [their] equitable discretion to correct a miscarriage of justice" was of "no avail" to McCleskey: The "*Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination." *Ibid.* The Court refused to address Warren McCleskey's claim of constitutional error, and he was executed on September 24, 1991.

The Court today takes for granted that the foregoing decisions correctly limited the concept of a "fundamental miscarriage of justice" to "actual innocence," even as it struggles, by ignoring the "natural usage of those words" and resorting to "analog[s]," see *ante*, at 341, to make sense of "actual innocence" in the capital context. I continue to believe, however, that the Court's "exaltation of accuracy as the only characteristic of 'fundamental fairness' is deeply flawed." *Smith*, 477 U. S., at 545 (STEVENS, J., dissenting).

As an initial matter, the Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction, pursuant to which federal courts are instructed to entertain petitions from state prisoners who allege that they are held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). The jurisdictional grant contains no support for the Court's decision to narrow the reviewing authority and obligation of the federal courts to claims of factual innocence. See also 28 U. S. C. § 2243 ("The court shall . . . dispose of the matter as law and justice require"). In addition, the actual innocence standard requires a reviewing federal court, unnaturally, to

"function in much the same capacity as the state trier of fact"; that is, to "make a rough decision on the question of guilt or innocence." *Wilson*, 477 U. S., at 471, n. 7 (Brennan, J., dissenting).

Most important, however, the focus on innocence assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination. But "[o]ur criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve 'law and justice' should similarly reflect those values." *Smith*, 477 U. S., at 545 (STEVENS, J., dissenting). The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth finding as their primary goal. These protections—including the Fifth Amendment right against compelled self-incrimination, the Eighth Amendment right against the imposition of an arbitrary and capricious sentence, the Fourteenth Amendment right to be tried by an impartial judge, and the Fourteenth Amendment right not to be indicted by a grand jury or tried by a petit jury from which members of the defendant's race have been systematically excluded—are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights.

Nowhere is this single-minded focus on actual innocence more misguided than in a case where a defendant alleges a constitutional error in the sentencing phase of a capital trial. The Court's ongoing struggle to give meaning to "innocence of death" simply reflects the inappropriateness of the inquiry. See *Smith*, 477 U. S., at 537; *Adams*, 489 U. S., at 412, n. 6; *ante*, at 340. "Guilt or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die." *Wilson*, 477 U. S., at 471–472, n. 7 (Brennan, J., dissenting).

See also Patchel, The New Habeas, 42 Hastings L. J. 941, 972 (1991).

Only by returning to the federal courts' central and traditional function on habeas review, evaluating claims of constitutional error, can the Court ensure that the ends of justice are served and that fundamental miscarriages of justice do not go unremedied. The Court would do well to heed Justice Black's admonition: "[I]t is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." *Brown* v. *Allen*, 344 U. S. 443, 554 (1953) (dissenting opinion).[2]

II

A

When I was on the United States Court of Appeals for the Eighth Circuit, I once observed, in the course of reviewing a death sentence on a writ of habeas corpus, that the decisional process in a capital case is "particularly excruciating" for someone "who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent." *Maxwell* v. *Bishop*, 398 F. 2d 138, 153–154 (1968), vacated, 398 U. S. 262 (1970). At the same time, however, I stated my then belief that "the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature." *Id.*, at 154. Four years later, as a Member of this Court, I echoed those sentiments in my separate dissenting opinion in *Furman* v. *Georgia*, 408 U. S. 238, 405 (1972). Although I reiterated my personal distaste for the

[2] Notwithstanding my view that the Court has erred in narrowing the concept of a "fundamental miscarriage of justice" to cases of "actual innocence," I have attempted faithfully to apply the "actual innocence" standard in prior cases. See, *e. g.*, *Dugger* v. *Adams*, 489 U. S. 401, 424, n. 15 (1989) (dissenting opinion). I therefore join JUSTICE STEVENS' analysis of the "actual innocence" standard and his application of that standard to the facts of this case. See *post*, p. 360.

death penalty and my doubt that it performs any meaningful deterrent function, see *id.*, at 405–406, I declined to join my Brethren in declaring the state statutes at issue in those cases unconstitutional. See *id.*, at 411 ("We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision").

My ability in *Maxwell*, *Furman*, and the many other capital cases I have reviewed during my tenure on the federal bench to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the Federal Judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed. Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty.

B

Only last Term I had occasion to lament the Court's continuing "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and its transformation of "the duty to protect federal rights into a self-fashioned abdication." *Coleman* v. *Thompson*, 501 U. S. 722, 759, 761 (1991) (dissenting opinion). This Term has witnessed the continued narrowing of the avenues of relief available to federal habeas petitioners seeking redress of their constitutional claims. See, *e. g.*, *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992) (overruling in part *Townsend* v. *Sain*, 372 U. S. 293 (1963)). It has witnessed, as well, the execution of two victims of the "new habeas," Warren McCleskey and Roger Keith Coleman.

Warren McCleskey's case seemed the archetypal "fundamental miscarriage of justice" that the federal courts are charged with remedying. As noted above, McCleskey dem-

onstrated that state officials deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment rights and had withheld information he needed to present his claim for relief. In addition, McCleskey argued convincingly in his final hours that he could not even obtain an impartial clemency hearing because of threats by state officials against the pardons and parole board. That the Court permitted McCleskey to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life. See *McCleskey* v. *Bowers*, 501 U. S. 1281 (1991) (Marshall, J., dissenting from denial of stay of execution).

The execution of Roger Keith Coleman is no less an affront to principles of fundamental fairness. Last Term, the Court refused to review the merits of Coleman's claims by effectively overruling, at Coleman's expense, precedents holding that state-court decisions are presumed to be based on the merits (and therefore, are subject to federal habeas review) unless they explicitly reveal that they were based on state procedural grounds. See *Coleman*, 501 U. S., at 762–764 (dissenting opinion). Moreover, the Court's refusal last month to grant a temporary stay of execution so that the lower courts could conduct a hearing into Coleman's well-supported claim that he was innocent of the underlying offense demonstrates the resounding hollowness of the Court's professed commitment to employ the "fundamental miscarriage of justice exception" as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *McCleskey* v. *Zant*, 499 U. S., at 495 (internal quotation marks omitted). See *Coleman* v. *Thompson*, 504 U. S. 188, 189 (1992) (opinion dissenting from denial of stay of execution).

As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of

the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg* v. *Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. See 428 U. S. 153, 189, 195 (1976) (joint opinion); *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978). At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, concurring in the judgment.

Only 10 years ago, the Court reemphasized that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.' *Wainwright* v. *Sykes*, 433 U. S. [72,] 97 [(1977)] (STEVENS, J., concurring)." *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982). It is this centrality of "fundamental fairness" that has led the Court to hold that habeas review of a defaulted, successive, or abusive claim is available, even absent a showing of cause, if failure to consider the claim would result in a fundamental miscarriage of justice. See *Sanders* v. *United States*, 373 U. S. 1, 17–18 (1963); *Engle*, 456 U. S., at 135.

In *Murray* v. *Carrier*, 477 U. S. 478, 495, 496 (1986), the Court ruled that the concept of "fundamental miscarriage of justice" applies to those cases in which the defendant was

"probably . . . actually innocent." The Court held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 496. Having equated the "ends of justice" with "actual innocence," the Court is now confronted with the task of giving meaning to "actual innocence" in the context of a capital sentencing proceeding—hence the phrase "innocence of death."

While the conviction of an innocent person may be the archetypal case of a manifest miscarriage of justice, it is not the only case. There is no reason why "actual innocence" must be both an animating *and the limiting* principle of the work of federal courts in furthering the "ends of justice." As Judge Friendly emphasized, there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151–154 (1970). Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence.

Nowhere is this more true than in capital sentencing proceedings. Because the death penalty is qualitatively and morally different from any other penalty, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures." *Smith* v. *Murray*, 477 U. S. 527, 545–546 (1986) (STEVENS, J., dissenting). Accordingly, the ends of justice dictate that "[w]hen a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation . . . to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair." *Id.*, at 546.

Thus the Court's first and most basic error today is that it asks the wrong question. Charged with averting manifest miscarriages of justice, the Court instead narrowly recasts

its duty as redressing cases of "actual innocence." This error aside, under a proper interpretation of the *Carrier* analysis, the Court's definition of "innocence of death" is plainly wrong because it disregards well-settled law—both the law of habeas corpus and the law of capital punishment.

I

The Court today holds that, absent a showing of cause, a federal court may not review a capital defendant's defaulted, successive, or abusive claims unless the defendant

> "show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 336.

This definition of "innocence of the death sentence" deviates from our established jurisprudence in two ways. First, the "clear and convincing evidence" standard departs from a line of decisions defining the "actual innocence" exception to the cause-and-prejudice requirement. Second, and more fundamentally, the Court's focus on *eligibility* for the death penalty conflicts with the very structure of the constitutional law of capital punishment.

As noted above, in *Murray* v. *Carrier*, the Court held that in those cases in which "a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U. S., at 496 (emphasis added). The Court has since frequently confirmed this standard. See, *e. g.*, *Coleman* v. *Thompson*, 501 U. S. 722, 748 (1991); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989); *Teague* v. *Lane*, 489 U. S. 288, 313 (1989). In subsequent decisions, both those involving "innocence of the offense" and those involving "innocence of the death sentence," the Court has employed the same standard of proof. For example, in *Smith* v. *Murray*, 477 U. S. 527

(1986), the Court repeated the *Carrier* standard and applied it in a capital sentencing proceeding. The Court ruled that Smith's claim did not present "the risk of a manifest miscarriage of justice" as it was "devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U. S., at 538–539. Similarly, in *Dugger* v. *Adams*, a case involving "innocence of the death sentence," the Court stated the controlling standard as whether an "individual defendant *probably* is 'actually innocent' of the sentence he or she received." 489 U. S., at 412, n. 6 (emphasis added). In sum, in construing both "innocence of the offense" and "innocence of the death sentence," we have consistently required a defendant to show that the alleged constitutional error has *more likely than not* created a fundamental miscarriage of justice.

As we noted in another context, "[t]his outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence." *Strickland* v. *Washington*, 466 U. S. 668, 693–694 (1984).

Equally significant, this "probably resulted" standard is well calibrated to the manifest miscarriage of justice exception. Not only does the standard respect the competing demands of finality and fundamental fairness, it also fits squarely within our habeas jurisprudence. In general, a federal court may entertain a defaulted, successive, or abusive claim if a prisoner demonstrates cause and prejudice. See generally *McCleskey* v. *Zant*, 499 U. S. 467, 493–495 (1991). To show "prejudice," a defendant must demonstrate "a reasonable probability that, but for [the alleged] erro[r], the result of the proceeding would have been different." *Strickland*, 466 U. S., at 694; see also *United States* v. *Bag-*

ley, 473 U. S. 667, 682, 685 (1985). The "miscarriage of justice" exception to this general rule requires a more substantial showing: The defendant must not simply demonstrate a *reasonable probability* of a different result, he must show that the alleged error *more likely than not* created a manifest miscarriage of justice. This regime makes logical sense. If a defendant cannot show cause and can only show a "reasonable probability" of a different outcome, a federal court should not hear his defaulted, successive, or abusive claim. Only in the "exceptional case" in which a defendant can show that the alleged constitutional error "probably resulted" in the conviction (or sentencing) of one innocent of the offense (or the death sentence) should the court hear the defendant's claim.

The Court today repudiates this established standard of proof and replaces it with a requirement that a defendant "show by *clear and convincing evidence* that . . . no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 336 (emphasis supplied). I see no reason to reject the established and well-functioning "probably resulted" standard and impose such a severe burden on the capital defendant. Although we have frequently recognized the State's strong interest in finality, we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence. To the contrary, the "actual innocence" exception itself manifests our recognition that the criminal justice system occasionally errs and that, when it does, finality must yield to justice.

"The function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'. . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979) (citation omitted). Neither of these considerations

supports the heightened standard of proof the Court imposes today.

First, there is no basis for requiring a federal court to be virtually certain that the defendant is actually ineligible for the death penalty before *merely entertaining* his claim. We have required a showing by clear and convincing evidence in several contexts: For example, the medical facts underlying a civil commitment must be established by this standard, *Addington* v. *Texas*, 441 U. S. 418 (1979), as must "actual malice" in a libel suit brought by a public official. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242 (1986). And we have required a related showing in cases involving deportation, *Woodby* v. *INS*, 385 U. S. 276, 285–286 (1966), and denaturalization, *Schneiderman* v. *United States*, 320 U. S. 118, 125 (1943). In each of these contexts, the interests of the nonmoving party were truly substantial: personal liberty in *Addington*, freedom of expression in *New York Times*, residence in *Woodby*, and citizenship in *Schneiderman*. In my opinion, the State's interest in finality in a capital prosecution is not nearly as great as any of these interests. Indeed, it is important to remember that "innocence of the death sentence" is not a standard for staying or vacating a death sentence, but merely a standard for determining whether or not a court should reach the merits of a defaulted claim. The State's interest in "finality" in this context certainly does not warrant a "clear and convincing" evidentiary standard.

Nor is there any justification for allocating the risk of error to fall so severely upon the capital defendant or attaching greater importance to the initial sentence than to the issue of whether that sentence is appropriate. The States themselves have declined to attach such weight to capital sentences: Most States provide plain-error review for defaulted claims in capital cases. See *Smith* v. *Murray*, 477 U. S., at 548–550, n. 20 (collecting authorities). In this regard, the

Court's requirement that "innocence of death" must be demonstrated by "clear and convincing evidence" fails to respect the uniqueness of death penalty decisions: Nowhere is the need for accuracy greater than when the State exercises its ultimate authority and takes the life of one of its citizens.

Indeed, the Court's ruling creates a perverse double standard. While a defendant raising defaulted claims in a noncapital case must show that constitutional error "probably resulted" in a miscarriage of justice, a capital defendant must present "clear and convincing evidence" that no reasonable juror would find him eligible for the death penalty. It is heartlessly perverse to impose a more stringent standard of proof to avoid a miscarriage of justice in a capital case than in a noncapital case.

In sum, I see no reason to depart from settled law, which clearly requires a defendant pressing a defaulted, successive, or abusive claim to show that a failure to hear his claim will "probably result" in a fundamental miscarriage of justice. In my opinion, a corresponding standard governs a defaulted, successive, or abusive challenge to a capital sentence: The defendant must show that he is probably—that is, more likely than not—"innocent of the death sentence."

II

The Court recognizes that the proper definition of "innocence of the death sentence" must involve a reweighing of the evidence and must focus on the sentencer's likely evaluation of that evidence. Thus, the Court directs federal courts to look to whether a "reasonable juror *would* have found the petitioner eligible for the death penalty." *Ante*, at 336 (emphasis added). Nevertheless, the Court inexplicably limits this inquiry in two ways. First, the Court holds that courts should consider *only* evidence concerning aggravating factors. As demonstrated below, this limitation is wholly without foundation and neglects the central role of mitigating evidence in capital sentencing proceedings. Second, the

Court requires a petitioner to refute his *eligibility* for the death penalty. This narrow definition of "innocence of the death sentence" fails to recognize that, in rare cases, even though a defendant is eligible for the death penalty, such a sentence may nonetheless constitute a fundamental miscarriage of justice.

It is well established that, "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987) (internal quotation marks and citations omitted). Yet in ascribing a narrow, eligibility-based meaning to "innocence of the death sentence" the Court neglects this rudimentary principle.

As the Court recognizes, a single general directive animates and informs our capital-punishment jurisprudence: "[T]he death penalty [may not] be imposed under sentencing procedures that creat[e] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). As applied and developed over the years, this constitutional requirement has yielded two central principles. First, a sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983). Second, the sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of Burger, C. J.) (emphasis in original). Although these principles—one narrowing the relevant class, the other broadening the scope of considered evidence—seemingly point in opposite directions, in fact both serve the same end: ensuring that a capital sentence is the product of individualized and reasoned moral decisionmaking.

Against this backdrop of well-settled law, the Court's ruling is a startling anomaly. The Court holds that "innocence of the death sentence" concerns only "those elements that render a defendant *eligible* for the death penalty, and *not . . . additional mitigating evidence* that [constitutional error precluded] from being introduced." *Ante,* at 347 (emphasis added). Stated bluntly, the Court today respects only one of the two bedrock principles of capital-punishment jurisprudence. As such, the Court's impoverished vision of capital sentencing is at odds with both the doctrine and the theory developed in our many decisions concerning capital punishment.

First, the Court implicitly repudiates the requirement that the sentencer be allowed to consider all relevant mitigating evidence, a constitutive element of our Eighth Amendment jurisprudence. We have reiterated and applied this principle in more than a dozen cases over the last 14 years. For example, in *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982), we overturned a capital sentence because the sentencer refused to consider certain mitigating evidence. Similarly, in *Skipper* v. *South Carolina,* 476 U. S. 1 (1986), we ruled that a State cannot preclude consideration of evidence of postincarceration, pretrial good behavior. And in *Penry* v. *Lynaugh,* 492 U. S. 302 (1989), we held that Texas' death penalty scheme impermissibly restricted the jury's consideration of the defendant's mental retardation as mitigating evidence.[1]

Moreover, the Court's holding also clashes with the *theory* underlying our capital-punishment jurisprudence. The nonarbitrariness—and therefore the constitutionality—of the death penalty rests on *individualized* sentencing determinations. See generally *California* v. *Brown,* 479 U. S. 538, 544–546 (1987) (O'CONNOR, J., concurring). This is the dif-

[1] See also *Boyde* v. *California,* 494 U. S. 370 (1990); *McKoy* v. *North Carolina,* 494 U. S. 433 (1990); *Franklin* v. *Lynaugh,* 487 U. S. 164 (1988); *Mills* v. *Maryland,* 486 U. S. 367 (1988); *Hitchcock* v. *Dugger,* 481 U. S. 393 (1987); *Bell* v. *Ohio,* 438 U. S. 637 (1978).

ference between the guided-discretion regime upheld in *Gregg* v. *Georgia* and the mandatory death-sentence regime invalidated in *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). The *Roberts* scheme was constitutionally infirm because it left no room for individualized moral judgments, because it failed to provide the sentencer with a "meaningful opportunity [to] conside[r the] mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Id.*, at 333–334 (opinion of Stewart, Powell, and STEVENS, JJ.). The Court's definition of "innocence of the death sentence" is like the statutory scheme in *Roberts:* It focuses solely on whether the defendant is in a class eligible for the death penalty and disregards the equally important question whether " 'death is the appropriate punishment in [the defendant's] specific case.' " *Zant* v. *Stephens*, 462 U. S., at 885 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)).[2]

The Court's definition of "innocent of the death sentence" is flawed in a second, related way. The Court's analysis not only neglects errors that preclude a sentencer's consideration of mitigating factors; it also focuses too narrowly on *eligibility.* The Court requires a defendant to call into question *all* of the aggravating factors found by the sentencer and thereby show himself ineligible for the death penalty.

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[2] The Court rejects the argument that federal courts should also consider *mitigating* evidence because consideration of such evidence involves the "far more difficult task [of] assess[ing] how jurors would have reacted to additional showings." *Ante*, at 346. I see no such difference between consideration of aggravating and mitigating circumstances; both require the federal courts to reconsider and anticipate a sentencer's decision: By the Court's own standard federal courts must determine whether a "reasonable juror would have found" certain facts. Thus, the Court's reason for barring federal courts from considering mitigating circumstances applies equally to the standard that *it* endorses. Its exclusion of mitigating evidence from consideration is therefore wholly arbitrary.

Contrary to the Court's suggestion, however, there may be cases in which, although the defendant remains eligible for the death penalty, imposition of a death sentence would constitute a manifest miscarriage of justice. If, for example, the sentencer, in assigning a sentence of death, relied heavily on a finding that the defendant severely tortured the victim, but later it is discovered that another person was responsible for the torture, the elimination of the aggravating circumstance will, in some cases, indicate that the death sentence was a miscarriage of justice. By imposing an "all-or-nothing" eligibility test, the Court's definition of "innocent of the death sentence" fails to acknowledge this important possibility.

In sum, the Court's "innocent of the death sentence" standard is flawed both in its failure to consider constitutional errors implicating mitigating factors and in its unduly harsh requirement that a defendant's eligibility for the death penalty be disproved.

III

In my opinion, the "innocence of the death sentence" standard must take into account several factors. First, such a standard must reflect *both* of the basic principles of our capital-punishment jurisprudence. The standard must recognize both the need to define narrowly the class of "death-eligible" defendants and the need to define broadly the scope of mitigating evidence permitted the capital sentencer. Second, the "innocence of the death sentence" standard should also recognize the distinctive character of the capital sentencing decision. While the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a matter of reasoned moral judgment. Thus, there may be some situations in which, although the defendant remains technically "eligible" for the death sentence, nonetheless, in light of all of the evidence,

that sentence constitutes a manifest miscarriage of justice. Finally, the "innocence of the death sentence" standard must also respect the "profound importance of finality in criminal proceedings," *Strickland* v. *Washington*, 466 U. S., at 693–694, and the "heavy burden" that successive habeas petitions place "on scarce federal judicial resources." *McCleskey* v. *Zant*, 499 U. S., at 491.

These requirements are best met by a standard that provides that a defendant is "innocent of the death sentence" only if his capital sentence is *clearly erroneous*. This standard encompasses several types of error. A death sentence is clearly erroneous if, taking into account all of the available evidence, the sentencer lacked the legal authority to impose such a sentence because, under state law, the defendant was not eligible for the death penalty. Similarly, in the case of a "jury override," a death sentence is clearly erroneous if, taking into account all of the evidence, the evidentiary prerequisites for that override (as established by state law) were not met. See, *e. g.*, *Johnson* v. *Singletary*, 938 F. 2d 1166, 1194–1195 (CA11 1991) (Tjoflat, C. J., concurring in part and dissenting in part) (concluding that the sentencing "judge, as a matter of law, could not have sentenced the petitioner to death" because there was insufficient evidence to meet the jury-override standard established in *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975)). A death sentence is also clearly erroneous under a "balancing" regime if, in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that no reasonable sentencer would have imposed the death penalty. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 316–318 (1979). Such a case might arise if constitutional error either precluded the defendant from demonstrating that aggravating circumstances did not obtain or precluded the sentencer's consideration of important mitigating evidence.

Unlike the standard suggested by the Court, this standard acknowledges both the "aggravation" and "mitigation" aspects of capital-punishment law. It recognizes that, in the extraordinary case, constitutional error may have precluded consideration of mitigating circumstances so substantial as to warrant a court's review of a defaulted, successive, or abusive claim. It also recognizes that, again in the extraordinary case, constitutional error may have inaccurately demonstrated aggravating circumstances so substantial as to warrant review of a defendant's claims.

Moreover, the "clearly-erroneous" standard is duly protective of the State's legitimate interests in finality and respectful of the systemic and institutional costs of successive habeas litigation. The standard is stringent: If the sentence "is plausible in light of the record viewed in its entirety" it is not clearly erroneous "even though [the court is] convinced that had it been sitting as the [sentencer], it would have weighed the evidence differently." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). At the same time, "clearly-erroneous" review allows a federal court to entertain a defaulted claim in the rare case in which the "court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

Finally, the "clearly-erroneous" standard is workable. As was true of the cause-and-prejudice standard adopted in *McCleskey* v. *Zant*, the clear-error standard is "[w]ell-defined in the case law [and] familiar to federal courts. . . . The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry." 499 U. S., at 496. Federal courts have long applied the "clearly-erroneous" standard pursuant to Rule 52 of the Federal Rules of Civil Procedure and have done so "in civil contempt actions, condemnation proceedings, copyright appeals, [and] forfeiture actions for illegal activity." 1 S. Childress & M. Davis, Standards of Review § 2.3, pp. 29–30

(1986) (citing cases).[3] This workability supports the application of the "clearly-erroneous" standard to the "innocence of the death sentence" inquiry.

In my opinion, then, the "clearly-erroneous" standard is the core of the "innocence of the death sentence" exception. Just as a defendant who presses a defaulted, successive, or abusive claim and who cannot show cause must demonstrate that it is more likely than not that he is actually innocent of the offense, so a capital defendant who presses such a claim and cannot show cause must demonstrate that it is more likely than not that his death sentence was clearly erroneous. Absent such a showing, a federal court may not reach the merits of the defendant's defaulted, successive, or abusive claim.

IV

It remains to apply this standard to the case at hand. As the majority indicates, Sawyer alleges two constitutional errors. First, he contends that the State withheld certain exculpatory evidence, in violation of Sawyer's due process rights as recognized in *Brady* v. *Maryland*, 373 U. S. 83 (1963). Second, Sawyer argues that his trial counsel's failure to uncover and present records from Sawyer's earlier treatments in psychiatric institutions deprived him of effective assistance of counsel as guaranteed by the Sixth Amendment.

As Sawyer failed to assert his *Brady* claim in an earlier habeas petition and as he cannot show cause for that failure, the court may only reach the merits of that "abusive" claim if Sawyer demonstrates that he is probably actually innocent of the offense or that it is more likely than not that his death sentence was clearly erroneous. As Sawyer's ineffective-assistance claim was considered and rejected in an earlier

[3] Courts have also reviewed nonguilt findings of fact made in criminal cases pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure under this standard. See 2 S. Childress & M. Davis, Standards of Review § 10.3, pp. 73–76 (1986) (citing cases).

habeas proceeding, the court may only review that "successive" claim upon a similar showing. Upon a review of the record in its entirety, I conclude that Sawyer has failed to make such a showing.

Sawyer points to two pieces of exculpatory evidence allegedly withheld by the State. First, he offers the affidavit of a woman (Diane Thibodeaux) who, on occasion, took care of the small child who witnessed the crime. That account appears to conflict with contemporaneous police reports. While police records indicate that the child implicated Sawyer in the cruel burning of the victim, Thibodeaux avers that the child stated to her that Sawyer's codefendant, Charles Lane, set the victim afire. Second, he offers other affidavits casting doubt on the credibility of Cindy Shano, the State's principal witness. Sawyer emphasizes that Shano testified under a grant of immunity and highlights inaccuracies in her trial testimony. Finally, as part of his Sixth Amendment claim, Sawyer also offers medical records documenting brain damage and retarded mental development.

Viewed as a whole, the record does not demonstrate that failure to reach the merits of Sawyer's claims would constitute a fundamental miscarriage of justice. First, in view of the other evidence in the record, the Thibodeaux affidavit and questions concerning Shano's testimony do not establish that Sawyer is "probably . . . actually innocent" of the crime of first-degree murder. At most, Thibodeaux's hearsay statements cast slight doubt on the facts underlying the burning of the victim. Similarly, although the challenges to Shano's testimony raise questions, these affidavits do not demonstrate that Sawyer probably did not commit first-degree murder. Thus, Sawyer has not met the standard "actual innocence" exception.

Second, the affidavits and the new medical records do not convince me that Sawyer's death sentence is clearly erroneous. The jury found two statutory aggravating factors—that the murder was committed in the course of an aggra-

vated arson, and that the murder was especially heinous, atrocious, and cruel. *State* v. *Sawyer*, 422 So. 2d 95, 100 (La. 1982). As suggested above, the Thibodeaux affidavit does not show that it is "more likely than not" that Sawyer did not commit aggravated arson. Moreover, Sawyer offers no evidence to undermine the jury's finding that the murder was especially heinous, atrocious, and cruel. In addition, assuming that the new medical evidence would support a finding of a statutory mitigating factor (diminished capacity due to mental disease or defect),[4] I cannot say that it would be clear error for a sentencer faced with the two unrefuted aggravating circumstances and that single mitigating circumstance to sentence Sawyer to death.

In sum, in my opinion Sawyer has failed to demonstrate that it is more likely than not that his death sentence was clearly erroneous. Accordingly, I conclude that the court below was correct in declining to reach the merits of Sawyer's successive and abusive claims.

V

The Court rejects an "innocence of death" standard that recognizes constitutional errors affecting *mitigating* evidence because such a standard "would so broaden the inquiry as to make it anything but a 'narrow' exception to the principle of finality." *Ante*, at 345. As the foregoing analysis indicates, however, the Court's concerns are unfounded. Indeed, even when federal courts have applied a less restrictive standard than the standard I propose, those courts have rarely found "innocence of death" and reached the merits of a defaulted, successive, or abusive claim. See *Deutscher* v. *Whitley*, 946 F. 2d 1443 (CA9 1991); *Stokes* v.

[4] See La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984) (defining "mitigating circumstances" to include the fact that "the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect" at the time of the offense).

Armontrout, 893 F. 2d 152, 156 (CA8 1989); *Smith* v. *Armontrout*, 888 F. 2d 530, 545 (CA8 1989).

Similarly, I do not share the Court's concern that a standard broader than the eligibility standard creates "a far more difficult task" for federal courts. *Ante*, at 346. As noted above, both the "probably resulted" standard and the "clearly-erroneous" standard have long been applied by federal courts in a variety of contexts. Moreover, to the extent that the "clearly-erroneous" standard is more difficult to apply than the Court's "eligibility" test, I believe that that cost is far outweighed by the importance of making just decisions in the few cases that fit within this narrow exception. To my mind, any added administrative burden is surely justified by the overriding interest in minimizing the risk of error in implementing the sovereign's decision to take the life of one of its citizens. As we observed in *Gardner* v. *Florida*, 430 U. S. 349, 360 (1977), "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."

Syllabus

R. A. V. *v.* CITY OF ST. PAUL, MINNESOTA

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 90–7675. Argued December 4, 1991—Decided June 22, 1992

After allegedly burning a cross on a black family's lawn, petitioner R. A. V. was charged under, *inter alia*, the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which prohibits the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court dismissed this charge on the ground that the ordinance was substantially overbroad and impermissibly content based, but the State Supreme Court reversed. It rejected the overbreadth claim because the phrase "arouses anger, alarm or resentment in others" had been construed in earlier state cases to limit the ordinance's reach to "fighting words" within the meaning of this Court's decision in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, a category of expression unprotected by the First Amendment. The court also concluded that the ordinance was not impermissibly content based because it was narrowly tailored to serve a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

Held: The ordinance is facially invalid under the First Amendment. Pp. 381–396.

(a) This Court is bound by the state court's construction of the ordinance as reaching only expressions constituting "fighting words." However, R. A. V.'s request that the scope of the *Chaplinsky* formulation be modified, thereby invalidating the ordinance as substantially overbroad, need not be reached, since the ordinance unconstitutionally prohibits speech on the basis of the subjects the speech addresses. P. 381.

(b) A few limited categories of speech, such as obscenity, defamation, and fighting words, may be regulated *because of their constitutionally proscribable content.* However, these categories are not entirely invisible to the Constitution, and government may not regulate them based on hostility, or favoritism, towards a nonproscribable message they contain. Thus the regulation of "fighting words" may not be based on nonproscribable content. It may, however, be underinclusive, addressing some offensive instances and leaving other, equally offensive, ones alone, so long as the selective proscription is not based on content, or there is no realistic possibility that regulation of ideas is afoot. Pp. 382–390.

Syllabus

(c) The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of "race, color, creed, religion or gender." At the same time, it permits displays containing abusive invective if they are not addressed to those topics. Moreover, in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination. Displays containing "fighting words" that do not invoke the disfavored subjects would seemingly be useable *ad libitum* by those arguing in favor of racial, color, etc., tolerance and equality, but not by their opponents. St. Paul's desire to communicate to minority groups that it does not condone the "group hatred" of bias-motivated speech does not justify selectively silencing speech on the basis of its content. Pp. 391–393.

(d) The content-based discrimination reflected in the ordinance does not rest upon the very reasons why the particular class of speech at issue is proscribable, it is not aimed only at the "secondary effects" of speech within the meaning of *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, and it is not for any other reason the sort that does not threaten censorship of ideas. In addition, the ordinance's content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect. Pp. 393–396.

464 N. W. 2d 507, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined, and in which STEVENS, J., joined except as to Part I–A, *post*, p. 397. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 415. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which WHITE and BLACKMUN, JJ., joined, *post*, p. 416.

Edward J. Cleary argued the cause for petitioner. With him on the briefs was *Michael F. Cromett.*

Tom Foley argued the cause for respondent. With him on the brief was *Steven C. DeCoster.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *John A. Powell*, and *Mark R. Anfinson;* for the Association of American Publishers et al. by

JUSTICE SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been pun-

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Bruce J. Ennis; and for the Center for Individual Rights by *Gary B. Born* and *Michael P. McDonald.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Richard S. Slowes*, Assistant Attorney General, *Jimmy Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Richard Blumenthal*, Attorney General of Connecticut, and *John J. Kelly*, Chief State's Attorney of Connecticut, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lee I. Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Charles W. Burson*, Attorney General of Tennessee, *Mary Sue Terry*, Attorney General of Virginia, and *Paul Van Dam*, Attorney General of Utah; for the Anti-Defamation League of B'nai B'rith by *Allen I. Saeks, Jeffrey P. Sinensky, Steven M. Freeman*, and *Michael Lieberman;* for the Asian American Legal Defense and Education Fund et al. by *Angelo N. Ancheta;* for the Center for Democratic Renewal et al. by *Frank E. Deale;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the League of Minnesota Cities et al. by *Carla J. Heyl, Robert J. Alfton*, and *Jerome J. Segal;* for the National Association for the Advancement of Colored People et al. by *Ronald D. Maines, Dennis C. Hayes, Willie Abrams*, and *Kemp R. Harshman;* for the National Black Women's Health Project by *Catharine A. MacKinnon* and *Burke Marshall;* for the National Institute of Municipal Law Officers et al. by *Richard Ruda, Michael J. Wahoske*, and *Mark B. Rotenberg;* and for People for the American Way by *Richard S. Hoffman, Kevin J. Hasson*, and *Elliot M. Mincberg.*

Charles R. Sheppard filed a brief for the Patriot's Defense Foundation, Inc., as *amicus curiae.*

ished under any of a number of laws,[1] one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), which provides:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment.[2] The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases, see, *e. g.*, *In re Welfare of S. L. J.*, 263 N. W. 2d 412 (Minn. 1978), the modifying phrase "arouses anger, alarm or resentment in others" limited the reach of the ordinance to conduct that amounts to "fighting words," *i. e.*, "conduct that itself inflicts injury or tends to incite immediate violence . . . ," *In re Welfare of R. A. V.*, 464 N. W. 2d 507, 510 (Minn. 1991) (citing *Chaplin-*

[1] The conduct might have violated Minnesota statutes carrying significant penalties. See, *e. g.*, Minn. Stat. § 609.713(1) (1987) (providing for up to five years in prison for terroristic threats); § 609.563 (arson) (providing for up to five years and a $10,000 fine, depending on the value of the property intended to be damaged); § 609.595 (Supp. 1992) (criminal damage to property) (providing for up to one year and a $3,000 fine, depending upon the extent of the damage to the property).

[2] Petitioner has also been charged, in Count I of the delinquency petition, with a violation of Minn. Stat. § 609.2231(4) (Supp. 1990) (racially motivated assaults). Petitioner did not challenge this count.

sky v. *New Hampshire*, 315 U. S. 568, 572 (1942)), and therefore the ordinance reached only expression "that the first amendment does not protect," 464 N. W. 2d, at 511. The court also concluded that the ordinance was not impermissibly content based because, in its view, "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." *Ibid.* We granted certiorari, 501 U. S. 1204 (1991).

I

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 339 (1986); *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky*. 464 N. W. 2d, at 510–511. Petitioner and his *amici* urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as "substantially overbroad," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973). We find it unnecessary to consider this issue. Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.[3]

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[3] Contrary to JUSTICE WHITE's suggestion, *post*, at 397–398, n. 1, petitioner's claim is "fairly included" within the questions presented in the petition for certiorari, see this Court's Rule 14.1(a). It was clear from the petition and from petitioner's other filings in this Court (and in the courts below) that his assertion that the St. Paul ordinance "violat[es] overbreadth . . . principles of the First Amendment," Pet. for Cert. i, was *not*

The First Amendment generally prevents government from proscribing speech, see, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–311 (1940), or even expressive conduct, see, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991); *id.*, at 124 (KENNEDY, J., concurring in judgment); *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 536 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a

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just a technical "overbreadth" claim—*i. e.*, a claim that the ordinance violated the rights of too many third parties—but included the contention that the ordinance was "overbroad" in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based. An important component of petitioner's argument is, and has been all along, that narrowly construing the ordinance to cover only "fighting words" cannot cure this fundamental defect. *Id.*, at 12, 14, 15–16. In his briefs in this Court, petitioner argued that a narrowing construction was ineffective because (1) its boundaries were vague, Brief for Petitioner 26, and because (2) denominating particular expression a "fighting word" because of the impact of its ideological content upon the audience is inconsistent with the First Amendment, Reply Brief for Petitioner 5; *id.*, at 13 ("[The ordinance] is overbroad, *viewpoint discriminatory* and vague as 'narrowly construed' ") (emphasis added). At oral argument, counsel for petitioner reiterated this second point: "It is . . . one of my positions, that in [punishing only some fighting words and not others], even though it is a subcategory, technically, of unprotected conduct, [the ordinance] still is picking out an opinion, a disfavored message, and making that clear through the State." Tr. of Oral Arg. 8. In resting our judgment upon this contention, we have not departed from our criteria of what is "fairly included" within the petition. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375, 382, n. 6 (1983); *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U. S. 87, 94, n. 9 (1982); *Eddings* v. *Oklahoma*, 455 U. S. 104, 113, n. 9 (1982); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 361 (6th ed. 1986).

few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, *supra*, at 572. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, *e. g.*, *Roth* v. *United States*, 354 U. S. 476 (1957) (obscenity); *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952) (defamation); *Chaplinsky* v. *New Hampshire*, *supra* ("'fighting' words"); see generally *Simon & Schuster*, *supra*, at 124 (KENNEDY, J., concurring in judgment). Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); see generally *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 13–17 (1990), and for obscenity, see *Miller* v. *California*, 413 U. S. 15 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," *Roth*, *supra*, at 483; *Beauharnais*, *supra*, at 266; *Chaplinsky*, *supra*, at 571–572, or that the "protection of the First Amendment does not extend" to them, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 504 (1984); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 124 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Sunstein, Pornography and the First Amendment, 1986 Duke L. J. 589, 615, n. 46. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for

content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. We recently acknowledged this distinction in *Ferber*, 458 U. S., at 763, where, in upholding New York's child pornography law, we expressly recognized that there was no "question here of censoring a particular literary theme . . . ." See also *id.*, at 775 (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas").

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," *post*, at 400 (WHITE, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.[4] It is

[4] JUSTICE WHITE concedes that a city council cannot prohibit only those legally obscene works that contain criticism of the city government, *post*, at 406, but asserts that to be the consequence, not of the First Amendment, but of the Equal Protection Clause. Such content-based discrimination would not, he asserts, "be rationally related to a legitimate government interest." *Ibid.* But of course the only *reason* that government interest is not a "legitimate" one is that it violates the First Amendment. This Court itself has occasionally fused the First Amendment into the Equal Protection Clause in this fashion, but at least with the acknowledgment (which JUSTICE WHITE cannot afford to make) that the First Amendment underlies its analysis. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972) (ordinance prohibiting only nonlabor picketing violated the Equal Protection Clause because there was no "appropriate governmental interest" supporting the distinction inasmuch as "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Carey* v.

not true that "fighting words" have at most a "*de minimis*" expressive content, *ibid.*, or that their content is *in all respects* "worthless and undeserving of constitutional protection," *post*, at 401; sometimes they are quite expressive indeed. We have not said that they constitute "*no* part of the expression of ideas," but only that they constitute "no *essential* part of any exposition of ideas." *Chaplinsky*, *supra*, at 572 (emphasis added).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e. g.*, obscenity) but not on the basis of another (*e. g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. See *Johnson*, 491 U. S., at 406–407. See also *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 569–570 (1991) (plurality opinion); *id.*, at 573–574 (SCALIA, J., concurring in judgment); *id.*, at 581–582 (SOUTER, J., concurring in judgment); *United*

Brown, 447 U. S. 455 (1980). See generally *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 124 (1991) (KENNEDY, J., concurring in judgment).

JUSTICE STEVENS seeks to avoid the point by dismissing the notion of obscene antigovernment speech as "fantastical," *post*, at 418, apparently believing that any reference to politics prevents a finding of obscenity. Unfortunately for the purveyors of obscenity, that is obviously false. A shockingly hardcore pornographic movie that contains a model sporting a political tattoo can be found, "*taken as a whole*, [to] lac[k] serious literary, artistic, political, or scientific value," *Miller* v. *California*, 413 U. S. 15, 24 (1973) (emphasis added). Anyway, it is easy enough to come up with other illustrations of a content-based restriction upon "unprotected speech" that is obviously invalid: the antigovernment libel illustration mentioned earlier, for one. See *supra*, at 384. And of course the concept of racist fighting words is, unfortunately, anything but a "highly speculative hypothetica[l]," *post*, at 419.

States v. *O'Brien*, 391 U. S. 367, 376–377 (1968). Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (internal quotation marks omitted); see also *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298 (1984) (noting that the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a noncontent element (*e. g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e. g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech," *Niemotko* v. *Maryland*, 340 U. S. 268, 282 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. Compare *Frisby* v. *Schultz*, 487 U. S. 474 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with *Carey* v. *Brown*, 447 U. S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing).[5]

[5] Although JUSTICE WHITE asserts that our analysis disregards "established principles of First Amendment law," *post*, at 415, he cites not a single case (and we are aware of none) that even involved, much less con-

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusiv[e]," *post*, at 402 (WHITE, J., concurring in judgment)—a First Amendment "absolutism" whereby "[w]ithin a particular 'proscribable' category of expression, . . . a government must either proscribe *all* speech or no speech at all," *post*, at 419 (STEVENS, J., concurring in judgment). That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content. See, *e. g.*, *Sable Communications*, 492 U. S., at 124–126 (upholding 47 U. S. C. § 223(b)(1), which prohibits obscene *telephone* communications).

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster*, 502 U. S., at 116; *Leathers* v. *Medlock*, 499 U. S. 439, 448 (1991); *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 383–384 (1984); *Consolidated Edison Co.*, 447 U. S., at 536; *Police Dept. of Chicago* v. *Mosley*, 408 U. S.,

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sidered and resolved, the issue of content discrimination through regulation of "unprotected" speech—though we plainly *recognized* that as an issue in *New York* v. *Ferber*, 458 U. S. 747 (1982). It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.

at 95–98. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i. e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek* v. *Hanaway*, 902 F. 2d 513, 517 (CA7 1990), cert. denied, 498 U. S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U. S. C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts* v. *United States*, 394 U. S. 705, 707 (1969) (upholding the facial validity of § 871 because of the "overwhelmin[g] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence"). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by JUSTICE STEVENS, *post*, at 421–422), a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, see *Virginia*

State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976)) is in its view greater there. Cf. *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992) (state regulation of airline advertising); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (state regulation of lawyer advertising). But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. See, *e. g.*, Los Angeles Times, Aug. 8, 1989, section 4, p. 6, col. 1.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the . . . speech," *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (quoting, with emphasis, *Virginia State Bd. of Pharmacy, supra*, at 771); see also *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71, n. 34 (1976) (plurality opinion); *id.*, at 80–82 (Powell, J., concurring); *Barnes*, 501 U. S., at 586 (SOUTER, J., concurring in judgment). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. See *id.*, at 571 (plurality opinion); *id.*, at 577 (SCALIA, J., concurring in judgment); *id.*, at 582 (SOUTER, J., concurring in judgment); *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 425–432 (1990); *O'Brien*, 391 U. S., at 376–377. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U. S. C. § 2000e–2; 29 CFR § 1604.11 (1991). See also 18

U. S. C. § 242; 42 U. S. C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is "even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 555 (1981) (STEVENS, J., dissenting in part) (citation omitted). There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone. See *Posadas de Puerto Rico*, 478 U. S., at 342–343.[6]

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[6] JUSTICE STEVENS cites a string of opinions as supporting his assertion that "selective regulation of speech based on content" is not presumptively invalid. *Post*, at 421–422. Analysis reveals, however, that they do not support it. To begin with, three of them did not command a majority of the Court, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–73 (1976) (plurality opinion); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 744–748 (1978) (plurality opinion); *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974) (plurality opinion), and two others did not even discuss the First Amendment, *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992); *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946). In any event, all that their contents establish is what we readily concede: that presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions as reasonable and viewpoint-neutral content-based discrimination in nonpublic forums, see *Lehman*, *supra*, at 301–304; see also *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985), or with respect to certain speech by government employees, see *Broadrick* v. *Oklahoma*,

II

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. See *Simon & Schuster*, 502 U. S., at 116; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 229–230 (1987).

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-

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413 U. S. 601 (1973); see also *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 564–567 (1973).

Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." 464 N. W. 2d, at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," *id.*, at 508, but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, JUSTICE STEVENS suggests that this "fundamentally misreads" the ordinance. *Post*, at 433. It is directed, he claims, not to speech of a particular content, but to particular "injur[ies]" that are "qualitatively different" from other injuries. *Post*, at 424. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is

nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to "racial, religious, or gender-specific symbols" such as "a burning cross, Nazi swastika or other instrumentality of like import." Brief for Respondent 8. Indeed, St. Paul argued in the Juvenile Court that "[t]he burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate." Memorandum from the Ramsey County Attorney to the Honorable Charles A. Flinn, Jr., dated July 13, 1990, in *In re Welfare of R. A. V.*, No. 89–D–1231 (Ramsey Cty. Juvenile Ct.), p. 1, reprinted in App. to Brief for Petitioner C–1.

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, see *supra,* at 386, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fight-

ing words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the "secondary effects" of the speech, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). According to St. Paul, the ordinance is intended, "not to impact on *[sic]* the right of free expression of the accused," but rather to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against." Brief for Respondent 28. Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos* v. *Barry*, 485 U. S. 312 (1988), "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Id.*, at 321. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Ibid.* See also *id.*, at 334 (opinion of Brennan, J.).[7]

[7] St. Paul has not argued in this case that the ordinance merely regulates that subclass of fighting words which is most likely to provoke a violent response. But even if one assumes (as appears unlikely) that the categories selected may be so described, that would not justify selective regulation under a "secondary effects" theory. The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message; because the "chain of causation" thus *necessarily* "run[s] through the persuasive effect of the expressive component" of the conduct, *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 586 (1991) (SOUTER, J., concurring in judgment), it is clear that the St. Paul

It hardly needs discussion that the ordinance does not fall within some more general exception permitting *all* selectivity that for any reason is beyond the suspicion of official suppression of ideas. The statements of St. Paul in this very case afford ample basis for, if not full confirmation of, that suspicion.

Finally, St. Paul and its *amici* defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute, *Leathers* v. *Medlock*, 499 U. S., at 448, requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest," *Burson* v. *Freeman*, 504 U. S. 191, 199 (1992) (plurality opinion) (emphasis added); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute, *Boos* v. *Barry*, *supra*, at 329, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the purpose and effect of the law," *Burson*, *supra*, at 213 (KENNEDY, J., concurring). See *Boos*, *supra*, at 324–329; cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 586–587 (1983). The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compel-

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ordinance regulates on the basis of the "primary" effect of the speech—*i. e.*, its persuasive (or repellant) force.

ling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.[8] That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

* * *

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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[8] A plurality of the Court reached a different conclusion with regard to the Tennessee antielectioneering statute considered earlier this Term in *Burson* v. *Freeman*, 504 U. S. 191 (1992). In light of the "logical connection" between electioneering and the State's compelling interest in preventing voter intimidation and election fraud—an inherent connection borne out by a "long history" and a "widespread and time-tested consensus," *id.*, at 206, 208, n. 10, 211—the plurality concluded that it was faced with one of those "rare case[s]" in which the use of a facially content-based restriction was justified by interests unrelated to the suppression of ideas, *id.*, at 211; see also *id.*, at 213 (KENNEDY, J., concurring). JUSTICE WHITE and JUSTICE STEVENS are therefore quite mistaken when they seek to convert the *Burson* plurality's passing comment that "[t]he First Amendment does not require States to regulate for problems that do not exist," *id.*, at 207, into endorsement of the revolutionary proposition that the suppression of particular ideas can be justified when only those ideas have been a source of trouble in the past. *Post*, at 405 (WHITE, J., concurring in judgment); *post*, at 434 (STEVENS, J., concurring in judgment).

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, and with whom JUSTICE STEVENS joins except as to Part I–A, concurring in the judgment.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment. See Part II, *infra.* Instead, "find[ing] it unnecessary" to consider the questions upon which we granted review,[1] *ante*, at 381, the

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[1] The Court granted certiorari to review the following questions:

"1. May a local government enact a content-based, 'hate-crime' ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

"2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, like that used to save the vague and overbroad content-neutral laws, restricting its application to 'fighting words' or 'imminent lawless action?' " Pet. for Cert. i.

It has long been the rule of this Court that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This Court's Rule 14.1(a). This Rule has served to focus the issues presented for review. But the majority reads the Rule so expansively that any First Amendment theory would appear to be "fairly included" within the questions quoted above.

Contrary to the impression the majority attempts to create through its selective quotation of petitioner's briefs, see *ante,* at 381–382, n. 3, petitioner did not present to this Court or the Minnesota Supreme Court anything approximating the novel theory the majority adopts today. Most certainly petitioner did not "reiterat[e]" such a claim at argument; he responded to a question from the bench, Tr. of Oral Arg. 8. Previously, this Court has shown the restraint to refrain from deciding cases on the basis

Court holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in *Burson* v. *Freeman*, 504 U. S. 191 (1992), which was joined by two of the five Justices in the majority in the present case.

This Court ordinarily is not so eager to abandon its precedents. Twice within the past month, the Court has declined to overturn longstanding but controversial decisions on questions of constitutional law. See *Allied-Signal, Inc.* v. *Director, Division of Taxation*, 504 U. S. 768 (1992); *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992). In each case, we had the benefit of full briefing on the critical issue, so that the parties and *amici* had the opportunity to apprise us of the impact of a change in the law. And in each case, the Court declined to abandon its precedents, invoking the principle of *stare decisis*. *Allied-Signal, Inc.*, *supra*, at 783–786; *Quill Corp.*, *supra*, at 317–318.

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

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of its own theories when they have not been pressed or passed upon by a state court of last resort. See, *e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 217–224 (1983).

Given this threshold issue, it is my view that the Court lacks jurisdiction to decide the case on the majority rationale. Cf. *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375, 382, n. 6 (1983). Certainly the preliminary jurisdictional and prudential concerns are sufficiently weighty that we would never have granted certiorari had petitioner sought review of a question based on the majority's decisional theory.

I

A

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), made the point in the clearest possible terms:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572.

See also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 504 (1984) (citing *Chaplinsky*).

Thus, as the majority concedes, see *ante*, at 383–384, this Court has long held certain discrete categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts "fire" in a crowded theater may not claim the protection of the First Amendment. *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York* v. *Ferber*, 458 U. S. 747, 764 (1982); *Miller* v. *California*, 413 U. S. 15, 20 (1973); *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957). And the Court has observed that, "[l]eaving aside the special considerations when public officials [and public figures] are the target, a libelous publication is not protected by the Constitution." *Ferber*, *supra*, at 763 (citations omitted).

All of these categories are content based. But the Court has held that the First Amendment does not apply to them because their expressive content is worthless or of *de minimis* value to society. *Chaplinsky*, *supra*, at 571–572. We have not departed from this principle, emphasizing repeatedly that, "within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, *supra*, at 763–764; *Bigelow* v. *Virginia*, 421 U. S. 809, 819 (1975). This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.[2]

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are "not within the area of constitutionally protected speech." *Roth*, *supra*, at 483. See *ante*, at 383, citing *Beauharnais* v. *Illinois*, 343 U. S. 250, 266 (1952); *Chaplinsky*, *supra*, at 571–572; *Bose Corp.*, *supra*, at 504; *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 124 (1989). The present Court submits that such clear statements "must be taken in context" and are not "literally true." *Ante*, at 383.

To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence. Indeed, the Court in *Roth* reviewed the guarantees of freedom of expression in effect at the time of the ratification of the Constitution and concluded, "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was

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[2] "In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 504–505 (1984).

not intended to protect every utterance." 354 U. S., at 482–483.

In its decision today, the Court points to "[n]othing . . . in this Court's precedents warrant[ing] disregard of this long-standing tradition." *Burson*, 504 U. S., at 216 (SCALIA, J., concurring in judgment); *Allied-Signal, Inc.*, *supra*, at 783. Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *Ante*, at 386. Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: "Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *Ante*, at 384. It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, *Ferber*, *supra*, at 763–764; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

The majority's observation that fighting words are "quite expressive indeed," *ante*, at 385, is no answer. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. *Chaplinsky*, 315 U. S., at 572. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. See *ante*, at 387.

Therefore, the Court's insistence on inventing its brand of First Amendment underinclusiveness puzzles me.[3] The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973); *Osborne* v. *Ohio*, 495 U. S. 103, 112, n. 8 (1990); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503 (1985); *Ferber*, *supra*, at 772, but the Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms, see *Ferber*, *supra*, at 763–764; *Chaplinsky*, *supra*, at 571–572, until the city of St. Paul cures the underbreadth by adding to its ordinance a catchall phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.[4] Indeed, by characterizing fighting words as a form of "debate," *ante*, at 392, the majority legitimates hate speech as a form of public discussion.

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[3] The assortment of exceptions the Court attaches to its rule belies the majority's claim, see *ante*, at 387, that its new theory is truly concerned with content discrimination. See Part I–C, *infra* (discussing the exceptions).

[4] This does not suggest, of course, that cross burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. Cf. *Brandenburg* v. *Ohio*, 395 U. S. 444, 445 (1969). But in such a context, the cross burning could not be characterized as a "direct personal insult or an invitation to exchange fisticuffs," *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989), to which the fighting words doctrine, see Part II, *infra*, applies.

Furthermore, the Court obscures the line between speech that could be regulated freely on the basis of content (*i. e.*, the narrow categories of expression falling outside the First Amendment) and that which could be regulated on the basis of content only upon a showing of a compelling state interest (*i. e.*, all remaining expression). By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category. See *Burson* v. *Freeman*, *supra*, at 196; *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214, 222–223 (1989).

B

In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression. Assuming, *arguendo*, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation "'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991) (quoting *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 231 (1987)). St. Paul has urged that its ordinance, in the words of the majority, "helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination . . . ." *Ante*, at 395. The Court expressly concedes that this interest is compelling and is promoted by the ordinance. *Ibid.* Nevertheless, the Court treats strict scrutiny analysis as irrelevant to the constitutionality of the legislation:

> "The dispositive question . . . is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not

> limited to the favored topics, for example, would have precisely the same beneficial effect." *Ante*, at 395–396.

Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.[5]

This abandonment of the doctrine is inexplicable in light of our decision in *Burson* v. *Freeman*, 504 U. S. 191 (1992), which was handed down just a month ago.[6] In *Burson*, seven of the eight participating Members of the Court agreed that the strict scrutiny standard applied in a case involving a First Amendment challenge to a content-based statute. See *id.*, at 198 (plurality opinion); *id.*, at 217 (STEVENS, J.,

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[5] The majority relies on *Boos* v. *Barry*, 485 U. S. 312 (1988), in arguing that the availability of content-neutral alternatives "'undercut[s] significantly'" a claim that content-based legislation is "'*necessary* to serve the asserted [compelling] interest.'" *Ante*, at 395 (quoting *Boos*, *supra*, at 329, and *Burson* v. *Freeman*, 504 U. S. 191, 199 (1992) (plurality opinion)). *Boos* does not support the majority's analysis. In *Boos*, Congress already had decided that the challenged legislation was not necessary, and the Court pointedly deferred to this choice. 485 U. S., at 329. St. Paul lawmakers have made no such legislative choice.

Moreover, in *Boos*, the Court held that the challenged statute was not narrowly tailored because a less restrictive alternative was available. *Ibid.* But the Court's analysis today turns *Boos* inside-out by substituting the majority's policy judgment that a *more* restrictive alternative could adequately serve the compelling need identified by St. Paul lawmakers. The result would be: (a) a statute that was not tailored to fit the need identified by the government; and (b) a greater restriction on fighting words, even though the Court clearly believes that fighting words have protected expressive content. *Ante*, at 384–385.

[6] Earlier this Term, seven of the eight participating Members of the Court agreed that strict scrutiny analysis applied in *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105 (1991), in which we struck down New York's "Son of Sam" law, which required "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account." *Id.*, at 108.

dissenting).[7] The statute at issue prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The plurality concluded that the legislation survived strict scrutiny because the State had asserted a compelling interest in regulating electioneering near polling places and because the statute at issue was narrowly tailored to accomplish that goal. *Id.*, at 208–210.

Significantly, the statute in *Burson* did not proscribe all speech near polling places; it restricted only political speech. *Id.*, at 197. The *Burson* plurality, which included THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that the distinction between types of speech required application of strict scrutiny, but it squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms:

> "States adopt laws to address the problems that confront them. *The First Amendment does not require States to regulate for problems that do not exist.*" *Id.*, at 207 (emphasis added).

This reasoning is in direct conflict with the majority's analysis in the present case, which leaves two options to lawmakers attempting to regulate expressions of violence: (1) enact a sweeping prohibition on an entire class of speech (thereby requiring "regulat[ion] for problems that do not exist"); or (2) not legislate at all.

Had the analysis adopted by the majority in the present case been applied in *Burson*, the challenged election law would have failed constitutional review, for its content-based distinction between political and nonpolitical speech could not have been characterized as "reasonably necessary," *ante*,

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[7] The *Burson* dissenters did not complain that the plurality erred in applying strict scrutiny; they objected that the plurality was not sufficiently rigorous in its review. 504 U. S., at 225–226 (STEVENS, J., dissenting).

at 395, to achieve the State's interest in regulating polling place premises.[8]

As with its rejection of the Court's categorical analysis, the majority offers no reasoned basis for discarding our firmly established strict scrutiny analysis at this time. The majority appears to believe that its doctrinal revisionism is necessary to prevent our elected lawmakers from prohibiting libel against members of one political party but not another and from enacting similarly preposterous laws. *Ante*, at 384. The majority is misguided.

Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," *ibid.*, would unquestionably fail rational-basis review.[9]

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[8] JUSTICE SCALIA concurred in the judgment in *Burson*, reasoning that the statute, "though content based, is constitutional [as] a reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.*, at 214. However, nothing in his reasoning in the present case suggests that a content-based ban on fighting words would be constitutional were that ban limited to nonpublic fora. Taken together, the two opinions suggest that, in some settings, political speech, to which "the First Amendment 'has its fullest and most urgent application,'" is entitled to less constitutional protection than fighting words. *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)).

[9] The majority is mistaken in stating that a ban on obscene works critical of government would fail equal protection review only because the ban would violate the First Amendment. *Ante*, at 384–385, n. 4. While decisions such as *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972), recognize that First Amendment principles may be relevant to an equal protection claim challenging distinctions that impact on protected expression, *id.*, at 95–99, there is no basis for linking First and Fourteenth Amendment analysis in a case involving unprotected expression. Certainly, one

Turning to the St. Paul ordinance and assuming, *arguendo*, as the majority does, that the ordinance is not constitutionally overbroad (but see Part II, *infra*), there is no question that it would pass equal protection review. The ordinance proscribes a subset of "fighting words," those that injure "on the basis of race, color, creed, religion or gender." This selective regulation reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed, as the majority concedes, the interest is compelling. *Ante*, at 395.

C

The Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, see *post*, at 415 (BLACKMUN, J., concurring in judgment), or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.

For instance, if the majority were to give general application to the rule on which it decides this case, today's decision would call into question the constitutionality of the statute making it illegal to threaten the life of the President. 18 U. S. C. § 871. See *Watts* v. *United States*, 394 U. S. 705 (1969) *(per curiam)*. Surely, this statute, by singling out certain threats, incorporates a content-based distinction; it indicates that the Government especially disfavors threats against the President as opposed to threats against all oth-

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need not resort to First Amendment principles to conclude that the sort of improbable legislation the majority hypothesizes is based on senseless distinctions.

ers.[10] See *ante,* at 391. But because the Government could prohibit all threats and not just those directed against the President, under the Court's theory, the compelling reasons justifying the enactment of special legislation to safeguard the President would be irrelevant, and the statute would fail First Amendment review.

To save the statute, the majority has engrafted the following exception onto its newly announced First Amendment rule: Content-based distinctions may be drawn within an unprotected category of speech if the basis for the distinctions is "the very reason the entire class of speech at issue is proscribable." *Ante,* at 388. Thus, the argument goes, the statute making it illegal to threaten the life of the President is constitutional, "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Ibid.*

The exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since "the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination]."

To avoid the result of its own analysis, the Court suggests that fighting words are simply a mode of communication, rather than a content-based category, and that the St. Paul ordinance has not singled out a particularly objectionable mode of communication. *Ante,* at 386, 393. Again, the majority confuses the issue. A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, *Chaplinsky,* 315 U. S., at 572, a message that is at its ugliest when directed against groups

[10] Indeed, such a law is content based in and of itself because it distinguishes between threatening and nonthreatening speech.

that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.

As its second exception, the Court posits that certain content-based regulations will survive under the new regime if the regulated subclass "happens to be associated with particular 'secondary effects' of the speech . . . ," *ante,* at 389, which the majority treats as encompassing instances in which "words can . . . violate laws directed not against speech but against conduct . . . ," *ibid.*[11] Again, there is a simple explanation for the Court's eagerness to craft an exception to its new First Amendment rule: Under the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional.

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate "because of [an] individual's race, color, religion, sex, or national origin," 42 U. S. C. § 2000e–2(a)(1), and the regulations covering hostile workplace claims forbid "sexual harassment," which includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that create "an intimidating, hostile, or offensive working environment," 29 CFR § 1604.11(a) (1991). The regulation does not prohibit workplace harassment generally; it focuses on what the majority would characterize as the "disfavored topi[c]" of sexual harassment. *Ante,* at 391. In this way, Title VII is similar to the St. Paul ordinance that the majority condemns because it "impose[s] special prohibitions on those speakers who express views on disfavored subjects." *Ibid.* Under the broad principle the Court uses to decide the present case,

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[11] The consequences of the majority's conflation of the rarely used secondary effects standard and the *O'Brien* test for conduct incorporating "speech" and "nonspeech" elements, see generally *United States* v. *O'Brien,* 391 U. S. 367, 376–377 (1968), present another question that I fear will haunt us and the lower courts in the aftermath of the majority's opinion.

hostile work environment claims based on sexual harassment should fail First Amendment review; because a general ban on harassment in the workplace would cover the problem of sexual harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment.

Hence, the majority's second exception, which the Court indicates would insulate a Title VII hostile work environment claim from an underinclusiveness challenge because "sexually derogatory 'fighting words' . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Ante*, at 389. But application of this exception to a hostile work environment claim does not hold up under close examination.

First, the hostile work environment regulation is not keyed to the presence or absence of an economic *quid pro quo*, *Meritor Savings Bank, F. S. B.* v. *Vinson*, 477 U. S. 57, 65 (1986), but to the impact of the speech on the victimized worker. Consequently, the regulation would no more fall within a secondary effects exception than does the St. Paul ordinance. *Ante*, at 394. Second, the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working environment, which reaches beyond any "incidental" effect on speech. *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). If the relationship between the broader statute and specific regulation is sufficent to bring the Title VII regulation within *O'Brien*, then all St. Paul need do to bring its ordinance within this exception is to add some prefatory language concerning discrimination generally.

As to the third exception to the Court's theory for deciding this case, the majority concocts a catchall exclusion to protect against unforeseen problems, a concern that is heightened here given the lack of briefing on the majority's decisional theory. This final exception would apply in cases in which "there is no realistic possibility that official suppression of ideas is afoot." *Ante*, at 390. As I have demon-

strated, this case does not concern the official suppression of ideas. See *supra*, at 401. The majority discards this notion out of hand. *Ante*, at 395.

As I see it, the Court's theory does not work and will do nothing more than confuse the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles.

II

Although I disagree with the Court's analysis, I do agree with its conclusion: The St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds.

We have emphasized time and again that overbreadth doctrine is an exception to the established principle that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U. S., at 610; *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S., at 503–504. A defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. This is because "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Broadrick*, *supra*, at 612; *Osborne* v. *Ohio*, 495 U. S., at 112, n. 8; *New York* v. *Ferber*, 458 U. S., at 768–769; *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Gooding* v. *Wilson*, 405 U. S. 518, 521 (1972).

However, we have consistently held that, because overbreadth analysis is "strong medicine," it may be invoked to strike an entire statute only when the overbreadth of the statute is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broad-*

rick, 413 U. S., at 615, and when the statute is not susceptible to limitation or partial invalidation, *id.*, at 613; *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987). "When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction." *Ferber*, 458 U. S., at 769, n. 24. Of course, "[a] state court is also free to deal with a state statute in the same way." *Ibid.* See, *e. g.*, *Osborne*, 495 U. S., at 113–114.

Petitioner contends that the St. Paul ordinance is not susceptible to a narrowing construction and that the ordinance therefore should be considered as written, and not as construed by the Minnesota Supreme Court. Petitioner is wrong. Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is not one that we would have reached if we were construing the statute in the first instance. *Ibid.; Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, n. 5 (1982).[12]

Of course, the mere presence of a state court interpretation does not insulate a statute from overbreadth review. We have stricken legislation when the construction supplied by the state court failed to cure the overbreadth problem.

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[12] Petitioner can derive no support from our statement in *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988), that "the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." In *American Booksellers*, no state court had construed the language in dispute. In that instance, we certified a question to the state court so that it would have an opportunity to provide a narrowing interpretation. *Ibid.* In *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 216 (1975), the other case upon which petitioner principally relies, we observed not only that the ordinance at issue was not "by its plain terms . . . easily susceptible of a narrowing construction," but that the state courts had made no effort to restrict the scope of the statute when it was challenged on overbreadth grounds.

See, *e. g.*, *Lewis* v. *New Orleans*, 415 U. S. 130, 132–133 (1974); *Gooding*, *supra*, at 524–525. But in such cases, we have looked to the statute as construed in determining whether it contravened the First Amendment. Here, the Minnesota Supreme Court has provided an authoritative construction of the St. Paul antibias ordinance. Consideration of petitioner's overbreadth claim must be based on that interpretation.

I agree with petitioner that the ordinance is invalid on its face. Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment.

In attempting to narrow the scope of the St. Paul antibias ordinance, the Minnesota Supreme Court relied upon two of the categories of speech and expressive conduct that fall outside the First Amendment's protective sphere: words that incite "imminent lawless action," *Brandenburg* v. *Ohio*, 395 U. S. 444, 449 (1969), and "fighting" words, *Chaplinsky* v. *New Hampshire*, 315 U. S., at 571–572. The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in *Chaplinsky*—words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 572. However, the Minnesota court was far from clear in identifying the "injur[ies]" inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that "the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias." *In re Welfare of R. A. V.*, 464 N. W. 2d 507, 510 (1991). I

therefore understand the court to have ruled that St. Paul may constitutionally prohibit expression that "by its very utterance" causes "anger, alarm or resentment."

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. See *United States* v. *Eichman*, 496 U. S. 310, 319 (1990); *Texas* v. *Johnson*, 491 U. S. 397, 409, 414 (1989); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978); *Hess* v. *Indiana*, 414 U. S. 105, 107–108 (1973); *Cohen* v. *California*, 403 U. S. 15, 20 (1971); *Street* v. *New York*, 394 U. S. 576, 592 (1969); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

In the First Amendment context, "[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston* v. *Hill*, 482 U. S. 451, 459 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. Cf. *Lewis*, *supra*, at 132.[13] The ordinance is therefore fatally overbroad and invalid on its face.

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[13] Although the First Amendment protects offensive speech, *Johnson* v. *Texas*, 491 U. S., at 414, it does not require us to be subjected to such expression at all times, in all settings. We have held that such expression may be proscribed when it intrudes upon a "captive audience." *Frisby* v. *Schultz*, 487 U. S. 474, 484–485 (1988); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748–749 (1978). And expression may be limited when it merges into conduct. *United States* v. *O'Brien*, 391 U. S. 367 (1968); cf. *Meritor Savings Bank, F. S. B.* v. *Vinson*, 477 U. S. 57, 65 (1986). However, because of the manner in which the Minnesota Supreme Court construed the St. Paul ordinance, those issues are not before us in this case.

III

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

JUSTICE BLACKMUN, concurring in the judgment.

I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. As JUSTICE WHITE points out, this weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden to categorize, as the Court has done here, we shall reduce protection across the board. It is sad that in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence but, instead, will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its

proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with JUSTICE WHITE that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join as to Part I, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.

This case involves the constitutionality of one such ordinance. Because the regulated conduct has some communicative content—a message of racial, religious, or gender hostility—the ordinance raises two quite different First Amendment questions. Is the ordinance "overbroad" be-

cause it prohibits too much speech? If not, is it "underbroad" because it does not prohibit enough speech?

In answering these questions, my colleagues today wrestle with two broad principles: first, that certain "categories of expression [including 'fighting words'] are 'not within the area of constitutionally protected speech,'" *ante*, at 400 (WHITE, J., concurring in judgment); and second, that "[c]ontent-based regulations [of expression] are presumptively invalid," *ante*, at 382 (majority opinion). Although in past opinions the Court has repeated both of these maxims, it has—quite rightly—adhered to neither with the absolutism suggested by my colleagues. Thus, while I agree that the St. Paul ordinance is unconstitutionally overbroad for the reasons stated in Part II of JUSTICE WHITE's opinion, I write separately to suggest how the allure of absolute principles has skewed the analysis of both the majority and JUSTICE WHITE's opinions.

I

Fifty years ago, the Court articulated a categorical approach to First Amendment jurisprudence.

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942).

We have, as JUSTICE WHITE observes, often described such categories of expression as "not within the area of constitutionally protected speech." *Roth* v. *United States*, 354 U. S. 476, 483 (1957).

The Court today revises this categorical approach. It is not, the Court rules, that certain "categories" of expression are "unprotected," but rather that certain "elements" of expression are wholly "proscribable." To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains. Thus, obscene antigovernment speech may be regulated because it is obscene, but not because it is antigovernment. *Ante*, at 384. It is this revision of the categorical approach that allows the Court to assume that the St. Paul ordinance proscribes *only* fighting words, while at the same time concluding that the ordinance is invalid because it imposes a content-based regulation on expressive activity.

As an initial matter, the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland, for the concept of "obscene antigovernment" speech is fantastical. The category of the obscene is very narrow; to be obscene, expression must be found by the trier of fact to "appea[l] to the prurient interest, . . . depic[t] or describ[e], in a patently offensive way, sexual conduct, [and], taken as a whole, *lac[k] serious literary, artistic, political, or scientific value.*" *Miller* v. *California*, 413 U. S. 15, 24 (1973) (emphasis added). "Obscene antigovernment" speech, then, is a contradiction in terms: If expression is antigovernment, it does not "lac[k] serious . . . political . . . value" and cannot be obscene.

The Court attempts to bolster its argument by likening its novel analysis to that applied to restrictions on the time, place, or manner of expression or on expressive conduct. It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag. But these anal-

ogies are inapposite. In each of these examples, the two elements (*e. g.*, loudness and pro-Republican orientation) can coexist; in the case of "obscene antigovernment" speech, however, the presence of one element ("obscenity") by definition means the absence of the other. To my mind, it is unwise and unsound to craft a new doctrine based on such highly speculative hypotheticals.

I am, however, even more troubled by the second step of the Court's analysis—namely, its conclusion that the St. Paul ordinance is an unconstitutional content-based regulation of speech. Drawing on broadly worded dicta, the Court establishes a near-absolute ban on content-based regulations of expression and holds that the First Amendment prohibits the regulation of fighting words by subject matter. Thus, while the Court rejects the "all-or-nothing-at-all" nature of the categorical approach, *ante*, at 384, it promptly embraces an absolutism of its own: Within a particular "proscribable" category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.[1] This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

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[1] The Court disputes this characterization because it has crafted two exceptions, one for "certain media or markets" and the other for content discrimination based upon "the very reason that the entire class of speech at issue is proscribable." *Ante*, at 388. These exceptions are, at best, ill defined. The Court does not tell us whether, with respect to the former, fighting words such as cross burning could be proscribed only in certain neighborhoods where the threat of violence is particularly severe, or whether, with respect to the second category, fighting words that create a particular risk of harm (such as a race riot) would be proscribable. The hypothetical and illusory category of these two exceptions persuades me that either my description of the Court's analysis is accurate or that the Court does not in fact mean much of what it says in its opinion.

Although the Court has, on occasion, declared that content-based regulations of speech are "never permitted," *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972), such claims are overstated. Indeed, in *Mosley* itself, the Court indicated that Chicago's selective proscription of nonlabor picketing was not *per se* unconstitutional, but rather could be upheld if the city demonstrated that nonlabor picketing was "clearly more disruptive than [labor] picketing." *Id.*, at 100. Contrary to the broad dicta in *Mosley* and elsewhere, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.

This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity: Although the First Amendment broadly protects "speech," it does not protect the right to "fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort." Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 270 (1981). Whether an agreement among competitors is a violation of the Sherman Act or protected activity under the *Noerr-Pennington* doctrine[2] hinges upon the content of the agreement. Similarly, "the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66 (1976) (plurality opinion); see also *Musser* v. *Utah*, 333 U. S. 95, 100–103 (1948) (Rutledge, J., dissenting).

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[2] See *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961).

Likewise, whether speech falls within one of the categories of "unprotected" or "proscribable" expression is determined, in part, by its content. Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content. Even within categories of protected expression, the First Amendment status of speech is fixed by its content. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985), establish that the level of protection given to speech depends upon its subject matter: Speech about public officials or matters of public concern receives greater protection than speech about other topics. It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: Much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.

Consistent with this general premise, we have frequently upheld content-based regulations of speech. For example, in *Young* v. *American Mini Theatres*, the Court upheld zoning ordinances that regulated movie theaters based on the content of the films shown. In *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978) (plurality opinion), we upheld a restriction on the broadcast of *specific* indecent words. In *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974) (plurality opinion), we upheld a city law that permitted commercial advertising, but prohibited political advertising, on city buses. In *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), we upheld a state law that restricted the speech of state employees, but only as concerned partisan political matters. We have long recognized the power of the Federal Trade Commission to regulate misleading advertising and labeling, see, *e. g.*, *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946), and the National Labor Relations Board's power to regulate an employer's election-related speech on the basis of its content, see, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–618 (1969).

It is also beyond question that the Government may choose to limit advertisements for cigarettes, see 15 U. S. C. §§ 1331–1340,[3] but not for cigars; choose to regulate airline advertising, see *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992), but not bus advertising; or choose to monitor solicitation by lawyers, see *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), but not by doctors.

All of these cases involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content based, but they are not, in my opinion, "presumptively invalid." As these many decisions and examples demonstrate, the prohibition on content-based regulations is not nearly as total as the *Mosley* dictum suggests.

Disregarding this vast body of case law, the Court today goes beyond even the overstatement in *Mosley* and applies the prohibition on content-based regulation to speech that the Court had until today considered wholly "unprotected" by the First Amendment—namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. Yet in ruling that proscribable speech cannot be regulated based on subject

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[3] See also *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932) (Brandeis, J.) (upholding a statute that prohibited the advertisement of cigarettes on billboards and streetcar placards).

matter, the Court does just that.[4] Perversely, this gives fighting words *greater* protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender" while leaving unregulated fighting words based on "union membership . . . or homosexuality." *Ante*, at 391. The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that still can be wholly proscribed) is now entitled to greater protection than commercial speech—and possibly greater protection than core political speech. See *Burson* v. *Freeman*, 504 U. S. 191, 195, 196 (1992).

Perhaps because the Court recognizes these perversities, it quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations. First, the Court states that a content-based regulation is valid "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech . . . is proscribable." *Ante*, at 388. In a pivotal passage, the Court writes:

> "[T]he Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U. S. C. § 871—since the reasons why

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[4] The Court states that the prohibition on content-based regulations "applies differently in the context of proscribable speech" than in the context of other speech, *ante*, at 387, but its analysis belies that claim. The Court strikes down the St. Paul ordinance because it regulates fighting words based on subject matter, despite the fact that, as demonstrated above, we have long upheld regulations of commercial speech based on subject matter. The Court's self-description is inapt: By prohibiting the regulation of fighting words based on its subject matter, the Court provides the same protection to fighting words as is currently provided to core political speech.

> threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the . . . President." *Ibid.*

As I understand this opaque passage, Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause "fear of violence," "disruption," and actual "violence."

Precisely this same reasoning, however, compels the conclusion that St. Paul's ordinance is constitutional. Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.

Next, the Court recognizes that a State may regulate advertising in one industry but not another because "the risk of fraud (one of the characteristics . . . that justifies depriving [commercial speech] of full First Amendment protection . . .)" in the regulated industry is "greater" than in other industries. *Ibid.* Again, the same reasoning demonstrates the constitutionality of St. Paul's ordinance. "[O]ne of the characteristics that justifies" the constitutional status of fighting words is that such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U. S., at 572. Certainly a legislature that may determine that the risk of fraud is greater in the legal

trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats.

Similarly, it is impossible to reconcile the Court's analysis of the St. Paul ordinance with its recognition that "a prohibition of fighting words that are directed at certain persons or groups . . . would be facially valid." *Ante,* at 392 (emphasis deleted). A selective proscription of unprotected expression designed to protect "certain persons or groups" (for example, a law proscribing threats directed at the elderly) would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression (that is, if the elderly are more severely injured by threats than are the nonelderly). Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications. See *Ginsberg* v. *New York*, 390 U. S. 629 (1968). St. Paul has determined—reasonably in my judgment—that fighting-word injuries "based on race, color, creed, religion or gender" are qualitatively different and more severe than fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target ("certain persons or groups") or the basis of the harm (injuries "based on race, color, creed, religion or gender") makes no constitutional difference: What matters is whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction.

In sum, the central premise of the Court's ruling—that "[c]ontent-based regulations are presumptively invalid"—has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. Finally, although the Court recog-

nizes exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny.

II

Although I agree with much of JUSTICE WHITE's analysis, I do not join Part I–A of his opinion because I have reservations about the "categorical approach" to the First Amendment. These concerns, which I have noted on other occasions, see, *e. g.*, *New York* v. *Ferber*, 458 U. S. 747, 778 (1982) (opinion concurring in judgment), lead me to find JUSTICE WHITE's response to the Court's analysis unsatisfying.

Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of "obscenity," see, *e. g.*, *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part), and "public forum," see, *e. g.*, *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 126–131 (1981); *id.*, at 136–140 (Brennan, J., concurring in judgment); *id.*, at 147–151 (Marshall, J., dissenting); *id.*, at 152–154 (STEVENS, J., dissenting) (all debating the definition of "public forum"), illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of *context.* The meaning of any expression and the legitimacy of its regulation can only be determined

in context.[5] Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. Similarly, although legislatures may freely regulate most nonobscene child pornography, such pornography that is part of "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device" may be entitled to constitutional protection; the "question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context." *Ferber*, 458 U. S., at 778 (STEVENS, J., concurring in judgment); see also *Smith* v. *United States*, 431 U. S. 291, 311–321 (1977) (STEVENS, J., dissenting). The categorical approach sweeps too broadly when it declares that all such expression is beyond the protection of the First Amendment.

Perhaps sensing the limits of such an all-or-nothing approach, the Court has applied its analysis less categorically than its doctrinal statements suggest. The Court has recognized intermediate categories of speech (for example, for indecent nonobscene speech and commercial speech) and geographic categories of speech (public fora, limited public fora, nonpublic fora) entitled to varying levels of protection. The Court has also stringently delimited the categories of unprotected speech. While we once declared that "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech," *Beauharnais* v. *Illinois*, 343 U. S. 250, 266 (1952), our rulings in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), and *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985), have substantially qualified this

[5] "A word," as Justice Holmes has noted, "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918); see also *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting).

broad claim. Similarly, we have consistently construed the "fighting words" exception set forth in *Chaplinsky* narrowly. See, *e. g.*, *Houston* v. *Hill*, 482 U. S. 451 (1987); *Lewis* v. *New Orleans*, 415 U. S. 130 (1974); *Cohen* v. *California*, 403 U. S. 15 (1971). In the case of commercial speech, our ruling that "the Constitution imposes no . . . restraint on government [regulation] as respects purely commercial advertising," *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942), was expressly repudiated in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). In short, the history of the categorical approach is largely the history of narrowing the categories of unprotected speech.

This evolution, I believe, indicates that the categorical approach is unworkable and the quest for absolute categories of "protected" and "unprotected" speech ultimately futile. My analysis of the faults and limits of this approach persuades me that the categorical approach presented in Part I–A of JUSTICE WHITE's opinion is not an adequate response to the novel "underbreadth" analysis the Court sets forth today.

III

As the foregoing suggests, I disagree with both the Court's and part of JUSTICE WHITE's analysis of the constitutionality of the St. Paul ordinance. Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike JUSTICE WHITE, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. Applying this analysis and assuming, *arguendo*, (as the Court does) that the St. Paul ordinance is *not* overbroad, I conclude that such a selective, subject-matter regulation on proscribable speech is constitutional.

Not all content-based regulations are alike; our decisions clearly recognize that some content-based restrictions raise more constitutional questions than others. Although the Court's analysis of content-based regulations cannot be reduced to a simple formula, we have considered a number of factors in determining the validity of such regulations.

First, as suggested above, the scope of protection provided expressive activity depends in part upon its content and character. We have long recognized that when government regulates political speech or "the expression of editorial opinion on matters of public importance," *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 375–376 (1984), "First Amendment protectio[n] is 'at its zenith,'" *Meyer* v. *Grant*, 486 U. S. 414, 425 (1988). In comparison, we have recognized that "commercial speech receives a limited form of First Amendment protection," *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 340 (1986), and that "society's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate," *Young* v. *American Mini Theatres*, 427 U. S., at 70; see also *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). The character of expressive activity also weighs in our consideration of its constitutional status. As we have frequently noted, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989); see also *United States* v. *O'Brien*, 391 U. S. 367 (1968).

The protection afforded expression turns as well on the context of the regulated speech. We have noted, for example, that "[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers." *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 617. Similarly, the distinctive character of a university environment, see

Widmar v. *Vincent*, 454 U. S. 263, 277–280 (1981) (STEVENS, J., concurring in judgment), or a secondary school environment, see *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988), influences our First Amendment analysis. The same is true of the presence of a "'captive audience[, one] there as a matter of necessity, not of choice.'" *Lehman* v. *Shaker Heights*, 418 U. S., at 302 (citation omitted).[6] Perhaps the most familiar embodiment of the relevance of context is our "fora" jurisprudence, differentiating the levels of protection afforded speech in different locations.

The nature of a contested restriction of speech also informs our evaluation of its constitutionality. Thus, for example, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963). More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U. S., at 414. "Viewpoint discrimination is censorship in its purest form," *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 62 (1983) (Brennan, J., dissenting), and requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue, see, *e. g.*, *Schacht* v. *United States*, 398 U. S. 58, 63 (1970). "Especially where . . . the legislature's suppression of speech suggests an attempt

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[6] Cf. *In re Chase*, 468 F. 2d 128, 139–140 (CA7 1972) (Stevens, J., dissenting) (arguing that defendant who, for reasons of religious belief, refused to rise and stand as the trial judge entered the courtroom was not subject to contempt proceedings because he was not present in the courtroom "as a matter of choice").

to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785–786 (1978). Thus, although a regulation that on its face regulates speech by subject matter may in some instances effectively suppress particular viewpoints, see, *e. g.*, *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 546–547 (1980) (STEVENS, J., concurring in judgment), in general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions.[7]

Finally, in considering the validity of content-based regulations we have also looked more broadly at the scope of the restrictions. For example, in *Young* v. *American Mini Theatres*, 427 U. S., at 71, we found significant the fact that "what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited." Similarly, in *FCC* v. *Pacifica Foundation*, the Court emphasized two dimensions of the limited scope of the FCC ruling. First, the ruling concerned only broadcast material which presents particular problems because it "confronts the citizen . . . in the privacy of the home"; second, the ruling was not a complete ban on the use of selected offensive words, but rather merely a limitation on the times such speech could be broadcast. 438 U. S., at 748–750.

All of these factors play some role in our evaluation of content-based regulations on expression. Such a multifaceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression "protected" or "unprotected" or to proclaim a regulation "content based" or "content neutral."

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[7] Although the Court has sometimes suggested that subject-matter-based and viewpoint-based regulations are equally problematic, see, *e. g.*, *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S., at 537, our decisions belie such claims.

In applying this analysis to the St. Paul ordinance, I assume, *arguendo*—as the Court does—that the ordinance regulates *only* fighting words and therefore is *not* overbroad. Looking to the content and character of the regulated activity, two things are clear. First, by hypothesis the ordinance bars only low-value speech, namely, fighting words. By definition such expression constitutes "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U. S., at 572. Second, the ordinance regulates "expressive conduct [rather] than . . . the written or spoken word." *Texas* v. *Johnson*, 491 U. S., at 406.

Looking to the context of the regulated activity, it is again significant that the ordinance (by hypothesis) regulates *only* fighting words. Whether words are fighting words is determined in part by their context. Fighting words are not words that merely cause offense; fighting words must be directed at individuals so as to "by their very utterance inflict injury." By hypothesis, then, the St. Paul ordinance restricts speech in confrontational and potentially violent situations. The case at hand is illustrative. The cross burning in this case—directed as it was to a single African-American family trapped in their home—was nothing more than a crude form of physical intimidation. That this cross burning sends a message of racial hostility does not automatically endow it with complete constitutional protection.[8]

[8] The Court makes much of St. Paul's description of the ordinance as regulating "a message." *Ante*, at 393. As always, however, St. Paul's argument must be read in context:

"Finally, we ask the Court to reflect on the 'content' of the 'expressive conduct' represented by a 'burning cross.' It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even

Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes. In this regard, the Court fundamentally misreads the St. Paul ordinance. The Court describes the St. Paul ordinance as regulating expression "addressed to one of [several] specified disfavored *topics*," *ante*, at 391 (emphasis supplied), as policing "disfavored *subjects*," *ibid.* (emphasis supplied), and as "prohibit[ing] . . . speech solely on the basis of the *subjects* the speech addresses," *ante*, at 381 (emphasis supplied). Contrary to the Court's suggestion, the ordinance regulates only a subcategory of expression that causes *injuries based on* "race, color, creed, religion or gender," not a subcategory that involves *discussions* that concern those characteristics.[9] The ordinance, as construed by the Court, criminalizes expression that "one knows . . . [by its very utterance inflicts injury on] others on the basis of race, color, creed, religion or

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a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim['s] head. It is perhaps the ultimate expression of 'fighting words.'" App. to Brief for Petitioner C–6.

[9] The Court contends that this distinction is "wordplay," reasoning that "[w]hat makes [the harms caused by race-based threats] distinct from [the harms] produced by other fighting words is . . . the fact that [the former are] caused by a *distinctive idea*." *Ante*, at 392–393 (emphasis added). In this way, the Court concludes that regulating speech based on the injury it causes is no different from regulating speech based on its subject matter. This analysis fundamentally miscomprehends the role of "race, color, creed, religion [and] gender" in contemporary American society. One need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order. Although it is regrettable that race occupies such a place and is so incendiary an issue, until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable.

gender." In this regard, the ordinance resembles the child pornography law at issue in *Ferber*, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults.

Moreover, even if the St. Paul ordinance did regulate fighting words based on its subject matter, such a regulation would, in my opinion, be constitutional. As noted above, subject-matter-based regulations on commercial speech are widespread and largely unproblematic. As we have long recognized, subject-matter regulations generally do not raise the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations. Thus, in upholding subject-matter regulations we have carefully noted that viewpoint-based discrimination was not implicated. See *Young* v. *American Mini Theatres*, 427 U. S., at 67 (emphasizing "the need for absolute neutrality by the government," and observing that the contested statute was not animated by "hostility for the point of view" of the theaters); *FCC* v. *Pacifica Foundation*, 438 U. S., at 745–746 (stressing that "government must remain neutral in the marketplace of ideas"); see also *FCC* v. *League of Women's Voters of Cal.*, 468 U. S., at 412–417 (STEVENS, J., dissenting); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 554–555 (1981) (STEVENS, J., dissenting in part). Indeed, some subject-matter restrictions are a functional necessity in contemporary governance: "The First Amendment does not require States to regulate for problems that do not exist." *Burson* v. *Freeman*, 504 U. S., at 207.

Contrary to the suggestion of the majority, the St. Paul ordinance does *not* regulate expression based on viewpoint. The Court contends that the ordinance requires proponents of racial intolerance to "follow the Marquis of Queensberry rules" while allowing advocates of racial tolerance to "fight freestyle." The law does no such thing.

The Court writes:

> "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" *Ante*, at 391–392.

This may be true, but it hardly proves the Court's point. The Court's reasoning is asymmetrical. The response to a sign saying that "all [religious] bigots are misbegotten" is a sign saying that "all advocates of religious tolerance are misbegotten." Assuming such signs could be fighting words (which seems to me extremely unlikely), neither sign would be banned by the ordinance for the attacks were not "based on . . . religion" but rather on one's beliefs about tolerance. Conversely (and again assuming such signs are fighting words), just as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims.

The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt"—*by either party.* It does not, therefore, favor one side of any debate.[10]

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[10] Cf. *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 418 (1984) (STEVENS, J., dissenting) ("In this case . . . the regulation applies . . . to a defined class of . . . licensees [who] represent heterogenous points of view. There is simply no sensible basis for considering this regulation a viewpoint restriction—or . . . to condemn it as 'content-based'—because it applies equally to station owners of all shades of opinion").

Finally, it is noteworthy that the St. Paul ordinance is, as construed by the Court today, quite narrow. The St. Paul ordinance does not ban all "hate speech," nor does it ban, say, all cross burnings or all swastika displays. Rather it only bans a subcategory of the already narrow category of fighting words. Such a limited ordinance leaves open and protected a vast range of expression on the subjects of racial, religious, and gender equality. As construed by the Court today, the ordinance certainly does not "'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Ante*, at 387. Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to "by its very [execution] inflict injury." Such a limited proscription scarcely offends the First Amendment.

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

Syllabus

MEDINA *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 90–8370. Argued February 25, 1992—Decided June 22, 1992

Before petitioner Medina's trial for, *inter alia*, first-degree murder, the California court granted his motion for a competency hearing pursuant to a state law that forbids a mentally incompetent person to be tried or punished, establishes a presumption of competence, and placed on petitioner the burden of proving incompetence by a preponderance of the evidence. The jury empaneled for the competency hearing found Medina competent to stand trial and, subsequently, he was convicted and sentenced to death. The State Supreme Court affirmed, rejecting Medina's claim that the competency statute's burden of proof and presumption provisions violated his right to due process.

Held:

1. The Due Process Clause permits a State to require that a defendant claiming incompetence to stand trial bear the burden of proving so by a preponderance of the evidence. Pp. 442–453.

(a) Contrary to Medina's argument, the *Mathews* v. *Eldridge*, 424 U. S. 319, test for evaluating procedural due process claims does not provide the appropriate framework for assessing the validity of state procedural rules that are part of the criminal law process. It is not at all clear that *Mathews* was essential to the results in *United States* v. *Raddatz*, 447 U. S. 667, or *Ake* v. *Oklahoma*, 470 U. S. 68, the only criminal law cases in which this Court has invoked *Mathews* in resolving due process claims. Rather, the proper analytical approach is that set forth in *Patterson* v. *New York*, 432 U. S. 197, in which this Court held that the power of a State to regulate procedures for carrying out its criminal laws, including the burdens of producing evidence and persuasion, is not subject to proscription under the Due Process Clause unless "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.*, at 201–202. Pp. 442–446.

(b) There is no historical basis for concluding that allocating the burden of proof to a criminal defendant to prove incompetence violates due process. While the rule that an incompetent criminal defendant should not be required to stand trial has deep roots in this country's common-law heritage, no settled tradition exists for the proper allocation of the burden of proof in a competency proceeding. Moreover, con-

temporary practice demonstrates that there remains no settled view on where the burden should lie. Pp. 446–448.

(c) Nor does the State's allocation of the burden of proof to a defendant transgress any recognized principle of "fundamental fairness" in operation. This Court's decision in *Leland* v. *Oregon*, 343 U. S. 790—which upheld a State's right to place on a defendant the burden of proving the defense of insanity—does not compel the conclusion that the procedural rule at issue is constitutional, because there are significant differences between a claim of incompetence and a plea of not guilty by reason of insanity. Nonetheless, once the State has met its due process obligation of providing a defendant access to procedures for making a competency evaluation, there is no basis for requiring it to assume the burden of vindicating the defendant's constitutional right not to be tried while legally incompetent by persuading the trier of fact that the defendant is competent to stand trial. Pp. 448–449.

(d) Allocating the burden to the defendant is not inconsistent with this Court's holding in *Pate* v. *Robinson*, 383 U. S. 375, 384, that a defendant whose competence is in doubt cannot be deemed to have waived his right to a competency hearing, because the question whether a defendant whose competence is in doubt can be deemed to have made a knowing and intelligent waiver is quite different from the question presented here. Although psychiatry is an inexact science and reasonable minds may differ as to the wisdom of placing the burden of proof on the defendant in these circumstances, the State is not required to adopt one procedure over another on the basis that it may produce results more favorable to the accused. In addition, the fact that the burden of proof has been allocated to the State on a variety of other issues implicating a criminal defendant's constitutional rights does not mean that the burden must be placed on the State here. *Lego* v. *Twomey*, 404 U. S. 477, 489, distinguished. Pp. 449–452.

2. For the same reasons discussed herein with regard to the allocation of the burden of proof, the presumption of competence does not violate due process. There is no reason to disturb the State Supreme Court's conclusion that, in essence, the challenged presumption is a restatement of that burden. Pp. 452–453.

51 Cal. 3d 870, 799 P. 2d 1282, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which SOUTER, J., joined, *post*, p. 453. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 456.

Michael Pescetta, by appointment of the Court, 502 U. S. 955, argued the cause for petitioner. With him on the briefs was *Sarah Plotkin*.

Holly D. Wilkens, Deputy Attorney General of California, argued the cause for respondent. With her on the brief were *Daniel E. Lungren*, Attorney General, *George Williamson*, Chief Assistant Attorney General, *Gary W. Schons*, Senior Assistant Attorney General, and *Pat Zaharopoulos*, Supervising Deputy Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Drope* v. *Missouri*, 420 U. S. 162 (1975); *Pate* v. *Robinson*, 383 U. S. 375 (1966). The issue in this case is whether the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence.

I

In 1984, petitioner Teofilo Medina, Jr., stole a gun from a pawnshop in Santa Ana, California. In the weeks that followed, he held up two gas stations, a drive-in dairy, and a market, murdered three employees of those establishments, attempted to rob a fourth employee, and shot at two passers-by who attempted to follow his getaway car. Petitioner was apprehended less than one month after his crime spree

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**Edward M. Chikofsky* and *William J. Rold* filed a brief for the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Paul J. Larkin, Jr.*; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

began and was charged with a number of criminal offenses, including three counts of first-degree murder. Before trial, petitioner's counsel moved for a competency hearing under Cal. Penal Code Ann. § 1368 (West 1982), on the ground that he was unsure whether petitioner had the ability to participate in the criminal proceedings against him. 1 Record 320.

Under California law, "[a] person cannot be tried or adjudged to punishment while such person is mentally incompetent." Cal. Penal Code Ann. § 1367 (West 1982). A defendant is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." *Ibid.* The statute establishes a presumption that the defendant is competent, and the party claiming incompetence bears the burden of proving that the defendant is incompetent by a preponderance of the evidence. § 1369(f) ("It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent").

The trial court granted the motion for a hearing and the preliminary issue of petitioner's competence to stand trial was tried to a jury. Over the course of the 6-day hearing, in addition to lay testimony, the jury heard conflicting expert testimony about petitioner's mental condition. The Supreme Court of California gives this summary:

> "Dr. Gold, a psychiatrist who knew defendant while he was in the Arizona prison system, testified that defendant was a paranoid schizophrenic and was incompetent to assist his attorney at trial. Dr. Echeandia, a clinical psychologist at the Orange County jail, doubted the accuracy of the schizophrenia diagnosis, and could not express an opinion on defendant's competence to stand trial. Dr. Sharma, a psychiatrist, likewise expressed doubts regarding the schizophrenia diagnosis and leaned toward a finding of competence. Dr. Pierce,

> a psychologist, believed defendant was schizophrenic, with impaired memory and hallucinations, but nevertheless was competent to stand trial. Dr. Sakurai, a jail psychiatrist, opined that although defendant suffered from depression, he was competent, and that he may have been malingering. Dr. Sheffield, who treated defendant for knife wounds he incurred in jail, could give no opinion on the competency issue." 51 Cal. 3d 870, 880, 799 P. 2d 1282, 1288 (1990).

During the competency hearing, petitioner engaged in several verbal and physical outbursts. App. 62, 81–82; 3 Record 671, 699, 916. On one of these occasions, he overturned the counsel table. App. 81–82.

The trial court instructed the jury in accordance with § 1369(f) that "the defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of mental disorder or developmental disability." App. 87. The jury found petitioner competent to stand trial. *Id.*, at 89. A new jury was empaneled for the criminal trial, 4 Record 1020, and petitioner entered pleas of not guilty and not guilty by reason of insanity, 51 Cal. 3d, at 899, 799 P. 2d, at 1300. At the conclusion of the guilt phase, petitioner was found guilty of all three counts of first-degree murder and a number of lesser offenses. *Id.*, at 878–879, 799 P. 2d, at 1287. He moved to withdraw his insanity plea, and the trial court granted the motion. Two days later, however, petitioner moved to reinstate his insanity plea. Although his counsel expressed the view that reinstatement of the insanity plea was "tactically unsound," the trial court granted petitioner's motion. *Id.*, at 899, 799 P. 2d, at 1300–1301. A sanity hearing was held, and the jury found that petitioner was sane at the time of the offenses. At the penalty phase, the jury found that the murders were premeditated and deliberate and returned a verdict of death. The trial court imposed the death penalty for the murder convictions and sentenced

petitioner to a prison term for the remaining offenses. *Id.*, at 878–880, 799 P. 2d, at 1287–1288.

On direct appeal to the California Supreme Court, petitioner did not challenge the standard of proof set forth in § 1369(f), but argued that the statute violated his right to due process by placing the burden of proof on him to establish that he was not competent to stand trial. In addition, he argued that § 1369(f) violates due process by establishing a presumption that a defendant is competent to stand trial unless proven otherwise. The court rejected both of these contentions. Relying upon our decision in *Leland* v. *Oregon*, 343 U. S. 790 (1952), which rejected a due process challenge to an Oregon statute that required a criminal defendant to prove the defense of insanity beyond a reasonable doubt, the court observed that "the states ordinarily have great latitude to decide the proper placement of proof burdens." 51 Cal. 3d, at 884, 799 P. 2d, at 1291. In its view, § 1369(f) "does not subject the defendant to hardship or oppression," because "one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry." *Id.*, at 885, 799 P. 2d, at 1291. The court also rejected petitioner's argument that it is "irrational" to retain a presumption of competence after sufficient doubt has arisen as to a defendant's competence to warrant a hearing and "decline[d] to hold as a matter of due process that such a presumption must be treated as a mere presumption affecting the burden of production, which disappears merely because a preliminary, often undefined and indefinite, 'doubt' has arisen that justifies further inquiry into the matter." *Id.*, at 885, 799 P. 2d, at 1291–1292. We granted certiorari, 502 U. S. 924 (1991), and now affirm.

II

Petitioner argues that our decision in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), provides the proper analytical framework for determining whether California's allocation of

the burden of proof in competency hearings comports with due process. We disagree. In *Mathews*, we articulated a three-factor test for evaluating procedural due process claims which requires a court to consider

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process. *E. g.*, *People* v. *Fields*, 62 Cal. 2d 538, 542, 399 P. 2d 369, 371 (competency hearing "must be regarded as part of the proceedings in the criminal case") (internal quotation marks omitted), cert. denied, 382 U. S. 858 (1965).

In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 493 U. S. 342, 352 (1990); accord, *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal

procedure." Accord, *Estelle* v. *McGuire*, 502 U. S. 62, 70 (1991); *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983).

Mathews itself involved a due process challenge to the adequacy of administrative procedures established for the purpose of terminating Social Security disability benefits, and the *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law. Although we have since characterized the *Mathews* balancing test as "a general approach for testing challenged state procedures under a due process claim," *Parham* v. *J. R.*, 442 U. S. 584, 599 (1979), and applied it in a variety of contexts, *e. g.*, *Santosky* v. *Kramer*, 455 U. S. 745 (1982) (standard of proof for termination of parental rights over objection); *Addington* v. *Texas*, 441 U. S. 418 (1979) (standard of proof for involuntary civil commitment to mental hospital for indefinite period), we have invoked *Mathews* in resolving due process claims in criminal law cases on only two occasions.

In *United States* v. *Raddatz*, 447 U. S. 667 (1980), we cited to the *Mathews* balancing test in rejecting a due process challenge to a provision of the Federal Magistrates Act which authorized magistrates to make findings and recommendations on motions to suppress evidence. In *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), we relied upon *Mathews* in holding that, when an indigent capital defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the defendant be provided access to the assistance of a psychiatrist. Without disturbing the holdings of *Raddatz* and *Ake*, it is not at all clear that *Mathews* was essential to the results reached in those cases. In *Raddatz*, *supra*, at 677–681, the Court adverted to the *Mathews* balancing test, but did not explicitly rely upon it in conducting the due process analysis. *Raddatz*, *supra*, at 700 (Marshall, J., dissenting) ("The Court recites th[e] test, but it does not even attempt to apply it"). The holding in *Ake* can be un-

derstood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him "a fair opportunity to present his defense" and "to participate meaningfully in [the] judicial proceeding." *Ake*, *supra*, at 76.

The proper analytical approach, and the one that we adopt here, is that set forth in *Patterson* v. *New York*, 432 U. S. 197 (1977), which was decided one year after *Mathews*. In *Patterson*, we rejected a due process challenge to a New York law which placed on a criminal defendant the burden of proving the affirmative defense of extreme emotional disturbance. Rather than relying upon the *Mathews* balancing test, however, we reasoned that a narrower inquiry was more appropriate:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958); *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)." *Patterson* v. *New York*, *supra*, at 201–202.

Accord, *Martin* v. *Ohio*, 480 U. S. 228, 232 (1987). As *Patterson* suggests, because the States have considerable expertise in matters of criminal procedure and the criminal process is

grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area. The analytical approach endorsed in *Patterson* is thus far less intrusive than that approved in *Mathews*.

Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, *supra*, at 202 (internal quotation marks omitted). Historical practice is probative of whether a procedural rule can be characterized as fundamental. See 432 U. S., at 202; *In re Winship*, 397 U. S. 358, 361 (1970). The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage. Blackstone acknowledged that a defendant "who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought,'" and "if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" *Drope* v. *Missouri*, 420 U. S., at 171 (quoting 4 W. Blackstone, Commentaries *24); accord, 1 M. Hale, Pleas of the Crown *34–*35.

By contrast, there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence. Petitioner concedes that "[t]he common law rule on this issue at the time the Constitution was adopted is not entirely clear." Brief for Petitioner 36. Early English authorities either express no view on the subject, *e. g.*, *Firth's Case* (1790), 22 Howell St. Tr. 307, 311, 317–318 (1817); *Kinloch's Case* (1746), 18 Howell St. Tr. 395, 411 (1813), or are ambiguous. *E. g.*, *King* v. *Steel*, 1 Leach 452, 168 Eng. Rep. 328 (1787) (stating that, once a jury had determined

that the defendant was "mute by the visitation of God" (*i. e.*, deaf and dumb) and not "mute of malice," there arose a "presumption of ideotism" that the prosecution could rebut by demonstrating that the defendant had the capacity "to understand by signs and tokens").

Nineteenth century English decisions do not take a consistent position on the allocation of the burden of proof. Compare *R.* v. *Turton*, 6 Cox C. C. 385 (1854) (burden on defendant), with *R.* v. *Davies*, 3 Carrington & Kirwan 328, 175 Eng. Rep. 575 (1853) (burden on prosecution); see generally *R.* v. *Podola*, 43 Crim. App. 220, 235–236, 3 All E. R. 418, 429–430 (1959) (collecting conflicting cases). American decisions dating from the turn of the century also express divergent views on the subject. *E. g.*, *United States* v. *Chisolm*, 149 F. 284, 290 (SD Ala. 1906) (defendant bears burden of raising a reasonable doubt as to competence); *State* v. *Helm*, 69 Ark. 167, 170–171, 61 S. W. 915, 916 (1901) (burden on defendant to prove incompetence).

Contemporary practice, while of limited relevance to the due process inquiry, see *Martin* v. *Ohio*, *supra*, at 236; *Patterson* v. *New York*, *supra*, at 211, demonstrates that there remains no settled view of where the burden of proof should lie. The Federal Government and all 50 States have adopted procedures that address the issue of a defendant's competence to stand trial. See 18 U. S. C. § 4241; S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law, Table 12.1, pp. 744–754 (3d ed. 1985). Some States have enacted statutes that, like § 1369(f), place the burden of proof on the party raising the issue. *E. g.*, Conn. Gen. Stat. § 54–56d(b) (1991); Pa. Stat. Ann., Tit. 50, § 7403(a) (Purdon Supp. 1991). A number of state courts have said that the burden of proof may be placed on the defendant to prove incompetence. *E. g.*, *Wallace* v. *State*, 248 Ga. 255, 258–259, 282 S. E. 2d 325, 330 (1981), cert. denied, 455 U. S. 927 (1982); *State* v. *Aumann*, 265 N. W. 2d 316, 319–320 (Iowa 1978); *State* v. *Chapman*, 104 N. M. 324, 327–328, 721 P. 2d 392, 395–396

(1986); *Barber* v. *State*, 757 S. W. 2d 359, 362–363 (Tex. Crim. App. 1988) (en banc), cert. denied, 489 U. S. 1091 (1989). Still other state courts have said that the burden rests with the prosecution. *E. g.*, *Diaz* v. *State*, 508 A. 2d 861, 863–864 (Del. 1986); *Commonwealth* v. *Crowley*, 393 Mass. 393, 400–401, 471 N. E. 2d 353, 357–358 (1984); *State* v. *Bertrand*, 123 N. H. 719, 727–728, 465 A. 2d 912, 916 (1983); *State* v. *Jones*, 406 N. W. 2d 366, 369–370 (S. D. 1987).

Discerning no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process, we turn to consider whether the rule transgresses any recognized principle of "fundamental fairness" in operation. *Dowling* v. *United States*, 493 U. S., at 352. Respondent argues that our decision in *Leland* v. *Oregon*, 343 U. S. 790 (1952), which upheld the right of the State to place on a defendant the burden of proving the defense of insanity beyond a reasonable doubt, compels the conclusion that § 1369(f) is constitutional because, like a finding of insanity, a finding of incompetence has no necessary relationship to the elements of a crime, on which the State bears the burden of proof. See also *Rivera* v. *Delaware*, 429 U. S. 877 (1976). This analogy is not convincing, because there are significant differences between a claim of incompetence and a plea of not guilty by reason of insanity. See *Drope* v. *Missouri*, *supra*, at 176–177; *Jackson* v. *Indiana*, 406 U. S. 715, 739 (1972).

In a competency hearing, the "emphasis is on [the defendant's] capacity to consult with counsel and to comprehend the proceedings, and . . . this is by no means the same test as those which determine criminal responsibility at the time of the crime." *Pate* v. *Robinson*, 383 U. S., at 388–389 (Harlan, J., dissenting). If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him. See *Dusky* v. *United States*, 362 U. S. 402

(1960) *(per curiam)*. The entry of a plea of not guilty by reason of insanity, by contrast, presupposes that the defendant is competent to stand trial and to enter a plea. Moreover, while the Due Process Clause affords an incompetent defendant the right not to be tried, *Drope* v. *Missouri*, *supra*, at 172–173; *Pate* v. *Robinson*, *supra*, at 386, we have not said that the Constitution requires the States to recognize the insanity defense. See, *e. g.*, *Powell* v. *Texas*, 392 U. S. 514, 536–537 (1968).

Under California law, the allocation of the burden of proof to the defendant will affect competency determinations only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent. See *United States* v. *DiGilio*, 538 F. 2d 972, 988 (CA3 1976), cert. denied, 429 U. S. 1038 (1977). Our cases recognize that a defendant has a constitutional right "not to be tried while legally incompetent," and that a State's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope* v. *Missouri*, 420 U. S., at 172, 173. Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.

Petitioner relies upon federal- and state-court decisions which have said that the allocation of the burden of proof to the defendant in these circumstances is inconsistent with the rule of *Pate* v. *Robinson*, *supra*, at 384, where we held that a defendant whose competence is in doubt cannot be deemed to have waived his right to a competency hearing. *E. g.*, *United States* v. *DiGilio*, *supra*, at 988; *People* v. *McCullum*, 66 Ill. 2d 306, 312–314, 362 N. E. 2d 307, 310–311 (1977); *State*

v. *Bertrand*, *supra*, at 727–728, 465 A. 2d, at 916. Because "'it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial,'" it has been said that it is also "contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." *United States* v. *DiGilio*, *supra*, at 988 (quoting *Pate* v. *Robinson*, *supra*, at 384).

In our view, the question whether a defendant whose competence is in doubt may waive his right to a competency hearing is quite different from the question whether the burden of proof may be placed on the defendant once a hearing is held. The rule announced in *Pate* was driven by our concern that it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing. Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel, *e. g.*, *Estelle* v. *Smith*, 451 U. S. 454, 469–471 (1981), and psychiatric evidence is brought to bear on the question of the defendant's mental condition, see, *e. g.*, Cal. Penal Code Ann. §§ 1369(a), 1370 (West 1982 and Supp. 1992); see generally Brakel, Parry, & Weiner, The Mentally Disabled and the Law, at 697–698. Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense. *E. g.*, *United States* v. *David*, 167 U. S. App. D. C. 117, 122, 511 F. 2d 355, 360 (1975); *United States ex rel. Roth* v. *Zelker*, 455 F. 2d 1105, 1108 (CA2), cert. denied, 408 U. S. 927 (1972). While reasonable minds may differ as to the wisdom of placing the burden of proof on the defendant in these circumstances, we believe that a State

may take such factors into account in making judgments as to the allocation of the burden of proof, and we see no basis for concluding that placing the burden on the defendant violates the principle approved in *Pate*.

Petitioner argues that psychiatry is an inexact science, and that placing the burden of proof on the defendant violates due process because it requires the defendant to "bear the risk of being forced to stand trial as a result of an erroneous finding of competency." Brief for Petitioner 8. Our cases recognize that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations," because "[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Addington* v. *Texas*, 441 U. S., at 430. The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused. See, *e. g.*, *Patterson* v. *New York*, 432 U. S., at 208 ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person"); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (a state procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar"). Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial.

Petitioner further contends that the burden of proof should be placed on the State because we have allocated the burden to the State on a variety of other issues that implicate a criminal defendant's constitutional rights. *E. g.*, *Colorado* v. *Connelly*, 479 U. S. 157, 168–169 (1986) (waiver of *Miranda* rights); *Nix* v. *Williams*, 467 U. S. 431, 444–445, n. 5 (1984)

(inevitable discovery of evidence obtained by unlawful means); *United States* v. *Matlock*, 415 U. S. 164, 177–178, n. 14 (1974) (voluntariness of consent to search); *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972) (voluntariness of confession). The decisions upon which petitioner relies, however, do not control the result here, because they involved situations where the government sought to introduce inculpatory evidence obtained by virtue of a waiver of, or in violation of, a defendant's constitutional rights. In such circumstances, allocating the burden of proof to the government furthers the objective of "deterring lawless conduct by police and prosecution." *Ibid.* No such purpose is served by allocating the burden of proof to the government in a competency hearing.

In light of our determination that the allocation of the burden of proof to the defendant does not offend due process, it is not difficult to dispose of petitioner's challenge to the presumption of competence imposed by § 1369(f). Under California law, a defendant is required to make a threshold showing of incompetence before a hearing is required and, at the hearing, the defendant may be prevented from making decisions that are normally left to the discretion of a competent defendant. *E. g.*, *People* v. *Samuel*, 29 Cal. 3d 489, 495–496, 629 P. 2d 485, 486–487 (1981). Petitioner argues that, once the trial court has expressed a doubt as to the defendant's competence, a hearing is held, and the defendant is deprived of his right to make determinations reserved to competent persons, it is irrational to retain the presumption that the defendant is competent.

In rejecting this contention below, the California Supreme Court observed that "[t]he primary significance of the presumption of competence is to place on defendant (or the People, if they contest his competence) the burden of rebutting it" and that, "[b]y its terms, the presumption of competence is one which affects the burden of proof." 51 Cal. 3d, at 885, 799 P. 2d, at 1291. We see no reason to disturb the Califor-

nia Supreme Court's conclusion that, in essence, the challenged presumption is a restatement of the burden of proof, and it follows from what we have said that the presumption does not violate the Due Process Clause.

Nothing in today's decision is inconsistent with our longstanding recognition that the criminal trial of an incompetent defendant violates due process. *Drope* v. *Missouri*, 420 U. S., at 172–173; *Pate* v. *Robinson*, 383 U. S., at 386; see also *Riggins* v. *Nevada*, 504 U. S. 127, 139 (1992) (Kennedy, J., concurring in judgment). Rather, our rejection of petitioner's challenge to § 1369(f) is based on a determination that the California procedure is "constitutionally adequate" to guard against such results, *Drope* v. *Missouri*, *supra*, at 172, and reflects our considered view that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch," *Patterson* v. *New York*, *supra*, at 210.

The judgment of the Supreme Court of California is

Affirmed.

Justice O'Connor, with whom Justice Souter joins, concurring in the judgment.

I concur in the judgment of the Court, but I reject its intimation that the balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process. *Ante*, at 443–446. We obviously applied the balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), a case concerning criminal procedure, and I do not see that *Ake* can be distinguished here without disavowing the analysis on which it rests. The balancing of equities that *Mathews* v. *Eldridge* outlines remains a useful guide in due process cases.

In *Mathews*, however, we did not have to address the question of how much weight to give historical practice; in the context of modern administrative procedures, there was no

historical practice to consider. The same is true of the new administrative regime established by the federal criminal sentencing guidelines, and I have agreed that *Mathews* may be helpful in determining what process is due in that context. See *Burns* v. *United States*, 501 U. S. 129, 147–148 (1991) (SOUTER, J., dissenting). While I agree with the Court that historical pedigree can give a procedural practice a presumption of constitutionality, see *Patterson* v. *New York*, 432 U. S. 197, 211 (1977), the presumption must surely be rebuttable.

The concept of due process is, "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy." *Griffin* v. *Illinois*, 351 U. S. 12, 20–21 (1956) (Frankfurter, J., concurring in judgment). Against the historical status quo, I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*. See *ante*, at 448–453. Any less charitable reading of the Court's opinion would put it at odds with many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution. See, *e. g.*, *Griffin* v. *Illinois*, *supra* (due process right to trial transcript on appeal); *Brady* v. *Maryland*, 373 U. S. 83 (1963) (due process right to discovery of exculpatory evidence); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) (due process right to introduce certain evidence); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973) (due process right to hearing and counsel before probation revoked); *Ake* v. *Oklahoma*, *supra* (due process right to psychiatric examination when sanity is significantly in question).

In determining whether the placement of the burden of proof is fundamentally unfair, relevant considerations include: whether the government has superior access to evidence; whether the defendant is capable of aiding in the garnering and evaluation of evidence on the matter to be proved; and whether placing the burden of proof on the government is necessary to help enforce a further right, such as the right to be presumed innocent, the right to be free from self-incrimination, or the right to be tried while competent.

After balancing the equities in this case, I agree with the Court that the burden of proof may constitutionally rest on the defendant. As the dissent points out, *post*, at 465, the competency determination is based largely on the testimony of psychiatrists. The main concern of the prosecution, of course, is that a defendant will feign incompetence in order to avoid trial. If the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state. States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession. The potentially greater overall access to information provided by placing the burden of proof on the defense may outweigh the danger that, in close cases, a marginally incompetent defendant is brought to trial. Unlike the requirement of a hearing or a psychiatric examination, placing the burden of proof on the government will not necessarily increase the reliability of the proceedings. The equities here, then, do not weigh so much in petitioner's favor as to rebut the presumption of constitutionality that the historical toleration of procedural variation creates.

As the Court points out, *ante*, at 451–452, the other cases in which we have placed the burden of proof on the government are distinguishable. See *Colorado* v. *Connelly*, 479 U. S. 157, 168–169 (1986) (burden of proof on government to show waiver of rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966)); *Nix* v. *Williams*, 467 U. S. 431, 444–445, n. 5 (1984) (burden on government to show inevitable discovery of evidence obtained by unlawful means); *United States* v. *Matlock*, 415 U. S. 164, 177–178, n. 14 (1974) (burden on government to show voluntariness of consent to search); *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972) (burden on government to show voluntariness of confession). In each of these cases, the government's burden of proof accords with its investigatory responsibilities. Before obtaining a confession, the government is required to ensure that the confession is given voluntarily. Before searching a private area without a warrant, the government is generally required to ensure that the owner consents to the search. The government has no parallel responsibility to gather evidence of a defendant's competence.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Teofilo Medina, Jr., may have been mentally incompetent when the State of California convicted him and sentenced him to death. One psychiatrist testified he was incompetent. Another psychiatrist and a psychologist testified he was not. Several other experts testified but did not express an opinion on competence. Instructed to presume that petitioner Medina was competent, the jury returned a finding of competence. For all we know, the jury was entirely undecided. I do not believe a Constitution that forbids the trial and conviction of an incompetent person tolerates the trial and conviction of a person about whom the evidence of competency is so equivocal and unclear. I dissent.

I

The right of a criminal defendant to be tried only if competent is "fundamental to an adversary system of justice," *Drope* v. *Missouri*, 420 U. S. 162, 172 (1975). The Due Process Clause forbids the trial and conviction of persons incapable of defending themselves—persons lacking the capacity to understand the nature and object of the proceedings against them, to consult with counsel, and to assist in preparing their defense. *Id.*, at 171.[1] See also *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966).

The right to be tried while competent is the foundational right for the effective exercise of a defendant's other rights in a criminal trial. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins* v. *Nevada*, 504 U. S. 127, 139 (1992) (KENNEDY, J., concurring in judgment). In the words of Professor Morris, one of the world's leading criminologists, incompetent persons "are not really present at trial; they may not be able properly to play the role of an accused person, to recall relevant events, to produce evidence and witnesses, to testify effectively on their own behalf, to help confront hostile witnesses, and to project to the trier of facts a

[1] "[I]t is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him," *Dusky* v. *United States*, 362 U. S. 402 (1960) (internal quotation marks and bracketing omitted); cf. *Riggins* v. *Nevada*, 504 U. S. 127, 140–141 (1992) (KENNEDY, J., concurring in judgment) (noting distinction between "functional competence" and higher level "competence to stand trial").

sense of their innocence." N. Morris, Madness and the Criminal Law 37 (1982).

This Court's cases are clear that the right to be tried while competent is so critical a prerequisite to the criminal process that "state procedures *must be adequate* to protect this right." *Pate*, 383 U. S., at 378 (emphasis added). "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U. S., at 172. In other words, the Due Process Clause does not simply forbid the State to try to convict a person who is incompetent. It also demands adequate *anticipatory, protective procedures* to minimize the risk that an incompetent person will be convicted. Justice Frankfurter recognized this in a related context: "If the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself." *Solesbee* v. *Balkcom*, 339 U. S. 9, 23 (1950) (dissenting opinion). Anticipatory protective procedures are necessary as well because "we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial." *Pate*, 383 U. S., at 387. See also *Drope*, 420 U. S., at 183; *Dusky* v. *United States*, 362 U. S. 402, 403 (1960). See generally Miller & Germain, The Retrospective Evaluation of Competency to Stand Trial, 11 Int'l J. Law and Psych. 113 (1988).

This Court expressly has recognized that one of the required procedural protections is "further inquiry" or a hearing when there is a sufficient doubt raised about a defendant's competency. *Drope*, 420 U. S., at 180; *Pate*, 383 U. S., at 385–386. In my view, then, the only question before the Court in this case is whether—as with the right to a hearing—placing the burden of proving competence on the State is necessary to protect adequately the underlying due proc-

ess right. I part company with the Court today, because I believe the answer to that question is in the affirmative.

II

As an initial matter, I believe the Court's approach to this case effectively asks and answers the wrong doctrinal question. Following the lead of the parties, the Court mistakenly frames its inquiry in terms of whether to apply a standard it takes to be derived from language in *Patterson* v. *New York*, 432 U. S. 197 (1977), or a standard based on the functional balancing approach of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). *Ante*, at 442–446. The Court is not put to such a choice. Under *Drope* and *Pate*, it need decide only whether a procedure imposing the burden of proof upon the defendant is "adequate" to protect the constitutional prohibition against trial of incompetent persons.

The Court, however, chooses the *Patterson* path, announcing that there is no violation of due process unless placing the burden of proof of incompetency upon the defendant "'"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" *Ante*, at 445 (quoting *Patterson*, 432 U. S., at 202). Separating the primary right (the right not to be tried while incompetent) from the subsidiary right (the right not to bear the burden of proof of incompetency), the Court acknowledges the primary right to be fundamental in "our common-law heritage," but determines the subsidiary right to be without a "settled tradition" deserving of constitutional protection. *Ante*, at 446. This approach is mistaken, because it severs two integrally related procedural rights that cannot be examined meaningfully in isolation. The protections of the Due Process Clause, to borrow the second Justice Harlan's words, are simply not "a series of isolated points pricked" out in terms of their most specific level of historic generality. *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (dissenting opinion). Had the Court taken the same historical-

categorical approach in *Pate* and *Drope*, it would not have recognized that a defendant has a right to a competency hearing, for in neither of those cases was there any showing that the mere denial of a hearing where there is doubt about competency offended any deeply rooted traditions of the American people.

In all events, I do not interpret the Court's reliance on *Patterson* to undermine the basic balancing of the government's interests against the individual's interest that is germane to any due process inquiry. While unwilling to discount the force of tradition and history, the Court in *Patterson* did not adopt an exclusively tradition-based approach to due process analysis. Relying on *Morrison* v. *California*, 291 U. S. 82 (1934), the Court in *Patterson* looked to the "convenience" to the government and "hardship or oppression" to the defendant in forming its allocation of the burden of proof. 432 U. S., at 203, n. 9, and 210.

> " 'The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, *or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.* Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512, and cases cited.' " *Id.*, at 203, n. 9 (quoting *Morrison* v. *California*, 291 U. S., at 88–89) (emphasis added).

See also *Speiser* v. *Randall*, 357 U. S. 513, 524 (1958) (same).

In *Morrison* v. *California*, the historical cornerstone of this Court's decisions in the area of due process and allocation of the burden of proof, the Court considered the consti-

tutionality of a California criminal statute forbidding aliens not eligible for naturalization to farm. The statute provided that, once the State proved the defendant used or occupied farmland, the burden of proving citizenship or eligibility for naturalization rested upon the defendant. See 291 U. S., at 84. At the time, persons of Asian ancestry were generally not eligible for naturalization. See *id.*, at 85–86. The Court observed that in the "vast majority of cases," there would be no unfairness to the distribution of the burden, because a defendant's Asian ancestry could plainly be observed. *Id.*, at 94. But, where the evidence is in equipoise—as when the defendant is of mixed blood and his outward appearance does not readily reveal his Asian ancestry—"the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused." *Ibid.* Thus, the Court concluded: "There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People." *Id.*, at 96.

Consistent with *Morrison*, I read the Court's opinion today to acknowledge that *Patterson* does not relieve the Court from evaluating the underlying fairness of imposing the burden of proof of incompetency upon the defendant. That is why the Court not only looks to "the historical treatment of the burden of proof in competency proceedings" but also looks to "the operation of the challenged rule, and our precedents." *Ante*, at 446. That is why the Court eventually turns to determining "whether the rule [placing upon the defendant the burden of proof of incompetency] transgresses any recognized principle of 'fundamental fairness' in operation." *Ante*, at 448.

Carrying out this inquiry, the Court points out that the defendant is already entitled to the assistance of counsel and to a psychiatric evaluation. *Ante*, at 450. It suggests as well that defense counsel will have "the best-informed view" of the defendant's ability to assist in his defense. *Ibid.* Ac-

cordingly, the Court concludes: "[I]t is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Ante*, at 451. While I am unable to agree with the Court's conclusion, it is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews* v. *Eldridge* test it earlier appears to forswear.[2]

I am perplexed that the Court, while recognizing "the *careful balance* that the Constitution strikes between liberty and order," *ante*, at 443 (emphasis added), intimates that the apparent "expertise" of the States in criminal procedure

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[2] Recently, several Members of this Court have expressly declined to limit *Mathews* v. *Eldridge* balancing to the civil administrative context and determined that *Mathews* provides the appropriate framework for assessing the validity of criminal rules of procedure. See *Burns* v. *United States*, 501 U. S. 129, 148–156 (1991) (SOUTER, J., joined in relevant part by WHITE and O'CONNOR, JJ., dissenting) (applying *Mathews* to federal criminal sentencing procedures, stating that *Mathews* does not apply only to civil "administrative" determinations but "[t]he *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest"). The Court also acknowledges that it has previously relied on *Mathews* v. *Eldridge* in at least two cases concerning criminal procedure. *Ante*, at 444 (citing *Ake* v. *Oklahoma*, 470 U. S. 68 (1985) (due process requires appointment of psychiatrist where defendant's sanity at the time of the offense is to be significant factor at trial), and *United States* v. *Raddatz*, 447 U. S. 667 (1980) (due process does not require federal district judges to make *de novo* determination with live testimony of issues presented in motion to suppress)).

The Court claims that "it is not at all clear" that *Mathews* was "essential to the results reached in" *Ake* and *Raddatz*. *Ante*, at 444. I am not sure what the Court means, because both cases unquestionably set forth the full *Mathews* test and evaluated the interests. See *Ake*, 470 U. S., at 77–83; *Raddatz*, 447 U. S., at 677–679. What the Court should find clear, if anything, from these two cases is that the *specific* rights asserted there were historically novel and could hardly be said to have constituted "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

and the "centuries of common-law tradition" of the "criminal process" warrant less than careful balancing in favor of "substantial deference to legislative judgments," *ante*, at 445–446. Because the *Due* Process Clause is not the *Some* Process Clause, I remain convinced that it requires careful balancing of the individual and governmental interests at stake to determine what process is due.

III

I believe that requiring a possibly incompetent person to carry the burden of proving that he is incompetent cannot be called "adequate," within the meaning of the decisions in *Pate* and *Drope*, to protect a defendant's right to be tried only while competent. In a variety of other contexts, the Court has allocated the burden of proof to the prosecution as part of the protective procedures designed to ensure the integrity of specific underlying rights. In *Lego* v. *Twomey*, 404 U. S. 477 (1972), for example, the Court determined that when the prosecution seeks to use at trial a confession challenged as involuntary, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary," because the defendant is "entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Id.*, at 489. See also *Colorado* v. *Connelly*, 479 U. S. 157, 167–169 (1986) (burden on prosecution to show defendant waived *Miranda* rights); *Nix* v. *Williams*, 467 U. S. 431, 444, and n. 5 (1984) (burden on prosecution to show inevitable discovery of evidence obtained by unlawful means); *United States* v. *Matlock*, 415 U. S. 164, 177–178, n. 14 (1974) (burden on prosecution to show voluntariness of consent to search). Equally weighty concerns warrant imposing the burden of proof upon the State here.

The Court suggests these cases are distinguishable because they shift the burden of proof in order to deter lawless conduct by law enforcement and prosecutorial authorities, while in this case deterrence is irrelevant. *Ante*, at 451–453.

If anything, this distinction cuts *against* the Court's point of view. Deterrence of official misconduct during the investigatory stage of the criminal process has less to do with the fairness of the trial and an accurate determination of the defendant's guilt than does the defendant's ability to understand and participate in the trial itself. Accordingly, there is greater reason here to impose a trial-related cost upon the government—in the form of the burden of proof—to ensure the fairness and accuracy of the trial. Cf. *United States* v. *Alvarez-Machain*, 504 U. S. 655, 660 (1992) (official misconduct in the form of forcible kidnaping of defendant for trial does not violate defendant's due process rights at trial). Moreover, given the Court's consideration of nontrial-related interests, I wonder whether the Court owes any consideration to the public interest in the appearance of fairness in the criminal justice system. The trial of persons about whose competence the evidence is inconclusive unquestionably "undermine[s] the very foundation of our system of justice—our citizens' confidence in it." *Georgia* v. *McCollum*, *ante*, at 49.

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U. S., at 525. To be sure, the requirement of a hearing (once there is a threshold doubt as to competency) and the provision for a psychiatric evaluation, see *Ake* v. *Oklahoma*, 470 U. S. 68, 81 (1985), do ensure at least some protection against the trial of incompetent persons. Yet in cases where the evidence is inconclusive, a defendant bearing the burden of proof of his own incompetency now will still be subjected to trial. In my view, this introduces a systematic and unacceptably high risk that persons will be tried and convicted who are unable to follow or participate in the proceedings determining their fate. I, therefore, cannot agree with the Court that "reasonable minds may differ as to the wisdom of placing the burden of proof" on likely incompetent defendants. *Ante*, at 450.

The Court suggests that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Ibid.* There are at least three good reasons, however, to doubt the Court's confidence. First, while the defendant is in custody, the State itself obviously has the most direct, unfettered access to him and is in the best position to observe his behavior. In the present case, Medina was held before trial in the Orange County jail system for more than a year and a half prior to his competency hearing. 3 Tr. 677–684. During the months immediately preceding the competency hearing, he was placed several times for extended periods in a padded cell for treatment and observation by prison psychiatric personnel. *Id.*, at 226, 682–684. While Medina was in the padded cell, prison personnel observed his behavior every 15 minutes. *Id.*, at 226.

Second, a competency determination is primarily a medical and psychiatric determination. Competency determinations by and large turn on the testimony of psychiatric experts, not lawyers. "Although competency is a legal issue ultimately determined by the courts, recommendations by mental health professionals exert tremendous influence on judicial determinations, with rates of agreement typically exceeding 90%." Nicholson & Johnson, Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psycholegal Ability, 14 Int'l J. Law and Psych. 287 (1991) (citations omitted). See also S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 703 (3d ed. 1985) (same). While the testimony of psychiatric experts may be far from infallible, see *Barefoot* v. *Estelle*, 463 U. S. 880, 916 (1983) (BLACKMUN, J., dissenting), it is the experts and not the lawyers who are credited as the "best informed," and most able to gauge a defendant's ability to understand and participate in the legal proceedings affecting him.

Third, even assuming that defense counsel has the "best-informed view" of the defendant's competency, the lawyer's

view will likely have no outlet in, or effect on, the competency determination. Unlike the testimony of medical specialists or lay witnesses, the testimony of defense counsel is far more likely to be discounted by the factfinder as self-interested and biased. Defense counsel may also be discouraged in the first place from testifying for fear of abrogating an ethical responsibility or the attorney-client privilege. See, *e. g.*, ABA Criminal Justice Mental Health Standards § 7–4.8(b), Commentary Introduction, p. 209, and Commentary, pp. 212–213 (1989). By way of example from the case at hand, it should come as little surprise that neither of Medina's two attorneys was among the dozens of persons testifying during the six days of competency proceedings in this case. 1 Tr. 1–5 (witness list).

Like many psychological inquiries, competency evaluations are "in the present state of the mental sciences . . . at best a hazardous guess however conscientious." *Solesbee* v. *Balkcom*, 339 U. S., at 23 (Frankfurter, J., dissenting). See also *Ake* v. *Oklahoma*, 470 U. S., at 81; *Addington* v. *Texas*, 441 U. S. 418, 430 (1979); *Drope*, 420 U. S., at 176. This unavoidable uncertainty expands the range of cases where the factfinder will conclude the evidence is in equipoise. The Court, however, dismisses this concern on grounds that "'[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" *Ante*, at 451 (quoting *Patterson*, 432 U. S., at 208). Yet surely the Due Process Clause requires *some* conceivable steps be taken to eliminate the risk of erroneous convictions. I search in vain for any guiding principle in the Court's analysis that determines when the risk of a wrongful conviction happens to be acceptable and when it does not.

The allocation of the burden of proof reflects a societal judgment about how the risk of error should be distributed between litigants. Cf. *Santosky* v. *Kramer*, 455 U. S. 745, 755 (1982) (standard of proof). This Court has said it well

before: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington* v. *Texas*, 441 U. S., at 427. The costs to the State of bearing the burden of proof of competency are not at all prohibitive. The Court acknowledges that several States already bear the burden, *ante*, at 447–448, and that the allocation of the burden of proof will make a difference "only in a narrow class of cases where the evidence is in equipoise," *ante*, at 449. In those few difficult cases, the State should bear the burden of remitting the defendant for further psychological observation to ensure that he is competent to defend himself. See, *e. g.*, Cal. Penal Code Ann. § 1370(a)(1) (West Supp. 1992) (defendant found incompetent shall be "delivered" to state hospital or treatment facility "which will promote the defendant's speedy restoration to mental competence"). See also *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) (Due Process Clause allows State to hold incompetent defendant "for reasonable period of time necessary to determine whether there is a substantial probability" of return to competency). In the narrow class of cases where the evidence is in equipoise, the State can reasonably expect that it will speedily be able to return the defendant for trial.

IV

Just this Term the Court reaffirmed that the Due Process Clause prevents the States from taking measures that undermine the defendant's right to be tried while fully aware and able to defend himself. In *Riggins* v. *Nevada*, 504 U. S. 127 (1992), the Court reversed on due process grounds the conviction of a defendant subjected to the forcible administration of antipsychotic drugs during his trial. Rejecting the dissent's insistence that actual prejudice be shown, the Court found it to be "*clearly possible*" that the medications affected the defendant's "ability to follow the proceedings, or the substance of his communication with counsel." *Id.*, at 137 (em-

phasis added). See also *id.*, at 141 (KENNEDY, J., concurring in judgment) (prosecution must show "*no significant risk* that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel") (emphasis added).

I consider it no less likely that petitioner Medina was tried and sentenced to death while effectively unable to defend himself. That is why I do not share the Court's remarkable confidence that "[n]othing in today's decision is inconsistent with our longstanding recognition that the criminal trial of an incompetent defendant violates due process." *Ante*, at 453. I do not believe the constitutional prohibition against convicting incompetent persons remains "fundamental" if the State is at liberty to go forward with a trial when the evidence of competency is inconclusive. Accordingly, I dissent.

Syllabus

ESTATE OF COWART *v.* NICKLOS DRILLING CO. ET AL.

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

No. 91–17. Argued March 25, 1992—Decided June 22, 1992

Floyd Cowart, whose estate is the petitioner, was injured while working on an oil drilling platform owned by Transco Exploration Company (Transco), in an area subject to the Longshore and Harbor Workers' Compensation Act (LHWCA or Act). The Department of Labor gave respondent Compass Insurance Co. (Compass), the insurer for Cowart's employer, respondent Nicklos Drilling Company (Nicklos), an informal notice that Cowart was due permanent disability payments, but none were ever made. In the meantime, Cowart settled a negligence action with Transco, which Nicklos funded under an indemnification agreement with Transco. However, Cowart did not secure from Nicklos or Compass a formal, prior, written approval of the settlement. Subsequently, Cowart filed a claim with the Department of Labor seeking disability payments from Nicklos. Nicklos denied liability on the ground that recovery was barred under § 33(g) of the Act, which provides that a "person entitled to compensation" must obtain prior written approval from the employer and its insurer of any settlement of a third-party claim, § 33(g)(1), and that the failure of the "employee" to secure the approval results in forfeiture of all rights under the Act, § 33(g)(2). The Administrative Law Judge awarded benefits, relying on past Benefits Review Board (BRB) decisions: one in which the BRB held that in an earlier version of § 33(g) the words "person entitled to compensation" did not refer to a person not yet receiving benefits; and another in which it held that, since this phrase was not altered in the 1984 amendments to the LHWCA that added § 33(g)(2), Congress was presumed to have adopted the BRB's interpretation. The Court of Appeals reversed, holding that § 33(g) unambiguously provides for forfeiture whenever an LHWCA claimant fails to meet the written-approval requirement.

Held: Section 33(g)'s forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor subject to an order to pay under the Act. The section's language is plain and cannot support the BRB's interpretation. The normal meaning of entitlement includes a right or benefit for which a person qualifies, regardless of whether the right or benefit has been acknowledged or adjudicated. Thus, Cowart became

"entitled to compensation" at the moment his right to recovery under the Act vested. If the language of § 33(g)(1) left any doubt, the ambiguity would be eliminated by the statute's structure, especially the addition of subsection (g)(2). This interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" is used elsewhere in the statute in contexts in which it cannot bear Cowart's meaning, and is not altered by the fact that subsection (g)(2) uses the term "employee" rather than that phrase. Contrary to Cowart's argument, this interpretation of § 33(g) gives full meaning to all of subsection (g)(2)'s notification and consent requirements. The question whether Nicklos' participation in the settlement brings this case outside § 33(g)(1)'s terms is not addressed, since it was not fairly included within the question on which certiorari was granted. The possible harsh effects of § 33(g) are recognized, but it is the duty of the courts to enforce the judgment of the legislature; it is Congress that has the authority to change the statute, not the courts. Pp. 475–484.

927 F. 2d 828, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 484.

Lloyd N. Frischhertz argued the cause and filed briefs for petitioner.

Michael R. Dreeben argued the cause for the federal respondent. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Mahoney*, *Steven J. Mandel*, and *Edward D. Sieger*. *H. Lee Lewis, Jr.*, argued the cause and filed a brief for the private respondents.*

JUSTICE KENNEDY delivered the opinion of the Court.

The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, creates a comprehensive federal scheme to compen-

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**Thomas D. Wilcox* and *Franklin W. Losey* filed a brief for the National Association of Stevedores et al. as *amici curiae* urging affirmance.

Vance E. Ellefson and *C. Theodore Alpaugh III* filed a brief for Petroleum Helicopters, Inc., et al. as *amici curiae*.

sate workers injured or killed while employed upon the navigable waters of the United States. The Act allows injured workers, without forgoing compensation under the Act, to pursue claims against third parties for their injuries. But § 33(g) of the LHWCA, 33 U. S. C. § 933(g), provides that under certain circumstances if a third-party claim is settled without the written approval of the worker's employer, all future benefits including medical benefits are forfeited. The question we must decide today is whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor yet subject to an order to pay under the Act.

I

The injured worker in this case was Floyd Cowart, and his estate is now the petitioner. Cowart suffered an injury to his hand on July 20, 1983, while working on an oil drilling platform owned by Transco Exploration Company (Transco). The platform was located on the Outer Continental Shelf, an area subject to the Act. 43 U. S. C. § 1333(b). Cowart was an employee of the Nicklos Drilling Company (Nicklos), who along with its insurer Compass Insurance Co. (Compass) are respondents before us. Nicklos and Compass paid Cowart temporary disability payments for 10 months following his injury. At that point Cowart's treating physician released him to return to work, though he found Cowart had a 40% permanent partial disability. App. 75. The Department of Labor notified Compass that Cowart was owed permanent disability payments in the total amount of $35,592.77, plus penalties and interest. This was an informal notice which did not constitute an award. No payments were made.

Cowart, meanwhile, had filed an action against Transco alleging that Transco's negligence caused his injury. On July 1, 1985, Cowart settled the action for $45,000, of which he received $29,350.60 after attorney's fees and expenses. Nicklos funded the entire settlement under an indemnifica-

tion agreement with Transco, and it had prior notice of the settlement amount. But Cowart made a mistake: He did not secure from Nicklos a formal, prior, written approval of the Transco settlement.

After settling, Cowart filed an administrative claim with the Department of Labor seeking disability payments from Nicklos. Nicklos denied liability on the grounds that under the terms of § 33(g)(2) of the LHWCA, Cowart had forfeited his benefits by failing to secure approval from Nicklos and Compass of his settlement with Transco, in the manner required by § 33(g)(1).

Section 33(g) provides in pertinent part:

> "(g) Compromise obtained by person entitled to compensation
>
> "(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> "(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has

made payments or acknowledged entitlement to benefits under this chapter." 33 U. S. C. § 933(g).

The Administrative Law Judge (ALJ) rejected Nicklos' argument on the basis of prior interpretations of § 33(g) by the Benefits Review Board (Board or BRB). In the first of those decisions, *O'Leary* v. *Southeast Stevedoring Co.*, 7 BRBS 144 (1977), aff'd mem., 622 F. 2d 595 (CA9 1980), the Board held that in an earlier version of § 33(g) the words "person entitled to compensation" referred only to injured employees whose employers were making compensation payments, whether voluntary or pursuant to an award. The *O'Leary* decision held that a person not yet receiving benefits was not a "person entitled to compensation," even though the person had a valid claim for benefits.

The statute was amended to its present form, the form we have quoted, in 1984. In that year Congress redesignated then subsection (g) to what is now (g)(1) and modified its language somewhat, but did not change the phrase "person entitled to compensation." Congress also added the current subsection (g)(2), as well as other provisions. Following the 1984 amendments the Board decided *Dorsey* v. *Cooper Stevedoring Co.*, 18 BRBS 25 (1986), app. dism'd, 826 F. 2d 1011 (CA11 1987). The Board reaffirmed its interpretation in *O'Leary* of the phrase "person entitled to compensation," saying that because the 1984 amendments had not changed the specific language, Congress was presumed to have adopted the Board's previous interpretation. It noted that nothing in the 1984 legislative history disclosed an intent to overrule the Board's interpretations. The Board decided that the forfeiture provisions of subsection (g)(2), including the final phrase providing that forfeiture occurs "regardless of whether the employer . . . has made payments or acknowledged entitlement to benefits," was a "separate provisio[n] applicable to separate situations." 18 BRBS, at 29.

The ALJ in this case held that under the reasoning of *O'Leary* and *Dorsey*, Cowart was not a person entitled to

compensation because he was not receiving payments at the time of the Transco settlement. Thus, the written-approval provision did not apply and Cowart was entitled to benefits. Cowart's total disability award was for $35,592.77, less Cowart's net recovery from Transco of $29,350.60, for a net award of $6,242.17. In addition, Cowart was awarded interest, attorney's fees, and future medical benefits, the last constituting, we think, a matter of great potential consequence. The Board affirmed in reliance on *Dorsey.* 23 BRBS 42 (1989) *(per curiam)*.

On review, a panel of the Court of Appeals for the Fifth Circuit reversed. 907 F. 2d 1552 (1990). Without addressing the Board's specific statutory interpretation, it held that § 33(g) contains no exceptions to its written-approval requirement. Because this holding, and a decision by a panel in a different case, *Petroleum Helicopters, Inc.* v. *Barger*, 910 F. 2d 276 (CA5 1990), conflicted with a previous unpublished decision in the same Circuit, *Kahny* v. *O. W. C. P.*, 729 F. 2d 777 (CA5 1984), the Court of Appeals granted rehearing en banc. The Director of the Office of Workers' Compensation Programs (OWCP), a part of the Department of Labor, 20 CFR § 701.201 (1991), appeared as a respondent before the full Court of Appeals to defend the interpretation and decision of the Board.

In a *per curiam* opinion, the en banc Court of Appeals confirmed the panel's decision reversing the BRB in its *Cowart* case. 927 F. 2d 828 (CA5 1991). The Court of Appeals' majority held that § 33(g) is unambiguous in providing for forfeiture whenever an LHWCA claimant fails to get written approval from his employer of a third-party settlement. The majority acknowledged the well-established principle requiring judicial deference to reasonable interpretations by an agency of the statute it administers, but concluded that the plain language of § 33(g) leaves no room for interpretation. Judge Politz, joined by Judges King and Johnson, dissented on the ground that the OWCP's was a reasonable

agency interpretation of the phrase "person entitled to compensation," to which the Court of Appeals should have deferred.

We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision. 502 U. S. 1003 (1991). We now affirm.

II

In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Demarest* v. *Manspeaker*, 498 U. S. 184, 190 (1991). The question is whether Cowart, at the time of the Transco settlement, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA. Cowart concedes that he did not comply with the written-approval requirements of the statute, while Nicklos and Compass do not claim that they lacked notice of the Transco settlement. By the terms of § 33(g)(2), Cowart would have forfeited his LHWCA benefits if, and only if, he was subject to the written-approval provisions of § 33(g)(1). Cowart claims that he is not subject to the approval requirement because in his view the phrase "person entitled to compensation," as long interpreted by both the BRB and the OWCP, limits the reach of § 33(g)(1) to injured workers who are either already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered. Nicklos and Compass, supported by the United States, defend the holding of the Court of Appeals that § 33(g) cannot support that reading. We agree with these respondents and hold that under the plain language of § 33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval of Nicklos and Compass prior to settling with Transco.

The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 417 (1992). Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms. *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988); *Chevron*, *supra*, at 842–843. In any event, we need not resolve any tension of that sort here, because the Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of § 33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals' statutory interpretation, and contrary to his previous position. See Brief for Federal Respondent 8, n. 6. If the Director asked us to defer to his *new* statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due to an interpretation formulated during litigation. See *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212–213 (1988); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 158 (1991). The agency does not ask this, however. Instead, the federal respondent argues that the Court of Appeals was correct in saying the language of § 33(g) is plain and cannot support the interpretation given it by the Board. Because we agree with the federal respondent and the Court of Appeals, and because Cowart concedes that the position of the BRB is not entitled to any special deference, see Brief for Petitioner 25; see also *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268, 278, n. 18 (1980); *Martin* v. *Occupational Safety and*

Health Review Comm'n, supra, we need not resolve the difficult issues regarding deference which would be lurking in other circumstances.

As a preliminary matter, the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right. See generally *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); Black's Law Dictionary 532 (6th ed. 1990) (defining "entitle" as "To qualify for; to furnish with proper grounds for seeking or claiming"). Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen.

If the language of § 33(g)(1), in isolation, left any doubt, the structure of the statute would remove all ambiguity. First, and perhaps most important, when Congress amended § 33(g) in 1984, it added the explicit forfeiture features of § 33(g)(2), which specify that forfeiture occurs "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." We read that phrase to modify the entirety of subsection (g)(2), including the beginning part discussing the written-approval requirement of paragraph (1). The BRB did not find this amendment controlling because the quoted language is not an explicit modification of subsection (1). This is a strained reading of what Congress intended. Subsection (g)(2) leaves little doubt that the contemplated for-

feiture will occur whether or not the employer has made payments or acknowledged liability.

The addition of subsection (g)(2) in 1984 also precludes the primary argument made by the BRB in favor of its decisions in *Dorsey* and this case, and repeated by Cowart to us: That Congress in 1984, by reenacting the phrase "person entitled to compensation," adopted the Board's reading of that language in *O'Leary.* The argument might have had some force if § 33(g) had been reenacted without changes, but that was not the case. In 1984 Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation. In light of the clear import of § 33(g)(2), the Board erred in relying on the purported lack of legislative history showing an explicit intent to reject the *O'Leary* decision. Even were it relevant, the Board's reading of the legislative history is suspect because as the federal respondent demonstrates, the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn *O'Leary.* See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess., 209, 210–211, 396 (1981). In any event, administrative interpretation followed by congressional reenactment cannot overcome the plain language of a statute. *Demarest* v. *Manspeaker*, 498 U. S., at 190. And the language of § 33(g) is plain.

Our interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" appears elsewhere in the statute in contexts in which it cannot bear the meaning placed on it by Cowart. For example, § 14(h) of the LHWCA, 33 U. S. C. § 914(h), requires an official to conduct an investigation upon the request of a person entitled to compensation when, *inter alia,* the claim is controverted and payments are not being made. For that provision, the inter-

pretation championed by Cowart would be nonsensical. Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the third-party recovery. That result makes no sense under the LHWCA structure. Indeed, when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in §§ 33(f) and 33(g). *Force* v. *Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 4–5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990); *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB, see *supra*, at 476.

Yet another reason why we are not convinced by the Board's position is that the Board's interpretation of "person entitled to compensation" has not been altogether consistent; and Cowart's interpretation may not be the same as the Board's in precise respects. At times the Board has said this language refers to an employee whose "employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement." *Dorsey*, 18 BRBS, at 28; 23 BRBS, at 44 (case below). At other times, sometimes within the same opinion, the Board has spoken in terms of the employer either making payments *or* acknowledging liability. *O'Leary*, 7 BRBS, at 147–149; *Dorsey*, *supra*, at 29; see also *In re Wilson*, 17 BRBS 471, 480 (ALJ 1985). Cowart, on the other hand, would include within the phrase both employees receiving compensation benefits and employees who have a judicial award of compen-

sation but are not receiving benefits. Brief for Petitioner 6. This distinction is an important part of Cowart's response to the position of the United States. Reply Brief for Petitioner 8. It may be that the gap between the Board's and Cowart's positions can be explained by the Board's inconsistency; but that in itself weakens any argument that the Board's interpretation is entitled to some weight.

We do not believe that Congress' use of the word "employee" in subsection (g)(2), rather than the phrase "person entitled to compensation," undercuts our reading of the statute. The plain meaning of subsection (g)(1) cannot be altered by the use of a somewhat different term in another part of the statute. Subsection (g)(2) does not purport to speak to the question of who is required under subsection (g)(1) to obtain prior written approval.

Cowart's strongest argument to the Court of Appeals was that any ambiguity in the statute favors him because of the deference due the OWCP Director's statutory construction, a deference which Nicklos and Compass concede is appropriate. Brief for Private Respondents 7. As we have said, we are not faced with this difficult issue because the views of the OWCP Director have changed since we granted certiorari. *Supra,* at 476. It seems apparent to us that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself. It is noteworthy, moreover, that even prior to this case the position of the Department of Labor has not been altogether consistent. It is true that the Director has twice, albeit in a somewhat equivocal manner, endorsed the Board's rulings in *O'Leary* and *Dorsey.* First, in a 1986 circular discussing the Board's *Dorsey* case a subordinate of the Director stated: "While the Board's position may not be totally consistent with the amended language of Section 33(g), we think it is a rational approach and have advised the Associate Solicitor that we will support this position." United States Dept. of Labor, LHWCA Circular No. 86–3, p. 1 (May 30, 1986).

Next, in a manual published in 1989 the Director again adopted the Board's position that written approval of a settlement is required only from employers who are paying compensation; but the statement ends with a qualifying comment, that "[t]he issue of consent to a settlement can be a complex matter. Judicial interpretation may be necessary to resolve the issue. (See LHWCA CIRCULAR 86–03, 5–30–86)." U. S. Dept. of Labor, Longshore and Harbor Workers' Compensation Act (LHWCA) Procedure Manual, ch. 3–600, ¶ 9 (Sept. 1989). On the other hand, the Department of Labor has issued regulations (effective in their current form since 1986) which are explicit that the written-approval requirement of § 33(g) applies to a settlement for less than the amount of compensation due under the LHWCA, "regardless of whether the employer or carrier has made payments of *[sic]* acknowledged entitlement to benefits under the Act." 20 CFR § 702.281(b) (1991). So the Department of Labor has not been speaking with one voice on this issue. This further diminishes the persuasive power of the Director's earlier decision to endorse the BRB's questionable interpretation, a decision he has since reconsidered.

The history of the Department of Labor regulation goes far toward confirming our view of the significance of the 1984 amendments. The original § 702.281, proposed in 1976 and enacted in final form in 1977, required only that an employee notify his employer and the Department of any third-party claim, settlement, or judgment. 41 Fed. Reg. 34297 (1976); 42 Fed. Reg. 45303 (1977). The sole reference to the forfeiture provisions was a closing parenthetical: "Caution: See 33 U. S. C. § 933(g)." In 1985, in response to the 1984 congressional amendments, the Department proposed to amend § 702.281 by replacing the closing parenthetical with a subsection (b), stating that failure to obtain written approval of settlements for amounts less than the compensation due under the Act would lead to forfeiture of future benefits. 50 Fed. Reg. 400 (1985). In response to comments, the final

rulemaking modified § 702.281(b) to clarify that the forfeiture provision applied regardless of whether the employer was paying compensation. 51 Fed. Reg. 4284–4285 (1986). Thus the evolution of § 702.281 suggests that at least some elements within the Department of Labor read the 1984 statutory amendments to adopt a rule different from the Board's previous decisions.

We also reject Cowart's argument that our interpretation of § 33(g) leaves the notification requirements of § 33(g)(2) without meaning. An employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability. Under our construction the written-approval requirement of § 33(g)(1) is inapplicable in those instances, but the notification requirement of § 33(g)(2) remains in force. That is why subsection (g)(2) mandates that an employer be notified of "any settlement."

This view comports with the purposes and structure of § 33. Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained reduces the compensation owed by the employer. So the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability. The written-approval requirement of § 33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 467 (1968). In cases where a judgment is entered, however, the employee does not determine the amount of his recovery, and employer approval, even if somehow feasible, would serve no purpose. And in cases where the employee settles for greater than the employer's liability, the employer is pro-

tected regardless of the precise amount of the settlement because his liability for compensation is wiped out. Notification provides full protection to the employer in these situations because it ensures against fraudulent double recovery by the employee.

As a final line of defense, Cowart's attorney suggested at oral argument that Nicklos' participation in the Transco settlement brought this case outside the terms of § 33(g)(1). Tr. of Oral Arg. 4–7. Relying on the recent decision of the Court of Appeals for the Fourth Circuit in *I. T. O. Corporation of Baltimore* v. *Sellman*, 954 F. 2d 239, 242–243 (1992), counsel argued that § 33(g)(1) requires written approval only of "settlement[s] with a third person," and that Nicklos' participation in the Transco settlement meant it was not with a *third person*. Without indicating any view on the merits of this contention, we do not address it because it is not fairly included within the question on which certiorari was granted. See this Court's Rule 14.1(a).

We need not today decide the retroactive effect of our decision, nor the relevance of res judicata principles for other LHWCA beneficiaries who may be affected by our decision. Cf. *Pittston Coal Group* v. *Sebben*, 488 U. S. 105, 121–123 (1988). We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. Counsel for respondents stated during oral argument that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA. Tr. of Oral Arg. 23–26. These harsh effects of § 33(g) may be exacerbated by the inconsistent course followed over the years by the federal agencies charged with enforcing the Act. But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to

enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

For the reasons stated, the judgment of the Court of Appeals is

Affirmed.

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

For more than 14 years, the Director of the Office of Workers' Compensation Programs interpreted the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, in the very same way that petitioner Floyd Cowart's estate now urges. Indeed, the Director *advocated* Cowart's position in the Court of Appeals, both before the panel and before that court en banc.

After certiorari was granted, however, and after Cowart's opening brief was filed, the federal respondent informed this Court: "In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue." Brief for Federal Respondent 8, n. 6. The federal respondent now assures us that the interpretation the Director advanced and defended for 14 years is inconsistent with the statute's "plain meaning." The Court today accepts that improbable contention, and in so doing rules that perhaps thousands of employees and their families must be denied death and disability benefits. I cannot agree with the federal respondent's newly discovered interpretation, and still less do I find it to be compelled by the "plain meaning" of the statute. The Court needlessly inflicts additional injury upon these workers and their families. I dissent.

I

Ever since the LHWCA was adopted in 1927, it has included some version of the present § 33(g), 33 U. S. C. § 933(g), the provision at issue in this case. Because that provision cannot be considered in isolation from the broader context of § 33, or indeed, the LHWCA as a whole, some background on the structure of the Act and the history of § 33's interpretation is essential.

A

The LHWCA requires employers to provide compensation, "irrespective of fault," for injuries and deaths arising out of covered workers' employment. §§ 3(a) and 4(b), 33 U. S. C. §§ 903(a) and 904(b). In return for requiring the employer to pay statutory compensation without proof of negligence, the Act grants the employer immunity from tort liability, regardless of how serious its fault may have been. See §§ 5(a) and 33(i). Benefits under the LHWCA are strictly limited, generally to medical expenses and two-thirds of lost earnings, and are set out in detailed schedules contained in the Act itself. See §§ 7–9. A fundamental assumption of the Act is that employers liable for benefits will pay compensation "promptly," "directly," and "without an award" having to be issued. See § 14(a).

In a case where a third party may be liable, the LHWCA does not require a claimant to elect between statutory compensation and tort recovery. § 33(a). Where a claimant has accepted compensation under a formal award, then, within a specified time, he may file a civil action against the third party. § 33(b). If a claimant recovers in that action, his compensation under the LHWCA is limited to the excess, if any, of his statutory compensation over the net amount of his recovery. § 33(f). Section 33(f) thus operates as a setoff provision, allowing an employer to reduce its LHWCA liability by the net amount a claimant obtains from a third party. Where the claimant nets as much or more from the third

party as he would have received from his employer under the LHWCA, the employer owes him no benefits.

Section 33(g) of the LHWCA, 33 U. S. C. § 933(g), addresses the situation in which a claimant-plaintiff settles an action against a third party for *less* than he would have received under the Act. Under § 33(f), considered alone, the claimant in this situation would always be able to collect the remainder of his statutory benefits from the employer. To protect the employer from having to pay excessive § 33(f) compensation because of an employee's "lowball" settlement, § 33(g) conditions LHWCA compensation, in specified circumstances, upon the employer's written approval of the third-party settlement. See *Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 467 (1968).

Before the LHWCA's 1984 amendments, § 33(g) provided that if a "person entitled to compensation" settled for less than the compensation to which he was entitled under the Act, then the employer would be liable for compensation, as determined in § 33(f), only if the person obtained and duly filed with the Department of Labor the employer's written approval of the settlement. The meaning of the term "person entitled to compensation" has proved to be a difficult issue, both in the pre-1984 version of the Act and—as this case demonstrates—in the Act's current form.

B

This issue apparently was considered first in *O'Leary* v. *Southeast Stevedoring Co.*, 7 BRBS 144 (1977), aff'd, 622 F. 2d 595 (CA9 1980). In that case, the employer denied liability for the death of the claimant's husband, contending that the decedent was not an employee covered by the LHWCA and that the injury did not arise out of his employment. 7 BRBS, at 145. The employer persisted in denying liability even after its position was rejected by the Benefits

Review Board (BRB or Board).[1] See *id.*, at 146–147. Eventually, more than 28 months after her husband's accident, the claimant settled a third-party suit for $37,500. About one month thereafter, an Administrative Law Judge (ALJ), on remand from the BRB, entered an award for the claimant. The value of the death benefits awarded, assuming that the claimant would live out her normal life expectancy without remarrying, amounted to more than $150,000. See *In re O'Leary*, 5 BRBS 16, 20 (ALJ 1976). At that point, the employer contested liability for any compensation on the ground that, under § 33(g), the claimant had forfeited that compensation by failing to obtain the employer's written approval of the settlement.

The ALJ rejected the employer's position, reasoning that the claimant was not a "person entitled to compensation" at the time of the settlement. The BRB affirmed. The Board pointed out that the "underlying concept" of the LHWCA is that "the employer upon being informed of an injury will voluntarily begin to pay compensation." *O'Leary*, 7 BRBS, at 147 (citing § 14(a)). Further, the Board observed, § 33(g) refers to the conditions under which an employer will be "liable" for compensation under § 33(f); the reference to "liability," the Board reasoned, "contemplat[es] that [the] employer either be making voluntary payments under the Act or that it ha[s] been found liable for benefits by a judicial determination." *Id.*, at 148. Moreover, the Board continued, § 33(b) gives the employer the right to pursue third parties only if the employer is paying compensation under an award. Thus, the premise of employer rights under § 33, the Board concluded, is that the employer is "making either voluntary payments under the Act or pursuant to an award." *Ibid.*

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[1] The BRB consists of persons appointed by the Secretary of Labor and empowered to "hear and determine appeals raising a substantial question of law or fact" with respect to LHWCA benefits claims. § 21(b)(3), 33 U. S. C. § 921(b)(3).

The BRB observed that the employer in *O'Leary* had not paid compensation either voluntarily or pursuant to an award, but, instead, consistently had denied liability. It could hardly have been clear to the claimant at the time she settled her third-party suit that the BRB would ultimately decide in her favor. Indeed, only after that settlement and after the ALJ award did the employer concede that the claimant represented a "person entitled to compensation," and then only to argue that, for that reason, she had forfeited her right to compensation under § 33(g). The Board emphasized that the employer's interpretation would place claimants in a severe bind:

> "If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e. g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . ." *Id.*, at 149.

And under the employer's interpretation of § 33(g), the employee would thereby forfeit all right to compensation under the Act. Surely, the Board concluded, "Congress by requiring written consent could not have contemplated such a result." *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion, App. 113, stating: "The Board's ruling

is reasonable and furthers the underlying purpose of the Act." *Id.*, at 117. The Court of Appeals for the Fifth Circuit, in an unpublished opinion, upheld a similar BRB decision in 1984, finding the *O'Leary* approach "fully consistent with the language, legislative history, and rationale of" § 33(g). See *Kahny* v. *OWCP*, 729 F. 2d 777 (table) and App. 96, 108. No other courts had occasion to examine the *O'Leary* interpretation before the LHWCA was next amended.

C

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639, revisited § 33(g). *Id.*, at 1652. The former § 33(g) was carried over, with minor changes not relevant here, as § 33(g)(1), and a new subsection (g)(2) was added. Section 33(g) now reads as follows:

> "(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> "(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless

> of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."

In *Dorsey* v. *Cooper Stevedoring Co.*, 18 BRBS 25 (1986), appeal dism'd *sub nom. Cooper Stevedoring Co.* v. *Director, Office of Workers' Comp. Programs, U. S. Dept. of Labor*, 826 F. 2d 1011 (CA11 1987), the Board rejected an employer's argument that the final clause of the new § 33(g)(2) should be understood as overturning the *O'Leary* rule that no duty to obtain approval arises until the employer begins to pay compensation. Subsection (g)(1), the Board stated, reenacted the prior version of § 33(g) as it was interpreted in *O'Leary;* the new subsection, (g)(2), was intended to apply to situations not covered by (g)(1) or *O'Leary.* In these situations—where the employer has neither paid compensation nor acknowledged liability—notice, but not written approval, is required. 18 BRBS, at 29–30. The Board interpreted the final clause of (g)(2)—language that echoes the Board's words in *O'Leary*—to make clear that the notification requirement, described in (g)(2), was not subject to the *O'Leary* limitation that is incorporated in (g)(1). 18 BRBS, at 29.

This interpretation is reinforced, the Board continued, by two other considerations. First, although in a number of instances the 1984 legislative history indicates a congressional intention to override other BRB and judicial decisions, that history "indicates no congressional intent to overrule *O'Leary.*" *Id.*, at 30. Second, the Board observed, this Court has held that the LHWCA "should be construed in order to further its purpose of compensating longshoremen and harbor workers 'and in a way which avoids harsh and incongruous results.'" *Id.*, at 31, quoting *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953), and citing *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 268 (1977). As *O'Leary* made clear, allowing employers to escape all LHWCA liability by withholding approval from any settlement, while refusing to

pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation.

D

Such was the legal background against which Cowart's claim was considered. In the administrative proceedings, the BRB relied on *O'Leary* and *Dorsey* to reject the argument, offered by respondent Nicklos Drilling Company, that by failing to obtain prior written approval of his third-party settlement Cowart had forfeited his LHWCA benefits. Because Nicklos was not paying Cowart benefits, either voluntarily or under an award, the Board reasoned, Cowart was not a "person entitled to compensation" within the meaning of § 33(g)(1), and he therefore was not required to obtain Nicklos' approval of his settlement. 23 BRBS 42, 46 (1989). Instead, the Board held, Cowart was required only to give Nicklos notice of the settlement, as provided in § 33(g)(2). Because Nicklos indisputably had notice of the settlement—indeed, it had notice three months before the settlement was consummated—the Board ruled Cowart was eligible for LHWCA benefits.

On Nicklos' petition for review, the Director of the Office of Workers' Compensation Programs (OWCP)—head of the agency charged with administering the Act—defended the Board's interpretation before the Court of Appeals for the Fifth Circuit. First a panel of the Court of Appeals, and then the full court, by a divided vote sitting en banc, however, rejected the Director's position, ruling that Cowart was a "person entitled to compensation" and was required by § 33(g)(1) to obtain Nicklos' written approval. See 907 F. 2d 1552 (1990) (panel), and 927 F. 2d 828 (1991) (en banc). We are told that after this Court granted certiorari, and after Cowart filed his opening brief, the Director "reexamined" his position and argued that the interpretation of § 33(g) he had maintained for 14 years, and defended in the

Court of Appeals, was inconsistent with the Act's plain meaning.

II

This Court today agrees with the Director's postcertiorari position that Cowart's claim for compensation is barred by the "clear meaning" of the statute "as written." *Ante*, at 476. According to the Court, Cowart is plainly a "person entitled to compensation" within the meaning of § 33(g)(1), and his failure to obtain Nicklos' written approval of his third-party settlement requires, by the "plain language" of § 33(g), that he be deemed to have forfeited his statutory benefits. Although the Court does not identify any plausible statutory purpose whatsoever advanced by its reading, and although—to its credit—it acknowledges the "harsh effects" of its interpretation, *ante*, at 483, the Court ultimately concludes that the language of § 33 compels it to reject Cowart's position.

In my view, the language of § 33 in no way compels the Court to deny Cowart's claim. In fact, the Court's reliance on the Act's "plain language," *ante*, at 475, is selective: as discussed below, analysis of §§ 33(b) and (f) of the Act shows that, even leaving aside the question whether Cowart is a "person entitled to compensation," a *consistently* literal interpretation of the Act's language would not require Cowart to have obtained Nicklos' written approval of the settlement. Indeed, under a thoroughgoing "plain meaning" approach, Cowart would be entitled to receive *full* LHWCA benefits in addition to his third-party settlement, not just the excess of his statutory benefits over the settlement.

At the same time, a consistently literal interpretation of the Act would commit the Court to positions it might be unwilling to take. The conclusion I draw is not that the Court should adopt a purely literal interpretation of the Act, but instead that the Court should recognize, as it has until today, that the LHWCA must be read in light of the purposes and policies it would serve. Once that point is recog-

nized, then, as suggested by the Court's closing remarks on the "stark and troubling" implications of its interpretation, *ante*, at 483, it follows that recognition of Cowart's claim is fully consistent with the Act.

A

Were the Court truly to interpret the Act "as written," it would not conclude that Cowart is barred from receiving compensation. Section 33(g)(1) of the LHWCA, on which the Court's "plain meaning" argument relies, provides that if a "person entitled to compensation" settles with a third party for an amount less than his statutory benefits, his employer will be "liable for compensation *as determined under subsection (f)*" only if the "person entitled to compensation" obtains and files the employer's written approval. The "plain language" of subsection (g)(1) does not establish any general written-approval requirement binding either all "persons entitled to compensation," or the subset of those persons who settle for less than their statutory benefits. Instead, it requires written approval only as a condition of receiving compensation "as determined under subsection (f)." Where the "person entitled to compensation" is not eligible for compensation "as determined under subsection (f)," subsection (g)(1) does not require him to obtain written approval.

The "plain language" of subsection (f) in turn suggests that the provision does not apply to Cowart's situation. Subsection (f), by its terms, applies only "[i]f the person entitled to compensation institutes proceedings within the period prescribed in subsection (b)." And the "period prescribed in subsection (b)" begins, by the terms of that subsection, upon the person's "[a]cceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Cowart's third-party suit was clearly *not* instituted within this period: He filed suit *before* any award of LHWCA benefits, and he still has not accepted (or been offered) compensation

under any award. Thus, he does not come within the "plain meaning" of subsection (f), and, accordingly, for the reasons given above, he would not be bound by the subsection (g)(1) written-approval requirement. It would also follow that, because Nicklos indisputably received the notice required by subsection (g)(2), that provision would not bar Cowart from receiving LHWCA compensation and medical benefits.

Indeed, if Cowart is not covered by subsection (f), he would appear to have been eligible for a larger award than he sought. Subsection (f) does not authorize compensation otherwise unavailable; instead, it operates as a *limit*, in the specified circumstances, on the employer's LHWCA liability. If read literally, subsection (f) would not bar Cowart from receiving full LHWCA benefits, *in addition to* the amount he received in settlement of the third-party claim.

It is true that § 33(f) has not always been read literally. Subsection (f) has been assumed to be applicable where, for example, the claimant's third-party suit was filed after an employer *voluntarily* began paying LHWCA compensation, not just where compensation was paid pursuant to an award. See, *e. g.*, *I. T. O. Corp. of Baltimore* v. *Sellman*, 954 F. 2d 239, 240, 243–245 (CA4 1992); *Shellman* v. *United States Lines, Inc.*, 528 F. 2d 675, 678–679, n. 2 (CA9 1975) (referring to the availability of an employer's lien, where the employer has paid compensation without an award, as "judicially created" rather than statutory), cert. denied, 425 U. S. 936 (1976). That interpretation is eminently sensible and consistent with the statutory purpose of encouraging employers to make payments "promptly," directly," and "without an award." See § 14(a). A contrary interpretation would penalize employers who acknowledge liability and commence payments without seeking an award, and it would reward employers who, whether in good faith or bad, contest their liability until faced with a formal award. See *Shellman*, 528 F. 2d, at 679, n. 2 ("The purpose of this Act would be frustrated if a different result could be reached merely because

the employer pays compensation without entry of a formal award").

It is not obvious, however, that a similar argument from statutory purpose should be available to employers such as Nicklos who refuse to pay benefits and then seek shelter under § 33(f) (and by extension, § 33(g)(1)). And the fact remains that the Court professes to interpret the "clear meaning" of the statute "as written." The Court's interpretation today, however, is no more compelled by the language of the LHWCA than the interpretation Cowart defends: The Court is simply insensible to the fact that it implicitly has relied upon presumed statutory purposes and policy considerations to bring Nicklos and Cowart under the setoff provisions of § 33(f), thus absolving Nicklos of the first $29,000 in LHWCA liability. Only at *that* point does the Court invoke the plain meaning rule and insist on a "literal" interpretation of § 33(g)(1). This selective insistence on "plain meaning" deprives Cowart's estate of the last $6,242.17 Nicklos would otherwise have been bound to pay.

B

For these reasons, I think it clear that a purely textual approach to the LHWCA cannot justify the Court's holding. In my view, a more sensible approach is to consider § 33(g) as courts always have considered the other parts of § 33—in relation to the history, structure, and policies of the Act.

1

Looking first to § 33's history, for present purposes the most relevant aspect is the 1984 amendment to § 33(g) through which that provision assumed its present form. The amended provision clearly bears the impress of the Board's *O'Leary* decision. The reference in § 33(g)(2) to that subsection's applicability, "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits," tracks the limitation

recognized in *O'Leary*—a limitation that had been unanimously approved by panels of two Federal Courts of Appeals. The question, then, is whether Congress sought to incorporate that holding or to repudiate it in the 1984 amendments to § 33(g).

The critical fact in this inquiry is Congress' use of the term "employee," rather than "person entitled to compensation," in connection with the notification requirement. The use of this term is in marked contrast to the other clauses of § 33(g). Section 33(g)(1) conditions § 33(f) compensation of a settling "person entitled to compensation" on securing the employer's written approval, and § 33(g)(2) provides, somewhat redundantly, that a "person entitled to compensation" forfeits all rights to compensation and medical benefits if the written approval mentioned in § 33(g)(1) is not obtained. The notification clause of § 33(g)(2), however, provides that "if the *employee* fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits . . . shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits" (emphasis added).

The use of the term "employee" in § 33(g)(2) strongly suggests that Congress intended to incorporate the BRB's holding in *O'Leary.* As mentioned, the language Congress chose for the last clause of § 33(g)(2) indicates that it was aware the Board had adopted a restrictive interpretation of the term "person entitled to compensation." Congress retained that term in connection with the written-approval requirement of subsection (g)(1). Yet Congress chose the broad term, "employee," for the notification clause of subsection (g)(2), and "employee," unlike "person entitled to compensation," is a term expressly defined in the statute. See § 2(3).[2] The

[2] Subject to exceptions not applicable here, that section of the Act defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

Court cannot explain why Congress would have chosen two different terms to apply to the different requirements. Indeed, on the Court's interpretation, the two terms are identical in their extension. On the Court's reading, the term "person entitled to compensation" denotes only a statutory employee who has a claim that, aside from the requirements of § 33(g), would be recognized as valid. And that is exactly the denotation of the term "employee" in connection with the notification requirement. The fact that Congress chose to use different terms in connection with the different § 33(g) requirements—using, with respect to the written-approval requirement, a term that it knew had been narrowly interpreted, and using, with respect to the notification requirement, a term broadly defined in the statute itself—surely indicates that Congress intended the two terms to have different meanings. Had Congress intended the meaning the Court attributes to it, it would have used the same term in both contexts.[3]

2

The inference that Congress intended to adopt the *O'Leary* rule in the amended language of § 33(g) is only strengthened

operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker."

[3] Two of the Court's other arguments concerning the 1984 amendments may deserve brief mention. First, the Court suggests in passing that "the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn *O'Leary*," citing snippets of written testimony submitted during the lengthy 1981 hearings. See *ante*, at 478. Needless to say, statements buried in hearings conducted *three years before the bill's passage* fall far short of demonstrating any such congressional intent. The BRB was correct when it said in *Dorsey* that the legislative history of the 1984 amendments indicates no intention to overturn *O'Leary*.

Second, the Court places great significance upon the fact that "at least some elements within the Department of Labor" read the post-1984 statute differently from the Director of OWCP. *Ante*, at 482. The Court is quite clear, however, that it is the Director who administers the Act, see *ante*, at 480, not these other "elements," and that the Director does not ask for deference to his recently adopted interpretation.

by consideration of the factual context to which the provision was designed to apply. As the Board noted in *O'Leary*, and as the Director argued to the Court of Appeals, the Act presumes that employers, as a rule, will promptly recognize their LHWCA obligations and commence payments immediately, without the need for a formal award. See § 14(a). In that situation, the claimant generally knows the value of the benefits to be received, and can accurately compare that figure to any settlement offer. The claimant in this situation has no strong interest in the precise amount of any settlement that nets less than the statutory benefits, so long as the costs of suit are covered, because by operation of § 33(f), he would not be allowed to retain any of the proceeds. On the other hand, the employer who has acknowledged liability has a strong interest in recovering from the third party any benefits already paid to the claimant and in reducing or eliminating any future benefits it has committed itself to pay. For the employer in this situation, the precise amount of a settlement for less than the claimant's statutory benefits is vitally important: any net dollar the claimant recovers in a third-party action is a dollar less the employer will have to pay in LHWCA benefits.

Given the parties' different incentives in the situation where the employer already is paying benefits, it makes sense to require the claimant to protect the employer's interest, by requiring settlements to be reasonable in the employer's judgment. At the same time, giving the employer this power of approval does not generally threaten the claimant's interests, since, as mentioned, only the employer has an interest in settlements above the threshold of the claimant-plaintiff's expenses and below the amount of promised or delivered LHWCA benefits.

Matters are quite different, however, when (as in the present case) the employer has refused to make statutory payments and is not subject to an enforceable award at the time of settlement. First, the claimant generally will not be able

to estimate with certainty whether he will receive any LHWCA benefits, let alone how much. Accordingly, the calculation required by § 33(g)—a comparison between LHWCA benefits and settlement amount—will be far more difficult. Second, the claimant who is not receiving LHWCA payments, and who cannot be certain that he ever will receive payments, will have a much more powerful interest in negotiating a third-party settlement that is as favorable as possible. This claimant, unlike its counterpart who is receiving payments, therefore will have a strong incentive—independent of the § 33(g) requirements—to protect any interest the employer might have in reducing potential LHWCA liability. Finally, disabled longshore employees, or the families of a longshoreman killed on the job, are likely to be in a highly vulnerable position, subject to financial pressure that may lead them to overvalue a present lump-sum payment and undervalue future periodic payments that might eventually be available under an LHWCA award.

The employer who refuses to pay, by contrast, has taken the position that it owes no LHWCA benefits that may be reduced through a third-party settlement, and thus that it has no real interest in the amount for which the third party settles. Moreover, as has been noted, the claimant who is not receiving benefits has a strong incentive to protect the employer's interest in reducing or eliminating any LHWCA liability that might eventually be imposed. Under the Court's interpretation of § 33(g)(1), however, such an employer in many cases can ensure that it will never be required to pay LHWCA benefits, even if it might otherwise ultimately be determined to be liable, simply by withholding approval of any settlement offer, regardless of amount. In practice, recalcitrant employers will seek to exempt themselves from statutory liability by withholding approval of settlements, hoping that their employees' need for present funds will force them to settle without approval. I cannot believe that Congress intended to require LHWCA claim-

ants to bet their statutory benefits on the possibility that future administrative and perhaps judicial proceedings, years later, might vindicate their position that the employer should have been paying benefits—particularly when the employer's asserted interest is already adequately protected independently of § 33(g)(1).

3

The Court recognizes the patent unfairness of this situation, and it as much as admits that its interpretation is out of line with the policies of the Act. See *ante,* at 483. Nevertheless, the Court holds that the plain meaning of the term "person entitled to compensation" clearly applies to both categories of claimants—those whose employers have denied liability, as well as those whose employers have acknowledged that they must pay statutory benefits. See *ante,* at 477. For that reason, the Court implies, regardless of what Congress may have thought it was accomplishing in the 1984 amendments, the words "person entitled to compensation" simply will not bear the construction *O'Leary* gave them. See *ante,* at 478–479.

Even setting aside my doubts, expressed above, about the plain meaning rule's application to this statute, I am not persuaded by the Court's contention. In my view, it does not strain ordinary language to describe claimants whose employers have acknowledged LHWCA liability as "persons entitled to compensation," but to withhold that description from claimants whose employers have denied liability for compensation. This is particularly so, given the context in which the term appears in the statute. Section 33(g)(1) requires the "person entitled to compensation" to compare two figures—the amount of a settlement offer, on the one hand, and the amount of compensation to which the person is entitled, on the other. But what is that latter figure in a situation in which the employer denies liability in full or in part? Doubtless, the claimant could hazard a guess by consulting the Act's jurisdictional provisions concerning who is covered

for which kind of accident, the compensation schedules included in the Act, and, in the case of a disability claim, the opinion of the claimant's doctor that the claimant, in fact, is disabled. The very nature of the situation, however, is that it is not clear that such a person is indeed "entitled to compensation"—that question, after all, is exactly the issue that the employer's position requires to be determined in administrative and perhaps subsequent judicial proceedings. The *O'Leary* limitation of the term "person entitled to compensation" to the situation in which the claimant's employer has acknowledged liability and commenced payments seems to me fully consistent with the requirements of ordinary language.

It is true, as the Court observes, that under the *O'Leary* interpretation, the term "person entitled to compensation" would take on different meanings in different contexts. See *ante,* at 478. This Court, however, has not inflexibly required the same term to be interpreted in the same way for all purposes. Compare *Barnhill* v. *Johnson,* 503 U. S. 393, 401–402, and n. 9 (1992), with *id.,* at 406 (STEVENS, J., dissenting) (noting that the maxim is "not inexorable," but arguing that because "nothing in the [statute's] structure or purpose" counsels otherwise, the Court should have applied it). This Court has recognized:

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. . . .
>
> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U. S. 427, 433 (1932).

This case is one in which the statutory term in question should be read contextually, rather than under the assumption that the term necessarily has the same meaning in all contexts. The phrase "person entitled to compensation" is not defined in the statute, and it is susceptible of at least two interpretations—a "formalist" interpretation, according to which one may be entitled to compensation whether or not anyone ever acknowledges that fact, and a "positivist" or "legal realist" interpretation, according to which one is entitled to compensation only if the relevant decisionmaker has so declared. Which of these two senses is "correct" will depend upon context. The latter sense, I have suggested, is appropriate to a context in which liability for compensation is disputed and the employee is called upon to predict the future course of administrative and perhaps judicial proceedings—not just as to liability, but as to the precise amount of liability. And, in any event, I think, the text and circumstances of the 1984 amendment to § 33(g) indicate that Congress intended to adopt the "realist" interpretation found in *O'Leary*.

Moreover, the Court simply has failed to apply, or even mention, a maxim of interpretation, specifically applicable to the LHWCA, that strongly supports Cowart's position. This Court long has held that "'[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 315–316 (1983), quoting *Voris* v. *Eikel*, 346 U. S., at 333. The only point at which the Court in this case consults the purposes of the Act is at the end of its opinion, when it assures the reader that its interpretation of the *notification requirement* of § 33(g)(2)—as opposed to its interpretation of the written-approval requirement stated in § 33(g)(1)—is consistent with the statute's purposes. See *ante*, at 482. Finally, underscoring its refusal to apply the maxim of liberal construction to this case, the Court ultimately acknowledges

that the interpretation of § 33(g) it has adopted has "harsh effects" and "creates a trap for the unwary." *Ante*, at 483. For my part, I can imagine no more appropriate occasion on which the maxim should be applied.

4

Once it is recognized that a claimant whose employer denies LHWCA liability is not a "person entitled to compensation" for purposes of § 33(g)(1), the proper resolution of this case is clear. Cowart was just such a claimant, and, accordingly, he was not bound by § 33(g)(1)'s written-approval requirement. It is undisputed that he satisfied the notice requirement of § 33(g)(2). It follows that § 33(g) is no bar to Cowart's eligibility for benefits.

III

The Court recognizes "the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute." *Ibid.* It attempts to justify the "harsh effects" of its decision on the ground that it is but the faithful agent of the Legislature, and "Congress has spoken with great clarity to the precise question raised by this case." *Ibid.* In my view, Congress did not answer the question in the way the Court suggests, let alone did it do so "with great clarity." The responsibility for today's unfortunate decision rests not with Congress, but with this very Court.

I dissent.

Syllabus

CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CIPOLLONE *v.* LIGGETT GROUP, INC., ET AL.

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

No. 90–1038. Argued October 8, 1991—Reargued January 13, 1992—Decided June 24, 1992

Section 4 of the Federal Cigarette Labeling and Advertising Act (1965 Act) required a conspicuous label warning of smoking's health hazards to be placed on every package of cigarettes sold in this country, while § 5 of that Act, captioned "Preemption," provided: "(a) No statement relating to smoking and health, other than the [§ 4] statement . . . , shall be required on any cigarette package," and "(b) No [such] statement . . . shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with" § 4. Section 5(b) was amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act) to specify: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are [lawfully] labeled." Petitioner's complaint in his action for damages invoked the District Court's diversity jurisdiction and alleged, *inter alia,* that respondent cigarette manufacturers were responsible for the 1984 death of his mother, a smoker since 1942, because they breached express warranties contained in their advertising, failed to warn consumers about smoking's hazards, fraudulently misrepresented those hazards to consumers, and conspired to deprive the public of medical and scientific information about smoking, all in derogation of duties created by New Jersey law. The District Court ultimately ruled, among other things, that these claims were preempted by the 1965 and 1969 Acts to the extent that the claims relied on respondents' advertising, promotional, and public relations activities after the effective date of the 1965 Act. The Court of Appeals affirmed on this point.

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

893 F. 2d 541, reversed in part, affirmed in part, and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that § 5 of the 1965 Act did not pre-

empt state-law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. This conclusion is required by the section's precise and narrow prohibition of required cautionary "statement[s]"; by the strong presumption against pre-emption of state police power regulations; by the fact that the required § 4 warning does not by its own effect foreclose additional obligations imposed under state law; by the fact that there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of common-law damages actions; and by the Act's stated purpose and regulatory context, which establish that § 5 was passed to prevent a multiplicity of pending and diverse "regulations," a word that most naturally refers to positive enactments rather than common-law actions. Pp. 517–520.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded in Parts V and VI that § 5(b) of the 1969 Act pre-empts certain of petitioner's failure-to-warn and fraudulent misrepresentation claims, but does not pre-empt other such claims or the claims based on express warranty or conspiracy. Pp. 520–530.

(a) The broad language of amended § 5(b) extends the section's pre-emptive reach beyond positive enactments to include some common-law damages actions. The statutory phrase "requirement or prohibition" suggests no distinction between positive enactments and common law, but, in fact, easily encompasses obligations that take the form of common-law rules, while the phrase "imposed under State law" clearly contemplates common law as well as statutes and regulations. This does not mean, however, that § 5(b) pre-empts all common-law claims, nor does the statute indicate that any familiar subdivision of common law is or is not pre-empted. Instead, the precise language of § 5(b) must be fairly but—in light of the presumption against pre-emption—narrowly construed, and each of petitioner's common-law claims must be examined to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: whether the legal duty that is the predicate of the common-law damages action satisfies § 5(b)'s express terms, giving those terms a fair but narrow reading. Each phrase within the section limits the universe of common-law claims pre-empted by the statute. Pp. 517–524.

(b) Insofar as claims under either of petitioner's failure-to-warn theories—*i. e.*, that respondents were negligent in the manner that they tested, researched, sold, promoted, and advertised their cigarettes, and that they failed to provide adequate warnings of smoking's consequences—require a showing that respondents' post-1969 advertising or

promotions should have included additional, or more clearly stated, warnings, those claims rely on a state-law "requirement or prohibition . . . with respect to . . . advertising or promotion" within § 5(b)'s meaning and are pre-empted. Pp. 524–525.

(c) To the extent that petitioner has a viable claim for breach of express warranties, that claim is not pre-empted. While the general duty not to breach such warranties arises under state law, a manufacturer's liability for the breach derives from, and is measured by, the terms of the warranty. A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement . . . imposed under State law" under § 5(b). Pp. 525–527.

(d) Because § 5(b) pre-empts "prohibition[s]" as well as "requirement[s]," it supersedes petitioner's first fraudulent-misrepresentation theory, which is predicated on a state-law prohibition against advertising and promotional statements tending to minimize smoking's health hazards, and which alleges that respondents' advertising neutralized the effect of the federally mandated warning labels. However, the claims based on petitioner's second fraudulent-misrepresentation theory—which alleges intentional fraud both by false representation and concealment of material facts—are not pre-empted. The concealment allegations, insofar as they rely on a state-law duty to disclose material facts through channels of communication other than advertising and promotions, do not involve an obligation "with respect to" those activities within § 5(b)'s meaning. Moreover, those fraudulent-misrepresentation claims that do arise with respect to advertising and promotions are not predicated on a duty "based on smoking and health" but rather on a more general obligation—the duty not to deceive. Pp. 527–529.

(e) Petitioner's claim alleging a conspiracy among respondents to misrepresent or conceal material facts concerning smoking's health hazards is not pre-empted, since the predicate duty not to conspire to commit fraud that underlies that claim is not a prohibition "based on smoking and health" as that § 5(b) phrase is properly construed. P. 530.

JUSTICE BLACKMUN, joined by JUSTICE KENNEDY and JUSTICE SOUTER, concluded that the modified language of § 5(b) in the 1969 Act does not clearly exhibit the necessary congressional intent to pre-empt state common-law damages actions, and therefore concurred in the judgment that certain of petitioner's failure-to-warn and fraudulent-misrepresentation claims, as well as his express warranty and conspiracy claims, are not pre-empted by that Act. Pp. 533–534.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that all of petitioner's common-law claims are pre-empted by the 1969 Act under ordinary principles of statutory construction, and therefore concurred in the judgment that certain of his post-1969 failure-to-warn claims

Syllabus

and certain of his fraudulent-misrepresentation claims are pre-empted. P. 548.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Parts V and VI, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which KENNEDY and SOUTER, JJ., joined, *post*, p. 531. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 544.

Laurence H. Tribe reargued the cause for petitioner. *Marc Z. Edell* argued the cause for petitioner on the original argument. With them on the briefs was *Alan M. Darnell*.

H. Bartow Farr III reargued the cause for respondents. With him on the briefs was *Richard G. Taranto*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Peter M. Ackerberg*, Special Assistant Attorney General, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Richard Blumenthal* of Connecticut, *Larry EchoHawk* of Idaho, *Michael E. Carpenter* of Maine, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Tom Udall* of New Mexico, *Nicholas J. Spaeth* of North Dakota, *Lee Fisher* of Ohio, and *Kenneth O. Eikenberry* of Washington; for the American Cancer Society et al. by *Alan B. Morrison*, *David C. Vladeck*, and *Cornish F. Hitchcock;* for the American College of Chest Physicians by *Raymond D. Cotton* and *Sherman S. Poland;* for the American Medical Association by *Kirk B. Johnson;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Michael C. Maher;* for the National League of Cities et al. by *Richard Ruda;* for Six Former Surgeons General of the United States et al. by *S. Stephen Rosenfeld* and *Richard A. Daynard;* and for Trial Lawyers for Public Justice, P. C., by *Charles S. Siegel* and *Arthur Bryant*.

Briefs of *amici curiae* urging affirmance were filed for the Association of National Advertisers, Inc., by *Burt Neuborne* and *Gilbert H. Weil;* for the National Association of Manufacturers by *Diane L. Zimmerman*, *Jan S. Amundson*, and *Quentin Riegel;* and for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller* and *Mark I. Levy*.

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI.

"WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH." A federal statute enacted in 1969 requires that warning (or a variation thereof) to appear in a conspicuous place on every package of cigarettes sold in the United States.[1] The questions presented to us by this case are whether that statute, or its 1965 predecessor which required a less alarming label, pre-empted petitioner's common-law claims against respondent cigarette manufacturers.

Petitioner is the son of Rose Cipollone, who began smoking in 1942 and who died of lung cancer in 1984. He claims that respondents are responsible for Rose Cipollone's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Court of Appeals held that petitioner's state-law claims were pre-empted by federal statutes, 893 F. 2d 541 (CA3 1990), and other courts have agreed with that analysis.[2] The highest court of the State of New Jersey, however, has held that the federal statutes

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[1] Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, 84 Stat. 87, as amended, 15 U. S. C. §§ 1331–1340. In 1984, Congress amended the statute to require four more explicit warnings, used on a rotating basis. See Comprehensive Smoking Education Act, Pub. L. 98–474, 98 Stat. 2201. Because petitioner's claims arose before 1984, neither party relies on this later Act.

[2] The Court of Appeals' analysis was initially set forth in *Cipollone* v. *Liggett Group, Inc.*, 789 F. 2d 181 (CA3 1986). Other federal courts have adopted a similar analysis. See *Pennington* v. *Vistron Corp.*, 876 F. 2d 414 (CA5 1989); *Roysdon* v. *R. J. Reynolds Tobacco Co.*, 849 F. 2d 230 (CA6 1988); *Stephen* v. *American Brands, Inc.*, 825 F. 2d 312 (CA11 1987); *Palmer* v. *Liggett Group, Inc.*, 825 F. 2d 620 (CA1 1987).

did not pre-empt similar common-law claims.[3] Because of the manifest importance of the issue, we granted certiorari to resolve the conflict, 499 U. S. 935 (1991). We now reverse in part and affirm in part.

I

On August 1, 1983, Rose Cipollone and her husband filed a complaint invoking the diversity jurisdiction of the Federal District Court. Their complaint alleged that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by the three respondents. After her death in 1984, her husband filed an amended complaint. After trial, he also died; their son, executor of both estates, now maintains this action.

Petitioner's third amended complaint alleges several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort. These claims, all based on New Jersey law, divide into five categories. The "design defect claims" allege that respondents' cigarettes were defective because respondents failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created (Count 2, App. 83–84). The "failure to warn claims" allege both that the product was "defective as a result of [respondents'] failure to provide adequate warnings of the health consequences of cigarette smoking" (Count 3, App. 85) and that respondents "were negligent in the manner [that] they tested, researched, sold, promoted and advertised" their cigarettes (Count 4, App. 86). The "express warranty claims" allege that respondents had "expressly

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[3] *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 577 A. 2d 1239 (1990) (holding that the Cigarette Act does not pre-empt plaintiff's failure-to-warn and misrepresentation claims); see also *Forster* v. *R. J. Reynolds Tobacco Co.*, 437 N. W. 2d 655 (Minn. 1989) (holding that plaintiffs' claim in strict liability for unsafe design was not pre-empted; claims for misrepresentation and breach of express warranty would also not be pre-empted).

warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences" (Count 7, App. 88). The "fraudulent misrepresentation claims" allege that respondents had willfully, "through their advertising, attempted to neutralize the [federally mandated] warnin[g]" labels (Count 6, App. 87–88), and that they had possessed, but had "ignored and failed to act upon," medical and scientific data indicating that "cigarettes were hazardous to the health of consumers" (Count 8, App. 89). Finally, the "conspiracy to defraud claims" allege that respondents conspired to deprive the public of such medical and scientific data *(ibid.)*.

As one of their defenses, respondents contended that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct after 1965. In a pretrial ruling, the District Court concluded that the federal statutes were intended to establish a uniform warning that would prevail throughout the country and that would protect cigarette manufacturers from being "subjected to varying requirements from state to state," *Cipollone* v. *Liggett Group, Inc.*, 593 F. Supp. 1146, 1148 (NJ 1984), but that the statutes did not pre-empt common-law actions. *Id.*, at 1153–1170.[4] Accordingly, the court granted a motion to strike the pre-emption defense entirely.

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[4] The court explained:

"However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act." 593 F. Supp., at 1148.

The Court of Appeals accepted an interlocutory appeal pursuant to 28 U. S. C. § 1292(b), and reversed. *Cipollone* v. *Liggett Group, Inc.*, 789 F. 2d 181 (CA3 1986). The court rejected respondents' contention that the federal Acts expressly pre-empted common-law actions, but accepted their contention that such actions would conflict with federal law. Relying on the statement of purpose in the statutes,[5] the court concluded that Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy" would be upset by state-law damages actions based on noncompliance with "warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act." *Id.*, at 187. Accordingly, the court held:

> "[T]he Act preempts those state law damage[s] actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. [W]here the success of a state law damage[s] claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act." *Ibid.* (footnote omitted).

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[5] "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U. S. C. § 1331 (1982 ed.).

The court did not, however, identify the specific claims asserted by petitioner that were pre-empted by the Act.

This Court denied a petition for certiorari, 479 U. S. 1043 (1987), and the case returned to the District Court for trial. Complying with the Court of Appeals' mandate, the District Court held that the failure-to-warn, express-warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims were barred to the extent that they relied on respondents' advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act). 649 F. Supp. 664, 669, 673–675 (NJ 1986). The court also ruled that while the design defect claims were not pre-empted by federal law, those claims were barred on other grounds.[6] *Id.*, at 669–672. Following extensive discovery and a 4-month trial, the jury answered a series of special interrogatories and awarded $400,000 in damages to Rose Cipollone's husband. In brief, it rejected all of the fraudulent-misrepresentation and conspiracy claims, but found that respondent Liggett had breached its duty to warn and its express warranties before 1966. It found, however, that Rose Cipollone had "'voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes'" and that 80% of the responsibility for her injuries was attributable to her. See 893 F. 2d, at 554 (summarizing jury findings). For that reason, no damages were awarded to her estate. However, the jury awarded damages to compensate her husband for losses caused by respondents' breach of express warranty.

On cross-appeals from the final judgment, the Court of Appeals affirmed the District Court's pre-emption rulings but remanded for a new trial on several issues not relevant to our decision. We granted the petition for certiorari to consider the pre-emptive effect of the federal statutes.

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[6] We are not presented with any question concerning these claims.

II

Although physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. See U. S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress 5 (1989). The ensuing decades saw a wide range of epidemiologic and laboratory studies on the health hazards of smoking. Thus, by the time the Surgeon General convened an advisory committee to examine the issue in 1962, there were more than 7,000 publications examining the relationship between smoking and health. *Id.*, at 5–7.

In 1964, the advisory committee issued its report, which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U. S. Dept. of Health, Education, and Welfare, U. S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964). Relying in part on that report, the Federal Trade Commission (FTC), which had long regulated unfair and deceptive advertising practices in the cigarette industry,[7] promulgated a new trade regulation rule. That rule, which was to take effect January 1, 1965, established that it would be a violation of the Federal Trade Commission Act "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325 (1964). Several States also moved to regulate the advertising and labeling of cigarettes. See, *e. g.*, 1965 N. Y. Laws, ch. 470; see also 111 Cong. Rec. 13900–13902 (1965) (statement of Sen. Moss). Upon a congressional request, the FTC postponed enforcement of its

[7] See, *e. g., Brown & Williamson Tobacco Corp.*, 56 F. T. C. 956 (1960); *Liggett & Myers Tobacco Co.*, 55 F. T. C. 354 (1958); *Philip Morris & Co., Ltd.*, 51 F. T. C. 857 (1955); *R. J. Reynolds Tobacco Co.*, 48 F. T. C. 682 (1952); *London Tobacco Co.*, 36 F. T. C. 282 (1943).

new regulation for six months. In July 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (1965 Act or Act).[8] The 1965 Act effectively adopted half of the FTC's regulation: the Act mandated warnings on cigarette packages (§ 5(a)), but barred the requirement of such warnings in cigarette advertising (§ 5(b)).[9]

Section 2 of the Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.[10] In furtherance of the first purpose, § 4 of the Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label stating: "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." In furtherance of the second purpose, § 5, captioned "Preemption," provided in part:

> "(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> "(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act took effect January 1, 1966, § 10 of the Act provided that its provisions affecting the regulation of advertising would terminate on July 1, 1969.

As that termination date approached, federal authorities prepared to issue further regulations on cigarette advertising. The FTC announced the reinstitution of its 1964 pro-

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[8] Pub. L. 89–92, 79 Stat. 282, as amended, 15 U. S. C. §§ 1331–1340.

[9] However, § 5(c) of the Act expressly preserved "the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 79 Stat. 283.

[10] See n. 5, *supra.*

ceedings concerning a warning requirement for cigarette advertisements. 34 Fed. Reg. 7917 (1969). The Federal Communications Commission (FCC) announced that it would consider "a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations." *Id.*, at 1959. State authorities also prepared to take actions regulating cigarette advertisements.[11]

It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969 (1969 Act or Act),[12] which amended the 1965 Act in several ways. First, the 1969 Act strengthened the warning label, in part by requiring a statement that cigarette smoking "is dangerous" rather than that it "may be hazardous." Second, the 1969 Act banned cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction." Third, and related, the 1969 Act modified the pre-emption provision by replacing the original § 5(b) with a provision that reads:

> "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act also directed the FTC not to "take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising," the narrowing of the pre-emption provision to prohibit only restrictions "imposed under State law" cleared the way for the FTC to extend the warning-label requirement to print advertisements for cigarettes. The FTC did so in 1972. See *In re Lorillard*, 80 F. T. C. 455 (1972).

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[11] For example, the California State Senate passed a total ban on both print and electronic cigarette advertisements. "California Senate Votes Ban On Cigarette Advertising," Washington Post, June 26, 1969, p. A9.

[12] Pub. L. 91–222, 84 Stat. 87, as amended, 15 U. S. C. §§ 1331–1340.

III

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since our decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963)).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230).

The Court of Appeals was not persuaded that the pre-emption provision in the 1969 Act encompassed state common-law claims.[13] 789 F. 2d, at 185–186. It was also

[13] In its express pre-emption analysis, the court did not distinguish between the pre-emption provisions of the 1965 and 1969 Acts; it relied solely on the latter, apparently believing that the 1969 provision was at least as

not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. *Id.*, at 186. Nevertheless, reading the statute as a whole in the light of the statement of purpose in § 2, and considering the potential regulatory effect of state common-law actions on the federal interest in uniformity, the Court of Appeals concluded that Congress had impliedly pre-empted petitioner's claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities. *Id.*, at 187.

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone* v. *White Motor Corp.*, 435 U. S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn.* v. *Guerra*, 479 U. S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn.

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broad as the 1965 provision. The court's ultimate ruling that petitioner's claims were impliedly pre-empted effective January 1, 1966, reflects the fact that the 1969 Act did not alter the statement of purpose in § 2, which was critical to the court's implied pre-emption analysis.

IV

In the 1965 pre-emption provision regarding advertising (§ 5(b)), Congress spoke precisely and narrowly: "No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." Section 5(a) used the same phrase ("No *statement* relating to smoking and health") with regard to cigarette labeling. As § 5(a) made clear, that phrase referred to the sort of warning provided for in § 4, which set forth verbatim the warning Congress determined to be appropriate. Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b)).

Beyond the precise words of these provisions, this reading is appropriate for several reasons. First, as discussed above, we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of § 5. Second, the warning required in § 4 does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically pre-empt a regulatory field. See *McDermott* v. *Wisconsin*, 228 U. S. 115, 131–132 (1913). Third, there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986,[14] Congress expressly pre-empted state or local imposition of a "statement relating to the use of smokeless tobacco products and health" but, at the same time, preserved state-law damages actions based on those products. See 15 U. S. C. § 4406. All of these considerations indicate that § 5 is best read as having super-

[14] Pub. L. 99–252, 100 Stat. 30, as codified, 15 U. S. C. §§ 4401–4408.

seded only positive enactments by legislatures or administrative agencies that mandate particular warning labels.[15]

This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health." Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General's report, the term "regulation" most naturally refers to positive enactments by those bodies, not to common-law damages actions.

The regulatory context of the 1965 Act also supports such a reading. As noted above, a warning requirement promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act. These regulatory actions animated the passage of § 5, which reflected Congress' efforts to prevent "a multiplicity of State and local regulations pertaining to labeling of cigarette packages," H. R. Rep. No. 449, 89th Cong., 1st Sess., 4 (1965), and to "preemp[t] all Federal, State, and local authorities from requiring *any statement* relating to smoking and health in the advertising of cigarettes." *Id.*, at 5 (emphasis supplied).[16]

For these reasons, we conclude that § 5 of the 1965 Act only pre-empted state and federal rulemaking bodies from

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[15] Cf. *Banzhaf* v. *FCC,* 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968) (holding that 1965 Act did not pre-empt FCC's fairness policy as applied to cigarette advertising), cert. denied, 396 U. S. 842 (1969).

[16] JUSTICE SCALIA takes issue with our narrow reading of the phrase "No statement." His criticism, however, relies solely on an interpretation of those two words, artificially severed from both textual and legislative context. As demonstrated above, the phrase "No statement" in § 5(b) refers to the similar phrase in § 5(a), which refers in turn to § 4, which itself sets forth a *particular* statement. This context, combined with the regulatory setting in which Congress acted, establishes that a narrow reading of the phrase "No statement" is appropriate.

mandating particular cautionary statements and did not pre-empt state-law damages actions.[17]

V

Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Notwithstanding these substantial differences in language, both petitioner and respondents contend that the 1969 Act did not materially alter the pre-emptive scope of federal law.[18] Their primary support for this contention is a sentence in a Committee Report which states that the 1969 amendment "clarified" the 1965 version of § 5(b). S. Rep. No. 91–566, p. 12 (1969). We reject the parties' reading as incompatible with the language and origins of the amendments. As we noted in another context, "[i]nferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording,

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[17] This interpretation of the 1965 Act appears to be consistent with respondents' contemporaneous understanding of the Act. Although respondents have participated in a great deal of litigation relating to cigarette use beginning in the 1950's, it appears that this case is the first in which they have raised § 5 as a pre-emption defense.

[18] See Brief for Petitioner 23–24; Brief for Respondents 21–23.

we cannot accept the parties' claim that the 1969 Act did not alter the reach of § 5(b).[19]

Petitioner next contends that § 5(b), however broadened by the 1969 Act, does not pre-empt *common-law* actions. He offers two theories for limiting the reach of the amended § 5(b). First, he argues that common-law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]."[20] We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959).

Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities, see S. Rep. No. 91–566, p. 12, the language of the Act plainly reaches beyond such enactments. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw* v.

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[19] As noted above, the 1965 Act's statement of purpose (§ 2) suggested that Congress was concerned primarily with "regulations"—positive enactments, rather than common-law damages actions. Although the 1969 Act did not amend § 2, we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to § 5(b).

[20] Brief for Petitioner 20.

Delta Air Lines, Inc., 463 U. S. 85, 97 (1983). In this case there is no "good reason to believe" that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is "good reason to believe" that Congress meant precisely what it said in amending that Act.

Moreover, common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose "requirements or prohibitions." See W. Prosser, Law of Torts 4 (4th ed. 1971); Black's Law Dictionary 1489 (6th ed. 1990) (defining "tort" as "always [involving] a violation of some duty owing to plaintiff"). It is in this way that the 1969 version of § 5(b) differs from its predecessor: Whereas the common law would not normally require a vendor to use any specific *statement* on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions.* We therefore reject petitioner's argument that the phrase "requirement or prohibition" limits the 1969 Act's pre-emptive scope to positive enactments by legislatures and agencies.

Petitioner's second argument for excluding common-law rules from the reach of § 5(b) hinges on the phrase "imposed under State law." This argument fails as well. At least since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations. Indeed just last Term, the Court stated that the phrase "'all other law, including State and municipal law'" "does not admit of [a] distinction . . . between positive enactments and common-law rules of liability." *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 128 (1991). Although the presumption against pre-emption might give good reason to construe the phrase "state law" in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate. As explained above, the

1965 version of § 5 was precise and narrow on its face; the obviously broader language of the 1969 version extended that section's pre-emptive reach. Moreover, while the version of the 1969 Act passed by the Senate pre-empted "any State *statute or regulation* with respect to . . . advertising or promotion," S. Rep. No. 91–566, p. 16 (1969), the Conference Committee replaced this language with "State *law* with respect to advertising or promotion." In such a situation, § 5(b)'s pre-emption of "state law" cannot fairly be limited to positive enactments.

That the pre-emptive scope of § 5(b) cannot be limited to positive enactments does not mean that that section pre-empts all common-law claims. For example, as respondents concede, § 5(b) does not generally pre-empt "state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes."[21] For purposes of § 5(b), the common law is not of a piece.

Nor does the statute indicate that any familiar subdivision of common-law claims is or is not pre-empted. We therefore cannot follow petitioner's passing suggestion that § 5(b) pre-empts liability for omissions but not for acts, or that § 5(b) pre-empts liability for unintentional torts but not for intentional torts. Instead we must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted.[22] The central inquiry in each case is

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[21] Brief for Respondents 14.

[22] Petitioner makes much of the fact that Congress did not expressly include common law within § 5's pre-emptive reach, as it has in other statutes. See, *e. g.*, 29 U. S. C. § 1144(c)(1); 12 U. S. C. § 1715z–17(d). Respondents make much of the fact that Congress did not include a saving clause preserving common-law claims, again, as it has in other statutes. See, *e. g.,* 17 U. S. C. § 301. Under our analysis of § 5, these omissions make perfect sense: Congress was neither pre-empting nor saving common law

straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims pre-empted by the statute.

We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, *arguendo*, that they are.

Failure to Warn

To establish liability for a failure to warn, petitioner must show that "a warning is necessary to make a product . . . reasonably safe, suitable and fit for its intended use," that respondents failed to provide such a warning, and that that failure was a proximate cause of petitioner's injury. Tr. 12738. In this case, petitioner offered two closely related theories concerning the failure to warn: first, that respondents "were negligent in the manner [that] they tested, researched, sold, promoted, and advertised" their cigarettes; and second, that respondents failed to provide "adequate warnings of the health consequences of cigarette smoking." App. 85–86.

Petitioner's claims are pre-empted to the extent that they rely on a state-law "requirement or prohibition . . . with respect to . . . advertising or promotion." Thus, insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The Act does not, however, pre-empt petitioner's claims that rely solely on respondents'

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as a whole—it was simply pre-empting particular common-law claims, while saving others.

testing or research practices or other actions unrelated to advertising or promotion.

Breach of Express Warranty

Petitioner's claim for breach of an express warranty arises under N. J. Stat. Ann. § 12A:2–313(1)(a) (West 1962), which provides:

> "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Petitioner's evidence of an express warranty consists largely of statements made in respondents' advertising. See 893 F. 2d, at 574, 576; 683 F. Supp. 1487, 1497 (NJ 1988). Applying the Court of Appeals' ruling that Congress pre-empted "damage[s] actions . . . that challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes," 789 F. 2d, at 187, the District Court ruled that this claim "inevitably brings into question [respondents'] advertising and promotional activities, and is therefore pre-empted" after 1965. 649 F. Supp., at 675. As demonstrated above, however, the 1969 Act does not sweep so broadly: The appropriate inquiry is not whether a claim challenges the "propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed *by the warrantor*.[23] If, for example, a

[23] Thus it is that express warranty claims are said to sound in contract rather than in tort. Compare Black's Law Dictionary 1489 (6th ed. 1990) (defining "tort": "There must always be a violation of some duty . . . and

manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be "imposed under state law," but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement . . . based on smoking and health . . . with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement . . . *imposed under State law*" within the meaning of § 5(b).[24]

That the terms of the warranty may have been set forth in advertisements rather than in separate documents is irrelevant to the pre-emption issue (though possibly not to the state-law issue of whether the alleged warranty is valid and enforceable) because, although the breach of warranty claim is made "with respect to . . . advertising," it does not rest on a duty imposed under state law. Accordingly, to the extent that petitioner has a viable claim for breach of express war-

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generally such duty must arise by operation of law and not by mere agreement of the parties") with *id.*, at 322 (defining "contract": "An agreement between two . . . persons which creates an obligation").

[24] JUSTICE SCALIA contends that because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requirement . . . imposed under State law," and that, therefore, the Act pre-empts petitioner's express warranty claim. JUSTICE SCALIA might be correct if the Act pre-empted "*liability*" imposed under state law (as he suggests, *post,* at 551); but instead the Act expressly pre-empts only a "*requirement or prohibition*" imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character," *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 130 (1991), does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the State, but rather is "imposed" by the contracting party upon itself.

ranties made by respondents, that claim is not pre-empted by the 1969 Act.

Fraudulent Misrepresentation

Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials. Section 5(b) of the 1969 Act pre-empts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent-misrepresentation theory.

Regulators have long recognized the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements. For example, the FTC, in promulgating its initial trade regulation rule in 1964, criticized advertising that "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . at the same time suggesting that smoking is an activity at least consistent with physical health and well-being." The Commission concluded:

> "To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves." 29 Fed. Reg. 8356 (1964).

Longstanding regulations of the Food and Drug Administration express a similar understanding of the relationship between required warnings and advertising that "negates or disclaims" those warnings: "A hazardous substance shall not be deemed to have met [federal labeling] requirements if

there appears in or on the label . . . statements, designs, or other graphic material that in any manner negates or disclaims [the required warning]." 21 CFR § 191.102 (1965). In this light it seems quite clear that petitioner's first theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory, a theory that we have already concluded is largely pre-empted by § 5(b).

Petitioner's second theory, as construed by the District Court, alleges intentional fraud and misrepresentation both by "false representation of a material fact [and by] conceal[ment of] a material fact." Tr. 12727.[25] The predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts. Our pre-emption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by § 5(b).

Section 5(b) pre-empts only the imposition of state-law obligations "with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not pre-empted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, § 5(b) would not pre-empt a state-law claim based on a failure to fulfill that obligation.

Moreover, petitioner's fraudulent-misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b). Such claims are predicated not on a duty "based on smoking and health" but rather on a more general obliga-

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[25] The District Court stated that this claim "consists of the following elements: 1) a material misrepresentation of . . . fact [by false statement or concealment]; 2) knowledge of the falsity . . . ; 3) intent that the misrepresentation be relied upon; 4) justifiable reliance . . . ; 5) resultant damage." 683 F. Supp. 1487, 1499 (NJ 1988).

tion—the duty not to deceive. This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long-standing rules governing fraud. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices—an authority that the FTC had long exercised and continues to exercise. See § 5(c) of the 1965 Act; § 7(b) of the 1969 Act; see also nn. 7, 9, *supra*. This indicates that Congress intended the phrase "relating to smoking and health" (which was essentially unchanged by the 1969 Act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising.[26]

Moreover, this reading of "based on smoking and health" is wholly consistent with the purposes of the 1969 Act. State-law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state-law obligations concerning the warning necessary to render a product "reasonably safe," state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements is not pre-empted by § 5(b) of the 1969 Act.[27]

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[26] The Senate Report emphasized that the "preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health.* It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations.*" S. Rep. No. 91–566, p. 12 (1969) (emphasis supplied).

[27] Both JUSTICE BLACKMUN and JUSTICE SCALIA challenge the level of generality employed in our analysis. JUSTICE BLACKMUN contends that, as a matter of consistency, we should construe failure-to-warn claims *not*

Conspiracy to Misrepresent or Conceal Material Facts

Petitioner's final claim alleges a conspiracy among respondents to misrepresent or conceal material facts concerning the health hazards of smoking.[28] The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty is not pre-empted by § 5(b) for it is not a prohibition "based on smoking and health" as that phrase is properly construed. Accordingly, we conclude that the 1969 Act does not pre-empt petitioner's conspiracy claim.

VI

To summarize our holding: The 1965 Act did not pre-empt state-law damages actions; the 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization

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as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." *Post*, at 543. JUSTICE SCALIA contends that, again as a matter of consistency, we should construe fraudulent-misrepresentation claims *not* as based on a general duty not to deceive but rather as "based on smoking and health." Admittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure-to-warn claims at the highest level of generality (as JUSTICE BLACKMUN would have us do) would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as JUSTICE SCALIA would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. See n. 25, *supra*.

[28] The District Court described the evidence of conspiracy as follows:

"Evidence presented by [petitioner], particularly that contained in the documents of [respondents] themselves, indicates . . . that the industry of which these [respondents] were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community . . . ." 683 F. Supp., at 1490.

of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

The judgment of the Court of Appeals is accordingly reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE KENNEDY and JUSTICE SOUTER join, concurring in part, concurring in the judgment in part, and dissenting in part.

I

The Court today would craft a compromise position concerning the extent to which federal law pre-empts persons injured by cigarette manufacturers' unlawful conduct from bringing state common-law damages claims against those manufacturers. I, however, find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language. In my view, *neither* version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims. I therefore join Parts I, II, III, and IV of the Court's opinion, but dissent from Parts V and VI.

A

I agree with the Court's exposition, in Part III of its opinion, of the underlying principles of pre-emption law, and in particular with its recognition that the pre-emptive scope of the Federal Cigarette Labeling and Advertising Act (1965 Act or Act) and the Public Health Cigarette Smoking Act of

1969 (1969 Act) is "governed entirely by the express language" of the statutes' pre-emption provisions. *Ante*, at 517. Where, as here, Congress has included in legislation a specific provision addressing—and indeed, entitled—pre-emption, the Court's task is one of statutory interpretation—only to "identify the domain expressly pre-empted" by the provision. *Ibid.* An interpreting court must " 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *FMC Corp.* v. *Holliday*, 498 U. S. 52, 57 (1990) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985)). See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 591–593 (1987); *California Federal Savings & Loan Assn.* v. *Guerra*, 479 U. S. 272, 282 (1987) (opinion of Marshall, J.). We resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, see *English* v. *General Electric Co.*, 496 U. S. 72, 79 (1990)—only when Congress has been silent with respect to pre-emption.

I further agree with the Court that we cannot find the state common-law damages claims at issue in this case pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. See *ante*, at 516. The Court describes this reluctance to infer pre-emption in ambiguous cases as a "presumption against the pre-emption of state police power regulations." *Ante*, at 518. Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied pre-emption, see, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 146–152 (1963); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236–237 (1947), this Court often speaks in general terms without reference to the nature of the pre-emption at issue in the given statutory scheme. See, *e. g.*, *Maryland* v. *Loui-*

siana, 451 U. S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); *Avocado Growers*, 373 U. S., at 146–147 ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.).

The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.[1] I therefore agree with the Court's unwillingness to conclude that the state common-law damages claims at issue in this case are pre-empted unless such result is "'the clear and manifest purpose of Congress.'" *Ante*, at 516 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230).

B

I also agree with the Court's application of the foregoing principles in Part IV of its opinion, where it concludes that

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[1] The Court construes congressional inroads on state power narrowly in other contexts, as well. For example, the Court repeatedly has held that, in order to waive a State's sovereign immunity from suit in federal court, Congress must make its intention "unmistakably clear in the language of the statute." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); *Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989).

none of petitioner's common-law damages claims are pre-empted by the 1965 Act. In my view, the words of § 5(b) of that Act ("No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act") can bear only one meaning: that States are prohibited merely from "mandating particular cautionary statements . . . in cigarette advertisements." *Ante*, at 518. As the Court recognizes, this interpretation comports with Congress' stated purpose of avoiding "'diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*'" relating to smoking and health. *Ante*, at 519 (quoting 15 U. S. C. § 1331(2)). The narrow scope of federal pre-emption is thus apparent from the statutory text, and it is correspondingly impossible to divine any "clear and manifest purpose" on the part of Congress to pre-empt common-law damages actions.

II

My agreement with the Court ceases at this point. Given the Court's proper analytical focus on the scope of the express pre-emption provisions at issue here and its acknowledgment that the 1965 Act does not pre-empt state common-law damages claims, I find the plurality's conclusion that the 1969 Act pre-empts at least some common-law damages claims little short of baffling. In my view, the modified language of § 5(b), 15 U. S. C. § 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act"), no more "clearly" or "manifestly" exhibits an intent to pre-empt state common-law damages actions than did the language of its predecessor in the 1965 Act. Nonetheless, the plurality reaches a different conclusion, and its reasoning warrants scrutiny.

A

The plurality premises its pre-emption ruling on what it terms the "substantial changes" wrought by Congress in § 5(b), *ante*, at 520, notably, the rewording of the provision to pre-empt any "requirement or prohibition" (as opposed merely to any "statement") "imposed under State law." As an initial matter, I do not disagree with the plurality that the phrase "State law," in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations. See *ante*, at 522–523. I do disagree, however, with the plurality's conclusion that "State law" as used in § 5(b) represents such an all-inclusive reference. Congress' intention in selecting that phrase cannot be understood without considering the narrow range of actions—any "requirement or prohibition"—that Congress specifically described in § 5(b) as "imposed under" state law. See *United States* v. *Morton*, 467 U. S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase" (footnote omitted)); *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"); see also *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 138–139 (1991) (STEVENS, J., dissenting) (declining to read the phrase "all other law, including State and municipal law," broadly).

Although the plurality flatly states that the phrase "no requirement or prohibition" "sweeps broadly" and "easily encompass[es] obligations that take the form of common-law rules," *ante*, at 521, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if

anything, specific actions mandated or disallowed by a formal governing authority. See, *e. g.*, Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "[a]ct or law prohibiting something"; an "interdiction").

More important, the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments—an assumption crucial to the plurality's conclusion that the phrase "requirement or prohibition" encompasses common-law actions—is significantly more complicated than the plurality's brief quotation from *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959), see *ante*, at 521, would suggest.

The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action (*e. g.*, the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. See *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 185–186 (1988) (corporation "may choose to disregard [state] safety regulations and simply pay an additional" damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enact-

ments such as statutes and administrative regulations. See *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 90, 577 A. 2d 1239, 1249 (1990); Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. Cal. L. Rev. 1423, 1454 (1980). Moreover, tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation. See *Ferebee* v. *Chevron Chemical Co.*, 237 U. S. App. D. C. 164, 175, 736 F. 2d 1529, 1540, cert. denied, 469 U. S. 1062 (1984).

Despite its earlier acknowledgment, consistent with the foregoing conception of damages actions, that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions," *ante*, at 518,[2] the plurality apparently finds *Garmon*'s statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," 359 U. S., at 247, sufficient authority to warrant extinguishing the common-law actions at issue in this case. See *ante*, at 521. I am not persuaded. Not only has the Court previously distinguished *Garmon*,[3] but it has declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption.

In *Goodyear Atomic Corp.* v. *Miller*, for example, the Court distinguished, for purposes of pre-emption analysis,

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[2] Congress, in fact, has expressly allowed common-law damages actions to survive while pre-empting other, more direct forms of state regulation. See, *e. g.*, Comprehensive Smokeless Tobacco Health Education Act of 1986, § 7, 100 Stat. 34, 15 U. S. C. § 4406; Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. § 651 *et seq.*, as construed in *Gade* v. *National Solid Wastes Management Assn.*, *ante*, p. 88.

[3] The Court has explained that *Garmon*, in which a state common-law damages award was found to be pre-empted by the National Labor Relations Act, involved a special "presumption of federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 502 (1984); *English* v. *General Electric Co.*, 496 U. S. 72, 86–87, n. 8 (1990).

"direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. 486 U. S., at 185. Relying in part on its earlier decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984),[4] the Court stated that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." 486 U. S., at 186. Even more recently, the Court declined in *English* v. *General Electric Co.*, 496 U. S., at 86, to find state common-law damages claims for emotional distress pre-empted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct and could lead employers to alter the underlying conditions about which employees were complaining, *ibid.*, such an effect would be "neither direct nor substantial enough" to warrant pre-emption. *Id.*, at 85.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law.

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[4] The Court in *Silkwood* declined to find state punitive damages awards pre-empted by federal nuclear safety laws, explaining: "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." 464 U. S., at 256. Although the Court has noted that the decision in *Silkwood* was based in "substantial part" on affirmative evidence in the legislative history suggesting that Congress did not intend to include common-law damages remedies within the pre-empted field, see *English* v. *General Electric Co.*, 496 U. S. 72, 86 (1990), *Silkwood*'s discussion of the regulatory effects of the common law is instructive and has been relied on in subsequent cases. See, *e. g.*, *Goodyear*, 486 U. S., at 186.

The plain language of the 1969 Act's modified pre-emption provision simply cannot bear the broad interpretation the plurality would impart to it.

B

Not only does the text of the revised § 5(b) fail clearly or manifestly to require pre-emption of state common-law damages actions, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969. The plurality acknowledges the evidence that Congress itself perceived the changes in § 5(b) to be a mere "'clarifi[cation]'" of the existing narrow pre-emption provision, *ante*, at 520 (quoting S. Rep. No. 91–566, p. 12 (1969) (hereinafter S. Rep.)), but it dismisses these statements of legislative intent as the "'views of a subsequent Congress.'" *Ante*, at 520 (quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960)). The plurality is wrong not only as a factual matter—for the statements of the Congress that amended § 5(b) are contemporaneous, not "subsequent," to enactment of the revised pre-emption provision—but as a legal matter, as well. This Court accords "great weight" to an amending Congress' interpretation of the underlying statute. See, *e. g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381, and n. 8 (1969).

Viewing the revisions to § 5(b) as generally nonsubstantive in nature makes sense. By replacing the word "statement" with the slightly broader term, "requirement," and adding the word "prohibition" to ensure that a State could not do through negative mandate (*e. g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e. g.*, mandating particular cautionary statements), Congress sought to "clarif[y]" the existing pre-

cautions against confusing and nonuniform state laws and regulations. S. Rep., at 12.[5]

Just as it acknowledges the evidence that Congress' changes in the pre-emption provision were nonsubstantive, the plurality admits that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities." *Ante*, at 521. Indeed, the relevant Senate Report explains that the revised pre-emption provision is "intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State," a list remarkable for the absence of any reference to common-law damages actions. S. Rep., at 12. Cf., *e. g.*, 29 U. S. C. §§ 1144(a) and (c)(1) (ERISA statute defines "any and all State laws" as used in pre-emption provision to mean "all laws, *decisions*, rules, regulations, or *other State action* having the effect of law") (emphasis added). The plurality dismisses this statement with the simple observation that "the language of the Act plainly reaches beyond such [positive] enactments." *Ante*, at 521. Yet, as discussed above, the words of § 5(b) ("requirement or prohibition") do not so "plainly" extend to common-law damages actions, and the plurality errs in placing so much weight on this fragile textual hook.

The plurality further acknowledges that, at the same time that Congress amended the pre-emption provision of § 5(b), it made no effort to alter the statement of purpose contained in § 2 of the 1965 Act. *Ante*, at 521, n. 19. Although the

[5] In the one reported case construing the scope of pre-emption under the 1965 Act, *Banzhaf* v. *FCC*—a case of which Congress was aware, see S. Rep., at 7—the Court of Appeals for the District of Columbia Circuit used the term "affirmative requirements" to describe § 5(b)'s ban on "statement[s]." 132 U. S. App. D. C. 14, 22, 405 F. 2d 1082, 1090 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969). It is but a small step from "affirmative requirement" to the converse, "negative requirement" ("prohibition"), and, from there, to the single explanatory phrase, "requirement or prohibition."

plurality relegates this fact to a footnote, the continued vitality of § 2 is significant, particularly in light of the Court's reliance on the same statement of purpose for its earlier conclusion that the 1965 Act does *not* pre-empt state common-law damages actions. See *ante*, at 519 (concluding that Congress' expressed intent to avoid diverse, nonuniform, and confusing regulations "most naturally refers to positive enactments by [state legislatures and federal agencies], not to common-law damages actions").

Finally, there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common-law damages claims are pre-empted. The Court in the past has hesitated to find pre-emption where federal law provides no comparable remedy. See Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in compensating injury victims"). Indeed, in *Silkwood*, the Court took note of "Congress' failure to provide any federal remedy" for injured persons, and stated that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U. S., at 251. See also *id.*, at 263 (BLACKMUN, J., dissenting) ("[I]t is inconceivable that Congress intended to leave victims with no remedy at all").

Unlike other federal statutes where Congress has eased the bite of pre-emption by establishing "comprehensive" civil enforcement schemes, see, *e. g., Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 144–145 (1990) (discussing § 502(a) of ERISA), the Cigarette Labeling and Advertising Act is barren of alternative remedies. The Act merely empowers the Federal Trade Commission to regulate unfair or deceptive advertising practices (15 U. S. C. § 1336), establishes minimal

criminal penalties (misdemeanor and fine not to exceed $10,000) for violations of the Act's provisions (§ 1338), and authorizes federal courts, upon the Government's application, to enjoin violations of the Act (§ 1339). Unlike the plurality, I am unwilling to believe that Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct.

Thus, not only does the plain language of the 1969 Act fail clearly to require pre-emption of petitioner's state common-law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision in the drastic manner that the plurality attributes to it. Our obligation to infer pre-emption only where Congress' intent is clear and manifest mandates the conclusion that state common-law damages actions are not pre-empted by the 1969 Act.[6]

III

Stepping back from the specifics of the plurality's pre-emption analysis to view the result the plurality ultimately reaches, I am further disturbed. Notwithstanding the Court's ready acknowledgment that "'"[t]he purpose of Congress is the ultimate touchstone"' of pre-emption analysis," *ante*, at 516 (quoting *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978)), the plurality proceeds to create a crazy quilt

[6] Every Court of Appeals to consider the question, including the Third Circuit in an earlier opinion in this case, similarly has concluded that state common-law damages claims are *not* expressly pre-empted under the 1969 Act. See, *e. g.*, *Cipollone* v. *Liggett Group, Inc.*, 789 F. 2d 181, 185–186 (CA3 1986), cert. denied, 479 U. S. 1043 (1987); *Pennington* v. *Vistron Corp.*, 876 F. 2d 414, 418 (CA5 1989); *Roysdon* v. *R. J. Reynolds Tobacco Co.*, 849 F. 2d 230, 234 (CA6 1988); *Palmer* v. *Liggett Group, Inc.*, 825 F. 2d 620, 625 (CA1 1987). See also *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 85, 577 A. 2d 1239, 1247 (1990); *Forster* v. *R. J. Reynolds Tobacco Co.*, 437 N. W. 2d 655, 658 (Minn. 1989).

of pre-emption from among the common-law claims implicated in this case, and in so doing reaches a result that Congress surely could not have intended.

The most obvious problem with the plurality's analysis is its frequent shift in the level of generality at which it examines the individual claims. For example, the plurality states that fraudulent-misrepresentation claims (at least those involving false statements of material fact in advertisements) are "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive," and therefore are not pre-empted by § 5(b) of the 1969 Act. *Ante*, at 528–529. Yet failure-to-warn claims—which could just as easily be described as based on a "more general obligation" to inform consumers of known risks—implicitly are found to be "based on smoking and health" and are declared pre-empted. See *ante*, at 524. The plurality goes on to hold that express warranty claims are not pre-empted because the duty at issue is undertaken by the manufacturer and is not "imposed under State law." *Ante*, at 525. Yet, as the plurality itself must acknowledge, "the *general duty* not to breach warranties arises under state law," *ibid.* (emphasis added); absent the State's decision to penalize such behavior through the creation of a common-law damages action, no warranty claim would exist.

In short, I can perceive no principled basis for many of the plurality's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to create such a hodgepodge of allowed and disallowed claims when it amended the pre-emption provision in 1970. Although the plurality acknowledges that § 5(b) fails to "indicate that any familiar subdivision of common-law claims is or is not pre-empted," *ante*, at 523, it ignores the simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the plurality does today. I can only speculate as to the difficulty

lower courts will encounter in attempting to implement today's decision.

IV

By finding federal pre-emption of certain state common-law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result. Because I believe that neither version of the Federal Cigarette Labeling and Advertising Act evidences such a clear congressional intent to pre-empt state common-law damages actions, I respectfully dissent from Parts V and VI of JUSTICE STEVENS' opinion.

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

Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express pre-emption provisions must be construed narrowly, "in light of the presumption against the pre-emption of state police power regulations." *Ante*, at 518. The life span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V, by adjudging at least some of the common-law tort claims at issue here pre-empted. In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did that job in the present case, we would find, under the 1965 Act, pre-emption of petitioner's failure-to-warn claims; and under the 1969 Act, we would find pre-emption of petitioner's claims complete.

I

The Court's threshold description of the law of pre-emption is accurate enough: Though we generally "'assum[e] that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress,'" *ante*, at 516 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)), we have traditionally not thought that to require express statutory text. Where state law is in actual conflict with federal law, see, *e. g.*, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204 (1983), or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941), or even where the nature of Congress's regulation, or its scope, convinces us that "Congress left no room for the States to supplement it," *Rice*, *supra*, at 230, we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved. See, *e. g.*, *English* v. *General Electric Co.*, 496 U. S. 72, 78–79 (1990); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983).

The Court goes beyond these traditional principles, however, to announce two new ones. First, it says that express pre-emption provisions must be given the narrowest possible construction. This is in its view the consequence of our oft-repeated assumption that, absent convincing evidence of statutory intent to pre-empt, "'the historic police powers of the States [are] not to be superseded,'" see *ante*, at 516. But it seems to me that assumption dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.

That is precisely what our express pre-emption cases have done. Less than a month ago, in *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992), we held that the Airline Deregulation Act's provision pre-empting state laws "relating to [airline] rates, routes, or services," 49 U. S. C. App. § 1305(a)(1), was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any "plain-statement" rule, or rule of narrow construction, but applied the usual "'"*assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.*"'" *Morales*, *supra*, at 383 (quoting *FMC Corp.* v. *Holliday*, 498 U. S. 52, 57 (1990)) (emphasis added). And last Term, in *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117 (1991), we interpreted an express pre-emption provision broadly despite the fact that a well-respected canon of statutory construction supported a narrower reading. See *id.*, at 129; *id.*, at 136 (STEVENS, J., dissenting). We said not a word about a "presumption against . . . pre-emption," *ante*, at 518, that was to be applied to construction of the text.

In light of our willingness to find pre-emption in the absence of *any* explicit statement of pre-emptive intent, the notion that such explicit statements, where they exist, are subject to a "plain-statement" rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. See, *e. g.*, *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980) (waivers of federal sovereign immunity must be "unequivocally expressed"); *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989) (clear statement required to compel States to entertain damages suits against themselves in state

courts); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). But *none* of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication*, with no express statement of intent at all. That is the novel regime the Court constructs today.

The results seem odder still when one takes into account the second new rule that the Court announces: "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, . . . we need only identify the domain expressly pre-empted by [that provision]." *Ante*, at 517. Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated. This proposition may be correct insofar as implied "field" pre-emption is concerned: The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines. However, with regard to implied "conflict" pre-emption—*i. e.*, where state regulation actually conflicts with federal law, or where state regulation "stands as an obstacle to the accomplishment and execution" of Congress's purposes, *Hines*, *supra*, at 67—the Court's second new rule works mischief. If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (*e. g.*, consumer protection) could impose requirements entirely contrary to federal law—forbidding, for example, the use of certain safety equipment that federal law requires. To my knowledge, we have never expressed such a rule before, and our prior cases are inconsist-

ent with it. See, *e. g.*, *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 540–543 (1977). When this second novelty is combined with the first, the result is extraordinary: The statute that says *anything* about pre-emption must say *everything;* and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption.

The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning. *FMC Corp.* v. *Holliday*, *supra*, at 57; *Shaw* v. *Delta Air Lines*, 463 U. S., at 97. When this suggests that the pre-emption provision was intended to sweep broadly, our construction must sweep broadly as well. See, *e. g.*, *id.*, at 96–97. And when it bespeaks a narrow scope of pre-emption, so must our judgment. See, *e. g.*, *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 7–8 (1987). Applying its niggardly rule of construction, the Court finds (not surprisingly) that none of petitioner's claims—common-law failure to warn, breach of express warranty, and intentional fraud and misrepresentation—is pre-empted under § 5(b) of the 1965 Act. And save for the failure-to-warn claims, the Court reaches the same result under § 5(b) of the 1969 Act. I think most of that is error. Applying ordinary principles of statutory construction, I believe petitioner's failure-to-warn claims are pre-empted by the 1965 Act, and all his common-law claims by the 1969 Act.

II

With much of what the plurality says in Part V of its opinion I agree—that "the language of the [1969] Act plainly reaches beyond [positive] enactments," *ante*, at 521; that the general tort-law duties petitioner invokes against the cigarette companies can, as a general matter, impose "requirement[s] or prohibition[s]" within the meaning of § 5(b) of the

1969 Act, *ibid.*; and that the phrase "State law" as used in that provision embraces state common law, *ante*, at 523. I take issue with the plurality, however, on its application of these general principles to the present case. Its finding that they produce only partial pre-emption of petitioner's common-law claims rests upon three misperceptions that I shall discuss in turn, under headings indicating the erroneously permitted claims to which they apply.

A

Pre-1969 Failure-to-Warn Claims

According to the Court,[1] § 5(b) of the 1965 Act "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate *particular* warning labels." *Ante*, at 518–519 (emphasis added). In essence, the Court reads § 5(b)'s critical language "No *statement* relating to smoking and health . . . shall be required" to mean "No *particular statement* relating to smoking and health shall be required." The Court reasons that because common-law duties do not require cigarette manufacturers to include any *particular* statement in their advertising, but only *some* statement warning of health risks, those duties survive the 1965 Act. I see no basis for this element of "particularity." To require a warning about cigarette health risks is to require a "statement relating to smoking and health." If the "presumption against . . . pre-emption," *ante*, at 518, requires us to import limiting language into the 1965 Act, I do not see why it does not require us to import similarly limiting language into the 1969 Act—so that a "requirement . . . based on smoking and health . . . with respect to advertising" means only a *specific* requirement, and not just general, noncigarette-specific duties imposed by tort law. The divergent treatment of the 1965 Act cannot be jus-

[1] The plurality is joined by JUSTICES BLACKMUN, KENNEDY, and SOUTER in its analysis of the 1965 Act.

tified by the Act's statement of purposes, which, as the Court notes, expresses concern with "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations.*" 15 U. S. C. § 1331(2) (emphasis added). That statement of purposes was left untouched by Congress in 1969, and thus should be as restrictive of the scope of the later § 5(b) as the Court believes it is of the scope of the earlier one.[2]

To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their *advertising* any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted. In addition, for reasons I shall later explain, see Part III, *infra,* I would find pre-emption even of those claims based on respondents' failure to make health-related statements to consumers *outside* their advertising. However, since § 5(b) of the 1965 Act enjoins only those laws that *require* "statement[s]" in cigarette advertising, those of petitioner's claims that, if accepted, would penalize statements *voluntarily* made by the cigarette companies must be deemed to survive. As these would appear to include petitioner's breach-of-express-warranty and intentional fraud and misrepresentation claims, I concur in the Court's judgment in this respect.

[2] The Court apparently thinks that because § 4 of the Act, imposing the federal package-labeling requirement, "itself sets forth a *particular* statement," *ante,* at 519, n. 16, § 5(b), the advertising pre-emption provision must be read to proscribe only those state laws that compel the use of *particular* statements in advertising. Besides being a complete *non sequitur,* this reasoning proves too much: The similar prescription of a *particular* warning in the 1969 Act would likewise require us to confine the pre-emptive scope of that later statute to specific, prescriptive "requirement[s] or prohibition[s]" (which, I presume, would not include tort-law obligations to warn consumers about product dangers). And under both the 1965 and 1969 versions of the Act, the package-labeling pre-emption provision of § 5*(a),* no less than the advertising pre-emption provision of § 5*(b),* would have to be limited to the prescription of *particular* language, leaving the States free to impose general health-labeling requirements. These results are obviously contrary to the Act's stated purposes.

B

Post-1969 Breach-of-Express-Warranty Claims

In the context of this case, petitioner's breach-of-express-warranty claim necessarily embodies an assertion that respondents' advertising and promotional materials made statements to the effect that cigarette smoking is not unhealthy. Making such statements civilly actionable certainly constitutes an advertising "requirement or prohibition . . . based on smoking and health." The plurality appears to accept this, but finds that liability for breach of express warranty is not "imposed under State law" within the meaning of § 5(b) of the 1969 Act. "[R]ather," it says, the duty "is best understood as undertaken by the manufacturer itself." *Ante*, at 526. I cannot agree.

When liability attaches to a particular promise or representation, it attaches *by law*. For the making of a voluntary promise or representation, no less than for the commission of an intentional tort, it is the background law against which the act occurs, and not the act itself, that supplies the element of legal obligation. See *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429 (1934); N. J. Stat. Ann. §§ 12A:2–313(1), 12A:2–714, and 12A:2–715 (West 1962) (providing for enforcement of express warranties). Of course, New Jersey's law of express warranty attaches legal consequences to the cigarette manufacturer's voluntary conduct in making the warranty, and in that narrow sense, I suppose, the warranty obligation can be said to be "undertaken by the manufacturer." But on that logic it could also be said that the duty to warn about the dangers of cigarettes is undertaken voluntarily by manufacturers when they choose to sell in New Jersey; or, more generally, that *any* legal duty imposed on volitional behavior is not one imposed by law.

The plurality cites no authority for its curious view, which is reason enough to doubt it. In addition, however, we rejected this very argument last Term in *Norfolk & Western*

R. Co. v. *Train Dispatchers*, where we construed a federal exemption "from the antitrust laws and from all other law," 49 U. S. C. § 11341(a), to include an exemption from contract obligations. We observed, in a passage flatly inconsistent with the plurality's analysis today, that "[a] contract has no legal force *apart from the law that acknowledges its binding character.*" 499 U. S., at 130. Cf. *id.*, at 139 (STEVENS, J., dissenting). I would find petitioner's claim for breach of express warranty pre-empted by § 5(b) of the 1969 Act.

C

Post-1969 Fraud and Misrepresentation Claims

According to the plurality, at least one of petitioner's intentional fraud and misrepresentation claims survives § 5(b) of the 1969 Act because the common-law duty underlying that claim is not "based on smoking and health" within the meaning of the Act. See *ante*, at 528–529. If I understand the plurality's reasoning, it proceeds from the implicit assumption that only duties deriving from laws that are specifically directed to "smoking and health," or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within § 5(b) of the Act, as amended. Given that New Jersey's tort-law "duty not to deceive," *ante*, at 529, is a general one, applicable to all commercial actors and all kinds of commerce, it follows from this assumption that § 5(b) does not pre-empt claims based on breaches of that duty.

This analysis is suspect, to begin with, because the plurality is unwilling to apply it consistently. As JUSTICE BLACKMUN cogently explains, see *ante*, at 543 (opinion concurring in part and dissenting in part), if New Jersey's common-law duty to avoid false statements of material fact—as applied to the cigarette companies' behavior—is not "based on smoking and health," the same must be said of New Jersey's common-law duty to warn about a product's dangers. *Each* duty transcends the relationship between the cigarette com-

panies and cigarette smokers; *neither* duty was specifically crafted with an eye toward "smoking and health." None of the arguments the plurality advances to support its distinction between the two is persuasive. That Congress specifically preserved, in both the 1965 and 1969 Acts, the Federal Trade Commission's authority to police deceptive advertising practices, see § 5(c) of the 1965 Act; § 7(b) of the 1969 Act; *ante*, at 529, does not suggest that Congress intended comparable state authority to survive § 5(b). In fact, at least in the 1965 Act (which generally excluded federal as well as state regulation), the exemption suggested that § 5(b) was broad enough to reach laws governing fraud and misrepresentation. And it is not true that the States' laws governing fraud and misrepresentation in advertising impose identical legal standards, whereas their laws "concerning the warning necessary to render a product 'reasonably safe' " are quite diverse, *ibid.* The question whether an ad featuring a glamorous, youthful smoker with pearly-white teeth is "misrepresentative" would almost certainly be answered differently from State to State. See *ante*, at 527 (discussing FTC's initial cigarette advertising rules).

Once one is forced to select a *consistent* methodology for evaluating whether a given legal duty is "based on smoking and health," it becomes obvious that the methodology must focus not upon the ultimate source of the duty (*e. g.*, the common law) but upon its proximate application. Use of the "ultimate source" approach (*i. e.*, a legal duty is not "based on smoking and health" unless the law from which it derives is directed only to smoking and health) would gut the statute, inviting the very "diverse, nonuniform, and confusing cigarette . . . advertising regulations" Congress sought to avoid. 15 U. S. C. § 1331(2). And the problem is not simply the common law: Requirements could be imposed by state executive agencies as well, so long as they were operating under a *general* statute authorizing their supervision of "commercial advertising" or "unfair trade practices." New

Jersey and many other States have such statutes already on the books. *E. g.*, N. J. Stat. Ann. § 56:8–1 *et seq.* (West 1989); N. Y. Gen. Bus. Law § 349 *et seq.* (McKinney 1988 and Supp. 1992); Texas Bus. & Com. Code Ann. § 17.01 *et seq.* (1987 and Supp. 1992).

I would apply to all petitioner's claims what I have called a "proximate application" methodology for determining whether they invoke duties "based on smoking and health"—I would ask, that is, whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health. On that basis, I would find petitioner's failure-to-warn and misrepresentation claims both pre-empted.

III

Finally, there is an additional flaw in the plurality's opinion, a systemic one that infects even its otherwise correct disposition of petitioner's post-1969 failure-to-warn claims. The opinion states that, since § 5(b) proscribes only "requirement[s] or prohibition[s] . . . '*with respect to . . . advertising or promotion*,'" state-law claims premised on the failure to warn consumers "through channels of communication other than advertising or promotion" are not covered. *Ante*, at 528 (emphasis added); see *ante*, at 524. This preserves not only the (somewhat fanciful) claims based on duties having no relation to the advertising and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public-health agency), but also claims based on duties that can be complied with by taking action *either* within the advertising and promotional realm *or elsewhere*. Thus, if—as appears to be the case in New Jersey—a State's common law requires manufacturers to advise consumers of their products' dangers, but the law is indifferent as to *how* that requirement is met (*i. e.*, through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find pre-emption as long

as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

I think that is inconsistent with the law of pre-emption. Advertising and promotion are the normal means by which a manufacturer communicates required product warnings to prospective customers, and by far the most economical means. It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still. As a practical matter, such a "tell-the-consumers-any-way-you-wish" law compels manufacturers to relinquish the advertising and promotion immunity accorded them by the Act. The test for pre-emption in this setting should be one of practical compulsion, *i. e.*, whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Cf., *e. g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 173, n. 25 (1978). Though the hypothetical law requiring disclosure to a state regulatory agency would seem to survive this test, I would have no difficulty finding that test met with respect to state laws that require the cigarette companies to meet general standards of "fair warning" regarding smoking and health.

* * *

Like JUSTICE BLACKMUN, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision." *Ante*, at 543–544 (opinion concurring in part and dissenting in part). Must express pre-emption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied pre-emption whenever the statute at issue contains an express pre-emption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes,

does "state law" include legal duties imposed on voluntary acts (as we held last Term in *Norfolk & Western R. Co.*), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.

Syllabus

CITY OF BURLINGTON *v.* DAGUE ET AL.

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

No. 91–810. Argued April 21, 1992—Decided June 24, 1992

After ruling on the merits for respondents, the District Court determined that they were "substantially prevailing" parties entitled to "reasonable" attorney's fees under the attorney's fee provisions of the Solid Waste Disposal Act and the Clean Water Act. The District Court calculated the fee award by, *inter alia*, enhancing the "lodestar" amount by 25% on the grounds that respondents' attorneys were retained on a contingent-fee basis and that without such enhancement respondents would have faced substantial difficulties in obtaining suitable counsel. The Court of Appeals affirmed the fee award.

Held: The fee-shifting statutes at issue do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis. In *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711 *(Delaware Valley II)*, this Court addressed, but did not resolve, a question essentially identical to the one presented here. The position taken by the principal opinion in that case, *id.*, at 723–727 (opinion of WHITE, J.)—that the typical federal fee-shifting statute does not permit an attorney's fee award to be enhanced on account of contingency—is adopted. The position advocated by *Delaware Valley II*'s concurrence, *id.*, at 731, 733 (O'CONNOR, J., concurring in part and concurring in judgment)—that contingency enhancement is appropriate in defined limited circumstances—is rejected, since it is based upon propositions that are mutually inconsistent as a practical matter; would make enhancement turn upon a circular test for a very large proportion of contingency-fee cases; and could not possibly achieve its supposed goal of mirroring market incentives to attorneys to take cases. Beyond that approach, there is no other basis, fairly derivable from the fee-shifting statutes, by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases. Moreover, contingency enhancement is not compatible with the fee-shifting statutes at issue, since such enhancement would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail; is unnecessary to the determination of a reasonable fee and inconsistent with this Court's general rejection of the contingent-fee model in favor of the lodestar model, see, *e. g.*, *Blanchard* v. *Bergeron*, 489 U. S. 87, 96; and would make the setting of

fees more complex and arbitrary, hence more unpredictable, and hence more litigable. Pp. 560–567.

935 F. 2d 1343, reversed in part.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 567. O'CONNOR, J., filed a dissenting opinion, *post*, p. 575.

Michael B. Clapp argued the cause and filed briefs for petitioner.

Barry L. Goldstein argued the cause for respondents. With him on the brief were *William W. Pearson*, *Guy T. Saperstein*, and *Mari Mayeda*.

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Hartman*, *Deputy Solicitor General Mahoney*, *Deputy Assistant Attorney General Clegg*, *Harriet S. Shapiro*, *Anne S. Almy*, and *Mark R. Haag*.*

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*Briefs of *amici curiae* urging reversal were filed for the District of Columbia et al. by *John Payton*, Corporation Counsel for the District of Columbia, *Charles L. Reischel*, Deputy Corporation Counsel, and *Donna M. Murasky*, Assistant Corporation Counsel, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Daniel E. Lungren* of California, *Robert A. Butterworth* of Florida, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Scott Harshbarger* of Massachusetts, *Frankie Sue Del Papa* of Nevada, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *Mark W. Barnett* of South Dakota, *Paul Van Dam* of Utah, and *James E. Doyle* of Wisconsin; 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 the Alabama Employment Lawyers Association et al. by *Sanford Jay Rosen*, *Andrea G. Asaro*, *Steven R. Shapiro*, *John A. Powell*, *Leon Friedman*, *Julius L. Chambers*, *Charles Stephen Ralston*, and *Terisa E. Chaw;* for the American Bar Association by *Talbot S. D'Alemberte* and *Carter G. Phillips;* and for the Lawyer's Committee for Civil Rights Under Law et al. by *Roger E. Warin*, *Jerald S. Howe, Jr.*, *D. Benson Tesdahl*, *Herbert M. Wachtell*, *William H. Brown III*, *Thomas J. Henderson*, and *Richard T. Seymour*.

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a court, in determining an award of reasonable attorney's fees under § 7002(e) of the Solid Waste Disposal Act (SWDA), 90 Stat. 2826, as amended, 42 U. S. C. § 6972(e), or § 505(d) of the Federal Water Pollution Control Act (Clean Water Act (CWA)), 86 Stat. 889, as amended, 33 U. S. C. § 1365(d), may enhance the fee award above the "lodestar" amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services. Although different fee-shifting statutes are involved, the question is essentially identical to the one we addressed, but did not resolve, in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711 (1987) *(Delaware Valley II)*.

I

Respondent Ernest Dague, Sr. (whom we will refer to in place of all the respondents), owns land in Vermont adjacent to a landfill that was owned and operated by petitioner city of Burlington. Represented by attorneys retained on a contingent-fee basis, he sued Burlington over its operation of the landfill. The District Court ruled, *inter alia*, that Burlington had violated provisions of the SWDA and the CWA, and ordered Burlington to close the landfill by January 1, 1990. It also determined that Dague was a "substantially prevailing party" entitled to an award of attorney's fees under the Acts, see 42 U. S. C. § 6972(e); 33 U. S. C. § 1365(d). 732 F. Supp. 458 (Vt. 1989).

In calculating the attorney's fees award, the District Court first found reasonable the figures advanced by Dague for his attorneys' hourly rates and for the number of hours expended by them, producing a resulting "lodestar" attorney's fee of $198,027.50. (What our cases have termed the "lodestar" is "the product of reasonable hours times a reasonable rate," *Pennsylvania* v. *Delaware Valley Citizens' Council*

for Clean Air, 478 U. S. 546, 565 (1986) *(Delaware Valley I)*.) Addressing Dague's request for a contingency enhancement, the court looked to Circuit precedent, which provided that "'the rationale that should guide the court's discretion is whether "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts."'" App. to Pet. for Cert. 131–132 (quoting *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F. 2d 295, 298 (CA2 1987), in turn quoting *Lewis* v. *Coughlin*, 801 F. 2d 570, 576 (CA2 1986)). Following this guidance, the court declared that Dague's "risk of not prevailing was substantial" and that "absent an opportunity for enhancement, [Dague] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." It concluded that "a 25% enhancement is appropriate, but anything more would be a windfall to the attorneys." It therefore enhanced the lodestar amount by 25%—$49,506.87. App. to Pet. for Cert. 133, 134.

The Court of Appeals affirmed in all respects. Reviewing the various opinions in *Delaware Valley II*, the court concluded that the issue whether and when a contingency enhancement is warranted remained open, and expressly disagreed with the position taken by some Courts of Appeals that the concurrence in *Delaware Valley II* was controlling. The court stated that the District Court had correctly relied on Circuit precedent, and, holding that the District Court's findings were not clearly erroneous, it upheld the 25% contingency enhancement. 935 F. 2d 1343, 1359–1360 (CA2 1991). We granted certiorari only with respect to the propriety of the contingency enhancement. 502 U. S. 1071 (1992).

II

We first provide some background to the issue before us. Fees for legal services in litigation may be either "certain" or "contingent" (or some hybrid of the two). A fee is certain

if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result's being obtained. Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses. Under this arrangement, the attorney bears a contingent risk of nonpayment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%.

In *Delaware Valley II*, we reversed a judgment that had affirmed enhancement of a fee award to reflect the contingent risk of nonpayment. In the process, we addressed whether the typical federal fee-shifting statute (there, § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d)) permits an attorney's fees award to be enhanced on account of contingency. In the principal opinion, JUSTICE WHITE, joined on this point by three other Justices, determined that such enhancement is not permitted. 483 U. S., at 723–727. JUSTICE O'CONNOR, in an opinion concurring in part and concurring in the judgment, concluded that no enhancement for contingency is appropriate "unless the applicant can establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market," *id.*, at 733 (internal quotation marks omitted), and that any enhancement "must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case," *id.*, at 731 (emphasis in original). JUSTICE BLACKMUN's dissenting opinion, joined by three other Justices, concluded that enhancement for contingency is always statutorily required. *Id.*, at 737–742, 754.

We turn again to this same issue.

III

Section 7002(e) of the SWDA and § 505(d) of the CWA authorize a court to "award costs of litigation (including *rea-*

sonable attorney . . . fees)" to a "prevailing or substantially prevailing party." 42 U. S. C. § 6972(e) (emphasis added); 33 U. S. C. § 1365(d) (emphasis added). This language is similar to that of many other federal fee-shifting statutes, see, *e. g.*, 42 U. S. C. §§ 1988, 2000e–5(k), 7604(d); our case law construing what is a "reasonable" fee applies uniformly to all of them. *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758, n. 2 (1989).

The "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a "strong presumption" that the lodestar represents the "reasonable" fee, *Delaware Valley I*, *supra*, at 565, and have placed upon the fee applicant who seeks more than that the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." *Blum* v. *Stenson*, 465 U. S. 886, 898 (1984) (emphasis added). The Court of Appeals held, and Dague argues here, that a "reasonable" fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment. Fee-shifting statutes should be construed, he contends, to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates. Petitioner Burlington argues, by contrast, that the lodestar fee may not be enhanced for contingency.

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. *Blum*,

supra, at 898–899. Taking account of it again through lodestar enhancement amounts to double counting. *Delaware Valley II*, 483 U. S., at 726–727 (plurality opinion).

The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that *always* exists (no claim has a 100% chance of success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases. See *id.*, at 740 (BLACKMUN, J., dissenting). Moreover, the consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provisions. "These statutes were not designed as a form of economic relief to improve the financial lot of lawyers." *Delaware Valley I*, 478 U. S., at 565.

Instead of enhancement based upon the contingency risk posed by each case, Dague urges that we adopt the approach set forth in the *Delaware Valley II* concurrence. We decline to do so, first and foremost because we do not see how it can intelligibly be applied. On the one hand, it would require the party seeking contingency enhancement to "establish that without the adjustment for risk [he] 'would have faced

substantial difficulties in finding counsel in the local or other relevant market.'" 483 U. S., at 733. On the other hand, it would forbid enhancement based "on an assessment of the 'riskiness' of any particular case." *Id.*, at 731; see *id.*, at 734 (no enhancement "based on 'legal' risks or risks peculiar to the case"). But since the predominant reason that a contingent-fee claimant has difficulty finding counsel in any legal market where the winner's attorney's fees will be paid by the loser is that attorneys view his case as too risky (*i. e.*, too unlikely to succeed), these two propositions, as a practical matter, collide. See *King* v. *Palmer*, 292 U. S. App. D. C. 362, 371, 950 F. 2d 771, 780 (1991) (en banc), cert. pending *sub nom. King* v. *Ridley*, No. 91–1370.

A second difficulty with the approach taken by the concurrence in *Delaware Valley II* is that it would base the contingency enhancement on "the difference in market treatment of contingent fee cases *as a class.*" 483 U. S., at 731 (emphasis in original). To begin with, for a very large proportion of contingency-fee cases—those seeking not monetary damages but injunctive or other equitable relief—there is no "market treatment." Such cases scarcely exist, except to the extent Congress has created an artificial "market" for them by fee shifting—and looking to *that* "market" for the meaning of fee shifting is obviously circular. Our decrees would follow the "market," which in turn is based on our decrees. See *King* v. *Palmer*, 285 U. S. App. D. C. 68, 76, 906 F. 2d 762, 770 (1990) (Williams, J., concurring) ("I see the judicial judgment as defining the market, not vice versa"), vacated, 292 U. S. App. D. C. 362, 950 F. 2d 771 (1991), cert. pending *sub nom. King* v. *Ridley*, No. 91–1370. But even apart from that difficulty, any approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass, cannot possibly achieve the supposed goal of mirroring market incentives. As discussed above, the contingent risk of a case (and hence the difficulty of getting contingent-fee lawyers to take

it) depends principally upon its particular merits. Contingency enhancement calculated on *any* class-wide basis, therefore, guarantees *at best* (leaving aside the double-counting problem described earlier) that those cases within the class that have the class-average chance of success will be compensated according to what the "market" requires to produce the services, and that *all cases* having above-class-average chance of success will be overcompensated.

Looking beyond the *Delaware Valley II* concurrence's approach, we perceive no other basis, fairly derivable from the fee-shifting statutes, by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases. And we see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), so should it bar a prevailing plaintiff from recovering for the risk of loss. See *Delaware Valley II*, *supra*, at 719–720, 724–725 (principal opinion). An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail.

Second, both before and since *Delaware Valley II*, "we have generally turned away from the contingent-fee model"—which would make the fee award a percentage of the value of the relief awarded in the primary action*—"to

*Contrary to JUSTICE BLACKMUN's understanding, *post*, at 572, there is no reason in theory why the contingent-fee model could not apply to relief other than damages; where injunctive relief is obtained, for example, the fee award would simply be a percentage of the value of the injunctive relief. There would be, to be sure, severe problems of administration in

the lodestar model." *Venegas* v. *Mitchell*, 495 U. S. 82, 87 (1990). We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. See, *e. g.*, Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). For example, in *Blanchard* v. *Bergeron*, 489 U. S. 87 (1989), we held that the lodestar governed, even though it produced a fee that substantially exceeded the amount provided in the contingent-fee agreement between plaintiff and his counsel (which was self-evidently an amount adequate to attract the needed legal services). *Id.*, at 96. Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

And finally, the interest in ready administrability that has underlain our adoption of the lodestar approach, see, *e. g.*, *Hensley*, 461 U. S., at 433, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation," *id.*, at 437), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable. It is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intrica-

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determining the value of injunctive relief, but such problems simply highlight why we have rejected the contingent-fee model in favor of the lodestar model.

cies of the fee-paying market in every respect. See *Delaware Valley I*, 478 U. S., at 565.

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Adopting the position set forth in JUSTICE WHITE's opinion in *Delaware Valley II*, 483 U. S., at 715–727, we hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue. We reverse the Court of Appeals' judgment insofar as it affirmed the 25% enhancement of the lodestar.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

In language typical of most federal fee-shifting provisions, the statutes involved in this case authorize courts to award the prevailing party a "reasonable" attorney's fee.[1] Two principles, in my view, require the conclusion that the "enhanced" fee awarded to respondents was reasonable. First, this Court consistently has recognized that a "reasonable" fee is to be a "fully compensatory fee," *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983), and is to be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri* v. *Jenkins*, 491 U. S. 274, 286 (1989). Second, it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome,[2] and relevant professional standards long have recognized that this practice is reasonable.[3]

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[1] See 33 U. S. C. § 1365(d) (Clean Water Act); 42 U. S. C. § 6972(e) (Solid Waste Disposal Act).

[2] See, *e. g.*, R. Posner, Economic Analysis of Law § 21.9, pp. 534–535 (3d ed. 1986).

[3] See Canons of Ethics § 12, 33 A. B. A. Rep. 575, 578 (1908); Model Code of Professional Responsibility, DR 2–106(B)(8) (1980); ABA Model Rules of Professional Conduct, Rule 1.5(a)(8) (1992).

The Court does not deny these principles. It simply refuses to draw the conclusion that follows ineluctably: If a statutory fee consistent with market practices is "reasonable," and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable. The Court's decision to the contrary violates the principles we have applied consistently in prior cases and will seriously weaken the enforcement of those statutes for which Congress has authorized fee awards—notably, many of our Nation's civil rights laws and environmental laws.

I

Congress' purpose in adopting fee-shifting provisions was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel. See S. Rep. No. 94–1011, p. 6 (1976). In particular, federal fee-shifting provisions have been designed to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys. See H. R. Rep. No. 94–1558, p. 1 (1976); S. Rep. No. 94–1011, at 2. Second, many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent-fee arrangement. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U. S. 711, 749 (1987) (dissenting opinion); H. R. Rep. No. 94–1558, at 9. The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If federal fee-bearing

litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers—who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation—and public interest lawyers who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found. See *Delaware Valley II*, 483 U. S., at 742–743 (dissenting opinion).

In many cases brought under federal statutes that authorize fee shifting, plaintiffs will be unable to ensure that their attorneys will be compensated for the risk that they might not prevail. This will be true in precisely those situations targeted by the fee-shifting statutes—where plaintiffs lack sufficient funds to hire an attorney on a win-or-lose basis and where potential damages awards are insufficient to justify a standard contingent-fee arrangement. In these situations, unless the fee-shifting statutes are construed to compensate attorneys for the risk of nonpayment associated with loss, the expected return from cases brought under federal fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation. Prudent counsel, under these conditions, would tend to avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed. This will be true even if the fee-bearing claim is more likely meritorious than the competing private claim.

In *Delaware Valley II*, five Justices of this Court concluded that for these reasons the broad statutory term "reasonable attorney's fee" must be construed to permit, in some circumstances, compensation above the hourly win-or-lose rate generally borrowed to compute the lodestar fee. See 483 U. S., at 731, 732–733 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 735 (dissenting opinion). Together with the three Justices who joined my dissenting opinion in that case, I would have allowed enhancement

where, and to the extent that, the attorney's compensation is contingent upon prevailing and receiving a statutory award. I indicated that if, by contrast, the attorney and client have been able to mitigate the risk of nonpayment—either in full, by agreeing to win-or-lose compensation or to a contingent share of a substantial damages recovery, or in part, by arranging for partial payment—then to that extent enhancement should be unavailable. *Id.*, at 748–749. I made clear that the "risk" for which enhancement might be available is not the particular factual and legal riskiness of an individual case, but the risk of nonpayment associated with contingent cases considered as a class. *Id.*, at 745–747, 752. Congress, I concluded, did not intend to prohibit district courts from considering contingency in calculating a "reasonable" attorney's fee.[4]

JUSTICE O'CONNOR's concurring opinion agreed that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee," *id.*, at 731, and that "compensation for contingency must be based on the difference in market treatment of contingent-fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case" (emphasis in original). *Ibid.* As I understand her opinion,

[4] A number of bills introduced in Congress would have done just this, by prohibiting "bonuses and multipliers" where a suit is against the United States, a State, or a local government. These bills failed to receive congressional approval. See *Delaware Valley II*, 483 U. S., at 739, n. 3 (dissenting opinion).

Moreover, in some instances Congress explicitly has prohibited enhancements, as in the 1986 amendments to the Education of the Handicapped Act. See 20 U. S. C. § 1415(e)(4)(C) ("[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection"). Congress' express prohibition on enhancement in this statute suggests that it did not understand the standard fee-shifting language used elsewhere to bar enhancement. Cf. *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 92–97 (1991) (relying, in part, on express authorization of expert-witness fees in subsequently passed fee-shifting statutes to infer that such fees could not have been included in unsupplemented references to "attorney's fees").

JUSTICE O'CONNOR further agreed that a court considering an enhancement must determine whether and to what extent the attorney's compensation was contingent, as well as whether and to what extent that contingency was, or could have been, mitigated. Her concurrence added, however, an additional inquiry designed to make the market-based approach "not merely justifiable in theory but also objective and nonarbitrary in practice." *Id.*, at 732. She suggested two additional "constraints on a court's discretion" in determining whether, and how much, enhancement is warranted. First, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market," and varying rates of enhancement among markets must be justifiable by reference to real differences in those markets. *Id.*, at 733. Second, the applicant bears the burden of demonstrating that without an adjustment for risk "the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market." *Ibid.* (internal quotation marks omitted).

II

After criticizing at some length an approach it admits respondents and their *amici* do not advocate, see *ante*, at 563–564, and after rejecting the approach of the *Delaware Valley II* concurrence, see *ante*, at 564–565, the Court states that it "see[s] a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Ante*, at 565. I do not find any of these arguments persuasive.

The Court argues, first, that "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases" and uses the cases that were successful to subsidize those that were not. *Ibid.* "To award a contingency enhancement under a fee-shifting statute," the Court concludes, would "in effect" contravene the prevailing-party

limitation, by allowing the attorney to recover fees for cases in which his client does not prevail. *Ibid.* What the words "in effect" conceal, however, is the Court's inattention to the language of the statutes: The provisions at issue in this case, like fee-shifting provisions generally, authorize fee awards to prevailing *parties*, not their attorneys. See 33 U. S. C. § 1365(d); 42 U. S. C. § 6972(e); see also *Venegas* v. *Mitchell*, 495 U. S. 82, 87 (1990). Respondents simply do not advocate awarding fees to any party who has not prevailed. Moreover, the Court's reliance on the "prevailing party" limitation is somewhat misleading: the Court's real objection to contingency enhancement is that the *amount* of an enhanced award would be excessive, not that parties receiving enhanced fee awards are not prevailing parties *entitled* to an award. In prior cases the Court has been careful to distinguish between these two issues. See, *e. g.*, *Hensley* v. *Eckerhart*, 461 U. S., at 433 (The "prevailing party" determination only "brings the plaintiff . . . across the statutory threshold. It remains for the district court to determine what fee is 'reasonable' ").

Second, the Court suggests that "both before and since *Delaware Valley II*, 'we have generally turned away from the contingent-fee model'—which would make the fee award a percentage of the value of the relief awarded in the primary action—'to the lodestar model.' " *Ante*, at 565–566 (footnote omitted), quoting *Venegas* v. *Mitchell*, 495 U. S., at 87. This argument simply plays on two meanings of "contingency." Most assuredly, respondents—who received no damages for their fee-bearing claims—do not advocate "mak[ing] the fee award a percentage" of that amount. Rather, they argue that the *lodestar* figure must be enhanced because their attorneys' compensation was contingent on prevailing, and because their attorneys could not otherwise be compensated for assuming the risk of nonpayment.

Third, the Court suggests that allowing for contingency enhancement "would make the setting of fees more complex

and arbitrary" and would likely lead to "burdensome satellite litigation" that this Court has said should be avoided. *Ante*, at 566. The present case is an odd one in which to make this point: The issue of enhancement hardly occupied center stage in the fees portion of this litigation, and it became a time-consuming matter only after the Court granted certiorari, limited to this question alone.[5] Moreover, if JUSTICE O'CONNOR's standard were adopted, the matter of the amount by which fees should be increased would quickly become settled in the various district courts and courts of appeals for the different kinds of federal litigation. And in any event, speculation that enhancement determinations would be "burdensome" does not speak to the issue whether they are required by the fee-shifting statutes.

The final objection to be considered is the Court's contention that any approach that treats contingent-fee cases as a class is doomed to failure. The Court's argument on this score has two parts. First, the Court opines that "for a very large proportion of contingency-fee cases"—cases in which only equitable relief is sought—"there is no 'market treatment,' " except insofar as Congress has created an "artificial" market with the fee-shifting statutes themselves. It is circular, the Court contends, to "loo[k] to *that* 'market' for the meaning of fee-shifting." *Ante*, at 564. And even leaving that difficulty aside, the Court continues, the real "risk" to which lawyers respond is the riskiness of particular cases. Because under a class-based contingency enhancement system the same enhancement will be awarded whether the

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[5] It is fair to say that petitioner's attention was directed almost exclusively toward the merits issues, both in the lower courts and in its petition for certiorari. While petitioner sharply contested respondents' entitlement to an award and objected to the amount of the lodestar, its opposition to enhancement occupies only a single page of its memorandum in opposition to the motion for fees and costs. See App. 224–225. Only a little more than 1 page of the 30-page petition for certiorari is devoted to the issue of contingency enhancement. See Pet. for Cert. 25–27.

chance of prevailing was 80% or 20%, "*all cases* having above-class-average chance of success will be overcompensated" (emphasis in original). *Ante*, at 565.

Both parts of this argument are mistaken. The circularity objection overlooks the fact that even under the Court's unenhanced lodestar approach, the district court must find a relevant private market from which to select a fee. The Court offers no reason why this market disappears only when the inquiry turns to enhancement. The second part of the Court's argument is mistaken so far as it assumes the only relevant incentive to which attorneys respond is the risk of losing particular cases. As explained above, a proper system of contingency enhancement addresses a different kind of incentive: the common incentive of all lawyers to avoid *any* fee-bearing claim in which the plaintiff cannot guarantee the lawyer's compensation if he does not prevail. Because, as the Court observes, "no claim has a 100% chance of success," *ante*, at 563, *any* such case under a pure lodestar system will offer a lower prospective return per hour than one in which the lawyer will be paid at the same lodestar rate, win or lose. Even the *least* meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be economically preferable to the *most* meritorious fee-bearing claim in which the attorney will be paid only if he prevails, so long as the cases require the same amount of time. Yet as noted above, this latter kind of case—in which potential plaintiffs can neither afford to hire attorneys on a straight hourly basis nor offer a percentage of a substantial damages recovery—is exactly the kind of case for which the fee-shifting statutes were designed.

III

Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement

mechanism in a variety of federal statutes—most notably, civil rights and environmental statutes. The *amicus* briefs filed in this case make clear that we can expect many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel.[6] Today's decision weakens the protections we afford important federal rights.

I dissent.

JUSTICE O'CONNOR, dissenting.

I continue to be of the view that in certain circumstances a "reasonable" attorney's fee should not be computed by the purely retrospective lodestar figure, but also must incorporate a reasonable incentive to an attorney contemplating whether or not to take a case in the first place. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 731–734 (1987) *(Delaware Valley II)* (O'CONNOR, J., concurring in part and concurring in judgment). As JUSTICE BLACKMUN cogently explains, when an attorney must choose between two cases—one with a client who will pay the attorney's fees win or lose and the other who can only promise the statutory compensation if the case is successful—the attorney will choose the fee-paying client, unless the contingency client can promise an enhancement of sufficient magnitude to justify the extra risk of nonpayment. *Ante*, at 568–569. Thus, a reasonable fee should be one that would "attract competent counsel," *Delaware Valley II*, *supra*, at 733 (O'CONNOR, J., concurring in part and concurring in judgment), and in some markets this must include the assurance of a contingency enhancement if the plaintiff should prevail. I therefore dissent from the Court's holding that a "reasonable" attorney's fee can never include an enhancement for cases taken on contingency.

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[6] See Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 16–22; Brief for Alabama Employment Lawyers Association et al. as *Amici Curiae* 12–13.

In my view the promised enhancement should be "based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." 483 U. S., at 731 (emphasis omitted). As JUSTICE BLACKMUN has shown, the Court's reasons for rejecting a market-based approach do not stand up to scrutiny. *Ante,* at 574. Admittedly, the courts called upon to determine the enhancements appropriate for various markets would be required to make economic calculations based on less-than-perfect data. Yet that is also the case, for example, in inverse condemnation and antitrust cases, and the Court has never suggested that the difficulty of the task or possible inexactitude of the result justifies forgoing those calculations altogether. As JUSTICE BLACKMUN notes, these initial hurdles would be overcome as the enhancements appropriate to various markets became settled in the district courts and courts of appeals. *Ante,* at 573.

In this case, the District Court determined that a 25% contingency enhancement was appropriate by reliance on the likelihood of success in the individual case. App. to Pet. for Cert. 132–133. The Court of Appeals affirmed on the basis of its holding in *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F. 2d 295 (CA2 1987), which asks simply whether, without the possibility of a fee enhancement, the prevailing party would not have been able to obtain competent counsel. 935 F. 2d 1343, 1360 (CA2 1991) (citing *Friends of the Earth, supra*). Although I believe that inquiry is part of the contingency enhancement determination, see *Delaware Valley II, supra,* at 733 (O'CONNOR, J., concurring in part and concurring in judgment), I also believe that it was error to base the degree of enhancement on case-specific factors. Because I can find no market-specific support for the 25% enhancement figure in the affidavits submitted by respondents in support of the fee request, I would vacate the judgment affirming the fee award and remand for a market-based assessment of a suitable enhancement for contingency.

Syllabus

LEE ET AL. *v.* WEISMAN, PERSONALLY AND AS NEXT FRIEND OF WEISMAN

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

No. 90–1014. Argued November 6, 1991—Decided June 24, 1992

Principals of public middle and high schools in Providence, Rhode Island, are permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. Petitioner Lee, a middle school principal, invited a rabbi to offer such prayers at the graduation ceremony for Deborah Weisman's class, gave the rabbi a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and advised him that the prayers should be nonsectarian. Shortly before the ceremony, the District Court denied the motion of respondent Weisman, Deborah's father, for a temporary restraining order to prohibit school officials from including the prayers in the ceremony. Deborah and her family attended the ceremony, and the prayers were recited. Subsequently, Weisman sought a permanent injunction barring Lee and other petitioners, various Providence public school officials, from inviting clergy to deliver invocations and benedictions at future graduations. It appears likely that such prayers will be conducted at Deborah's high school graduation. The District Court enjoined petitioners from continuing the practice at issue on the ground that it violated the Establishment Clause of the First Amendment. The Court of Appeals affirmed.

Held: Including clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause. Pp. 586–599.

(a) This Court need not revisit the questions of the definition and scope of the principles governing the extent of permitted accommodation by the State for its citizens' religious beliefs and practices, for the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here. Thus, the Court will not reconsider its decision in *Lemon* v. *Kurtzman*, 403 U. S. 602. The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a

[state] religion or religious faith, or tends to do so." *Lynch* v. *Donnelly*, 465 U. S. 668, 678. Pp. 586–587.

(b) State officials here direct the performance of a formal religious exercise at secondary schools' promotional and graduation ceremonies. Lee's decision that prayers should be given and his selection of the religious participant are choices attributable to the State. Moreover, through the pamphlet and his advice that the prayers be nonsectarian, he directed and controlled the prayers' content. That the directions may have been given in a good-faith attempt to make the prayers acceptable to most persons does not resolve the dilemma caused by the school's involvement, since the government may not establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds. Pp. 587–590.

(c) The Establishment Clause was inspired by the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. Prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion. *Engel* v. *Vitale*, 370 U. S. 421; *School Dist. of Abington* v. *Schempp*, 374 U. S. 203. The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the State may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a *de minimis* character, since that is an affront to the rabbi and those for whom the prayers have meaning, and since any intrusion was both real and a violation of the objectors' rights. Pp. 590–594.

(d) Petitioners' argument that the option of not attending the ceremony excuses any inducement or coercion in the ceremony itself is rejected. In this society, high school graduation is one of life's most significant occasions, and a student is not free to absent herself from the exercise in any real sense of the term "voluntary." Also not dispositive is the contention that prayers are an essential part of these ceremonies because for many persons the occasion would lack meaning without the recognition that human achievements cannot be understood apart from their spiritual essence. This position fails to acknowledge that what

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for many was a spiritual imperative was for the Weismans religious conformance compelled by the State. It also gives insufficient recognition to the real conflict of conscience faced by a student who would have to choose whether to miss graduation or conform to the state-sponsored practice, in an environment where the risk of compulsion is especially high. Pp. 594–596.

(e) Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh* v. *Chambers*, 463 U. S. 783, which condoned a prayer exercise. The atmosphere at a state legislature's opening, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend. Pp. 596–598.

908 F. 2d 1090, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. BLACKMUN, J., *post*, p. 599, and SOUTER, J., *post*, p. 609, filed concurring opinions, in which STEVENS and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined, *post*, p. 631.

Charles J. Cooper argued the cause for petitioners. With him on the briefs were *Michael A. Carvin*, *Peter J. Ferrara*, *Robert J. Cynkar*, *Joseph A. Rotella*, and *Jay Alan Sekulow*.

Solicitor General Starr argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General McGinnis*, and *Richard H. Seamon*.

Sandra A. Blanding argued the cause for respondent. With her on the brief were *Steven R. Shapiro* and *John A. Powell*.*

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*Briefs of *amici curiae* urging reversal were filed for the Board of Education of Alpine School District by *Brinton R. Burbidge* and *Merrill F. Nelson;* for the Christian Legal Society et al. by *Edward McGlynn Gaffney*, *Michael J. Woodruff*, *Samuel E. Ericsson*, and *Forest D. Montgomery;* for the Clarendon Foundation by *Kemp R. Harshman* and *Ronald*

JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

D. Maines; for Concerned Women for America et al. by *James Matthew Henderson, Sr., Jordan Lorence, Mark N. Troobnick,* and *Thomas Patrick Monaghan;* for Focus on the Family et al. by *Stephen H. Galebach* and *Laura D. Millman;* for the Liberty Counsel by *Mathew D. Staver;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* for the National Legal Foundation by *Robert K. Skolrood* and *Brian M. McCormick;* for the Rutherford Institute et al. by *John W. Whitehead, Alexis I. Crow, A. Eric Johnston, Stephen E. Hurst, Joseph Secola, Thomas S. Neuberger, J. Brian Heller, Amy Dougherty, David Melton, Thomas W. Strahan, Robert R. Melnick, William Bonner, Larry Crain, W. Charles Bundren,* and *James Knicely;* for Specialty Research Associates, Inc., et al. by *Jordan Lorence;* for the Southern Baptist Convention Christian Life Commission by *Michael K. Whitehead* and *James M. Smart, Jr.;* and for the United States Catholic Conference by *Mark E. Chopko* and *Phillip H. Harris.*

Briefs of *amici curiae* urging affirmance were filed for Americans for Religious Liberty by *Ronald A. Lindsay;* and for the American Jewish Congress et al. by *Douglas Laycock.*

Briefs of *amici curiae* were filed for the State of Delaware by *Charles M. Oberly III,* Attorney General of Delaware, *Michael F. Foster,* Solicitor General, *David S. Swayze,* and *David B. Ripsom;* for the Council on Religious Freedom et al. by *Lee Boothby, Robert W. Nixon, Walter E. Carson,* and *Rolland Truman;* for the Institute in Basic Life Principles by *Joe Reynolds;* for the National Coalition for Public Education and Religious Liberty et al. by *David B. Isbell* and *T. Jeremy Gunn;* and for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon.*

I

A

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." App. 20–21. The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian. Agreed Statement of Facts ¶ 17, *id.*, at 13.

Rabbi Gutterman's prayers were as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we

thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN"

Id., at 22–23.

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations, referred to by the school district as "promotional exercises." We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life that we can with confidence describe their customary features, confirmed by aspects of the record and by the parties' representations at oral argument. In the Providence school system, most high school graduation ceremonies are conducted away from the school, while most middle school ceremonies are held on school premises. Classical High School, which Deborah now attends, has conducted its graduation ceremonies on school premises. Agreed Statement of Facts ¶ 37, *id.*, at 17. The parties stipulate that attendance at graduation ceremonies is voluntary. Agreed Statement of Facts ¶ 41, *id.*, at 18. The graduating students enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families. We assume the clergy's participation in any high school graduation exercise would be about what it was at Deborah's middle school ceremony. There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. Tr. of Oral Arg. 38. Even on the assumption that there was a respectful moment of silence both before and after the prayers, the rabbi's two presentations must not have extended much beyond a minute each, if that. We do not know whether he remained on stage during the whole ceremony, or whether the students received individual diplomas on stage, or if he helped to congratulate them.

The school board (and the United States, which supports it as *amicus curiae*) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of

our people ought to be expressed at an event as important in life as a graduation. We assume this to be so in addressing the difficult case now before us, for the significance of the prayers lies also at the heart of Daniel and Deborah Weisman's case.

B

Deborah's graduation was held on the premises of Nathan Bishop Middle School on June 29, 1989. Four days before the ceremony, Daniel Weisman, in his individual capacity as a Providence taxpayer and as next friend of Deborah, sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit school officials from including an invocation or benediction in the graduation ceremony. The court denied the motion for lack of adequate time to consider it. Deborah and her family attended the graduation, where the prayers were recited. In July 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction barring petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations. We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation. Agreed Statement of Facts ¶ 38, App. 17.

The case was submitted on stipulated facts. The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. 728 F. Supp. 68 (1990). The court applied the three-part Establishment Clause test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under that test as described in our past cases, to satisfy the Establishment Clause a governmen-

tal practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973). The District Court held that petitioners' actions violated the second part of the test, and so did not address either the first or the third. The court decided, based on its reading of our precedents, that the effects test of *Lemon* is violated whenever government action "creates an identification of the state with a religion, or with religion in general," 728 F. Supp., at 71, or when "the effect of the governmental action is to endorse one religion over another, or to endorse religion in general." *Id.*, at 72. The court determined that the practice of including invocations and benedictions, even so-called nonsectarian ones, in public school graduations creates an identification of governmental power with religious practice, endorses religion, and violates the Establishment Clause. In so holding the court expressed the determination not to follow *Stein* v. *Plainwell Community Schools*, 822 F. 2d 1406 (1987), in which the Court of Appeals for the Sixth Circuit, relying on our decision in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), held that benedictions and invocations at public school graduations are not always unconstitutional. In *Marsh* we upheld the constitutionality of the Nebraska State Legislature's practice of opening each of its sessions with a prayer offered by a chaplain paid out of public funds. The District Court in this case disagreed with the Sixth Circuit's reasoning because it believed that *Marsh* was a narrow decision, "limited to the unique situation of legislative prayer," and did not have any relevance to school prayer cases. 728 F. Supp., at 74.

On appeal, the United States Court of Appeals for the First Circuit affirmed. The majority opinion by Judge Torruella adopted the opinion of the District Court. 908 F. 2d 1090 (1990). Judge Bownes joined the majority, but wrote a separate concurring opinion in which he decided that the

practices challenged here violated all three parts of the *Lemon* test. Judge Bownes went on to agree with the District Court that *Marsh* had no application to school prayer cases and that the *Stein* decision was flawed. He concluded by suggesting that under Establishment Clause rules no prayer, even one excluding any mention of the Deity, could be offered at a public school graduation ceremony. 908 F. 2d, at 1090–1097. Judge Campbell dissented, on the basis of *Marsh* and *Stein.* He reasoned that if the prayers delivered were nonsectarian, and if school officials ensured that persons representing a variety of beliefs and ethical systems were invited to present invocations and benedictions, there was no violation of the Establishment Clause. 908 F. 2d, at 1099. We granted certiorari, 499 U. S. 918 (1991), and now affirm.

II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); *Wallace* v. *Jaffree*, 472 U. S. 38 (1985); *Lynch* v. *Donnelly*, 465 U. S. 668 (1984). For without reference to those principles in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an

unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon* v. *Kurtzman*, *supra*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lynch*, *supra*, at 678; see also *County of Allegheny*, *supra*, at 591, quoting *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947). The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential

necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, see *infra*, at 593–594, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel* v. *Vitale*, 370 U. S. 421, 425 (1962), and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make

the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, picked up by Judge Campbell's dissent in the Court of Appeals in this case, that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. *Stein*, 822 F. 2d, at 1409; 908 F. 2d 1090, 1098–1099 (CA1 1990) (Campbell, J., dissenting) (case below); see also Note, Civil Religion and the Establishment Clause, 95 Yale L. J. 1237 (1986). If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government in-

terference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance Against Religious Assessments (1785), in 8 Papers of James Madison 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973).

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. *Engel* v. *Vitale*, *supra*, at 425. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And toler-

ance presupposes some mutuality of obligation. It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice. By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. *Meese* v. *Keene*, 481 U. S. 465, 480–481 (1987); see also *Keller* v. *State Bar of California*, 496 U. S. 1, 10–11 (1990); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977). The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. *Buckley* v. *Valeo*, 424 U. S. 1, 92–93, and n. 127 (1976) *(per curiam)*. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in

the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. See, *e. g.*, *School Dist. of Abington* v. *Schempp,* 374 U. S. 203, 307 (1963) (Goldberg, J., concurring); *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 261–262 (1990) (KENNEDY, J., concurring). Our decisions in *Engel* v. *Vitale*, 370 U. S. 421 (1962), and *School Dist. of Abington*, *supra*, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S., at 661 (KENNEDY, J., concurring in judgment in part and dissenting in part). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures,

28 Am. Sociological Rev. 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 J. of Youth and Adolescence 451 (Dec. 1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 Developmental Psychology 521 (July 1986). To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront. See *supra,* at 593.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Agreed Statement of Facts ¶ 41, App. 18. Petitioners and

the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of

Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. See *supra*, at 593–594. Just as in *Engel* v. *Vitale*, 370 U. S., at 430, and *School Dist. of Abington* v. *Schempp*, 374 U. S., at 224–225, where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh* v. *Chambers*, 463 U. S. 783 (1983). The considera-

tions we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there. 463 U. S., at 792. Today's case is different. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986). In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from *Marsh* and suffices to make the religious exercise a First Amendment violation. Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, and we cannot accept the parallel relied upon by petitioners and the United States between the facts of *Marsh* and the case now before us. Our decisions in *Engel* v. *Vitale*, *supra*, and *School Dist. of Abington* v. *Schempp*, *supra*, require us to distinguish the public school context.

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure

social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State.

> "The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School Dist. of Abington* v. *Schempp, supra,* at 308 (Goldberg, J., concurring).

Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. See *School Dist. of Abington*, *supra*, at 306 (Goldberg, J., concurring). We recognize that, at graduation time and throughout the course of the educational process, there will

be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. See *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990). But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is

Affirmed.

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

Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution. The application of these principles to the present case mandates the decision reached today by the Court.

I

This Court first reviewed a challenge to state law under the Establishment Clause in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947).[1] Relying on the history of the

[1] A few earlier cases involving federal laws touched on interpretation of the Establishment Clause. In *Reynolds* v. *United States*, 98 U. S. 145 (1879), and *Davis* v. *Beason*, 133 U. S. 333 (1890), the Court considered the Clause in the context of federal laws prohibiting bigamy. The Court in *Reynolds* accepted Thomas Jefferson's letter to the Danbury Baptist Asso-

Clause, and the Court's prior analysis, Justice Black outlined the considerations that have become the touchstone of Establishment Clause jurisprudence: Neither a State nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither a State nor the Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa.[2] "In the words of Jefferson, the clause

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ciation "almost as an authoritative declaration of the scope and effect" of the First Amendment. 98 U. S., at 164. In that letter Jefferson penned his famous lines that the Establishment Clause built "a wall of separation between church and State." *Ibid.* *Davis* considered that "[t]he first amendment to the Constitution . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." 133 U. S., at 342. In another case, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court held that it did not violate the Establishment Clause for Congress to construct a hospital building for caring for poor patients, although the hospital was managed by sisters of the Roman Catholic Church. The Court reasoned: "That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body." *Id.*, at 298. Finally, in 1908 the Court held that "the spirit of the Constitution" did not prohibit the Indians from using their money, held by the United States Government, for religious education. See *Quick Bear* v. *Leupp*, 210 U. S. 50, 81.

[2] The Court articulated six examples of paradigmatic practices that the Establishment Clause prohibits: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious

against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson*, 330 U. S., at 16 (quoting *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879)). The dissenters agreed: "The Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." 330 U. S., at 31–32 (Rutledge, J., dissenting, joined by Frankfurter, Jackson, and Burton, JJ.).

In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court considered for the first time the constitutionality of prayer in a public school. Students said aloud a short prayer selected by the State Board of Regents: "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'" *Id.*, at 422. Justice Black, writing for the Court, again made clear that the First Amendment forbids the use of the power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people. Although the prayer was "denominationally neutral" and "its observance on the part of the students [was] voluntary," *id.*, at 430, the Court found that it violated this essential precept of the Establishment Clause.

A year later, the Court again invalidated government-sponsored prayer in public schools in *School Dist. of Abington* v. *Schempp*, 374 U. S. 203 (1963). In *Schempp*, the school day for Baltimore, Maryland, and Abington Township, Pennsylvania, students began with a reading from the Bible, or a recitation of the Lord's Prayer, or both. After a thorough review of the Court's prior Establishment Clause cases, the Court concluded:

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organizations or groups and *vice versa*." *Everson* v. *Board of Ed. of Ewing*, 330 U. S., at 15.

> "[T]he Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.*, at 222.

Because the schools' opening exercises were government-sponsored religious ceremonies, the Court found that the primary effect was the advancement of religion and held, therefore, that the activity violated the Establishment Clause. *Id.*, at 223–224.

Five years later, the next time the Court considered whether religious activity in public schools violated the Establishment Clause, it reiterated the principle that government "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). "'If [the purpose or primary effect] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'" *Id.*, at 107 (quoting *Schempp*, 374 U. S., at 222). Finding that the Arkansas law aided religion by preventing the teaching of evolution, the Court invalidated it.

In 1971, Chief Justice Burger reviewed the Court's past decisions and found: "Three . . . tests may be gleaned from our cases." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612. In order for a statute to survive an Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive government entanglement with

religion." *Id.*, at 612–613 (internal quotation marks and citations omitted).[3] After *Lemon*, the Court continued to rely on these basic principles in resolving Establishment Clause disputes.[4]

Application of these principles to the facts of this case is straightforward. There can be "no doubt" that the "invocation of God's blessings" delivered at Nathan Bishop Middle School "is a religious activity." *Engel*, 370 U. S., at 424. In the words of *Engel*, the rabbi's prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Id.*, at 424–425. The question then is whether the government has "plac[ed] its official stamp of approval" on the prayer. *Id.*, at 429. As the Court ably demonstrates, when the government "compose[s] official prayers," *id.*, at 425, selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised, and given by school officials, and pres-

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[3] The final prong, excessive entanglement, was a focus of *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 674 (1970), but harkens back to the final example in *Everson:* "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*" *Everson*, 330 U. S., at 16. The discussion in *Everson* reflected the Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence. See generally The Complete Madison 298–312 (S. Padover ed. 1953).

[4] Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh* v. *Chambers*, 463 U. S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon.* For example, in the most recent Establishment Clause case, *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990), the Court applied the three-part *Lemon* analysis to the Equal Access Act, which made it unlawful for public secondary schools to deny equal access to any student wishing to hold religious meetings. *Id.*, at 248–253 (plurality opinion); *id.*, at 262 (Marshall, J., concurring in judgment). In no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors.

sures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion.[5] As our prior decisions teach us, it is this that the Constitution prohibits.

II

I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents. The Court holds that the graduation prayer is unconstitutional because the State "in effect required participation in a religious exercise." *Ante*, at 594. Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.

But it is not enough that the government restrain from compelling religious practices: It must not engage in them either. See *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring). The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion. See, *e. g.*, *id.*, at 223; *id.*, at 229 (Douglas, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 72 (1985) (O'CONNOR, J., concurring in judgment) ("The decisions [in *Engel* and *Schempp*] acknowledged the coercion implicit under the statutory schemes, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise" (citation omitted)); *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 786 (1973) ("[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause"). The Establishment Clause proscribes public schools from "conveying or attempting to con-

[5] In this case, the religious message it promotes is specifically Judeo-Christian. The phrase in the benediction: "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly" obviously was taken from the Book of the Prophet Micah, ch. 6, v. 8.

vey a message that religion or a particular religious belief is *favored* or *preferred*," *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 593 (1989) (internal quotation marks omitted; emphasis in original), even if the schools do not actually "impos[e] pressure upon a student to participate in a religious activity."[6] *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 261 (1990) (KENNEDY, J., concurring in part and concurring in judgment).

The scope of the Establishment Clause's prohibitions developed in our case law derives from the Clause's purposes. The First Amendment encompasses two distinct guarantees—the government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—both with the common purpose of securing religious liberty.[7] Through vigorous enforcement of both Clauses, we "promote and assure the fullest possible scope of religious liberty and tolerance for all and . . . nurture the conditions which secure the best hope of attainment of that end." *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring).

There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe. Representative Carroll explained during congressional debate over the Estab-

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[6] As a practical matter, of course, anytime the government endorses a religious belief there will almost always be some pressure to conform. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962).

[7] See, *e. g.*, *Everson*, 330 U. S., at 40 (Rutledge, J., dissenting) ("'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom"); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 227 (1963) (Douglas, J., concurring); *id.*, at 305 (Goldberg, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 50 (1985).

lishment Clause: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 Annals of Cong. 757 (1789).

Our decisions have gone beyond prohibiting coercion, however, because the Court has recognized that "the fullest possible scope of religious liberty," *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring), entails more than freedom from coercion. The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. "Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate." Religious Liberty, in Essays and Speeches of Jeremiah S. Black 53 (C. Black ed. 1885) (Chief Justice of the Commonwealth of Pennsylvania).[8]

The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.[9] A government cannot

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[8] See also *Engel*, 370 U. S., at 431 (The Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere").

[9] "[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace* v. *Jaffree*, 472 U. S., at 69 (O'CONNOR, J., concurring in judgment) (internal quotation marks omitted).

be premised on the belief that all persons are created equal when it asserts that God prefers some. Only "[a]nguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval." *Engel*, 370 U. S., at 429; see also *Lemon*, 403 U. S., at 622–623; *Aguilar* v. *Felton*, 473 U. S. 402, 416 (1985) (Powell, J., concurring).[10] Such a struggle can "strain a political system to the breaking point." *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.).

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree." Nuechterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L. J. 1127, 1131 (1990). Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.

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[10] Sigmund Freud expressed it this way: "a religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it." S. Freud, Group Psychology and the Analysis of the Ego 51 (1922). James Madison stated the theory even more strongly in his "Memorial and Remonstrance" against a bill providing tax funds to religious teachers: "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance." The Complete Madison, at 303. Religion has not lost its power to engender divisiveness. "Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats." Parish, Graduation Prayer Violates the Bill of Rights, 4 Utah Bar J. 19 (June/July 1991).

Madison warned that government officials who would use religious authority to pursue secular ends "exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." Memorial and Remonstrance against Religious Assessments (1785), in The Complete Madison 300 (S. Padover ed. 1953). Democratic government will not last long when proclamation replaces persuasion as the medium of political exchange.

Likewise, we have recognized that "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]."[11] *Id.*, at 309. To "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary," *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), the government must not align itself with any one of them. When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed] . . . with a corrosive secularism." *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 385 (1985). The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.[12] Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to "flourish according to the

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[11] The view that the Establishment Clause was primarily a vehicle for protecting churches was expounded initially by Roger Williams. "[W]ordly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained." M. Howe, The Garden and the Wilderness 6 (1965).

[12] "[B]ut when a religion contracts an alliance of this nature, I do not hesitate to affirm that it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own." 1 A. de Tocqueville, Democracy in America 315 (H. Reeve transl. 1900).

zeal of its adherents and the appeal of its dogma." *Zorach*, 343 U. S., at 313.

It is these understandings and fears that underlie our Establishment Clause jurisprudence. We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.

I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today. Accordingly, I join the Court in affirming the judgment of the Court of Appeals.

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

I join the whole of the Court's opinion, and fully agree that prayers at public school graduation ceremonies indirectly coerce religious observance. I write separately nonetheless on two issues of Establishment Clause analysis that underlie my independent resolution of this case: whether the Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.

I

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the

Establishment Clause forbids not only state practices that "aid one religion . . . or prefer one religion over another," but also those that "aid all religions." *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947). Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be. In barring the State from sponsoring generically theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.

A

Since *Everson*, we have consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others.[1] Thus, in *Engel* v. *Vitale*, 370 U. S. 421 (1962), we held that the public schools may not subject their students to readings of any prayer, however "denominationally neutral." *Id.*, at 430. More recently, in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), we held that an Alabama moment-of-silence statute passed for the sole purpose of "returning voluntary prayer to public schools," *id.*, at 57, violated the Establishment Clause even though it did not encourage students to pray to any particular deity. We said that "when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Id.*, at 52–53. This conclusion, we held,

> "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful,

[1] Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982) (subjecting discrimination against certain religious organizations to test of strict scrutiny).

> and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain." *Id.*, at 53–54 (footnotes omitted).

Likewise, in *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989), we struck down a state tax exemption benefiting only religious periodicals; even though the statute in question worked no discrimination among sects, a majority of the Court found that its preference for religious publications over all other kinds "effectively endorses religious belief." *Id.*, at 17 (plurality opinion); see *id.*, at 28 (BLACKMUN, J., concurring in judgment) ("A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable"). And in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), we struck down a provision of the Maryland Constitution requiring public officials to declare a "'belief in the existence of God,'" *id.*, at 489, reasoning that, under the Religion Clauses of the First Amendment, "neither a State nor the Federal Government . . . can constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . ," *id.*, at 495. See also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 319–320 (Stewart, J., dissenting) (the Clause applies "to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker").

Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it. See

Arizona v. *Rumsey*, 467 U. S. 203, 212 (1984); *Payne* v. *Tennessee*, 501 U. S. 808, 842 (1991) (SOUTER, J., concurring).

B

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. The challengers argue that, as originally understood by the Framers, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." *Wallace*, *supra*, at 106 (REHNQUIST, J., dissenting); see also R. Cord, Separation of Church and State: Historical Fact and Current Fiction (1988). While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.

When James Madison arrived at the First Congress with a series of proposals to amend the National Constitution, one of the provisions read that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 434 (1789). Madison's language did not last long. It was sent to a Select Committee of the House, which, without explanation, changed it to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729. Thence the proposal went to the Committee of the Whole, which was in turn dissatisfied with the Select Committee's language and adopted an alternative proposed by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." See *id.*, at 731. Livermore's proposal would have forbidden laws having anything to do with religion and was thus not

only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it. See, *e. g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987) (upholding legislative exemption of religious groups from certain obligations under civil rights laws).

The House rewrote the amendment once more before sending it to the Senate, this time adopting, without recorded debate, language derived from a proposal by Fisher Ames of Massachusetts: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." 1 Documentary History of the First Federal Congress of the United States of America 136 (Senate Journal) (L. de Pauw ed. 1972); see 1 Annals of Cong. 765 (1789). Perhaps, on further reflection, the Representatives had thought Livermore's proposal too expansive, or perhaps, as one historian has suggested, they had simply worried that his language would not "satisfy the demands of those who wanted something said specifically against establishments of religion." L. Levy, The Establishment Clause 81 (1986) (hereinafter Levy). We do not know; what we do know is that the House rejected the Select Committee's version, which arguably ensured only that "no religion" enjoyed an official preference over others, and deliberately chose instead a prohibition extending to laws establishing "religion" in general.

The sequence of the Senate's treatment of this House proposal, and the House's response to the Senate, confirm that the Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion. In September 1789, the Senate considered a number of provisions that would have permitted such aid, and ultimately it adopted one of them. First, it briefly entertained this language: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." See 1 Documentary History, at 151

(Senate Journal); *id.*, at 136. After rejecting two minor amendments to that proposal, see *id.*, at 151, the Senate dropped it altogether and chose a provision identical to the House's proposal, but without the clause protecting the "rights of conscience," *ibid.* With no record of the Senate debates, we cannot know what prompted these changes, but the record does tell us that, six days later, the Senate went half circle and adopted its narrowest language yet: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." *Id.*, at 166. The Senate sent this proposal to the House along with its versions of the other constitutional amendments proposed.

Though it accepted much of the Senate's work on the Bill of Rights, the House rejected the Senate's version of the Establishment Clause and called for a joint conference committee, to which the Senate agreed. The House conferees ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith."[2] The Framers re-

[2] Some commentators have suggested that by targeting laws respecting "an" establishment of religion, the Framers adopted the very nonpreferentialist position whose much clearer articulation they repeatedly rejected. See, *e. g.*, R. Cord, Separation of Church and State 11–12 (1988). Yet the indefinite article before the word "establishment" is better seen as evidence that the Clause forbids any kind of establishment, including a nonpreferential one. If the Framers had wished, for some reason, to use the indefinite term to achieve a narrow meaning for the Clause, they could far more aptly have placed it before the word "religion." See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 884–885 (1986) (hereinafter Laycock, "Nonpreferential" Aid).

peatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated. See, *e. g.*, Laycock, "Nonpreferential" Aid 902–906; Levy 91–119. But cf. T. Curry, The First Freedoms 208–222 (1986). Of particular note, the Framers were vividly familiar with efforts in the Colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. See generally Levy 1–62. The Virginia statute for religious freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the statute broadly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," including his own. Act for Establishing Religious Freedom (1785), in 5 The Founders' Constitution 84, 85 (P. Kurland & R. Lerner eds. 1987). Forcing a citizen to support even his own church would, among other things, deny "the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind." *Id.*, at 84. In general, Madison later added, "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105, 106.

What we thus know of the Framers' experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the

choice of language." Laycock, "Nonpreferential" Aid 882–883; see also *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 647–648 (1989) (opinion of STEVENS, J.). We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment.[3] Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

C

While these considerations are, for me, sufficient to reject the nonpreferentialist position, one further concern animates my judgment. In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the compe-

[3] In his dissent in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), THE CHIEF JUSTICE rested his nonpreferentialist interpretation partly on the postratification actions of the early National Government. Aside from the willingness of some (but not all) early Presidents to issue ceremonial religious proclamations, which were at worst trivial breaches of the Establishment Clause, see *infra*, at 630–631, he cited such seemingly preferential aid as a treaty provision, signed by Jefferson, authorizing federal subsidization of a Roman Catholic priest and church for the Kaskaskia Indians. 472 U. S., at 103. But this proves too much, for if the Establishment Clause permits a special appropriation of tax money for the religious activities of a particular sect, it forbids virtually nothing. See Laycock, "Nonpreferential" Aid 915. Although evidence of historical practice can indeed furnish valuable aid in the interpretation of contemporary language, acts like the one in question prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle. See *infra*, at 626.

tence of the federal judiciary, or more deliberately to be avoided where possible.

This case is nicely in point. Since the nonpreferentiality of a prayer must be judged by its text, JUSTICE BLACKMUN pertinently observes, *ante*, at 604, n. 5, that Rabbi Gutterman drew his exhortation "'[t]o do justly, to love mercy, to walk humbly'" straight from the King James version of Micah, ch. 6, v. 8. At some undefinable point, the similarities between a state-sponsored prayer and the sacred text of a specific religion would so closely identify the former with the latter that even a nonpreferentialist would have to concede a breach of the Establishment Clause. And even if Micah's thought is sufficiently generic for most believers, it still embodies a straightforwardly theistic premise, and so does the rabbi's prayer. Many Americans who consider themselves religious are not theistic; some, like several of the Framers, are deists who would question Rabbi Gutterman's plea for divine advancement of the country's political and moral good. Thus, a nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for theistic over nontheistic religion is constitutional.

Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. As Madison observed in criticizing religious Presidential proclamations, the practice of sponsoring religious messages tends, over time, "to narrow the recommendation to the standard of the predominant sect." Madison's "Detached Memoranda," 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946) (hereinafter Madison's "Detached Memoranda"). We have not changed much since the days of Madison, and the judiciary should not

willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.

II

Petitioners rest most of their argument on a theory that, whether or not the Establishment Clause permits extensive nonsectarian support for religion, it does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. I appreciate the force of some of the arguments supporting a "coercion" analysis of the Clause. See generally *County of Allegheny*, *supra*, at 655–679 (opinion of KENNEDY, J.); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986). But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course.

A

Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. For example, in *County of Allegheny*, *supra*, we forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity. *Id.*, at 589–594, 598–602. Likewise, in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), we struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of

its enactment "convey[ed] a message of state approval of prayer activities in the public schools." *Id.*, at 61; see also *id.*, at 67–84 (O'CONNOR, J., concurring in judgment). Cf. *Engel* v. *Vitale*, 370 U. S., at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that").

In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), we invalidated a state law that barred the teaching of Darwin's theory of evolution because, even though the statute obviously did not coerce anyone to support religion or participate in any religious practice, it was enacted for a singularly religious purpose. See also *Edwards* v. *Aguillard*, 482 U. S. 578, 593 (1987) (statute requiring instruction in "creation science" "endorses religion in violation of the First Amendment"). And in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), we invalidated a program whereby the State sent public school teachers to parochial schools to instruct students on ostensibly nonreligious matters; while the scheme clearly did not coerce anyone to receive or subsidize religious instruction, we held it invalid because, among other things, "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public." *Id.*, at 397; see also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S., at 17 (plurality opinion) (tax exemption benefiting only religious publications "effectively endorses religious belief"); *id.*, at 28 (BLACKMUN, J., concurring in judgment) (exemption unconstitutional because State "engaged in preferential support for the communication of religious messages").

Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

B

Like the provisions about "due" process and "unreasonable" searches and seizures, the constitutional language forbidding laws "respecting an establishment of religion" is not pellucid. But virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation. See generally Levy 1–62 (discussing such establishments in the Colonies and early States). This much follows from the Framers' explicit rejection of simpler provisions prohibiting either the establishment of a religion or laws "establishing religion" in favor of the broader ban on laws "respecting an establishment of religion." See *supra*, at 612–614.

While some argue that the Framers added the word "respecting" simply to foreclose federal interference with state establishments of religion, see, *e. g.*, Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1157 (1991), the language sweeps more broadly than that. In Madison's words, the Clause in its final form forbids "everything like" a national religious establishment, see Madison's "Detached Memoranda" 558, and, after incorporation, it forbids "everything like" a state religious establishment.[4] Cf. *County of Allegheny*, 492 U. S., at 649 (opinion of STEVENS, J.). The sweep is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional "establishments." Madison's "Detached Memoranda" 558–559; see *infra*, at 624–625, and n. 6.

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[4] In *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), we unanimously incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and, by so doing, extended its reach to the actions of States. *Id.*, at 14–15; see also *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (dictum). Since then, not one Member of this Court has proposed disincorporating the Clause.

While petitioners insist that the prohibition extends only to the "coercive" features and incidents of establishment, they cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free exercise thereof." Yet laws that coerce nonadherents to "support or participate in any religion or its exercise," *County of Allegheny*, *supra*, at 659–660 (opinion of KENNEDY, J.), would virtually by definition violate their right to religious free exercise. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990) (under Free Exercise Clause, "government may not compel affirmation of religious belief"), citing *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); see also J. Madison, Memorial and Remonstrance Against Religious Assessments (1785) (compelling support for religious establishments violates "free exercise of Religion"), quoted in 5 The Founders' Constitution, at 82, 84. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity, as petitioners' counsel essentially conceded at oral argument. Tr. of Oral Arg. 18.

Our cases presuppose as much; as we said in *School Dist. of Abington*, "[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." 374 U. S., at 223; see also Laycock, "Nonpreferential" Aid 922 ("If coercion is . . . an element of the establishment clause, establishment adds nothing to free exercise"). While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, cf. T. Curry, The First Freedoms 216–217 (1986), that must be a reading of last resort. Without compelling evidence to the contrary, we should presume that the Framers meant the Clause to stand for something more than petitioners attribute to it.

C

Petitioners argue from the political setting in which the Establishment Clause was framed, and from the Framers' own political practices following ratification, that government may constitutionally endorse religion so long as it does not coerce religious conformity. The setting and the practices warrant canvassing, but while they yield some evidence for petitioners' argument, they do not reveal the degree of consensus in early constitutional thought that would raise a threat to *stare decisis* by challenging the presumption that the Establishment Clause adds something to the Free Exercise Clause that follows it.

The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments, but their special antipathy to religious coercion did not exhaust their hostility to the features and incidents of establishment. Indeed, Jefferson and Madison opposed any political appropriation of religion, see *infra*, at 623–626, and, even when challenging the hated assessments, they did not always temper their rhetoric with distinctions between coercive and noncoercive state action. When, for example, Madison criticized Virginia's general assessment bill, he invoked principles antithetical to all state efforts to promote religion. An assessment, he wrote, is improper not simply because it forces people to donate "three pence" to religion, but, more broadly, because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution, at 83. Madison saw that, even without the tax collector's participation, an official endorsement of religion can impair religious liberty.

Petitioners contend that because the early Presidents included religious messages in their inaugural and Thanksgiving Day addresses, the Framers could not have meant the

Establishment Clause to forbid noncoercive state endorsement of religion. The argument ignores the fact, however, that Americans today find such proclamations less controversial than did the founding generation, whose published thoughts on the matter belie petitioners' claim. President Jefferson, for example, steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses. Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution, at 98. In explaining his views to the Reverend Samuel Miller, Jefferson effectively anticipated, and rejected, petitioners' position:

> "[I]t is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. That is, that I should *indirectly* assume to the U. S. an authority over religious exercises which the Constitution has directly precluded from them. It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion." *Id.*, at 98–99 (emphasis in original).

By condemning such noncoercive state practices that, in "recommending" the majority faith, demean religious dissenters "in public opinion," Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion. He accordingly construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance.[5] And if he opposed

[5] Petitioners claim that the quoted passage shows that Jefferson regarded Thanksgiving proclamations as "coercive": "Thus, while one may disagree with Jefferson's view that a recommendatory Thanksgiving proclamation would nonetheless be coercive . . . one cannot disagree that Jefferson believed coercion to be a necessary element of a First Amendment violation." Brief for Petitioners 34. But this is wordplay. The "proscription" to which Jefferson referred was, of course, by the public and not

impersonal Presidential addresses for inflicting "proscription in public opinion," all the more would he have condemned less diffuse expressions of official endorsement.

During his first three years in office, James Madison also refused to call for days of thanksgiving and prayer, though later, amid the political turmoil of the War of 1812, he did so on four separate occasions. See Madison's "Detached Memoranda" 562, and n. 54. Upon retirement, in an essay condemning as an unconstitutional "establishment" the use of public money to support congressional and military chaplains, *id.*, at 558–560,[6] he concluded that "[r]eligious procla-

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the government, whose only action was a noncoercive recommendation. And one can call any act of endorsement a form of coercion, but only if one is willing to dilute the meaning of "coercion" until there is no meaning left. Jefferson's position straightforwardly contradicts the claim that a showing of "coercion," under any normal definition, is prerequisite to a successful Establishment Clause claim. At the same time, Jefferson's practice, like Madison's, see *infra* this page and 625, sometimes diverged from principle, for he did include religious references in his inaugural speeches. See Inaugural Addresses of the Presidents of the United States 17, 22–23 (1989); see also n. 3, *supra*.

Petitioners also seek comfort in a different passage of the same letter. Jefferson argued that Presidential religious proclamations violate not just the Establishment Clause, but also the Tenth Amendment, for "what might be a right in a state government, was a violation of that right when assumed by another." Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution 99 (P. Kurland & R. Lerner eds. 1987). Jefferson did not, however, restrict himself to the Tenth Amendment in condemning such proclamations by a national officer. I do not, in any event, understand petitioners to be arguing that the Establishment Clause is exclusively a structural provision mediating the respective powers of the State and National Governments. Such a position would entail the argument, which petitioners do not make, and which we would almost certainly reject, that incorporation of the Establishment Clause under the Fourteenth Amendment was erroneous.

[6] Madison found this practice "a palpable violation of . . . Constitutional principles." Madison's "Detached Memoranda" 558. Although he sat on the committee recommending the congressional chaplainship, see R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23

mations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed. Altho' recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers." *Id.*, at 560. Explaining that "[t]he members of a Govt . . . can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities," *ibid.*, he further observed that the state necessarily freights all of its religious messages with political ones: "the idea of policy [is] associated with religion, whatever be the mode or the occasion, when a function of the latter is assumed by those in power." *Id.*, at 562 (footnote omitted).

Madison's failure to keep pace with his principles in the face of congressional pressure cannot erase the principles. He admitted to backsliding, and explained that he had made the content of his wartime proclamations inconsequential enough to mitigate much of their impropriety. See *ibid.;* see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105. While his writings suggest mild variations in his interpretation of the Establishment Clause, Madison was no different in that respect from the rest of his political generation. That he expressed so much doubt about the constitutionality of religious proclamations, however, suggests a brand of separationism stronger even than that embodied in our traditional jurisprudence. So too does his characterization of public subsidies for legislative and military chaplains as unconstitutional "establishments," see *supra*, at 624 and this page, and n. 6, for the federal courts, however expansive their general view of the Establishment Clause, have upheld both practices. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (legislative chap-

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(1988), he later insisted that "it was not with my approbation, that the deviation from [the immunity of religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury." Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105.

lains); *Katcoff* v. *Marsh*, 755 F. 2d 223 (CA2 1985) (military chaplains).

To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains, see *Marsh* v. *Chambers*, *supra*, at 788, and Presidents Washington and Adams unapologetically marked days of " 'public thanksgiving and prayer,' " see R. Cord, Separation of Church and State 53 (1988). Yet in the face of the separationist dissent, those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next. "Indeed, by 1787 the provisions of the state bills of rights had become what Madison called mere 'paper parchments'—expressions of the most laudable sentiments, observed as much in the breach as in practice." Kurland, The Origins of the Religion Clauses of the Constitution, 27 Wm. & Mary L. Rev. 839, 852 (1986) (footnote omitted). Sometimes the National Constitution fared no better. Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.

While we may be unable to know for certain what the Framers meant by the Clause, we do know that, around the time of its ratification, a respectable body of opinion supported a considerably broader reading than petitioners urge upon us. This consistency with the textual considerations is enough to preclude fundamentally reexamining our settled law, and I am accordingly left with the task of considering whether the state practice at issue here violates our traditional understanding of the Clause's proscriptions.

III

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. See, *e. g.*, *County of Allegheny*, 492 U. S., at 589–594, 598–602; *Texas Monthly*, 489 U. S., at 17 (plurality opinion); *id.*, at 28 (BLACKMUN, J., concurring in judgment); *Edwards* v. *Aguillard*, 482 U. S., at 593; *School Dist. of Grand Rapids*, 473 U. S., at 389–392; *Wallace* v. *Jaffree*, 472 U. S., at 61; see also Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990); cf. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community, see *County of Allegheny*, *supra*, at 594; J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution, at 82–83, and protecting religion from the demeaning effects of any governmental embrace, see *id.*, at 83. Now, as in the early Republic, "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 106. Our aspiration to religious liberty, embodied in the First Amendment, permits no other standard.

A

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, *e. g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987); see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Contrary to the

views of some,[7] such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the nonadherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. Cf. *Welsh* v. *United States*, 398 U. S. 333, 340 (1970) (plurality opinion). Thus, in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 CFR

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[7] See, *e. g.*, *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 726 (1981) (REHNQUIST, J., dissenting); Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 685–686 (1980); see also *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 668–669 (1970); *Sherbert* v. *Verner*, 374 U. S. 398, 414, 416 (1963) (Stewart, J., concurring in result); cf. *Wallace* v. *Jaffree*, 472 U. S., at 83 (O'CONNOR, J., concurring in judgment).

§ 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans. See Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L. J. 1127, 1135–1136 (1990).

B

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. See *County of Allegheny*, *supra*, at 601, n. 51; *id.*, at 631–632 (O'CONNOR, J., concurring in part and concurring in judgment); *Corporation of Presiding Bishop*, *supra*, at 348 (O'CONNOR, J., concurring in judgment); see also *Texas Monthly*, *supra*, at 18, 18–19, n. 8 (plurality opinion); *Wallace* v. *Jaffree*, *supra*, at 57–58, n. 45. But see *County of Allegheny*, *supra*, at 663, n. 2 (KENNEDY, J., concurring in judgment in part and dissenting in part). Concern for the position of religious individuals in the modern regulatory State cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment.

Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of like-minded students. Because they accordingly have no need for the machinery of the State to affirm their beliefs, the

government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion. One may fairly say, as one commentator has suggested, that the government brought prayer into the ceremony "precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities." Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841, 844 (1992).[8]

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from Presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. Madison himself respected the difference between the trivial and the serious in constitutional practice. Realizing that his con-

[8] If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. Cf. *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481 (1986). But that is not our case. Nor is this a case where the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria. See *Widmar* v. *Vincent*, 454 U. S. 263, 274–275 (1981); *Walz*, *supra*, at 696 (opinion of Harlan, J.) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter"). Finally, this is not a case like *Marsh* v. *Chambers*, 463 U. S. 783 (1983), in which government officials invoke spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead.

temporaries were unlikely to take the Establishment Clause seriously enough to forgo a legislative chaplainship, he suggested that "[r]ather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex . . . ." Madison's "Detached Memoranda" 559; see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105. But that logic permits no winking at the practice in question here. When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages may be, they are flatly unconstitutional.

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

Three Terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings." It said that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 657, 670 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part).

These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing

so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the *Durham* rule did for the insanity defense. See *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

I

Justice Holmes' aphorism that "a page of history is worth a volume of logic," *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921), applies with particular force to our Establishment Clause jurisprudence. As we have recognized, our interpretation of the Establishment Clause should "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984). "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring). "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices. *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983). Thus, "[t]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality . . .[,] is a fact of considerable import in the interpretation" of the

Establishment Clause. *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 681 (1970) (Brennan, J., concurring).

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, see, *e. g.*, *Lynch*, *supra*, at 674–678; *Marsh*, *supra*, at 786–788; see also *Wallace* v. *Jaffree*, 472 U. S. 38, 100–103 (1985) (REHNQUIST, J., dissenting); *Engel* v. *Vitale*, 370 U. S. 421, 446–450, and n. 3 (1962) (Stewart, J., dissenting), but since the Court is so oblivious to our history as to suggest that the Constitution restricts "preservation and transmission of religious beliefs . . . to the private sphere," *ante*, at 589, it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President:

> "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." Inaugural Addresses of the Presidents of the United States, S. Doc. 101–10, p. 2 (1989).

Such supplications have been a characteristic feature of inaugural addresses ever since. Thomas Jefferson, for example,

prayed in his first inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." *Id.*, at 17. In his second inaugural address, Jefferson acknowledged his need for divine guidance and invited his audience to join his prayer:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." *Id.*, at 22–23.

Similarly, James Madison, in his first inaugural address, placed his confidence

> "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Id.*, at 28.

Most recently, President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President. *Id.*, at 346.

Our national celebration of Thanksgiving likewise dates back to President Washington. As we recounted in *Lynch:*

> "The day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.' President Washington proclaimed November 26, 1789, a day of thanksgiving to 'offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions . . . .'" 465 U. S., at 675, n. 2 (citations omitted).

This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. *Id.*, at 675, and nn. 2 and 3; *Wallace* v. *Jaffree*, *supra*, at 100–103 (REHNQUIST, J., dissenting).

The other two branches of the Federal Government also have a long-established practice of prayer at public events. As we detailed in *Marsh*, congressional sessions have opened with a chaplain's prayer ever since the First Congress. 463 U. S., at 787–788. And this Court's own sessions have opened with the invocation "God save the United States and this Honorable Court" since the days of Chief Justice Marshall. 1 C. Warren, The Supreme Court in United States History 469 (1922).

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868—the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified—when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." Brodinsky, Commencement Rites Obsolete? Not At All, A 10-Week Study Shows, 10 Updat-

ing School Board Policies, No. 4, p. 3 (Apr. 1979). As the Court obliquely acknowledges in describing the "customary features" of high school graduations, *ante*, at 583, and as respondents do not contest, the invocation and benediction have long been recognized to be "as traditional as any other parts of the [school] graduation program and are widely established." H. McKown, Commencement Activities 56 (1931); see also Brodinsky, *supra*, at 5.

II

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays, see *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989), has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." *American Jewish Congress* v. *Chicago*, 827 F. 2d 120, 129 (CA7 1987) (Easterbrook, J., dissenting). But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here, *ante*, at 593, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause. *Ante*, at 586. Neither of them is in any relevant sense true.

A

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." *Ibid.* But what exactly is this "fair and real sense"? According to the Court, students at graduation who want "to avoid the fact or appearance of participation," *ante*, at 588, in the invocation and benediction are *psychologically* obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. *Ante*, at 593. This assertion—*the very linchpin of the Court's opinion*—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand . . . *or*, at least, maintain respectful silence." *Ibid.* (emphasis added). Both halves of this disjunctive (*both* of which must amount to the fact or appearance of participation in prayer if the Court's analysis is to survive on its own terms) merit particular attention.

To begin with the latter: The Court's notion that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions," *ibid.*, have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite "subtle coercive pressures," *ante*, at 588) the free will to sit, cf. *ante*, at 593, there is absolutely no basis for the Court's

decision. It is fanciful enough to say that "a reasonable dissenter," standing head erect in a class of bowed heads, "could believe that the group exercise signified her own participation or approval of it," *ibid.* It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced" . . . to stand! Even that half of the disjunctive does not remotely establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing . . . can signify adherence to a view or simple respect for the views of others." *Ibid.* (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a "reasonable dissenter . . . could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding *even the false appearance of participation* constitutionally trumps the government's interest in fostering respect for religion generally.

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? *Ante*, at 583. The government can, of course, no more coerce political orthodoxy than religious orthodoxy. *West*

Virginia Bd. of Ed. v. *Barnette*, 319 U. S. 624, 642 (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In *Barnette* we held that a public school student could not be compelled to *recite* the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer.

I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether "mature adults" may. *Ante*, at 593. I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?

B

The other "dominant fac[t]" identified by the Court is that "[s]tate officials direct the performance of a formal religious exercise" at school graduation ceremonies. *Ante*, at 586. "Direct[ing] the performance of a formal religious exercise" has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. A Court professing to be

engaged in a "delicate and fact-sensitive" line-drawing, *ante*, at 597, would better describe what it means as "prescribing the content of an invocation and benediction." But even that would be false. All the record shows is that principals of the Providence public schools, acting within their delegated authority, have invited clergy to deliver invocations and benedictions at graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," *ante*, at 588, that school officials "monitor prayer," *ante*, at 590, and attempted to "'compose official prayers,'" *ante*, at 588, and that the "government involvement with religious activity in this case is pervasive," *ante*, at 587, is difficult to fathom. The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

These distortions of the record are, of course, not harmless error: without them the Court's solemn assertion that the school officials could reasonably be perceived to be "enforc[ing] a religious orthodoxy," *ante*, at 592, would ring as hollow as it ought.

III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.* Typically, attendance at the state

church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.*, at 3–4.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term "establishment" had acquired an additional meaning—"financial support of religion generally, by public taxation"—that reflected the development of "general or multiple" establishments, not limited to a single church. *Id.*, at 8–9. But that would still be an establishment coerced *by force of law.* And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, see *Church of Holy Trinity* v. *United States,* 143 U. S. 457 (1892), ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite

them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," *ante*, at 587, I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "[s]peech is not coercive; the listener may do as he likes." *American Jewish Congress* v. *Chicago*, 827 F. 2d, at 132 (Easterbrook, J., dissenting).

This historical discussion places in revealing perspective the Court's extravagant claim that the State has "for all practical purposes," *ante*, at 589, and "in every practical sense," *ante*, at 598, compelled students to participate in prayers at graduation. Beyond the fact, stipulated to by the parties, that attendance at graduation is voluntary, there is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline. Contrast this with, for example, the facts of *Barnette:* Schoolchildren were required by law to recite the Pledge of Allegiance; failure to do so resulted in expulsion, threatened the expelled child with the prospect of being sent to a reformatory for criminally inclined juveniles, and subjected his parents to prosecution (and incarceration) for causing delinquency. 319 U. S., at 629–630. To characterize the "subtle coercive pressures," *ante*, at 588, allegedly present here as the "practical" equiva-

lent of the legal sanctions in *Barnette* is . . . well, let me just say it is not a "delicate and fact-sensitive" analysis.

The Court relies on our "school prayer" cases, *Engel* v. *Vitale*, 370 U. S. 421 (1962), and *School Dist. of Abington* v. *Schempp*, 374 U. S. 203 (1963). *Ante*, at 592. But whatever the merit of those cases, they do not support, much less compel, the Court's psycho-journey. In the first place, *Engel* and *Schempp* do not constitute an exception to the rule, distilled from historical practice, that public ceremonies may include prayer, see *supra*, at 633–636; rather, they simply do not fall within the scope of the rule (for the obvious reason that school instruction is not a public ceremony). Second, we have made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (*i. e.*, coercion under threat of penalty) provides the ultimate backdrop. In *Schempp*, for example, we emphasized that the prayers were "prescribed as part of the curricular activities of students who are *required by law* to attend school." 374 U. S., at 223 (emphasis added). *Engel*'s suggestion that the school prayer program at issue there—which permitted students "to remain silent or be excused from the room," 370 U. S., at 430—involved "indirect coercive pressure," *id.*, at 431, should be understood against this backdrop of legal coercion. The question whether the opt-out procedure in *Engel* sufficed to dispel the coercion resulting from the mandatory attendance requirement is quite different from the question whether forbidden coercion exists in an environment *utterly devoid of legal compulsion.* And finally, our school prayer cases turn in part on the fact that the classroom is inherently an instructional setting, and daily prayer there—where parents are not present to counter "the students' emulation of teachers as role models and the children's susceptibility to peer pressure," *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987)—might be thought to raise special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children: "Families entrust pub-

lic schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Ibid.;* see *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535 (1925). Voluntary prayer at graduation—a one-time ceremony at which parents, friends, and relatives are present—can hardly be thought to raise the same concerns.

IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, see *Lemon* v. *Kurtzman,* 403 U. S. 602, 612–613 (1971), which has received well-earned criticism from many Members of this Court. See, *e. g., County of Allegheny,* 492 U. S., at 655–656 (opinion of KENNEDY, J.); *Edwards* v. *Aguillard, supra,* at 636–640 (SCALIA, J., dissenting); *Wallace* v. *Jaffree,* 472 U. S., at 108–112 (REHNQUIST, J., dissenting); *Aguilar* v. *Felton,* 473 U. S. 402, 426–430 (1985) (O'CONNOR, J., dissenting); *Roemer* v. *Board of Pub. Works of Md.,* 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, see *ante,* at 587, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next

June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

* * *

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

The narrow context of the present case involves a community's celebration of one of the milestones in its young citi-

zens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is *whether a mandatory choice in favor of the former has been imposed by the United States Constitution.* As the age-old practices of our people show, the answer to that question is not at all in doubt.

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

For the foregoing reasons, I dissent.

Syllabus

DOGGETT *v.* UNITED STATES

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

No. 90–857. Argued October 9, 1991—Reargued February 24, 1992—Decided June 24, 1992

In February 1980, petitioner Doggett was indicted on federal drug charges, but he left the country before the Drug Enforcement Agency could secure his arrest. The DEA knew that he was later imprisoned in Panama, but after requesting that he be expelled back to the United States, never followed up on his status. Once the DEA discovered that he had left Panama for Colombia, it made no further attempt to locate him. Thus, it was unaware that he reentered this country in 1982 and subsequently married, earned a college degree, found steady employment, lived openly under his own name, and stayed within the law. The Marshal's Service eventually located him during a simple credit check on individuals with outstanding warrants. He was arrested in September 1988, 8½ years after his indictment. He moved to dismiss the indictment on the ground that the Government's failure to prosecute him earlier violated his Sixth Amendment right to a speedy trial, but the District Court denied the motion, and he entered a conditional guilty plea. The Court of Appeals affirmed.

Held: The delay between Doggett's indictment and arrest violated his right to a speedy trial. His claim meets the *Barker* v. *Wingo*, 407 U. S. 514, 530, criteria for evaluating speedy trial claims. First, the extraordinary 8½-year lag between his indictment and arrest clearly suffices to trigger the speedy trial enquiry. Second, the Government was to blame for the delay. The District Court's finding that the Government was negligent in pursuing Doggett should be viewed with considerable deference, and neither the Government nor the record provides any reason to reject that finding. Third, Doggett asserted in due course his right to a speedy trial. The courts below found that he did not know of his indictment before his arrest, and, in the factual basis supporting his guilty plea, the Government essentially conceded this point. Finally, the negligent delay between Doggett's indictment and arrest presumptively prejudiced his ability to prepare an adequate defense. The Government errs in arguing that the Speedy Trial Clause does not significantly protect a defendant's interest in fair adjudication. *United States* v. *Marion*, 404 U. S. 307, 320–323; *United States* v. *MacDonald*, 456 U. S. 1, 8; *United States* v. *Loud Hawk*, 474 U. S. 302, 312, distin-

guished. Nor does Doggett's failure to cite any specifically demonstrable prejudice doom his claim, since excessive delay can compromise a trial's reliability in unidentifiable ways. Presumptive prejudice is part of the mix of relevant *Barker* factors and increases in importance with the length of the delay. Here, the Government's egregious persistence in failing to prosecute Doggett is sufficient to warrant granting relief. The negligence caused delay six times as long as that generally deemed sufficient to trigger judicial review, and the presumption of prejudice is neither extenuated, as by Doggett's acquiescence, nor persuasively rebutted. Pp. 651–658.

906 F. 2d 573, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 658. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 659.

Wm. J. Sheppard reargued the cause for petitioner. With him on the briefs was *Elizabeth L. White.*

Deputy Solicitor General Bryson reargued the cause for the United States. *Assistant Attorney General Mueller* argued the cause for the United States on the original argument. With them on the briefs were *Solicitor General Starr*, *Ronald J. Mann*, and *Patty Merkamp Stemler.*

JUSTICE SOUTER delivered the opinion of the Court.

In this case we consider whether the delay of 8½ years between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial. We hold that it did.

I

On February 22, 1980, petitioner Marc Doggett was indicted for conspiring with several others to import and distribute cocaine. See 84 Stat. 1265, 1291, as amended, 21 U. S. C. §§ 846, 963. Douglas Driver, the Drug Enforcement Administration's (DEA's) principal agent investigating the conspiracy, told the United States Marshal's Service that the DEA would oversee the apprehension of Doggett and his confederates. On March 18, 1980, two police officers set out

under Driver's orders to arrest Doggett at his parents' house in Raleigh, North Carolina, only to find that he was not there. His mother told the officers that he had left for Colombia four days earlier.

To catch Doggett on his return to the United States, Driver sent word of his outstanding arrest warrant to all United States Customs stations and to a number of law enforcement organizations. He also placed Doggett's name in the Treasury Enforcement Communication System (TECS), a computer network that helps Customs agents screen people entering the country, and in the National Crime Information Center computer system, which serves similar ends. The TECS entry expired that September, however, and Doggett's name vanished from the system.

In September 1981, Driver found out that Doggett was under arrest on drug charges in Panama and, thinking that a formal extradition request would be futile, simply asked Panama to "expel" Doggett to the United States. Although the Panamanian authorities promised to comply when their own proceedings had run their course, they freed Doggett the following July and let him go to Colombia, where he stayed with an aunt for several months. On September 25, 1982, he passed unhindered through Customs in New York City and settled down in Virginia. Since his return to the United States, he has married, earned a college degree, found a steady job as a computer operations manager, lived openly under his own name, and stayed within the law.

Doggett's travels abroad had not wholly escaped the Government's notice, however. In 1982, the American Embassy in Panama told the State Department of his departure to Colombia, but that information, for whatever reason, eluded the DEA, and Agent Driver assumed for several years that his quarry was still serving time in a Panamanian prison. Driver never asked DEA officials in Panama to check into Doggett's status, and only after his own fortuitous assignment to that country in 1985 did he discover Doggett's depar-

ture for Colombia. Driver then simply assumed Doggett had settled there, and he made no effort to find out for sure or to track Doggett down, either abroad or in the United States. Thus Doggett remained lost to the American criminal justice system until September 1988, when the Marshal's Service ran a simple credit check on several thousand people subject to outstanding arrest warrants and, within minutes, found out where Doggett lived and worked. On September 5, 1988, nearly 6 years after his return to the United States and 8½ years after his indictment, Doggett was arrested.

He naturally moved to dismiss the indictment, arguing that the Government's failure to prosecute him earlier violated his Sixth Amendment right to a speedy trial. The Federal Magistrate hearing his motion applied the criteria for assessing speedy trial claims set out in *Barker* v. *Wingo*, 407 U. S. 514 (1972): "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.*, at 530 (footnote omitted). The Magistrate found that the delay between Doggett's indictment and arrest was long enough to be "presumptively prejudicial," Magistrate's Report, reprinted at App. to Pet. for Cert. 27–28, that the delay "clearly [was] attributable to the negligence of the government," *id.*, at 39, and that Doggett could not be faulted for any delay in asserting his right to a speedy trial, there being no evidence that he had known of the charges against him until his arrest, *id.*, at 42–44. The Magistrate also found, however, that Doggett had made no affirmative showing that the delay had impaired his ability to mount a successful defense or had otherwise prejudiced him. In his recommendation to the District Court, the Magistrate contended that this failure to demonstrate particular prejudice sufficed to defeat Doggett's speedy trial claim.

The District Court took the recommendation and denied Doggett's motion. Doggett then entered a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2),

expressly reserving the right to appeal his ensuing conviction on the speedy trial claim.

A split panel of the Court of Appeals affirmed. 906 F. 2d 573 (CA11 1990). Following Circuit precedent, see *Ringstaff* v. *Howard*, 885 F. 2d 1542 (CA11 1989) (en banc), the court ruled that Doggett could prevail only by proving "actual prejudice" or by establishing that "the first three *Barker* factors weigh[ed] heavily in his favor." 906 F. 2d, at 582. The majority agreed with the Magistrate that Doggett had not shown actual prejudice, and, attributing the Government's delay to "negligence" rather than "bad faith," *id.*, at 578–579, it concluded that *Barker*'s first three factors did not weigh so heavily against the Government as to make proof of specific prejudice unnecessary. Judge Clark dissented, arguing, among other things, that the majority had placed undue emphasis on Doggett's inability to prove actual prejudice.

We granted Doggett's petition for certiorari, 498 U. S. 1119 (1991), and now reverse.

II

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an "accused" for any reason at all. Our cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result. See *Barker*, *supra*, at 530.

The first of these is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the

threshold dividing ordinary from "presumptively prejudicial" delay, 407 U. S., at 530–531, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. See *id.*, at 533–534. This latter enquiry is significant to the speedy trial analysis because, as we discuss below, the presumption that pretrial delay has prejudiced the accused intensifies over time. In this case, the extraordinary 8½-year lag between Doggett's indictment and arrest clearly suffices to trigger the speedy trial enquiry;[1] its further significance within that enquiry will be dealt with later.

As for *Barker*'s second criterion, the Government claims to have sought Doggett with diligence. The findings of the courts below are to the contrary, however, and we review trial court determinations of negligence with considerable deference. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 402 (1990); *McAllister* v. *United States*, 348 U. S. 19, 20–22 (1954); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2590 (1971). The Government gives us nothing to gainsay the findings that have come up to us, and we see nothing fatal to them in the record. For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett

[1] Depending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. See 2 W. LaFave & J. Israel, Criminal Procedure § 18.2, p. 405 (1984); Joseph, Speedy Trial Rights in Application, 48 Ford. L. Rev. 611, 623, n. 71 (1980) (citing cases). We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry. Cf. Uviller, *Barker* v. *Wingo:* Speedy Trial Gets a Fast Shuffle, 72 Colum. L. Rev. 1376, 1384–1385 (1972).

was living abroad, and, had they done so, they could have found him within minutes. While the Government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking, it was still findable negligence, and the finding stands.

The Government goes against the record again in suggesting that Doggett knew of his indictment years before he was arrested. Were this true, *Barker*'s third factor, concerning invocation of the right to a speedy trial, would be weighed heavily against him. But here again, the Government is trying to revisit the facts. At the hearing on Doggett's speedy trial motion, it introduced no evidence challenging the testimony of Doggett's wife, who said that she did not know of the charges until his arrest, and of his mother, who claimed not to have told him or anyone else that the police had come looking for him. From this the Magistrate implicitly concluded, Magistrate's Report, reprinted at App. to Pet. for Cert. 42–44, and the Court of Appeals expressly reaffirmed, 906 F. 2d, at 579–580, that Doggett had won the evidentiary battle on this point. Not only that, but in the factual basis supporting Doggett's guilty plea, the Government explicitly conceded that it had

> "no information that Doggett was aware of the indictment before he left the United States in March 1980, or prior to his arrest. His mother testified at the suppression hearing that she never told him, and Barnes and Riddle [Doggett's confederates] state they did not have contact with him after their arrest [in 1980]." 2 Record, Exh. 63, p. 2.

While one of the Government's lawyers later expressed amazement that "that particular stipulation is in the factual basis," Tr. 13 (Mar. 31, 1989), he could not make it go away, and the trial and appellate courts were entitled to accept the defense's unrebutted and largely substantiated claim of

Doggett's ignorance. Thus, Doggett is not to be taxed for invoking his speedy trial right only after his arrest.

III

The Government is left, then, with its principal contention: that Doggett fails to make out a successful speedy trial claim because he has not shown precisely how he was prejudiced by the delay between his indictment and trial.

A

We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence. *Barker*, 407 U. S., at 532; see also *Smith* v. *Hooey*, 393 U. S. 374, 377–379 (1969); *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). Of these forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U. S., at 532. Doggett claims this kind of prejudice, and there is probably no other kind that he can claim, since he was subjected neither to pretrial detention nor, he has successfully contended, to awareness of unresolved charges against him.

The Government answers Doggett's claim by citing language in three cases, *United States* v. *Marion*, 404 U. S. 307, 320–323 (1971), *United States* v. *MacDonald*, 456 U. S. 1, 8 (1982), and *United States* v. *Loud Hawk*, 474 U. S. 302, 312 (1986), for the proposition that the Speedy Trial Clause does not significantly protect a criminal defendant's interest in fair adjudication. In so arguing, the Government asks us, in effect, to read part of *Barker* right out of the law, and that we will not do. In context, the cited passages support nothing beyond the principle, which we have independently

based on textual and historical grounds, see *Marion*, *supra*, at 313–320, that the Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution. Once triggered by arrest, indictment, or other official accusation, however, the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized.[2] See *Moore* v. *Arizona*, 414 U. S. 25, 26–27, and n. 2 (1973); *Barker*, *supra*, at 532; *Smith*, *supra*, at 377–379; *Ewell*, *supra*, at 120.

As an alternative to limiting *Barker*, the Government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable, and, as it concedes, Brief for United States 28, n. 21; Tr. of Oral Arg. 28–34 (Feb. 24, 1992), affirmative proof of particularized prejudice is not essential to every speedy trial claim. See *Moore*, *supra*, at 26; *Barker*, *supra*, at 533. *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." 407 U. S., at 532. And though time can tilt the case against either side, see *id.*, at 521; *Loud Hawk*, *supra*, at 315, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While

[2] Thus, we reject the Government's argument that the effect of delay on adjudicative accuracy is exclusively a matter for consideration under the Due Process Clause. We leave intact our earlier observation, see *United States* v. *MacDonald*, 456 U. S. 1, 7 (1982), that a defendant may invoke due process to challenge delay both before and after official accusation.

such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, see *Loud Hawk*, *supra*, at 315, it is part of the mix of relevant facts, and its importance increases with the length of delay.

B

This brings us to an enquiry into the role that presumptive prejudice should play in the disposition of Doggett's speedy trial claim. We begin with hypothetical and somewhat easier cases and work our way to this one.

Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down. We attach great weight to such considerations when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question. See *Loud Hawk*, *supra*, at 315–317. Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense.

The Government concedes, on the other hand, that Doggett would prevail if he could show that the Government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial. See Brief for United States 28, n. 21; Tr. of Oral Arg. 28–34 (Feb. 24, 1992). That we cannot doubt. *Barker* stressed that official bad faith in causing delay will be weighed heavily against the government, 407 U. S., at 531, and a bad-faith delay the length of this negligent one would present an overwhelming case for dismissal.

Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the mid-

dle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred, and on the facts before us, it was reversible error.

Barker made it clear that "different weights [are to be] assigned to different reasons" for delay. *Ibid.* Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, cf. *Arizona* v. *Youngblood*, 488 U. S. 51 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

To be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. But even so, the Government's egregious persistence in failing to prosecute Doggett is clearly sufficient. The lag between Doggett's indictment and arrest was 8½ years, and he would have faced trial 6 years earlier than he did but for the Government's inexcusable oversights. The portion of the

delay attributable to the Government's negligence far exceeds the threshold needed to state a speedy trial claim; indeed, we have called shorter delays "extraordinary." See *Barker*, *supra*, at 533. When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, see n. 1, *supra*, and when the presumption of prejudice, albeit unspecified, is neither extenuated,[3] as by the defendant's acquiescence, *e. g.*, 407 U. S., at 534–536, nor persuasively rebutted,[4] the defendant is entitled to relief.

IV

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, dissenting.

I believe the Court of Appeals properly balanced the considerations set forth in *Barker* v. *Wingo*, 407 U. S. 514 (1972). Although the delay between indictment and trial was lengthy, petitioner did not suffer any anxiety or restriction on his liberty. The only harm to petitioner from the lapse

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[3] Citing *United States* v. *Broce*, 488 U. S. 563, 569 (1989), the Government argues that, by pleading guilty, Doggett waived any right to claim that the delay would have prejudiced him had he gone to trial. Brief for United States 30. Yet Doggett did not sign a guilty plea *simpliciter*, but a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2), thereby securing the Government's explicit consent to his reservation of "the right to appeal the adverse Court ruling on his Motion to Dismiss for violation of Constitutional Speedy Trial provisions based upon post-indictment delay." Plea Agreement, 2 Record, Exh. 66, p. 1. One cannot reasonably construe this agreement to bar Doggett from pursuing as effective an appeal as he could have raised had he not pleaded guilty.

[4] While the Government ably counters Doggett's efforts to demonstrate particularized trial prejudice, it has not, and probably could not have, affirmatively proved that the delay left his ability to defend himself unimpaired. Cf. Uviller, 72 Colum. L. Rev., at 1394–1395.

of time was potential prejudice to his ability to defend his case. We have not allowed such speculative harm to tip the scales. Instead, we have required a showing of actual prejudice to the defense before weighing it in the balance. As we stated in *United States* v. *Loud Hawk*, 474 U. S. 302, 315 (1986), the "possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated. In this case, moreover, delay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden." The Court of Appeals followed this holding, and I believe we should as well. For this reason, I respectfully dissent.

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

Just as "bad facts make bad law," so too odd facts make odd law. Doggett's 8½-year odyssey from youthful drug dealing in the tobacco country of North Carolina, through stints in a Panamanian jail and in Colombia, to life as a computer operations manager, homeowner, and registered voter in suburban Virginia is extraordinary. But even more extraordinary is the Court's conclusion that the Government denied Doggett his Sixth Amendment right to a speedy trial despite the fact that he has suffered none of the harms that the right was designed to prevent. I respectfully dissent.

I

We have long identified the "major evils" against which the Speedy Trial Clause is directed as "undue and oppressive incarceration" and the "anxiety and concern accompanying public accusation." *United States* v. *Marion*, 404 U. S. 307, 320 (1971). The Court does not, and cannot, seriously dispute that those two concerns lie at the heart of the Clause, and that neither concern is implicated here. Doggett was

neither in United States custody nor subject to bail during the entire 8½-year period at issue. Indeed, as this case comes to us, we must assume that he was blissfully unaware of his indictment all the while, and thus was not subject to the anxiety or humiliation that typically accompanies a known criminal charge.

Thus, this unusual case presents the question whether, independent of these core concerns, the Speedy Trial Clause protects an accused from two additional harms: (1) prejudice to his ability to defend himself caused by the passage of time; and (2) disruption of his life years after the alleged commission of his crime. The Court today proclaims that the first of these additional harms is indeed an independent concern of the Clause, and on that basis compels reversal of Doggett's conviction and outright dismissal of the indictment against him. As to the second of these harms, the Court remains mum—despite the fact that we requested supplemental briefing on this very point.[1]

I disagree with the Court's analysis. In my view, the Sixth Amendment's speedy trial guarantee does not provide independent protection against either prejudice to an accused's defense or the disruption of his life. I shall consider each in turn.

A

As we have explained, "the Speedy Trial Clause's core concern is impairment of *liberty.*" *United States* v. *Loud Hawk*, 474 U. S. 302, 312 (1986) (emphasis added). Whenever a criminal trial takes place long after the events at issue, the defendant may be prejudiced in any number of ways. But "[t]he Speedy Trial Clause does not purport to

[1] See 502 U. S. 976 (1991) (directing the parties to brief the question "whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the Clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of a criminal defendant").

protect a defendant from all effects flowing from a delay before trial." *Id.*, at 311. The Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's liberty. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States* v. *MacDonald*, 456 U. S. 1, 8 (1982). Thus, "when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." *Loud Hawk*, *supra*, at 312.

A lengthy pretrial delay, of course, may prejudice an accused's ability to defend himself. But, we have explained, prejudice to the defense is not the sort of impairment of liberty against which the Clause is directed. "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. *But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.*" *Marion*, *supra*, at 321–322 (footnote omitted; emphasis added). Even though a defendant may be prejudiced by a pretrial delay, and even though the government may be unable to provide a valid justification for that delay, the Clause does not come into play unless the delay impairs the defendant's liberty. "Inordinate delay . . . may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist *quite apart* from actual or possible prejudice to an accused's defense." 404 U. S., at 320 (emphasis added).

These explanations notwithstanding, we have on occasion identified the prevention of prejudice to the defense as an independent and fundamental objective of the Speedy Trial

Clause. In particular, in *Barker* v. *Wingo*, 407 U. S. 514, 532 (1972), we asserted that the Clause was "designed to protect" *three* basic interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." See also *Smith* v. *Hooey*, 393 U. S. 374, 377–378 (1969); *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). Indeed, the *Barker* Court went so far as to declare that of these three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U. S., at 532.

We are thus confronted with two conflicting lines of authority, the one declaring that "limit[ing] the possibility that the defense will be impaired" is an independent and fundamental objective of the Speedy Trial Clause, *e. g.*, *Barker*, *supra*, at 532, and the other declaring that it is not, *e. g.*, *Marion*, 404 U. S. 307 (1971); *MacDonald*, *supra; Loud Hawk*, *supra*. The Court refuses to acknowledge this conflict. Instead, it simply reiterates the relevant language from *Barker* and asserts that *Marion*, *MacDonald*, and *Loud Hawk* "support nothing beyond the principle . . . that the Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution." *Ante*, at 654–655. That attempt at reconciliation is eminently unpersuasive.

It is true, of course, that the Speedy Trial Clause by its terms applies only to an "accused"; the right does not attach before indictment or arrest. See *Marion*, *supra*, at 313–315, 320–322; *Dillingham* v. *United States*, 423 U. S. 64, 64–65 (1975) *(per curiam)*. But that limitation on the Clause's protection only confirms that preventing prejudice to the defense is not one of its independent and fundamental objectives. For prejudice to the defense stems from the interval between *crime* and trial, which is quite distinct from the interval between *accusation* and trial. If the Clause were in-

deed aimed at safeguarding against prejudice to the defense, then it would presumably limit *all* prosecutions that occur long after the criminal events at issue. A defendant prosecuted 10 years after a crime is just as hampered in his ability to defend himself whether he was indicted the week after the crime or the week before the trial—but no one would suggest that the Clause protects him in the latter situation, where the delay did not substantially impair his liberty, either through oppressive incarceration or the anxiety of known criminal charges. Thus, while the Court is correct to observe that the defendants in *Marion*, *MacDonald*, and *Loud Hawk* were not subject to formal criminal prosecution during the lengthy period of delay prior to their trials, that observation misses the point of those cases. With respect to the relevant consideration—*the defendants' ability to defend themselves despite the passage of time*—they were in precisely the same situation as a defendant who had long since been indicted. The initiation of a formal criminal prosecution is simply irrelevant to whether the defense has been prejudiced by delay.

Although being an "accused" is necessary to trigger the Clause's protection, it is not sufficient to do so. The touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an "accusation," *not* the accusation itself. That explains why a person who has been arrested but not indicted is entitled to the protection of the Clause, see *Dillingham*, *supra*, even though technically he has not been "accused" at all.[2] And it ex-

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[2] In this regard, it is instructive to compare the Sixth Amendment's speedy trial right to its right to counsel, which also applies only to an "accused." The right to counsel, we have held, does not attach until "'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)). In

plains why the lower courts consistently have held that, with respect to sealed (and hence secret) indictments, the protections of the Speedy Trial Clause are triggered *not* when the indictment is *filed*, but when it is *unsealed*. See, *e. g.*, *United States* v. *Watson*, 599 F. 2d 1149, 1156–1157, and n. 5 (CA2 1979), modified on other grounds *sub nom. United States* v. *Muse*, 633 F. 2d 1041 (CA2 1980) (en banc); *United States* v. *Hay*, 527 F. 2d 990, 994, and n. 4 (CA10 1975); cf. *United States* v. *Lewis*, 907 F. 2d 773, 774, n. 3 (CA8 1990).

It is misleading, then, for the Court to accuse the Government of "ask[ing] us, in effect, to read part of *Barker* right out of the law," *ante*, at 654, a course the Court resolutely rejects. For the issue here is not simply whether the relevant language from *Barker* should be read out of the law, but whether that language trumps the contrary logic of *Marion*, *MacDonald*, and *Loud Hawk*. The Court's protestations notwithstanding, the two lines of authority cannot be reconciled; to reaffirm the one is to undercut the other.

In my view, the choice presented is not a hard one. *Barker*'s suggestion that preventing prejudice to the defense is a fundamental and independent objective of the Clause is plainly dictum. Never, until today, have we confronted a case where a defendant subjected to a lengthy delay after indictment nonetheless failed to suffer any substantial impairment of his liberty. I think it fair to say that *Barker* simply did not contemplate such an unusual situation. Moreover, to the extent that the *Barker* dictum purports to elevate considerations of prejudice to the defense to fundamental and independent status under the Clause, it cannot be

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other words, for purposes of the right to counsel, an "accused" must *in fact* be accused of a crime; unlike the speedy trial right, it does *not* attach upon arrest. See, *e. g.*, *Gouveia*, *supra*, at 189–190; *McNeil* v. *Wisconsin*, 501 U. S. 171, 175–176 (1991).

deemed to have survived our subsequent decisions in *MacDonald* and *Loud Hawk*.[3]

Just because the Speedy Trial Clause does not independently protect against prejudice to the defense does not, of course, mean that a defendant is utterly unprotected in this regard. To the contrary, "'the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges,'" *Marion*, 404 U. S., at 322 (quoting *Ewell*, 383 U. S., at 122). These statutes "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.'" 404 U. S., at 322 (quoting *Public Schools* v. *Walker*, 9 Wall. 282, 288 (1870)). Because such statutes are fixed by the legislature and not decreed by

[3] Our summary reversal in *Moore* v. *Arizona*, 414 U. S. 25 (1973) *(per curiam)*, is not to the contrary. The petitioner there was tried for murder in Arizona "[a]lmost three years after he was charged and 28 months after he first demanded that Arizona either extradite him from California, where he was serving a prison term, or drop a detainer against him." *Ibid.* The Arizona Supreme Court denied him speedy trial relief on the ground that "a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim." *Ibid.* We rejected that reasoning, emphasizing the contextual nature of the speedy trial analysis set forth in *Barker* v. *Wingo*, 407 U. S. 514 (1972).

To hold that a speedy trial claim can succeed without a showing of actual trial prejudice is not, of course, to hold that such a claim can succeed without a showing of *any prejudice at all*. *Moore*, like *Barker*, is clearly premised on the assumption that the defendant invoking the protection of the Speedy Trial Clause has been subjected to the evils against which the Clause was designed to protect. Indeed, *Moore* makes this assumption quite explicit, observing that prejudice is "'inevitably present in every case to some extent, *for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.*'" *Moore*, *supra*, at 27 (quoting *Barker*, *supra*, at 537 (WHITE, J., concurring)) (emphasis added). While accurate in the vast majority of cases, that observation is not inevitably true—as this case shows.

courts on an ad hoc basis, they "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." 404 U. S., at 322.

Furthermore, the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings. See *United States* v. *Lovasco*, 431 U. S. 783 (1977). As we explained in *Marion*, "the Due Process Clause . . . would require dismissal of [an] indictment if it were shown at trial that [a] delay . . . caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U. S., at 324. See also *MacDonald*, 456 U. S., at 8 ("The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations").[4]

[4] The result in the case may well be explained by an improvident concession. While the United States argued essentially that a defendant's speedy trial rights cannot be violated where he is neither incarcerated nor subject to the anxiety of known criminal charges, it did not claim that this was invariably so. Instead, the United States conceded that a defendant whose liberty was in no way impaired by a pretrial delay could nevertheless succeed in a speedy trial claim if the government had intentionally caused the delay for the specific purpose of prejudicing the defense or injuring the defendant in some other significant way. The defendant in *this* case is not entitled to relief, the United States asserts, because the delay in bringing him to trial was, at worst, caused by negligence.

Not surprisingly, the Court seizes on this concession with relish. See *ante*, at 655, 656 (citing Brief for United States 28, n. 21, Tr. of Oral Arg. 28–34 (Feb. 24, 1992)). For if defendants can bring successful speedy trial claims even though they have not been "incarcerated or subjected to other substantial restrictions on their liberty," *United States* v. *Loud Hawk*, 474 U. S. 302, 312 (1986), then the Clause's protections necessarily extend beyond those core concerns. If the Clause does not protect a defendant whose liberty has not been impaired by a delay, then it simply does not protect him; its protections cannot be triggered solely by the government's bad motives. The Speedy Trial Clause provides no basis for the line the United States advances between negligent governmental conduct, on the

Therefore, I see no basis for the Court's conclusion that Doggett is entitled to relief under the Speedy Trial Clause *simply* because the Government was negligent in prosecuting him and because the resulting delay may have prejudiced his defense.

B

It remains to be considered, however, whether Doggett is entitled to relief under the Speedy Trial Clause because of the disruption of his life years after the criminal events at issue. In other words, does the Clause protect a right to repose, free from secret or unknown indictments? In my view, it does not, for much the same reasons set forth above.

The common law recognized no right of criminals to repose. "The maxim of our law has always been 'Nullum tempus occurrit regi,' ['time does not run against the king'], and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time." 2 J. Stephen, A History of the Criminal Law of England 1, 2 (1883) (noting examples of delays in prosecution ranging from 14 to 35 years). See also F. Wharton, Criminal Pleading and Prac-

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one hand, and bad-faith conduct, on the other. As noted in text, the *Due Process Clause* is the proper recourse for an accused whose defense is materially prejudiced by bad-faith governmental behavior. See *United States* v. *Lovasco*, 431 U. S. 783 (1977); cf. *Arizona* v. *Youngblood*, 488 U. S. 51 (1988).

The Court, thus, is certainly entitled to decide *this particular case* adversely to the United States on the ground that the concession undercut the Government's entire argument. But the Court goes much further. It affirmatively endorses the point conceded, thereby embedding in the law the mischievous notion that a defendant is entitled to the protection of the Speedy Trial Clause even though he has suffered none of the harms against which the Clause protects, as long as the government's conduct is sufficiently culpable. I would disregard the concession, for much the same reasons that we sometimes consider an argument that a litigant has waived. See, *e. g.*, *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 77 (1990); *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 99–100 (1991); *United States* v. *Burke*, 504 U. S. 229, 246 (1992) (SCALIA, J., concurring in judgment). I see little sense in elevating an unwise concession into unwise law.

tice § 316, p. 209 (8th ed. 1880) ("While . . . courts look with disfavor on prosecutions that have been unduly delayed, there is, at common law, no absolute limitation which prevents the prosecution of offences after a specified time has arrived") (footnote omitted); 1 H. Wood, Limitation of Actions § 28, p. 117 (4th ed. 1916) ("At common law there is no limitation to criminal proceedings by indictment").

That is not to deny that our legal system has long recognized the value of repose, both to the individual and to society. But that recognition finds expression not in the sweeping commands of the Constitution, or in the common law, but in any number of specific statutes of limitations enacted by the federal and state legislatures. Such statutes not only protect a defendant from prejudice to his defense (as discussed above), but also balance his interest in repose against society's interest in the apprehension and punishment of criminals. Cf. *Toussie* v. *United States*, 397 U. S. 112, 114–115 (1970). In general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically carry no limitations period at all. See, *e. g.*, Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa. L. Rev. 630, 652–653 (1954) (comparing state statutes of limitations for various crimes); Uelmen, Making Sense out of the California Criminal Statute of Limitations, 15 Pac. L. J. 35, 76–79 (1983) (same). These statutes refute the notion that our society ever has recognized any general right of criminals to repose.

Doggett, however, asks us to hold that a defendant's interest in repose is a value independently protected by the Speedy Trial Clause. He emphasizes that at the time of his arrest he was "leading a normal, productive and law-abiding life," and that his "arrest and prosecution at this late date interrupted his life as a productive member of society and forced him to answer for actions taken in the distant past." Supplemental Brief for Petitioner on Reargument 2. However uplifting this tale of personal redemption, our task is to

illuminate the protections of the Speedy Trial Clause, not to take the measure of one man's life.

There is no basis for concluding that the disruption of an accused's life years after the commission of his alleged crime is an evil independently protected by the Speedy Trial Clause. Such disruption occurs *regardless* of whether the individual is under indictment during the period of delay. Thus, had Doggett been indicted shortly before his 1988 arrest rather than shortly after his 1980 crime, his repose would have been equally shattered—but he would not have even a colorable speedy trial claim. To recognize a constitutional right to repose is to recognize a right to be tried speedily *after the offense.* That would, of course, convert the Speedy Trial Clause into a constitutional statute of limitations—a result with no basis in the text or history of the Clause or in our precedents.

II

Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become obscured. I fear that danger has been realized here. So engrossed is the Court in applying the multifactor balancing test set forth in *Barker* that it loses sight of the nature and purpose of the speedy trial guarantee set forth in the Sixth Amendment. The Court's error, in my view, lies not so much in its particular application of the *Barker* test to the facts of this case, but more fundamentally in its failure to recognize that the speedy trial guarantee cannot be violated—and thus *Barker* does not apply at all—when an accused is *entirely unaware* of a pending indictment against him.

I do not mean to question *Barker*'s approach, but merely its scope. We have long recognized that whether an accused

has been denied his right to a speedy trial "depends upon circumstances." *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905). By setting forth a number of relevant factors, *Barker* provided this contextual inquiry with at least a modicum of structure. But *Barker*'s factors now appear to have taken on a life of their own. Instead of simply guiding the inquiry whether an individual *who has been deprived of a liberty protected by the Clause* is entitled to relief, *Barker* has become a source for new liberties under the Clause. In my view, application of *Barker* presupposes that an accused has been subjected to the evils against which the Speedy Trial Clause is directed—and, as I have explained, neither pretrial delay nor the disruption of life is itself such an evil.[5]

Today's opinion, I fear, will transform the courts of the land into boards of law enforcement supervision. For the Court compels dismissal of the charges against Doggett not because he was harmed in any way by the delay between his indictment and arrest,[6] but simply because the Government's efforts to catch him are found wanting. Indeed, the Court expressly concedes that "if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." *Ante*, at 656. Our function, however, is not to slap the Government on the wrist

[5] To recognize that neither of these considerations provides an independent ground for speedy trial relief, of course, is not to say that neither of them is *relevant* to speedy trial analysis. Both may be appropriate considerations in the highly contextual inquiry whether a defendant who *has* been deprived of a liberty protected by the Clause is entitled to relief. See *Barker*, 407 U. S., at 530–533.

[6] It is quite likely, in fact, that the delay *benefited* Doggett. At the time of his arrest, he had been living an apparently normal, law-abiding life for some five years—a point not lost on the District Court Judge, who, instead of imposing a prison term, sentenced him to three years' probation and a $1,000 fine. App. 114–115. Thus, the delay gave Doggett the opportunity to prove what most defendants can only promise: that he no longer posed a threat to society. There can be little doubt that, had he been tried immediately after his cocaine-importation activities, he would have received a harsher sentence.

for sloppy work or misplaced priorities, but to protect the legal rights of those individuals harmed thereby. By divorcing the Speedy Trial Clause from all considerations of prejudice to an accused, the Court positively invites the Nation's judges to indulge in ad hoc and result-driven second-guessing of the government's investigatory efforts. Our Constitution neither contemplates nor tolerates such a role. I respectfully dissent.

Syllabus

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. *v.* LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE

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

No. 91–155. Argued March 25, 1992—Decided June 26, 1992

The Port Authority of New York and New Jersey, which owns and operates three major airports in the New York City area and controls certain terminal areas at the airports (hereinafter terminals), adopted a regulation forbidding, *inter alia*, the repetitive solicitation of money within the terminals. However, solicitation is permitted on the sidewalks outside the terminal buildings. Petitioner International Society for Krishna Consciousness, Inc. (ISKCON), a not-for-profit religious corporation whose members, among other things, solicit funds in public places to support their movement, brought suit seeking declaratory and injunctive relief under 42 U. S. C. § 1983, alleging that the regulation deprived its members of their First Amendment rights. The District Court granted ISKCON summary judgment, concluding that the terminals were public fora, and that the regulation banning solicitation failed because it was not narrowly tailored to support a compelling state interest. The Court of Appeals reversed as here relevant. It determined that the terminals are not public fora, and found that the ban on solicitation was reasonable.

Held:

1. An airport terminal operated by a public authority is a nonpublic forum, and thus a ban on solicitation need only satisfy a reasonableness standard. Pp. 677–683.

(a) The extent to which the Port Authority can restrict expressive activity on its property depends on the nature of the forum. Regulation of traditional public fora or designated public fora survives only if it is narrowly drawn to achieve a compelling state interest, but limitations on expressive activity conducted on any other government-owned property need only be reasonable to survive. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45, 46. Pp. 677–679.

(b) Neither by tradition nor purpose can the terminals be described as public fora. Airports have not historically been made available for speech activity. Given the lateness with which the modern air terminal has made its appearance, it hardly qualifies as a property that has "immemorially . . . time out of mind" been held in the public trust and used

for the purposes of expressive activity. See *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515. Nor have airport operators opened terminals to such activities, see *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802, as evidenced by the operators' frequent and continuing litigation in this area. Pp. 679–681.

(c) That speech activities may have historically occurred at "transportation nodes" such as rail and bus stations, wharves, and Ellis Island is not relevant. Many of these sites traditionally have had private ownership. In addition, equating airports with other transportation centers would not take into account differences among the various facilities that may affect the extent to which such facilities can accommodate expressive activity. It is unsurprising to find differences among the facilities. The Port Authority, other airport builders and managers, and the Federal Government all share the view that terminals are dedicated to the facilitation of efficient air travel, not the solicitation of contributions. Pp. 681–683.

2. The Port Authority's ban on solicitation is reasonable. Solicitation may have a disruptive effect on business by slowing the path of both those who must decide whether to contribute and those who must alter their paths to avoid the solicitation. In addition, a solicitor may cause duress by targeting the most vulnerable persons or commit fraud by concealing his affiliation or shortchanging purchasers. The fact that the targets are likely to be on a tight schedule, and thus are unlikely to stop and complain to authorities, compounds the problem. The Port Authority has determined that it can best achieve its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly by limiting solicitation to the sidewalk areas outside the terminals. That area is frequented by an overwhelming percentage of airport users, making ISKCON's access to the general public quite complete. Moreover, it would be odd to conclude that the regulation is unreasonable when the Port Authority has otherwise assured access to a universally traveled area. While the inconvenience caused by ISKCON may seem small, the Port Authority could reasonably worry that the incremental effects of having one group and then another seek such access could prove quite disruptive. Pp. 683–685.

925 F. 2d 576, affirmed in part.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 685. KENNEDY, J., filed an opinion concurring in the judgment, in Part I of which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 693. SOUTER, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 709.

Barry A. Fisher argued the cause for petitioners. With him on the briefs were *David Grosz*, *Robert C. Moest*, *David M. Liberman*, *Jay Alan Sekulow*, and *Jeremiah S. Gutman*.

Arthur P. Berg argued the cause for respondent. With him on the brief were *Philip Maurer*, *Arnold D. Kolikoff*, and *Milton H. Pachter*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we consider whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment.

The relevant facts in this case are not in dispute. Petitioner International Society for Krishna Consciousness, Inc. (ISKCON), is a not-for-profit religious corporation whose members perform a ritual known as *sankirtan*. The ritual consists of "'going into public places, disseminating religious

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*Briefs of *amici curiae* were filed for the Airports Association Council International-North America by *Michael M. Conway;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *John A. Powell*, and *Arthur N. Eisenberg;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon*, *Walter Kamiat*, and *Laurence Gold;* for the American Jewish Congress et al. by *Bradley P. Jacob* and *Edward McGlynn Gaffney, Jr.;* for the American Newspaper Publishers Association et al. by *Robert C. Bernius*, *Alice Neff Lucan*, *Rene P. Milam*, *Richard A. Bernstein*, *Barbara Wartelle Wall*, *John C. Fontaine*, *Cristina L. Mendoza*, *George Freeman*, and *Carol D. Melamed;* for the American Tract Society et al. by *James Matthew Henderson, Sr.*, *Mark N. Troobnick*, *Thomas Patrick Monaghan*, and *Charles E. Rice;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the Free Congress Foundation by *Wendell R. Bird* and *David J. Myers;* for Multimedia Newspaper Co. et al. by *Carl F. Muller* and *Wallace K. Lightsey;* for Project Vote et al. by *Robert Plotkin* and *Elliot M. Mincberg;* and for the National Institute of Municipal Law Officers by *Benjamin L. Brown*, *Analeslie Muncy*, *Robert J. Alfton*, *Frank B. Gummey III*, *Frederick S. Dean*, *Neal M. Janey*, *Victor J. Kaleta*, *Robert J. Mangler*, *Neal E. McNeill*, *Robert J. Watson*, and *Iris J. Jones*.

literature and soliciting funds to support the religion.'" 925 F. 2d 576, 577 (CA2 1991). The primary purpose of this ritual is raising funds for the movement. *Ibid.*

Respondent Walter Lee, now deceased, was the police superintendent of the Port Authority of New York and New Jersey and was charged with enforcing the regulation at issue. The Port Authority owns and operates three major airports in the greater New York City area: John F. Kennedy International Airport (Kennedy), La Guardia Airport (La Guardia), and Newark International Airport (Newark). The three airports collectively form one of the world's busiest metropolitan airport complexes. They serve approximately 8% of this country's domestic airline market and more than 50% of the trans-Atlantic market. By decade's end they are expected to serve at least 110 million passengers annually. *Id.*, at 578.

The airports are funded by user fees and operated to make a regulated profit. *Id.*, at 581. Most space at the three airports is leased to commercial airlines, which bear primary responsibility for the leasehold. The Port Authority retains control over unleased portions, including La Guardia's Central Terminal Building, portions of Kennedy's International Arrivals Building, and Newark's North Terminal Building (we refer to these areas collectively as the "terminals"). The terminals are generally accessible to the general public and contain various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types. *Id.*, at 578. Virtually all who visit the terminals do so for purposes related to air travel. These visitors principally include passengers, those meeting or seeing off passengers, flight crews, and terminal employees. *Ibid.*

The Port Authority has adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. The regulation states:

> "1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal

> if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> "(a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.
>
> "(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> "(c) The solicitation and receipt of funds." *Id.*, at 578–579.

The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings. The regulation effectively prohibits ISKCON from performing *sankirtan* in the terminals. As a result, ISKCON brought suit seeking declaratory and injunctive relief under 42 U. S. C. § 1983, alleging that the regulation worked to deprive its members of rights guaranteed under the First Amendment.[1] The District Court analyzed the claim under the "traditional public forum" doctrine. It concluded that the terminals were akin to public streets, 721 F. Supp. 572, 577 (SDNY 1989), the quintessential traditional public fora. This conclusion in turn meant that the Port Authority's terminal regulation could be sustained only if it was narrowly tailored to support a compelling state interest. *Id.*, at 579. In the absence of any argument that the blanket prohibition constituted such

[1] The suit was filed in 1975. ISKCON originally sought access to both the airline controlled areas and to the terminals and as a result sued both respondent and various private airlines. The suit worked a meandering course, see 721 F. Supp. 572, 573–574 (SDNY 1989), with the private airlines eventually being dismissed and leaving, as the sole remaining issue, ISKCON's claim against respondent seeking a declaration and injunction against the regulation. The regulation at issue was not formally promulgated until 1988 although it represents a codification of presuit policy. App. to Pet. for Cert. 52. As noted in the text, *supra* this page, respondent concedes that *sankirtan* may be performed on the sidewalks outside the terminals.

narrow tailoring, the District Court granted ISKCON summary judgment. *Ibid.*

The Court of Appeals affirmed in part and reversed in part. 925 F. 2d 576 (1991). Relying on our recent decision in *United States* v. *Kokinda*, 497 U. S. 720 (1990), a divided panel concluded that the terminals are not public fora. As a result, the restrictions were required only to satisfy a standard of reasonableness. The Court of Appeals then concluded that, presented with the issue, this Court would find that the ban on solicitation was reasonable, but the ban on distribution was not. ISKCON and one of its members, also a petitioner here, sought certiorari respecting the Court of Appeals' decision that the terminals are not public fora and upholding the solicitation ban. Respondent cross-petitioned respecting the court's holding striking down the distribution ban. We granted both petitions, 502 U. S. 1022 (1992), to resolve whether airport terminals are public fora, a question on which the Circuits have split[2] and on which we once before granted certiorari but ultimately failed to reach. *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987).[3]

It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Kokinda*, *supra*, at 725 (citing

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[2] Compare decision below with *Jamison* v. *St. Louis*, 828 F. 2d 1280 (CA8 1987), cert. denied, 485 U. S. 987 (1988); *Chicago Area Military Project* v. *Chicago*, 508 F. 2d 921 (CA7), cert. denied, 421 U. S. 992 (1975); *Fernandes* v. *Limmer*, 663 F. 2d 619 (CA5 1981), cert. dism'd, 458 U. S. 1124 (1982); *U. S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 228 U. S. App. D. C. 191, 708 F. 2d 760 (1983); *Jews for Jesus, Inc.* v. *Board of Airport Comm'rs of Los Angeles*, 785 F. 2d 791 (CA9 1986), aff'd on other grounds, 482 U. S. 569 (1987).

[3] We deal here only with petitioners' claim regarding the permissibility of solicitation. Respondent's cross-petition concerning the leafletting ban is disposed of in the companion case, *Lee* v. *International Soc. for Krishna Consciousness, Inc.*, *post*, p. 830.

Schaumburg v. *Citizens for a Better Environment*, 444 U. S. 620, 629 (1980)); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 788–789 (1988). But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981); *Greer* v. *Spock*, 424 U. S. 828 (1976). Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *Kokinda*, *supra*, at 725 (plurality opinion) (citing *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896 (1961)). Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983).

These cases reflect, either implicitly or explicitly, a "forum based" approach for assessing restrictions that the government seeks to place on the use of its property. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. *Perry*, 460 U. S., at 45. The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public. *Ibid.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. *Id.*, at 46. Finally, there is all re-

maining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Ibid.*

The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the "reasonableness" review governing nonpublic fora, should that prove the appropriate category.[4] Like the Court of Appeals, we conclude that the terminals are nonpublic fora and that the regulation reasonably limits solicitation.

The suggestion that the government has a high burden in justifying speech restrictions relating to traditional public fora made its first appearance in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515, 516 (1939). Justice Roberts, concluding that individuals have a right to use "streets and parks for communication of views," reasoned that such a right flowed from the fact that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." We confirmed this observation in *Frisby* v. *Schultz*, 487 U. S. 474, 481 (1988), where we held that a residential street was a public forum.

Our recent cases provide additional guidance on the characteristics of a public forum. In *Cornelius* we noted that a traditional public forum is property that has as "a principal purpose . . . the free exchange of ideas." 473 U. S., at 800. Moreover, consistent with the notion that the government—like other property owners—"has power to preserve the

[4] Respondent also argues that the regulations survive under the strict scrutiny applicable to public fora. We find it unnecessary to reach that question.

property under its control for the use to which it is lawfully dedicated," *Greer*, 424 U. S., at 836, the government does not create a public forum by inaction. Nor is a public forum created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *Ibid.* The decision to create a public forum must instead be made "by intentionally opening a nontraditional forum for public discourse." *Cornelius, supra*, at 802. Finally, we have recognized that the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction. *United States* v. *Grace*, 461 U. S. 171, 179–180 (1983).

These precedents foreclose the conclusion that airport terminals are public fora. Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. See H. Hubbard, M. McClintock, & F. Williams, Airports: Their Location, Administration and Legal Basis 8 (1930) (noting that the United States had only 807 airports in 1930). But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having "immemorially . . . time out of mind" been held in the public trust and used for purposes of expressive activity. *Hague*, *supra*, at 515. Moreover, even within the rather short history of air transport, it is only "[i]n recent years [that] it has become a common practice for various religious and nonprofit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities." 45 Fed. Reg. 35314 (1980). Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidenc-

ing the operators' objections belies any such claim. See n. 2, *supra*. In short, there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioners' favor.

Petitioners attempt to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that they claim historically occurred at various "transportation nodes" such as rail stations, bus stations, wharves, and Ellis Island. Even if we were inclined to accept petitioners' historical account describing speech activity at these locations, an account respondent contests, we think that such evidence is of little import for two reasons. First, much of the evidence is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership. See *United Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 687 (1982); H. Grant & C. Bohi, The Country Railroad Station in America 11–15 (1978); U. S. Dept. of Transportation, The Intercity Bus Terminal Study 31 (Dec. 1984). The development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks. But the reverse is also true. The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport.

Second, the relevant unit for our inquiry is an airport, not "transportation nodes" generally. When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. To make a category of "transportation nodes," therefore, would unjustifiably elide what may prove to be critical differences of which we should rightfully take account. The "security magnet," for example, is

an airport commonplace that lacks a counterpart in bus terminals and train stations. And public access to air terminals is also not infrequently restricted—just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible. See 14 CFR 107.11(f) (1991) and U. S. Dept. of Transportation News Release, Office of Assistant Secretary for Public Affairs, Jan. 18, 1991. To blithely equate airports with other transportation centers, therefore, would be a mistake.

The differences among such facilities are unsurprising since, as the Court of Appeals noted, airports are commercial establishments funded by users fees and designed to make a regulated profit, 925 F. 2d, at 581, and where nearly all who visit do so for some travel related purpose, *id.*, at 578. As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting "the free exchange of ideas." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). To the contrary, the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression. Sloane Affidavit, ¶ 11, App. 464; Defendant's Civil Rule 3(g) Statement, ¶ 39, App. 453. Even if we look beyond the intent of the Port Authority to the manner in which the terminals have been operated, the terminals have never been dedicated (except under the threat of court order) to expression in the form sought to be exercised here: *i. e.*, the solicitation of contributions and the distribution of literature.

The terminals here are far from atypical. Airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel. See, *e. g.*, R. Horonjeff & F. McKelvey, Planning and Design of Airports 326 (3d ed. 1983) ("The terminal is used to process passengers

and baggage for the interface with aircraft and the ground transportation modes"). The Federal Government is in accord; the Secretary of Transportation has been directed to publish a plan for airport development necessary "to anticipate and meet the needs *of civil aeronautics*, to meet requirements in support of the national defense . . . and to meet identified needs of the Postal Service." 49 U. S. C. App. § 2203(a)(1) (emphasis added); see also 45 Fed. Reg. 35317 (1980) ("The purpose for which the [Dulles and National airport] terminal[s] [were] built and maintained is to process and serve air travelers efficiently"). Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. See *supra*, at 680–681. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum.

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness. We reiterate what we stated in *Kokinda:* The restriction "'need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation.'" 497 U. S., at 730 (plurality opinion) (quoting *Cornelius*, *supra*, at 808). We have no doubt that under this standard the prohibition on solicitation passes muster.

We have on many prior occasions noted the disruptive effect that solicitation may have on business. "Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." *Kokinda, supra*, at 734; see *Heffron*, 452 U. S., at 663 (BLACKMUN, J., concurring in part and dissenting in part). Passengers who wish to avoid the solicitor may have to alter their paths, slowing both themselves and those around them.

The result is that the normal flow of traffic is impeded. *Id.*, at 653. This is especially so in an airport, where "[a]ir travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation." 925 F. 2d, at 582. Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.

In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. See, *e. g.*, *International Soc. for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147, 159–163 (NDNY 1980), rev'd on other grounds, 650 F. 2d 430 (CA2 1981). The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. 506 F. Supp., 159–163. See 45 Fed. Reg. 35314–35315 (1980). Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. Sloane Supp. Affidavit, ¶ 11, App. 514. This sidewalk area is frequented by an overwhelming percentage of airport users, see *id.*, at ¶ 14, App. 515–516 (noting that no more than 3% of air travelers passing through the terminals are doing so on intraterminal flights, *i. e.*, transferring planes). Thus the resulting access of those who would so-

licit the general public is quite complete. In turn we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.

The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but viewed against the fact that "pedestrian congestion is one of the greatest problems facing the three terminals," 925 F. 2d, at 582, the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive.[5] Moreover, "[t]he justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON." *Heffron*, *supra*, at 652. For if ISKCON is given access, so too must other groups. "Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely." 452 U. S., at 653. As a result, we conclude that the solicitation ban is reasonable.

For the foregoing reasons, the judgment of the Court of Appeals sustaining the ban on solicitation in Port Authority terminals is

Affirmed.

Justice O'Connor, concurring in No. 91–155 and concurring in the judgment in No. 91–339, *post*, p. 830.

In the decision below, the Court of Appeals upheld a ban on solicitation of funds within the airport terminals operated by the Port Authority of New York and New Jersey, but struck down a ban on the repetitive distribution of printed

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[5] The congestion problem is not unique to these airports. See 45 Fed. Reg. 35314–35315 (1980) (describing congestion at Washington's Dulles and National Airports) and 49 U. S. C. App. § 2201(a)(11) (congressional declaration that as part of the national airport system plan airport projects designed to increase passenger capacity "should be undertaken to the maximum feasible extent").

or written material within the terminals. 925 F. 2d 576 (CA2 1991). I would affirm both parts of that judgment.

I concur in the Court's opinion in No. 91–155 and agree that publicly owned airports are not public fora. Unlike public streets and parks, both of which our First Amendment jurisprudence has identified as "traditional public fora," airports do not count among their purposes the "free exchange of ideas," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985); they have not "by long tradition or by government fiat . . . been devoted to assembly and debate," *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983); nor have they "time out of mind, . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions," *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939). Although most airports do not ordinarily restrict public access, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States* v. *Grace*, 461 U. S. 171, 177 (1983); see also *Greer* v. *Spock*, 424 U. S. 828, 836 (1976). "[W]hen government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Perry*, *supra*, at 53. There is little doubt that airports are among those publicly owned facilities that could be closed to all except those who have legitimate business there. See *Grace*, *supra*, at 178. Public access to airports is thus not "inherent in the open nature of the locations," as it is for most streets and parks, but is rather a "matter of grace by government officials." *United States* v. *Kokinda*, 497 U. S. 720, 743 (1990) (Brennan, J., dissenting). I also agree with the Court that the Port Authority has not expressly opened its airports to the types of expression at issue here, see *ante*, at 680–681, and therefore has not created a "limited" or "designated" public forum relevant to this case.

For these reasons, the Port Authority's restrictions on solicitation and leafletting within the airport terminals do not qualify for the strict scrutiny that applies to restriction of speech in public fora. That airports are not public fora, however, does not mean that the government can restrict speech in whatever way it likes. "The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints." *Kokinda*, *supra*, at 725 (plurality opinion). For example, in *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987), we unanimously struck down a regulation that prohibited "all First Amendment activities" in the Los Angeles International Airport (LAX) without even reaching the question whether airports were public fora. *Id.*, at 574–575. We found it "obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.*, at 575. Moreover, we have consistently stated that restrictions on speech in nonpublic fora are valid only if they are "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, *supra*, at 46; see also *Kokinda*, *supra*, at 731; *Cornelius*, *supra*, at 800; *Lehman* v. *Shaker Heights*, 418 U. S. 298, 303 (1974). The determination that airports are not public fora thus only begins our inquiry.

"The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, *supra*, at 809. "'[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.'" *Kokinda*, *supra*, at 732, quoting *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 650–651 (1981).

In this case, the "special attributes" and "surrounding circumstances" of the airports operated by the Port Authority are determinative. Not only has the Port Authority chosen *not* to limit access to the airports under its control, it has created a huge complex open to travelers and nontravelers alike. The airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs. See App. 183–185 (Newark); *id.*, at 185–186 (JFK); *id.*, at 190–192 (La Guardia). The International Arrivals Building at JFK Airport even has two branches of Bloomingdale's. *Id.*, at 185–186.

We have said that a restriction on speech in a nonpublic forum is "reasonable" when it is "consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" *Perry*, *supra*, at 50–51, quoting *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129–130 (1981) (internal quotation marks omitted). Ordinarily, this inquiry is relatively straightforward, because we have almost always been confronted with cases where the fora at issue were discrete, single-purpose facilities. See, *e. g.*, *Kokinda*, *supra* (dedicated sidewalk between parking lot and post office); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985) (literature for charity drive); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984) (utility poles); *Perry*, *supra* (interschool mail system); *Postal Service* v. *Council of Greenburgh Civic Assns.*, *supra* (household mail boxes); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (curtilage of jailhouse). The Port Authority urges that this case is no different and contends that it, too, has dedicated its airports to a single purpose—facilitating air travel—and that the speech it seeks to prohibit is not consistent with that purpose. But the wide range of activities promoted by the

Port Authority is no more directly related to facilitating air travel than are the types of activities in which the International Society for Krishna Consciousness, Inc. (ISKCON), wishes to engage. See *Jews for Jesus*, *supra*, at 576 ("The line between airport-related speech and nonairport-related speech is, at best, murky"). In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are "consistent with . . . preserving the property" for air travel, *Perry*, *supra*, at 50–51 (internal quotation marks and citation omitted), but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.

Applying that standard, I agree with the Court in No. 91–155 that the ban on solicitation is reasonable. Face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not. We have previously observed that "[s]olicitation impedes the normal flow of traffic [because it] requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. . . . As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *Kokinda*, 497 U. S., at 733–734 (plurality opinion) (citations omitted); *id.*, at 739 (Kennedy, J., concurring in judgment) (accepting Postal Service's judgment that, given its past experience, "in-person solicitation deserves different treatment from alternative forms of solicitation and expression"); *Heffron*, *supra*, at 657 (Brennan, J., concurring in part and dissenting in part) (upholding partial restriction on solicitation at fairgrounds because of state interest "in protecting its fairgoers from fraudulent, deceptive, and mis-

leading solicitation practices"); 452 U. S., at 665 (BLACKMUN, J., concurring in part and dissenting in part) (upholding partial restriction on solicitation because of the "crowd control problems" it creates). The record in this case confirms that the problems of congestion and fraud that we have identified with solicitation in other contexts have also proved true in the airports' experience. See App. 67–111 (affidavits). Because airport users are frequently facing time constraints, and are traveling with luggage or children, the ban on solicitation is a reasonable means of avoiding disruption of an airport's operation.

In my view, however, the regulation banning leafletting—or, in the Port Authority's words, the "continuous or repetitive . . . distribution of . . . printed or written material"—cannot be upheld as reasonable on this record. I therefore concur in the judgment in No. 91–339, *post*, p. 830, striking down that prohibition. While the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious that its regulation may "rin[g] of common-sense," *Kokinda*, 497 U. S., at 734 (internal quotation marks and citation omitted), the same is not necessarily true of leafletting. To the contrary, we have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'" *Ibid.* (plurality opinion), quoting *Heffron*, *supra*, at 665 (BLACKMUN, J., concurring in part and dissenting in part). With the possible exception of avoiding litter, see *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 162 (1939), it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.

We have only once before considered restrictions on speech in a nonpublic forum that sustained the kind of extensive, nonforum-related activity found in the Port Authority airports, and I believe that case is instructive. In *Greer* v. *Spock*, 424 U. S. 828 (1976), the Court held that even though certain parts of a military base were open to the public, they still did not constitute a public forum in light of "'the historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command.'" *Id.*, at 838, quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 893 (1961). The Court then proceeded to uphold a regulation banning the distribution of literature without the prior approval of the base commander. In so doing, the Court "emphasized" that the regulation on leafletting did "not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature." Rather, the Court explained, "[t]he only publications that a military commander may disapprove are those that he finds constitute 'a clear danger to [military] loyalty, discipline, or morale'" and that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U. S., at 840 (citation omitted). In contrast, the regulation at issue in this case effects an absolute prohibition and is not supported by any independent justification outside of the problems caused by the accompanying solicitation.

Moreover, the Port Authority has not offered any justifications or record evidence to support its ban on the distribution of pamphlets alone. Its argument is focused instead on the problems created when literature is distributed in conjunction with a solicitation plea. Although we do not "requir[e] that . . . proof be present to justify the denial of access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function," *Perry*, 460 U. S., at 52, n. 12, we have required some explanation as to why

certain speech is inconsistent with the intended use of the forum. In *Kokinda*, for example, we upheld a regulation banning solicitation on postal property in part because the Postal Service's 30-year history of regulation of solicitation in post offices demonstrated that permitting solicitation interfered with its postal mission. 497 U. S., at 731–732 (plurality opinion). Similarly, in *Cornelius*, we held that it was reasonable to exclude political advocacy groups from a fundraising campaign targeted at federal employees in part because "the record amply support[ed] an inference" that the participation of those groups would have jeopardized the success of the campaign. 473 U. S., at 810. Here, the Port Authority has provided no independent reason for prohibiting leafletting, and the record contains no information from which we can draw an inference that would support its ban. Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction "preserv[es] the property" for the several uses to which it has been put. *Perry*, *supra*, at 50–51 (internal quotation marks and citation omitted).

Of course, it is still open for the Port Authority to promulgate regulations of the time, place, and manner of leafletting which are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, *supra*, at 45; *Postal Service*, 453 U. S., at 132. For example, during the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. Tr. of Oral Arg. 5–6, 46–47. In my view, that regulation meets the standards we have applied to time, place, and manner restrictions of protected

expression. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984).

I would affirm the judgment of the Court of Appeals in both No. 91–155 and No. 91–339.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join as to Part I, concurring in the judgments.*

While I concur in the judgments affirming in these cases, my analysis differs in substantial respects from that of the Court. In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles. The Port Authority's blanket prohibition on the distribution or sale of literature cannot meet those stringent standards, and I agree it is invalid under the First and Fourteenth Amendments. The Port Authority's rule disallowing in-person solicitation of money for immediate payment, however, is in my view a narrow and valid regulation of the time, place, and manner of protected speech in this forum, or else is a valid regulation of the nonspeech element of expressive conduct. I would sustain the Port Authority's ban on solicitation and receipt of funds.

I

An earlier opinion expressed my concern that "[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control" the status of the property. *United States* v. *Kokinda*, 497 U. S. 720, 737 (1990) (KENNEDY, J., concurring in judgment). The cases before us do not heed that principle. Our public

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*[This opinion applies also to No. 91–339, *Lee* v. *International Soc. for Krishna Consciousness, Inc.*, *post*, p. 830.]

forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat. I believe that the Court's public forum analysis in these cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment.

Our public forum analysis has its origins in Justice Roberts' rather sweeping dictum in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939); see also *ante*, at 679. The doctrine was not stated with much precision or elaboration, though, until our more recent decisions in *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), and *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985). These cases describe a three-part analysis to designate government-owned property as either a traditional public forum, a designated public forum, or a nonpublic forum. *Perry*, *supra*, at 45–46; *ante*, at 678–679. The Court today holds that traditional public forums are limited to public property which have as "'a principal purpose . . . the free exchange of ideas,'" *ante*, at 679 (quoting *Cornelius*, *supra*, at 800); *ante*, at 686 (O'CONNOR, J., concurring in No. 91–155 and concurring in judgment in No. 91–339 (hereinafter opinion of O'CONNOR, J.)); and that this purpose must be evidenced by a longstanding historical practice of permitting speech, *ante*, at 679; *ante*, at 686 (opinion of O'CONNOR, J.). The Court also holds that designated forums consist of property which the government intends to open for public discourse. *Ante*, at 680, citing *Cornelius*, *supra*, at 802; *ante*, at 686 (opinion of O'CONNOR, J.). All other types of property are, in the Court's view, nonpublic forums (in other words, not public forums), and government-imposed restrictions of speech in these places will be upheld so long as reasonable and viewpoint neutral. Under this categorical view the application of public forum analysis to airport terminals seems easy. Airports are of course public spaces of recent vintage, and so there can be no time-honored

tradition associated with airports of permitting free speech. *Ante*, at 680. And because governments have often attempted to restrict speech within airports, it follows *a fortiori* under the Court's analysis that they cannot be so-called "designated" forums. *Ante*, at 680–681. So, the Court concludes, airports must be nonpublic forums, subject to minimal First Amendment protection.

This analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property. The fact that in our public forum cases we discuss and analyze these precise characteristics tends to support my position. *Perry*, *supra*, at 46–48; *Cornelius*, *supra*, at 804–806; *Kokinda*, *supra*, at 727–729 (plurality opinion).

The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there. The Court acknowledges as much, by reintroducing today into our First Amendment law a strict doctrinal line between the proprietary and regulatory functions of government which I thought had been abandoned long ago. *Ante*, at 678; compare *Davis* v. *Massachusetts*, 167 U. S. 43 (1897), with *Hague*, *supra*, at 515; *Schnei-*

der v. *State (Town of Irvington),* 308 U. S. 147 (1939); and *Grayned* v. *Rockford,* 408 U. S. 104, 115–116 (1972).

The Court's approach is contrary to the underlying purposes of the public forum doctrine. The liberties protected by our doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 S. Ct. Rev. 1, 14, 19. Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The public forum doctrine vindicates that principle by recognizing limits on the government's control over speech activities on property suitable for free expression. The doctrine focuses on the physical characteristics of the property because government ownership is the source of its purported authority to regulate speech. The right of speech protected by the doctrine, however, comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people.

The Court's analysis rests on an inaccurate view of history. The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. The types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks. *Cornelius,* 473 U. S., at 802; *Frisby* v. *Schultz,* 487 U. S. 474, 480–481 (1988). It would seem apparent that the principal purpose of streets and sidewalks, like

airports, is to facilitate transportation, not public discourse, and we have recognized as much. *Schneider* v. *State*, *supra*, at 160. Similarly, the purpose for the creation of public parks may be as much for beauty and open space as for discourse. Thus under the Court's analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum.

The effect of the Court's narrow view of the first category of public forums is compounded by its description of the second purported category, the so-called "designated" forum. The requirements for such a designation are so stringent that I cannot be certain whether the category has any content left at all. In any event, it seems evident that under the Court's analysis today few, if any, types of property other than those already recognized as public forums will be accorded that status.

The Court's answer to these objections appears to be a recourse to history as justifying its recognition of streets, parks, and sidewalks, but apparently no other types of government property, as traditional public forums. *Ante*, at 681. The Court ignores the fact that the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. The jurisprudence is rooted in historic practice, but it is not tied to a narrow textual command limiting the recognition of new forums. In my view the policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. There is support in our precedents for such a view. See *Lehman* v. *Shaker Heights*, 418 U. S. 298, 303 (1974) (plurality opinion); *Hague*, 307 U. S., at 515 (speaking of "streets and public places" as forums). Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and

parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

One of the places left in our mobile society that is suitable for discourse is a metropolitan airport. It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public. Given that private spaces of similar character are not subject to the dictates of the First Amendment, see *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), it is critical that we preserve these areas for protected speech. In my view, our public forum doctrine must recognize this reality, and allow the creation of public forums that do not fit within the narrow tradition of streets, sidewalks, and parks. We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation, see, *e. g.*, *Katz* v. *United States*, 389 U. S. 347 (1967), and I believe we must do the same with the First Amendment.

I agree with the Court that government property of a type which by history and tradition has been available for speech activity must continue to be recognized as a public forum. *Ante*, at 679. In my view, however, constitutional protection is not confined to these properties alone. Under the proper circumstances I would accord public forum status to other forms of property, regardless of their ancient or contemporary origins and whether or not they fit within a narrow historic tradition. If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the

property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing, and would provide little guidance to the State regarding its discretion to regulate speech. Courts must also consider the availability of reasonable time, place, and manner restrictions in undertaking this compatibility analysis. The possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations.

The second category of the Court's jurisprudence, the so-called designated forum, provides little, if any, additional protection for speech. Where government property does not satisfy the criteria of a public forum, the government retains the power to dedicate the property for speech, whether for all expressive activity or for limited purposes only. See *ante*, at 678; *Perry*, 460 U. S., at 45–46; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). I do not quarrel with the fact that speech must often be restricted on property of this kind to retain the purpose for which it has been designated. And I recognize that when property has been designated for a particular expressive use, the government may choose to eliminate that designation. But this increases the need to protect speech in other places, where discourse may occur free of such restrictions. In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the

State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require. The difference is that when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status.

Under this analysis, it is evident that the public spaces of the Port Authority's airports are public forums. First, the District Court made detailed findings regarding the physical similarities between the Port Authority's airports and public streets. 721 F. Supp. 572, 576–577 (SDNY 1989). These findings show that the public spaces in the airports are broad, public thoroughfares full of people and lined with stores and other commercial activities. An airport corridor is of course not a street, but that is not the proper inquiry. The question is one of physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by the people who use them.

Second, the airport areas involved here are open to the public without restriction. *Ibid.* Plaintiffs do not seek access to the secured areas of the airports, nor do I suggest that these areas would be public forums. And while most people who come to the Port Authority's airports do so for a reason related to air travel, either because they are passengers or because they are picking up or dropping off passengers, this does not distinguish an airport from streets or sidewalks, which most people use for travel. See *supra*, at 696–697. Further, the group visiting the airports encompasses a vast portion of the public: In 1986 the Authority's three airports served over 78 million passengers. It is the very breadth and extent of the public's use of airports that makes it imperative to protect speech rights there. Of course, airport operators retain authority to restrict public

access when necessary, for instance to respond to special security concerns. But if the Port Authority allows the uses and open access to airports that is shown on this record, it cannot argue that some vestigial power to change its practices bars the conclusion that its airports are public forums, any more than the power to bulldoze a park bars a finding that a public forum exists so long as the open use does.

Third, and perhaps most important, it is apparent from the record, and from the recent history of airports, that when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports. The Port Authority's primary argument to the contrary is that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel. The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech. The Authority makes no showing that any real impediments to the smooth functioning of the airports cannot be cured with reasonable time, place, and manner regulations. In fact, the history of the Authority's own airports, as well as other major airports in this country, leaves little doubt that such a solution is quite feasible. The Authority has for many years permitted expressive activities by petitioners and others, without any apparent interference with its ability to meet its transportation purposes. App. 462, 469–470; see also *ante*, at 691–692 (opinion of O'CONNOR, J.). The Federal Aviation Administration, in its operation of the airports of the Nation's capital, has issued rules which allow regulated expressive activity within specified areas, without any suggestion that the speech would be incompatible with the airports' business. 14 CFR §§ 159.93, 159.94 (1992). And, in fact, expressive activity has been a commonplace feature of our Nation's major airports for many years, in part because of the wide consensus among the Courts of Appeals, prior to the decision in

these cases, that the public spaces of airports are public forums. See, *e. g.*, *Chicago Area Military Project* v. *Chicago*, 508 F. 2d 921 (CA7), cert. denied, 421 U. S. 992 (1975); *Fernandes* v. *Limmer*, 663 F. 2d 619 (CA5 1981), cert. dism'd, 458 U. S. 1124 (1982); *United States Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 228 U. S. App. D. C. 191, 708 F. 2d 760 (1983); *Jews for Jesus, Inc.* v. *Board of Airport Comm'rs*, 785 F. 2d 791 (CA9 1986), aff'd on other grounds, 482 U. S. 569 (1987); *Jamison* v. *St. Louis*, 828 F. 2d 1280 (CA8 1987), cert. denied, 485 U. S. 987 (1988). As the District Court recognized, the logical consequence of the Port Authority's congestion argument is that the crowded streets and sidewalks of major cities cannot be public forums. 721 F. Supp., at 578. These problems have been dealt with in the past, and in other settings, through proper time, place, and manner restrictions; and the Port Authority does not make any showing that similar regulations would not be effective in its airports. The Port Authority makes a half-hearted argument that the special security concerns associated with airports suggest they are not public forums; but this position is belied by the unlimited public access the Authority allows to its airports. This access demonstrates that the Port Authority does not consider the general public to pose a serious security threat, and there is no evidence in the record that persons engaged in expressive activities are any different.

The danger of allowing the government to suppress speech is shown in the cases now before us. A grant of plenary power allows the government to tilt the dialog heard by the public, to exclude many, more marginal, voices. The first challenged Port Authority regulation establishes a flat prohibition on "[t]he sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material," if conducted within the airport terminal, "in a continuous or repetitive manner." We have long recognized that the right to distribute flyers and literature lies at the heart of the lib-

erties guaranteed by the Speech and Press Clauses of the First Amendment. See, *e. g.*, *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). The Port Authority's rule, which prohibits almost all such activity, is among the most restrictive possible of those liberties. The regulation is in fact so broad and restrictive of speech, JUSTICE O'CONNOR finds it void even under the standards applicable to government regulations in nonpublic forums. *Ante*, at 691–693. I have no difficulty deciding the regulation cannot survive the far more stringent rules applicable to regulations in public forums. The regulation is not drawn in narrow terms, and it does not leave open ample alternative channels for communication. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The Port Authority's concerns with the problem of congestion can be addressed through narrow restrictions on the time and place of expressive activity. See *ante*, at 692–693 (opinion of O'CONNOR, J.). I would strike down the regulation as an unconstitutional restriction of speech.

II

It is my view, however, that the Port Authority's ban on the "solicitation and receipt of funds" within its airport terminals should be upheld under the standards applicable to speech regulations in public forums. The regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct. The two standards have considerable overlap in a case like this one.

It is well settled that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"

Ward, *supra*, at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)). We have held further that the government in appropriate circumstances may regulate conduct, even if the conduct has an expressive component. *United States* v. *O'Brien*, 391 U. S. 367 (1968). And in several recent cases we have recognized that the standards for assessing time, place, and manner restrictions are little, if any, different from the standards applicable to regulations of conduct with an expressive component. *Clark*, *supra*, at 298, and n. 8; *Ward*, *supra*, at 798; *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 566 (1991) (plurality opinion); see generally Kalven, 1965 S. Ct. Rev., at 23, 27 (arguing that all speech contains elements of conduct which may be regulated). The confluence of the two tests is well demonstrated by a case like this, where the government regulation at issue can be described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component.

I am in full agreement with the statement of the Court that solicitation is a form of protected speech. *Ante*, at 677; see also *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 788–789 (1988); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 629 (1980); *Murdock* v. *Pennsylvania*, *supra*. If the Port Authority's solicitation regulation prohibited all speech that requested the contribution of funds, I would conclude that it was a direct, content-based restriction of speech in clear violation of the First Amendment. The Authority's regulation does not prohibit all solicitation, however; it prohibits the "solicitation and receipt of funds." I do not understand this regulation to prohibit all speech that solicits funds. It reaches only personal solicitations for immediate payment of money. Otherwise, the "receipt of funds" phrase would be written out of the provision. The regulation does not cover, for example, the distribution of preaddressed envelopes along with a plea to contribute money to the distributor or his organization. As

I understand the restriction it is directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation. In other words, the regulation permits expression that solicits funds, but limits the manner of that expression to forms other than the immediate receipt of money.

So viewed, I believe the Port Authority's rule survives our test for speech restrictions in the public forum. In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct. Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country, its customs, and its language, are an easy prey for the money solicitor. I agree in full with the Court's discussion of these dangers in No. 91–155. *Ante*, at 683–684; *ante*, at 689–690 (opinion of O'CONNOR, J.). I would add that our precedents, as well as the actions of coordinate branches of Government, support this conclusion. We have in the past recognized that in-person solicitation has been associated with coercive or fraudulent conduct. *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940); *Riley*, *supra*, at 800; *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 657 (1981) (Brennan, J., concurring in part and dissenting in part); *Schaumburg*, *supra*, at 636–638. In addition, the Federal Government has adopted regulations which acknowledge and respond to the serious problems associated with solicitation. The National Park Service has enacted a flat ban on the direct solicitation of money in the parks of the Nation's capital within its control. 36 CFR § 7.96(h) (1991); see also *United States* v. *Kokinda*, 497 U. S., at 739 (KENNEDY, J., concurring in judgment). Also, the Federal Aviation Administration, in its administration of the airports of Washington, D. C., even while permitting the solicitation of funds has adopted special rules to prevent coercive, harassing, or repetitious behavior. 14 CFR § 159.94(e)–(h) (1992). And

in the commercial sphere, the Federal Trade Commission has long held that "it constitutes an unfair and deceptive act or practice" to make a door-to-door sale without allowing the buyer a 3-day "cooling-off period" during which time he or she may cancel the sale. 16 CFR § 429.1 (1992). All of these measures are based on a recognition that requests for immediate payment of money create a strong potential for fraud or undue pressure, in part because of the lack of time for reflection. As the Court recounts, questionable practices associated with solicitation can include the targeting of vulnerable and easily coerced persons, misrepresentation of the solicitor's cause, and outright theft. *Ante*, at 684; see also *International Soc. for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147, 159–163 (NDNY 1980), rev'd on other grounds, 650 F. 2d 430 (CA2 1981).

Because the Port Authority's solicitation ban is directed at these abusive practices and not at any particular message, idea, or form of speech, the regulation is a content-neutral rule serving a significant government interest. We have held that the content neutrality of a rule must be assessed based on whether it is "'*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U. S., at 791 (quoting *Clark*, 468 U. S., at 293) (emphasis in original). It is apparent that the justification for the solicitation ban is unrelated to the content of speech or the identity of the speaker. There can also be no doubt that the prevention of fraud and duress is a significant government interest. The government cannot, of course, prohibit speech for the sole reason that it is concerned the speech may be fraudulent. *Schaumburg*, 444 U. S., at 637. But the Port Authority's regulation does not do this. It recognizes that the risk of fraud and duress is intensified by particular conduct, the immediate exchange of money; and it addresses only that conduct. We have recognized that such narrowly drawn regulations are in fact the proper means for addressing

the dangers which can be associated with speech. *Ibid.; Riley*, *supra*, at 799, n. 11.

To survive scrutiny, the regulation must be drawn in narrow terms to accomplish its end and leave open ample alternative channels for communication. Regarding the former requirement, we have held that to be narrowly tailored a regulation need not be the least restrictive or least intrusive means of achieving an end. The regulation must be reasonable, and must not burden substantially more speech than necessary. *Ward*, *supra*, at 798–800. Under this standard the solicitation ban survives with ease, because it prohibits only solicitation of money for immediate receipt. The regulation does not burden any broader category of speech or expressive conduct than is the source of the evil sought to be avoided. And in fact, the regulation is even more narrow because it only prohibits such behavior if conducted in a continuous or repetitive manner. The Port Authority has made a reasonable judgment that this type of conduct raises the most serious concerns, and it is entitled to deference. My conclusion is not altered by the fact that other means, for example, the regulations adopted by the Federal Aviation Administration to govern its airports, may be available to address the problems associated with solicitation, because the existence of less intrusive means is not decisive. Our cases do not so limit the government's regulatory flexibility. See *Ward*, *supra*, at 800.

I have little difficulty in deciding that the Port Authority has left open ample alternative channels for the communication of the message which is an aspect of solicitation. As already discussed, see *supra*, at 704, the Authority's rule does not prohibit all solicitation of funds: It restricts only the manner of the solicitation, or the conduct associated with solicitation, to prohibit immediate receipt of the solicited money. Requests for money continue to be permitted, and in the course of requesting money solicitors may explain their cause, or the purposes of their organization, without

violating the regulation. It is only if the solicitor accepts immediate payment that a violation occurs. Thus the solicitor can continue to disseminate his message, for example, by distributing preaddressed envelopes in which potential contributors may mail their donations. See *supra*, at 704.

Much of what I have said about the solicitation of funds may seem to apply to the sale of literature, but the differences between the two activities are of sufficient significance to require they be distinguished for constitutional purposes. The Port Authority's flat ban on the distribution or sale of printed material must, in my view, fall in its entirety. See *supra*, at 703. The application of our time, place, and manner test to the ban on sales leads to a result quite different from the solicitation ban. For one, the government interest in regulating the sales of literature is not as powerful as in the case of solicitation. The danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. Also, the Port Authority's sale regulation is not as narrowly drawn as the solicitation rule, since it does not specify the receipt of money as a critical element of a violation. And perhaps most important, the flat ban on sales of literature leaves open fewer alternative channels of communication than the Port Authority's more limited prohibition on the solicitation and receipt of funds. Given the practicalities and ad hoc nature of much expressive activity in the public forum, sales of literature must be completed in one transaction to be workable. Attempting to collect money at another time or place is a far less plausible option in the context of a sale than when soliciting donations, because the literature sought to be sold will under normal circumstances be distributed within the forum. These distinctions have been recognized by the National Park Service, which permits the sale or distribution of literature, while prohibiting solicitation. *Supra*, at 705; 36 CFR § 7.96(j)(2) (1991). Thus the Port Authority's regulation allows no prac-

tical means for advocates and organizations to sell literature within the public forums which are its airports.

Against all of this must be balanced the great need, recognized by our precedents, to give the sale of literature full First Amendment protection. We have long recognized that to prohibit distribution of literature for the mere reason that it is sold would leave organizations seeking to spread their message without funds to operate. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock*, 319 U. S., at 111; see also *Schaumburg*, *supra*, at 628–635 (discussing cases). The effect of a rule of law distinguishing between sales and distribution would be to close the marketplace of ideas to less affluent organizations and speakers, leaving speech as the preserve of those who are able to fund themselves. One of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak. A prohibition on sales forecloses that opportunity for the very persons who need it most. And while the same arguments might be made regarding solicitation of funds, the answer is that the Port Authority has not prohibited all solicitation, but only a narrow class of conduct associated with a particular manner of solicitation.

For these reasons I agree that the Court of Appeals should be affirmed in full in finding the Port Authority's ban on the distribution or sale of literature unconstitutional, but upholding the prohibition on solicitation and immediate receipt of funds.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment in No. 91–339, *post*, p. 830, and dissenting in No. 91–155.

I

I join in Part I of JUSTICE KENNEDY's opinion and the judgment of affirmance in No. 91–339. I agree with JUSTICE

KENNEDY's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such. The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks, and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech. See *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988). To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.

Nor is that a Scylla without Charybdis. Public forum analysis is stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identification with the archetypes. We need not say that all "transportation nodes" or all airports are public forums in order to find that certain metropolitan airports are. Thus, the enquiry may and must relate to the particular property at issue and not necessarily to the "precise classification of the property." See *ante*, at 697 (KENNEDY, J., concurring in judgment). It is true that property of some types will invariably be public forums. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, *supra*, at 481. But to find one example of a certain property type (*e. g.*, airports, post offices, etc.) that is not a public forum is not to rule out all properties of that sort.

Cf. *United States* v. *Kokinda*, 497 U. S. 720, 727 (1990) (plurality opinion) (implicitly rejecting the categorical approach by examining whether "[t]he postal sidewalk at issue . . . [has] the characteristics of public sidewalks traditionally open to expressive activity"). One can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use. But that would be no reason to conclude that one of the more usual variety of metropolitan airports is not a public forum.

I also agree with JUSTICE KENNEDY's statement of the public forum principle: We should classify as a public forum any piece of public property that is "suitable for discourse" in its physical character, where expressive activity is "compatible" with the use to which it has actually been put. See *ante*, at 698 (opinion concurring in judgment); see also *Grayned* v. *Rockford*, 408 U. S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *ante*, at 692 (O'CONNOR, J., concurring in No. 91–155 and concurring in judgment in No. 91–339) (finding that the ban on the sale or distribution of leaflets here must be struck down "[b]ecause I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports," and concluding that regulations of leafletting may thus only be upheld if they pass scrutiny under our test for restrictions on time, place, or manner of speech). Applying this test, I have no difficulty concluding that the unleased public areas at airports like the metropolitan New York airports at issue in these cases are public forums.

II

From the Court's conclusion in No. 91–155, however, sustaining the total ban on solicitation of money for immediate payment, I respectfully dissent. "We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. See [*Riley* v. *National Federation of*

Blind of N. C., Inc., 487 U. S. 781,] 787–789 [(1988)]; *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 959–961 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 628–632 (1980). It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 803 (1988) (SCALIA, J., concurring in part and concurring in judgment) (some citations omitted).

Even if I assume, *arguendo*, that the ban on the petitioners' activity at issue here is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest, see, *e. g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984), and availability of "ample alternative channels for communication," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976).

As JUSTICE KENNEDY's opinion indicates, respondent comes closest to justifying the restriction as one furthering the government's interest in preventing coercion and fraud.*

*Respondent also attempts to justify his regulation on the alternative basis of "interference with air travelers," referring in particular to problems of "annoyance" and "congestion." Brief for Respondent 24–25, 42–44, 47. The First Amendment inevitably requires people to put up with annoyance and uninvited persuasion. Indeed, in such cases we need to scrutinize restrictions on speech with special care. In their degree of congestion, most of the public spaces of these airports are probably more comparable to public streets than to the fairground as we described it in *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 651 (1981). Consequently, the congestion argument, which was held there to justify a regulation confining solicitation to a fixed location, should have less force here. See *id.*, at 650–651. Be that as it may, the conclusion of a majority of the Court today that the Constitution forbids the ban on the sale, as well as the distribution, of leaflets puts to rest respondent's argument that congestion justifies a total ban on solicitation. While there

The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971) ("The claim that . . . expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper"). Since there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban, see *United States* v. *O'Brien*, 391 U. S. 367 (1968); *Claiborne Hardware Co.*, *supra*, at 912, the regulation cannot be sustained to avoid coercion.

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent. "Broad prophylactic rules in the area of free expression are suspect," *NAACP* v. *Button*, 371 U. S. 415, 438 (1963), and more than a laudable intent to prevent fraud is required to sustain the present ban. See, *e. g.*, *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636–638 (1980) ("The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing on the streets and house to house"); *Riley*, *supra*, at 800. The evidence of fraudulent conduct here is virtually nonexistent. It consists of one affidavit describing eight

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may, of course, be congested locations where solicitation could severely compromise the efficient flow of pedestrians, the proper response would be to tailor the restrictions to those choke points.

complaints, none of them substantiated, "involving some form of fraud, deception, or larceny" over an entire 11-year period between 1975 and 1986, during which the regulation at issue here was, by agreement, not enforced. See Brief for Respondent 44; Brief for Petitioners 46. Petitioners claim, and respondent does not dispute, that by the Port Authority's own calculation, there has not been a single claim of fraud or misrepresentation since 1981. *Ibid.* As against these facts, respondent's brief is ominous in adding that "[t]he Port Authority is also aware that members of [International Society for Krishna Consciousness] have engaged in misconduct elsewhere." Brief for Respondent 44. This is precisely the type of vague and unsubstantiated allegation that could never support a restriction on speech. Finally, the fact that other governmental bodies have also enacted restrictions on solicitation in other places, see, *e. g.*, 36 CFR § 7.96(h) (1991), is not evidence of fraudulent conduct.

Even assuming a governmental interest adequate to justify some regulation, the present ban would fall when subjected to the requirement of narrow tailoring. See *Riley*, *supra*, at 800; *Schaumburg*, *supra*, at 637 ("The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms"). "Precision of regulation must be the touchstone . . . ." *Button*, *supra*, at 438. Thus, in *Schaumburg* we said:

> "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the

> decision whether to contribute . . . ." 444 U. S., at 637–638 (citations and footnotes omitted).

Similarly, in *Riley* we required the State to cure its perceived fraud problem by more narrowly tailored means than compelling disclosure by professional fundraisers of the amount of collected funds that were actually turned over to charity during the previous year:

> "In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." 487 U. S., at 800.

Finally, I do not think the Port Authority's solicitation ban leaves open the "ample" channels of communication required of a valid content-neutral time, place, and manner restriction. A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation. Cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977) ("Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like").

Accordingly, I would reverse the judgment of the Court of Appeals in No. 91–155 and strike down the ban on solicitation.

Syllabus

UNITED STATES *v.* FORDICE, GOVERNOR OF MISSISSIPPI, ET AL.

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

No. 90–1205. Argued November 13, 1991—Decided June 26, 1992*

Despite this Court's decisions in *Brown* v. *Board of Education*, 347 U. S. 483 *(Brown I)*, and *Brown* v. *Board of Education*, 349 U. S. 294 *(Brown II)*, Mississippi continued its policy of *de jure* segregation in its public university system, maintaining five almost completely white and three almost exclusively black universities. Private petitioners initiated this lawsuit in 1975, and the United States intervened, charging that state officials had failed to satisfy their obligation under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 to dismantle the dual system. In an attempt to reach a consensual resolution through voluntary dismantlement, the State Board of Trustees, in 1981, issued "Mission Statements" classifying the three flagship white institutions during the *de jure* period as "comprehensive" universities having the most varied programs and offering doctoral degrees, redesignating one of the black colleges as an "urban" university with limited research and degree functions geared toward its urban setting, and characterizing the rest of the colleges as "regional" institutions which functioned primarily in an undergraduate role. When, by the mid-1980's, the student bodies at the white universities were still predominantly white, and the racial composition at the black institutions remained largely black, the suit proceeded to trial. After voluminous evidence was presented on a full range of educational issues, the District Court entered extensive findings of fact on, among other things, admissions requirements, institutional classification and missions assignments, duplication of programs, and funding. Its conclusions of law included rulings that, based on its interpretation of *Bazemore* v. *Friday*, 478 U. S. 385, and other cases, the affirmative duty to desegregate in the higher education context does not contemplate either restricting student choice or the achievement of any degree of racial balance; that current state policies and practices should be examined to ensure that they are racially neutral, developed and implemented in good faith, and do not substantially contribute to the racial identifiability

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*Together with No. 90–6588, *Ayers et al.* v. *Fordice, Governor of Mississippi, et al.*, also on certiorari to the same court.

of individual institutions; and that Mississippi's current actions demonstrate conclusively that the State is fulfilling its affirmative duty to disestablish the former *de jure* segregated system. In affirming, the Court of Appeals left largely undisturbed the lower court's findings and conclusions.

Held:

1. The courts below did not apply the correct legal standard in ruling that Mississippi has brought itself into compliance with the Equal Protection Clause. If the State perpetuates policies and practices traceable to its prior *de jure* dual system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the policies violate the Clause, even though the State has abolished the legal requirement that the races be educated separately and has established racially neutral policies not animated by a discriminatory purpose. *Bazemore* v. *Friday*, *supra*, distinguished. The proper inquiry asks whether existing racial identifiability is attributable to the State, see, *e. g.*, *Freeman* v. *Pitts*, 503 U. S. 467, and examines a wide range of factors to determine whether the State has perpetuated its former segregation in any facet of its system, see, *e. g.*, *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 250. Because the District Court's standard did not ask the appropriate questions, the Court of Appeals erred in affirming the lower court's judgment. Pp. 727–732.

2. When the correct legal standard is applied, it becomes apparent from the District Court's undisturbed factual findings that there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race neutral on their face, they substantially restrict a person's choice of which institution to enter and they contribute to the racial identifiability of the eight public universities. Mississippi must justify these policies, as well as any others that are susceptible to challenge by petitioners on remand under the proper standard, or eliminate them. Pp. 732–743.

(a) Although the State's current admissions policy requiring higher minimum composite scores on the American College Testing Program (ACT) for the five historically white institutions than for the three historically black universities derived from policies enacted in the 1970's to redress the problem of student unpreparedness, the policy is constitutionally suspect because it was originally enacted in 1963 by three of the white universities to discriminate against black students, who, at the time, had an average ACT score well below the required minimum.

Syllabus

The policy also has present discriminatory effects, since a much higher percentage of white than of black high school seniors recently scored at or above the minimum necessary to enter a white university. The segregative effect of this standard is especially striking in light of the differences in minimum required entrance scores among the white and black regional universities and colleges with dissimilar programmatic missions, and yet the courts below made little effort to justify those disparities in educational terms or to inquire whether it was practicable to eliminate them. The State's refusal to consider high school grade performance along with ACT scores is also constitutionally problematic, since the ACT's administering organization discourages use of ACT scores alone, the disparity between black and white students' high school grade averages is much narrower than the gap between their average ACT scores, most States use high school grades and other indicators along with standardized test scores, and Mississippi's approach was not adequately justified or shown to be unsusceptible to elimination without eroding sound educational policy. Pp. 733–738.

(b) The District Court's treatment of the widespread duplication of programs at the historically black and historically white Mississippi universities is problematic for several reasons. First, it can hardly be denied that such duplication represents a continuation of the "separate but equal" treatment required by the prior dual system, and yet the court's holding that petitioners could not establish a constitutional defect shifted the burden of proof away from the State in violation of *Brown II*, *supra*, at 300, and its progeny. Second, implicit in the court's finding of "unnecessary" duplication is the absence of any educational justification and the fact that some, if not all, duplication may be practically eliminated. Finally, by treating this issue in isolation, the court failed to consider the combined effects of unnecessary duplication with other policies in evaluating whether the State had met its constitutional duty. Pp. 738–739.

(c) Mississippi's 1981 mission assignments scheme has as its antecedents the policies enacted to perpetuate racial separation during the *de jure* period. When combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system. On remand, the court should inquire whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects. Pp. 739–741.

(d) Also on remand, the court should inquire and determine whether the State's retention and operation of all eight higher educational institutions in an attempt to bring itself into constitutional compliance actually affects student choice and perpetuates the *de jure* system,

whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can practicably be closed or merged with other existing institutions. Though certainly closure of one or more institutions would decrease the system's discriminatory effects, the present record is inadequate to demonstrate whether such action is constitutionally required. Pp. 741–742.

(e) In addition to the foregoing policies and practices, the full range of the State's higher educational activities, including its funding of the three historically black schools, must be examined on remand under the proper standard to determine whether the State is taking the necessary steps to dismantle its prior system. Pp. 742–743.

914 F. 2d 676, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., *post*, p. 743, and THOMAS, J., *post*, p. 745, filed concurring opinions. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 749.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Roger Clegg* and *Barbara S. Drake*, *Deputy Assistant Attorneys General*, and *Jeffrey P. Minear*. *Alvin O. Chambliss, Jr.*, argued the cause for petitioners in No. 90-6588. With him on the briefs were *Lawrence Young* and *Robert Pressman*.

William F. Goodman, Jr., argued the cause for respondents in both cases. With him on the brief were *Mike Moore*, Attorney General of Mississippi, and *Paul H. Stephenson III* and *William F. Ray*, Special Assistant Attorneys General.†

†Briefs of *amici curiae* urging reversal were filed for the State of Tennessee by *Charles W. Burson*, Attorney General of Tennessee, *John Knox Walkup*, Solicitor General, and *Christine Modisher*, Assistant Attorney General; for Alcorn State University by *Gilbert Kujovich;* for Jackson State University by *Deborah McDonald* and *Carrol Rhodes;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers*, *Charles Stephen Ralston*, *Norman J. Chachkin*, *John W. Garland*, *Janell M. Byrd*, and *John A. Powell;* and for the National Bar Association et al. by *J. Clay Smith, Jr.*, and *Herbert O. Reid, Sr.*

Briefs of *amici curiae* urging affirmance were filed for the Board of Trustees of the University of Alabama by *C. Glenn Powell* and *Stanley J.*

JUSTICE WHITE delivered the opinion of the Court.

In 1954, this Court held that the concept of "'separate but equal'" has no place in the field of public education. *Brown* v. *Board of Education*, 347 U. S. 483, 495 *(Brown I)*. The following year, the Court ordered an end to segregated public education "with all deliberate speed." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) *(Brown II)*. Since these decisions, the Court has had many occasions to evaluate whether a public school district has met its affirmative obligation to dismantle its prior *de jure* segregated system in elementary and secondary schools. In these cases we decide what standards to apply in determining whether the State of Mississippi has met this obligation in the university context.

I

Mississippi launched its public university system in 1848 by establishing the University of Mississippi, an institution dedicated to the higher education exclusively of white persons. In succeeding decades, the State erected additional postsecondary, single-race educational facilities. Alcorn State University opened its doors in 1871 as "an agricultural college for the education of Mississippi's black youth." *Ayers* v. *Allain*, 674 F. Supp. 1523, 1527 (ND Miss. 1987). Creation of four more exclusively white institutions followed: Mississippi State University (1880), Mississippi University for Women (1885), University of Southern Mississippi (1912), and Delta State University (1925). The State added two more solely black institutions in 1940 and 1950: in the former year, Jackson State University, which was charged with training "black teachers for the black public schools," *id.*, at 1528; and in the latter year, Mississippi Valley State Univer-

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Murphy; and for Charles E. "Buddy" Roemer III, Governor of the State of Louisiana, et al. by *John N. Kennedy, Joseph J. Levin, Jr., Margaret E. Woodward,* and *W. Shelby McKenzie.*

Joseph A. Califano, Jr., pro se, and *David S. Tatel* filed a brief of *amicus curiae* for Joseph A. Califano, Jr., et al.

sity, whose functions were to educate teachers primarily for rural and elementary schools and to provide vocational instruction to black students.

Despite this Court's decisions in *Brown I* and *Brown II*, Mississippi's policy of *de jure* segregation continued. The first black student was not admitted to the University of Mississippi until 1962, and then only by court order. See *Meredith* v. *Fair*, 306 F. 2d 374 (CA5), cert. denied, 371 U. S. 828, enf'd, 313 F. 2d 532 (1962) (en banc) *(per curiam)*. For the next 12 years the segregated public university system in the State remained largely intact. Mississippi State University, Mississippi University for Women, University of Southern Mississippi, and Delta State University each admitted at least one black student during these years, but the student composition of these institutions was still almost completely white. During this period, Jackson State and Mississippi Valley State were exclusively black; Alcorn State had admitted five white students by 1968.

In 1969, the United States Department of Health, Education and Welfare (HEW) initiated efforts to enforce Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d.[1] HEW requested that the State devise a plan to disestablish the formerly *de jure* segregated university system. In June 1973, the Board of Trustees of State Institutions of Higher Learning (Board) submitted a plan of compliance, which expressed the aims of improving educational opportunities for all Mississippi citizens by setting numerical goals on the enrollment of other-race students at state universities, hiring other-race faculty members, and instituting remedial programs and special recruitment efforts to achieve those goals. App. 898–900. HEW rejected this Plan as failing to comply with Title VI because it did not go far enough in the areas of student

[1] This provision states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

recruitment and enrollment, faculty hiring, elimination of unnecessary program duplication, and institutional funding practices to ensure that "a student's choice of institution or campus, henceforth, will be based on other than racial criteria." *Id.*, at 205. The Board reluctantly offered amendments, prefacing its reform pledge to HEW with this statement: "With deference, it is the position of the Board of Trustees . . . that the Mississippi system of higher education is in compliance with Title VI of the Civil Rights Act of 1964." *Id.*, at 898. At this time, the racial composition of the State's universities had changed only marginally from the levels of 1968, which were almost exclusively single race.[2] Though HEW refused to accept the modified Plan, the Board adopted it anyway. 674 F. Supp., at 1530. But even the limited effects of this Plan in disestablishing the prior *de jure* segregated system were substantially constricted by the state legislature, which refused to fund it until fiscal year 1978, and even then at well under half the amount sought by the Board. App. 896–897, 1444–1445, 1448–1449.[3]

Private petitioners initiated this lawsuit in 1975. They complained that Mississippi had maintained the racially segregative effects of its prior dual system of postsecondary education in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U. S. C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d.

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[2] For the 1974–1975 school year, black students comprised 4.1 percent of the full-time undergraduate enrollments at University of Mississippi; at Mississippi State University, 7.5 percent; at University of Southern Mississippi, 8.0 percent; at Delta State University, 12.6 percent; at Mississippi University for Women, 13.0 percent. At Jackson State, Alcorn State, and Mississippi Valley State, the percentages of black students were 96.6 percent, 99.9 percent, and 100 percent, respectively. Brief for United States 7.

[3] According to counsel for respondents, it was in this time period—the mid- to late-1970's—that the State came into full "compliance with the law" as having taken the necessary affirmative steps to dismantle its prior *de jure* system. Tr. of Oral Arg. 45.

Shortly thereafter, the United States filed its complaint in intervention, charging that state officials had failed to satisfy their obligation under the Equal Protection Clause of the Fourteenth Amendment and Title VI to dismantle Mississippi's dual system of higher education.

After this lawsuit was filed, the parties attempted for 12 years to achieve a consensual resolution of their differences through voluntary dismantlement by the State of its prior separated system. The board of trustees implemented reviews of existing curricula and program "mission" at each institution. In 1981, the Board issued "Mission Statements" that identified the extant purpose of each public university. These "missions" were clustered into three categories: comprehensive, urban, and regional. "Comprehensive" universities were classified as those with the greatest existing resources and program offerings. All three such institutions (University of Mississippi, Mississippi State, and Southern Mississippi) were exclusively white under the prior *de jure* segregated system. The Board authorized each to continue offering doctoral degrees and to assert leadership in certain disciplines. Jackson State, the sole urban university, was assigned a more limited research and degree mission, with both functions geared toward its urban setting. It was exclusively black at its inception. The "regional" designation was something of a misnomer, as the Board envisioned those institutions primarily in an undergraduate role, rather than a "regional" one in the geographical sense of serving just the localities in which they were based. Only the universities classified as "regional" included institutions that, prior to desegregation, had been either exclusively white—Delta State and Mississippi University for Women—or exclusively black—Alcorn State and Mississippi Valley State.

By the mid-1980's, 30 years after *Brown*, more than 99 percent of Mississippi's white students were enrolled at University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women.

The student bodies at these universities remained predominantly white, averaging between 80 and 91 percent white students. Seventy-one percent of the State's black students attended Jackson State, Alcorn State, and Mississippi Valley State, where the racial composition ranged from 92 to 99 percent black. *Ayers* v. *Allain*, 893 F. 2d 732, 734–735 (CA5 1990) (panel decision).

II

By 1987, the parties concluded that they could not agree on whether the State had taken the requisite affirmative steps to dismantle its prior *de jure* segregated system. They proceeded to trial. Both sides presented voluminous evidence on a full range of educational issues spanning admissions standards, faculty and administrative staff recruitment, program duplication, on-campus discrimination, institutional funding disparities, and satellite campuses. Petitioners argued that in various ways the State continued to reinforce historic, race-based distinctions among the universities. Respondents argued generally that the State had fulfilled its duty to disestablish its state-imposed segregative system by implementing and maintaining good-faith, nondiscriminatory race-neutral policies and practices in student admission, faculty hiring, and operations. Moreover, they suggested, the State had attracted significant numbers of qualified black students to those universities composed mostly of white persons. Respondents averred that the mere continued existence of racially identifiable universities was not unlawful given the freedom of students to choose which institution to attend and the varying objectives and features of the State's universities.

At trial's end, based on the testimony of 71 witnesses and 56,700 pages of exhibits, the District Court entered extensive findings of fact. The court first offered a historical overview of the higher education institutions in Mississippi and the developments in the system between 1954 and the filing of this suit in 1975. 674 F. Supp., at 1526–1530. It

then made specific findings recounting post-1975 developments, including a description at the time of trial, in those areas of the higher education system under attack by plaintiffs: admission requirements and recruitment; institutional classification and assignment of missions; duplication of programs; facilities and finance; the land grant institutions; faculty and staff; and governance. *Id.*, at 1530–1550.

The court's conclusions of law followed. As an overview, the court outlined the common ground in the action: "Where a state has previously maintained a racially dual system of public education established by law, it assumes an 'affirmative duty' to reform those policies and practices which required or contributed to the separation of races." *Id.*, at 1551. Noting that courts unanimously hold that the affirmative duty to dismantle a racially dual structure in elementary and secondary schools also governs in the higher education context, the court observed that there was disagreement whether *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), applied in all of its aspects to formerly dual systems of higher education, *i. e.*, whether "some level of racial mixture at previously segregated institutions of higher learning is not only desirable but necessary to 'effectively' desegregate the system." 674 F. Supp., at 1552. Relying on a Fifth Circuit three-judge court decision, *Alabama State Teachers Assn. (ASTA)* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (MD Ala. 1968), our *per curiam* affirmance of that case, 393 U. S. 400 (1969), and its understanding of our later decision in *Bazemore* v. *Friday*, 478 U. S. 385 (1986), the court concluded that in the higher education context, "the affirmative duty to desegregate does not contemplate either restricting choice or the achievement of any degree of racial balance." 674 F. Supp., at 1553. Thus, the court stated: "While student enrollment and faculty and staff hiring patterns are to be examined, greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such

policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions." *Id.*, at 1554.

When it addressed the same aspects of the university system covered by the findings of fact in light of the foregoing standard, the court found no violation of federal law in any of them. "In summary, the court finds that current actions on the part of the defendants demonstrate conclusively that the defendants are fulfilling their affirmative duty to disestablish the former *de jure* segregated system of higher education." *Id.*, at 1564.

The Court of Appeals reheard the action en banc and affirmed the decision of the District Court. *Ayers* v. *Allain*, 914 F. 2d 676 (CA5 1990). With a single exception, see *infra*, at 741, it did not disturb the District Court's findings of fact or conclusions of law. The en banc majority agreed that "Mississippi was . . . constitutionally required to eliminate invidious racial distinctions and dismantle its dual system." *Id.*, at 682. That duty, the court held, had been discharged since "the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish . . . ." *Id.*, at 678.

We granted the respective writs of certiorari filed by the United States and the private petitioners. 499 U. S. 958 (1991).

III

The District Court, the Court of Appeals, and respondents recognize and acknowledge that the State of Mississippi had the constitutional duty to dismantle the dual school system that its laws once mandated. Nor is there any dispute that this obligation applies to its higher education system. If the State has not discharged this duty, it remains in violation of the Fourteenth Amendment. *Brown* v. *Board of Education*

and its progeny clearly mandate this observation. Thus, the primary issue in these cases is whether the State has met its affirmative duty to dismantle its prior dual university system.

Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. Thus we have consistently asked whether existing racial identifiability is attributable to the State, see, *e. g.*, *Freeman* v. *Pitts*, 503 U. S. 467, 496 (1992); *Bazemore* v. *Friday*, *supra*, at 407 (WHITE, J., concurring); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 434 (1976); *Gilmore* v. *City of Montgomery*, 417 U. S. 556, 566–567 (1974); and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system. See, *e. g.*, *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 250 (1991); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 18 (1971); *Green* v. *School Bd. of New Kent County*, *supra*, at 435–438.

The Court of Appeals concluded that the State had fulfilled its affirmative obligation to disestablish its prior *de jure* segregated system by adopting and implementing race-neutral policies governing its college and university system. Because students seeking higher education had "real freedom" to choose the institution of their choice, the State need do no more. Even though neutral policies and free choice were not enough to dismantle a dual system of primary or secondary schools, *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), the Court of Appeals thought that universities "differ in character fundamentally" from lower levels of schools, 914 F. 2d, at 686, sufficiently so that our decision in *Bazemore* v. *Friday*, *supra*, justified the conclusion that the State had dismantled its former dual system.

Like the United States, we do not disagree with the Court of Appeals' observation that a state university system is

quite different in very relevant respects from primary and secondary schools. Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice. The State historically has not assigned university students to a particular institution. Moreover, like public universities throughout the country, Mississippi's institutions of higher learning are not fungible—they have been designated to perform certain missions. Students who qualify for admission enjoy a range of choices of which institution to attend. Thus, as the Court of Appeals stated, "[i]t hardly needs mention that remedies common to public school desegregation, such as pupil assignments, busing, attendance quotas, and zoning, are unavailable when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend." 914 F. 2d, at 687.

We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be. Thus, even after a State dismantles its segregative *admissions* policy, there may still be state action that is traceable to the State's prior *de jure* segregation and that continues to foster segregation. The Equal Protection Clause is offended by "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939). If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices. *Freeman*,

supra, at 494; *Dowell*, *supra*, at 250; *Green*, *supra*, at 439; *Florida ex rel. Hawkins* v. *Board of Control of Fla.*, 350 U. S. 413, 414 (1956) *(per curiam)*.[4] We also disagree with respondents that the Court of Appeals and District Court properly relied on our decision in *Bazemore* v. *Friday*, 478 U. S. 385 (1986). *Bazemore* neither requires nor justifies the conclusions reached by the two courts below.[5]

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[4] To the extent we understand private petitioners to urge us to focus on present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system, we reject this position. Private petitioners contend that the State must not only cease its legally authorized discrimination, it must also "eliminate its continuing effects insofar as practicable." Brief for Petitioners in No. 90–6588, p. 44. Though they seem to disavow as radical a remedy as student reassignment in the university setting, *id.*, at 66, their focus on "student enrollment, faculty and staff employment patterns, [and] black citizens' college-going and degree-granting rates," *id.*, at 63, would seemingly compel remedies akin to those upheld in *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), were we to adopt their legal standard. As will become clear, however, the inappropriateness of remedies adopted in *Green* by no means suggests that the racial identifiability of the institutions in a university system is irrelevant to deciding whether a State such as Mississippi has satisfactorily dismantled its prior *de jure* dual system or that the State need not take additional steps to ameliorate such identifiability.

[5] Similarly, reliance on our *per curiam* affirmance in *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (MD Ala. 1968) *(ASTA)*, aff'd, 393 U. S. 400 (1969) *(per curiam)*, is misplaced. In *ASTA*, the state teachers association sought to enjoin construction of an extension campus of Auburn University in Montgomery, Alabama. The three-judge District Court rejected the allegation that such a facility would perpetuate the State's dual system. It found that the State had educationally justifiable reasons for this new campus and that it had acted in good faith in the fields of admissions, faculty, and staff. 289 F. Supp., at 789. The court also noted that it was "reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school." *Ibid.* Respondents are incorrect to suppose that *ASTA* validates policies traceable to the *de jure* system regardless of whether or not they are educationally justifiable or can be practicably altered to reduce their segregative effects.

Bazemore raised the issue whether the financing and operational assistance provided by a state university's extension service to voluntary 4–H and Homemaker Clubs was inconsistent with the Equal Protection Clause because of the existence of numerous all-white and all-black clubs. Though prior to 1965 the clubs were supported on a segregated basis, the District Court had found that the policy of segregation had been completely abandoned and that no evidence existed of any lingering discrimination in either services or membership; any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals. *Bazemore*, *supra*, at 407 (WHITE, J., concurring). In this context, we held inapplicable the *Green* Court's judgment that a voluntary choice program was insufficient to dismantle a *de jure* dual system in public primary and secondary schools, but only after satisfying ourselves that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join.

Bazemore plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system. If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies

not animated by a discriminatory purpose.[6] Because the standard applied by the District Court did not make these inquiries, we hold that the Court of Appeals erred in affirming the District Court's ruling that the State had brought itself into compliance with the Equal Protection Clause in the operation of its higher education system.[7]

IV

Had the Court of Appeals applied the correct legal standard, it would have been apparent from the undisturbed fac-

[6] Of course, if challenged policies are not rooted in the prior dual system, the question becomes whether the fact of racial separation establishes a new violation of the Fourteenth Amendment under traditional principles. *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 250–251 (1991); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977).

[7] The Court of Appeals also misanalyzed the Title VI claim. The court stated that "we are not prepared to say the defendants have failed to meet the duties outlined in the regulations." 914 F. 2d 676, 687–688, n. 11 (CA5 1990). The court added that it need not "discuss the scope of Mississippi's duty under the regulations" because "the duty outlined by the Supreme Court in *Bazemore* controls in Title VI cases." *Ibid.* It will be recalled, however, that the relevant agency and the courts had specifically found no violation of the regulation in *Bazemore* v. *Friday*, 478 U. S. 385, 409 (1986) (WHITE, J., concurring). Insofar as it failed to perform the same factual inquiry and application as the courts in *Bazemore* had made, therefore, the Court of Appeals' reliance on *Bazemore* to *avoid* conducting a similar analysis in these cases was inappropriate.

Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." 34 CFR § 100.3(b)(6)(i) (1991). Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. See *Regents of Univ. of California* v. *Bakke*, 438 U. S. 265, 287 (1978) (opinion of Powell, J.); *id.*, at 328 (opinion of Brennan, WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part); see also *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, 610–611 (1983) (Powell, J., concurring in judgment); *id.*, at 612–613 (O'CONNOR, J., concurring in judgment); *id.*, at 639–643 (STEVENS, J., dissenting). We thus treat the issues in these cases as they are implicated under the Constitution.

tual findings of the District Court that there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race neutral on their face, they substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of the eight public universities. Mississippi must justify these policies or eliminate them.

It is important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior *de jure* system. In highlighting, as we do below, certain remnants of the prior system that are readily apparent from the findings of fact made by the District Court and affirmed by the Court of Appeals,[8] we by no means suggest that the Court of Appeals need not examine, in light of the proper standard, each of the other policies now governing the State's university system that have been challenged or that are challenged on remand in light of the standard that we articulate today. With this caveat in mind, we address four policies of the present system: admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.

We deal first with the current admissions policies of Mississippi's public universities. As the District Court found, the three flagship historically white universities in the sys-

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[8] In this sense, it is important to reiterate that we do not disturb the findings of no discriminatory purpose in the many instances in which the courts below made such conclusions. The private petitioners and the United States, however, need not show such discriminatory intent to establish a constitutional violation for the perpetuation of policies traceable to the prior *de jure* segregative regime which have continuing discriminatory effects. As for present policies that do not have such historical antecedents, a claim of violation of the Fourteenth Amendment cannot be made out without a showing of discriminatory purpose. See *supra*, at 732, n. 6.

tem—University of Mississippi, Mississippi State University, and University of Southern Mississippi—enacted policies in 1963 requiring all entrants to achieve a minimum composite score of 15 on the test administered by the American College Testing Program (ACT). 674 F. Supp., at 1531. The court described the "discriminatory taint" of this policy, *id.*, at 1557, an obvious reference to the fact that, at the time, the average ACT score for white students was 18 and the average score for blacks was 7. 893 F. 2d, at 735. The District Court concluded, and the en banc Court of Appeals agreed, that present admissions standards derived from policies enacted in the 1970's to redress the problem of student unpreparedness. 914 F. 2d, at 679; 674 F. Supp., at 1531. Obviously, this midpassage justification for perpetuating a policy enacted originally to discriminate against black students does not make the present admissions standards any less constitutionally suspect.

The present admissions standards are not only traceable to the *de jure* system and were originally adopted for a discriminatory purpose, but they also have present discriminatory effects. Every Mississippi resident under 21 seeking admission to the university system must take the ACT test. Any applicant who scores at least 15 qualifies for automatic admission to any of the five historically white institutions except Mississippi University for Women, which requires a score of 18 for automatic admission unless the student has a 3.0 high school grade average. Those scoring less than 15 but at least 13 automatically qualify to enter Jackson State University, Alcorn State University, and Mississippi Valley State University. Without doubt, these requirements restrict the range of choices of entering students as to which institution they may attend in a way that perpetuates segregation. Those scoring 13 or 14, with some exceptions, are excluded from the five historically white universities and if they want a higher education must go to one of the historically black institutions or attend junior college with the hope

of transferring to a historically white institution.[9] Proportionately more blacks than whites face this choice: In 1985, 72 percent of Mississippi's white high school seniors achieved an ACT composite score of 15 or better, while less than 30 percent of black high school seniors earned that score. App. 1524–1525. It is not surprising then that Mississippi's universities remain predominantly identifiable by race.

The segregative effect of this automatic entrance standard is especially striking in light of the differences in minimum automatic entrance scores among the regional universities in Mississippi's system. The minimum score for automatic admission to Mississippi University for Women is 18; it is 13 for the historically black universities. Yet Mississippi University for Women is assigned the same institutional mission as two other regional universities, Alcorn State and Mississippi Valley State—that of providing quality undergraduate education. The effects of the policy fall disproportionately on black students who might wish to attend Mississippi University for Women; and though the disparate impact is not as great, the same is true of the minimum standard ACT score of 15 at Delta State University—the other "regional" university—as compared to the historically black "regional" universities where a score of 13 suffices for automatic admission. The courts below made little, if any, effort to justify in educational terms those particular disparities in entrance requirements or to inquire whether it was practicable to eliminate them.

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[9] The District Court's finding that "[v]ery few black students, if any, are actually denied admission to a Mississippi university as a first-time freshman for failure to achieve the minimal ACT score," *Ayers* v. *Allain*, 674 F. Supp. 1523, 1535 (ND Miss. 1987), ignores the inherent self-selection that accompanies public announcement of "automatic" admissions standards. It is logical to think that some percentage of black students who fail to score 15 do *not* seek admission to one of the historically white universities because of this automatic admissions standard.

We also find inadequately justified by the courts below or by the record before us the differential admissions requirements between universities with dissimilar programmatic missions. We do not suggest that absent a discriminatory purpose different programmatic missions accompanied by different admissions standards would be constitutionally suspect simply because one or more schools are racially identifiable. But here the differential admissions standards are remnants of the dual system with a continuing discriminatory effect, and the mission assignments "to some degree follow the historical racial assignments," 914 F. 2d, at 692. Moreover, the District Court did not justify the differing admissions standards based on the different mission assignments. It observed only that in the 1970's, the board of trustees justified a minimum ACT score of 15 because too many students with lower scores were not prepared for the historically white institutions and that imposing the 15 score requirement on admissions to the historically black institutions would decimate attendance at those universities. The District Court also stated that the mission of the regional universities had the more modest function of providing quality undergraduate education. Certainly the comprehensive universities are also, among other things, educating undergraduates. But we think the 15 ACT test score for automatic admission to the comprehensive universities, as compared with a score of 13 for the regionals, requires further justification in terms of sound educational policy.

Another constitutionally problematic aspect of the State's use of the ACT test scores is its policy of denying automatic admission if an applicant fails to earn the minimum ACT score specified for the particular institution, without also resorting to the applicant's high school grades as an additional factor in predicting college performance. The United States produced evidence that the American College Testing Program (ACTP), the administering organization of the ACT, discourages use of ACT scores as the sole admissions crite-

rion on the ground that it gives an incomplete "picture" of the student applicant's ability to perform adequately in college. App. 1209–1210. One ACTP report presented into evidence suggests that "it would be foolish" to substitute a 3- or 4-hour test in place of a student's high school grades as a means of predicting college performance. *Id.*, at 193. The record also indicated that the disparity between black and white students' high school grade averages was much narrower than the gap between their average ACT scores, thereby suggesting that an admissions formula which included grades would increase the number of black students eligible for automatic admission to all of Mississippi's public universities.[10]

The United States insists that the State's refusal to consider information which would better predict college performance than ACT scores alone is irrational in light of most States' use of high school grades and other indicators along with standardized test scores. The District Court observed that the board of trustees was concerned with grade inflation and the lack of comparability in grading practices and course offerings among the State's diverse high schools. Both the District Court and the Court of Appeals found this concern ample justification for the failure to consider high school grade performance along with ACT scores. In our view, such justification is inadequate because the ACT requirement was originally adopted for discriminatory purposes, the

[10] In 1985, 72 percent of white students in Mississippi scored 15 or better on the ACT test, whereas only 30 percent of black students achieved that mark, a difference of nearly 2½ times. By contrast, the disparity among grade averages was not nearly so wide. 43.8 percent of white high school students and 30.5 percent of black students averaged at least a 3.0, and 62.2 percent of whites and 49.2 percent of blacks earned at least a 2.5 grade point average. App. 1524–1525. Though it failed to make specific factfindings on this point, this evidence, which the State does not dispute, is fairly encompassed within the District Court's statement that "[b]lack students on the average score somewhat lower [than white students]." 674 F. Supp., at 1535.

current requirement is traceable to that decision and seemingly continues to have segregative effects, and the State has so far failed to show that the "ACT-only" admissions standard is not susceptible to elimination without eroding sound educational policy.

A second aspect of the present system that necessitates further inquiry is the widespread duplication of programs. "Unnecessary" duplication refers, under the District Court's definition, "to those instances where two or more institutions offer the same nonessential or noncore program. Under this definition, all duplication at the bachelor's level of nonbasic liberal arts and sciences course work and all duplication at the master's level and above are considered to be unnecessary." 674 F. Supp., at 1540. The District Court found that 34.6 percent of the 29 undergraduate programs at historically black institutions are "unnecessarily duplicated" by the historically white universities, and that 90 percent of the graduate programs at the historically black institutions are unnecessarily duplicated at the historically white institutions. *Id.*, at 1541. In its conclusions of law on this point, the District Court nevertheless determined that "there is no proof" that such duplication "is directly associated with the racial identifiability of institutions," and that "there is no proof that the elimination of unnecessary program duplication would be justifiable from an educational standpoint or that its elimination would have a substantial effect on student choice." *Id.*, at 1561.

The District Court's treatment of this issue is problematic from several different perspectives. First, the court appeared to impose the burden of proof on the plaintiffs to meet a legal standard the court itself acknowledged was not yet formulated. It can hardly be denied that such duplication was part and parcel of the prior dual system of higher education—the whole notion of "separate but equal" required duplicative programs in two sets of schools—and that the present unnecessary duplication is a continuation of that practice.

Brown and its progeny, however, established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system. *Brown II*, 349 U. S., at 300. The court's holding that petitioners could not establish the constitutional defect of unnecessary duplication, therefore, improperly shifted the burden away from the State. Second, implicit in the District Court's finding of "unnecessary" duplication is the absence of any educational justification and the fact that some, if not all, duplication may be practicably eliminated. Indeed, the District Court observed that such duplication "cannot be justified economically or in terms of providing quality education." 674 F. Supp., at 1541. Yet by stating that "there is no proof" that elimination of unnecessary duplication would decrease institutional racial identifiability, affect student choice, and promote educationally sound policies, the court did not make clear whether it had directed the parties to develop evidence on these points, and if so, what that evidence revealed. See *id.*, at 1561. Finally, by treating this issue in isolation, the court failed to consider the combined effects of unnecessary program duplication with other policies, such as differential admissions standards, in evaluating whether the State had met its duty to dismantle its prior *de jure* segregated system.

We next address Mississippi's scheme of institutional mission classification, and whether it perpetuates the State's formerly *de jure* dual system. The District Court found that, throughout the period of *de jure* segregation, University of Mississippi, Mississippi State University, and University of Southern Mississippi were the flagship institutions in the state system. They received the most funds, initiated the most advanced and specialized programs, and developed the widest range of curricular functions. At their inception, each was restricted for the education solely of white persons. *Id.*, at 1526–1528. The missions of Mississippi University for Women and Delta State University, by contrast, were more

limited than their other all-white counterparts during the period of legalized segregation. Mississippi University for Women and Delta State University were each established to provide undergraduate education solely for white students in the liberal arts and such other fields as music, art, education, and home economics. *Id.*, at 1527–1528. When they were founded, the three exclusively black universities were more limited in their assigned academic missions than the five all-white institutions. Alcorn State, for example, was designated to serve as "an agricultural college for the education of Mississippi's black youth." *Id.*, at 1527. Jackson State and Mississippi Valley State were established to train black teachers. *Id.*, at 1528. Though the District Court's findings do not make this point explicit, it is reasonable to infer that state funding and curriculum decisions throughout the period of *de jure* segregation were based on the purposes for which these institutions were established.

In 1981, the State assigned certain missions to Mississippi's public universities as they then existed. It classified University of Mississippi, Mississippi State, and Southern Mississippi as "comprehensive" universities having the most varied programs and offering graduate degrees. Two of the historically white institutions, Delta State University and Mississippi University for Women, along with two of the historically black institutions, Alcorn State University and Mississippi Valley State University, were designated as "regional" universities with more limited programs and devoted primarily to undergraduate education. Jackson State University was classified as an "urban" university whose mission was defined by its urban location.

The institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the *de jure* segregated regime. The Court of Appeals expressly disagreed with the District Court by recognizing that the "inequalities among the institutions largely follow the mission designations, and the mis-

sion designations to some degree follow the historical racial assignments." 914 F. 2d, at 692. It nevertheless upheld this facet of the system as constitutionally acceptable based on the existence of good-faith racially neutral policies and procedures. That different missions are assigned to the universities surely limits to some extent an entering student's choice as to which university to seek admittance. While the courts below both agreed that the classification and mission assignments were made without discriminatory purpose, the Court of Appeals found that the record "supports the plaintiffs' argument that the mission designations had the effect of maintaining the more limited program scope at the historically black universities." *Id.*, at 690. We do not suggest that absent discriminatory purpose the assignment of different missions to various institutions in a State's higher education system would raise an equal protection issue where one or more of the institutions become or remain predominantly black or white. But here the issue is whether the State has sufficiently dismantled its prior dual system; and when combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system. On remand, the court should inquire whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects of the State's present policy of mission assignments.

Fourth, the State attempted to bring itself into compliance with the Constitution by continuing to maintain and operate all eight higher educational institutions. The existence of eight instead of some lesser number was undoubtedly occasioned by state laws forbidding the mingling of the races. And as the District Court recognized, continuing to maintain all eight universities in Mississippi is wasteful and irrational. The District Court pointed especially to the facts that Delta State and Mississippi Valley State are only 35 miles apart

and that only 20 miles separate Mississippi State and Mississippi University for Women. 674 F. Supp., at 1563–1564. It was evident to the District Court that "the defendants undertake to fund more institutions of higher learning than are justified by the amount of financial resources available to the state," *id.*, at 1564, but the court concluded that such fiscal irresponsibility was a policy choice of the legislature rather than a feature of a system subject to constitutional scrutiny.

Unquestionably, a larger rather than a smaller number of institutions from which to choose in itself makes for different choices, particularly when examined in the light of other factors present in the operation of the system, such as admissions, program duplication, and institutional mission designations. Though certainly closure of one or more institutions would decrease the discriminatory effects of the present system, see, *e. g.*, *United States* v. *Louisiana*, 718 F. Supp. 499, 514 (ED La. 1989), based on the present record we are unable to say whether such action is constitutionally required.[11] Elimination of program duplication and revision of admissions criteria may make institutional closure unnecessary. However, on remand this issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself affects student choice and perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions.

Because the former *de jure* segregated system of public universities in Mississippi impeded the free choice of pro-

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[11] It should be noted that in correspondence with the board of trustees in 1973, an HEW official expressed the "overall objective" of the Plan to be "that a student's choice of institution or campus, henceforth, will be based on other than racial criteria." App. 205. The letter added that closure of a formerly *de jure* black institution "would create a presumption that a greater burden is being placed upon the black students and faculty in Mississippi." *Id.*, at 206.

spective students, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free. The full range of policies and practices must be examined with this duty in mind. That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one. Whether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that must be addressed on remand.

Because the District Court and the Court of Appeals failed to consider the State's duties in their proper light, the cases must be remanded. To the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VI and remedial proceedings shall be conducted. The decision of the Court of Appeals is vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'Connor, concurring.

I join the opinion of the Court, which requires public universities, like public elementary and secondary schools, to

affirmatively dismantle their prior *de jure* segregation in order to create an environment free of racial discrimination and to make aggrieved individuals whole. See *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955); *Milliken* v. *Bradley*, 418 U. S. 717, 746 (1974). I write separately to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation, and that the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow. In light of the State's long history of discrimination, and the lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems, see *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954); *Sweatt* v. *Painter*, 339 U. S. 629, 634–635 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–641 (1950), the courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices. Where the State can accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith; "at the least it places a heavy burden upon the [State] to explain its preference for an apparently less effective method." *Green* v. *School Bd. of New Kent County*, 391 U. S. 430, 439 (1968). In my view, it also follows from the State's obligation to prove that it has "take[n] all steps" to eliminate policies and practices traceable to *de jure* segregation, *Freeman* v. *Pitts*, 503 U. S. 467, 485 (1992), that if the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible. Only by eliminating a remnant that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its

constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory.

JUSTICE THOMAS, concurring.

"We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard." Du Bois, Schools, 13 The Crisis 111, 112 (1917).

I agree with the Court that a State does not satisfy its obligation to dismantle a dual system of higher education merely by adopting race-neutral policies for the future administration of that system. Today, we hold that "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." *Ante*, at 729. I agree that this statement defines the appropriate standard to apply in the higher education context. I write separately to emphasize that this standard is far different from the one adopted to govern the grade-school context in *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), and its progeny. In particular, because it does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions.

In *Green*, we held that the adoption of a freedom-of-choice plan does not satisfy the obligations of a formerly *de jure* grade-school system should the plan fail to decrease, if not eliminate, the racial imbalance within that system. See *id.*, at 441. Although racial imbalance does not itself establish a violation of the Constitution, our decisions following *Green* indulged the presumption, often irrebuttable in practice, that a presently observed imbalance has been proximately caused by intentional state action during the prior *de jure* era. See, *e. g.*, *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 537 (1979); *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189,

211 (1973). As a result, we have repeatedly authorized the district courts to reassign students, despite the operation of facially neutral assignment policies, in order to eliminate or decrease observed racial imbalances. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 22–31 (1971); *Green*, *supra*, at 442, n. 6.

Whatever the merit of this approach in the grade-school context, it is quite plainly not the approach that we adopt today to govern the higher education context. We explicitly reject the use of remedies as "radical" as student reassignment—*i. e.*, "remedies akin to those upheld in *Green*." *Ante*, at 730, n. 4; see also *ante*, at 728–729. Of necessity, then, we focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself. Thus, a plaintiff cannot obtain relief merely by identifying a persistent racial imbalance, because the district court cannot provide a reassignment remedy designed to eliminate that imbalance directly. Plaintiffs are likely to be able to identify, as these plaintiffs have identified, specific policies traceable to the *de jure* era that continue to produce a current racial imbalance. As a practical matter, then, the district courts administering our standard will spend their time determining whether such policies have been adequately justified—a far narrower, more manageable task than that imposed under *Green*.

A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts, and persists without sound educational justification. When each of these elements has been met, I believe, we are justified in not requiring proof of a present specific intent to discriminate. It is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent. As long as that intent remains, of course, such a policy cannot continue. And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both be-

cause the State has created the dispute through its own prior unlawful conduct, see, *e. g.*, *Keyes*, *supra*, at 209–210, and because discriminatory intent does tend to persist through time, see, *e. g.*, *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 309–310, n. 15 (1977). Although we do not formulate our standard in terms of a burden shift with respect to intent, the factors we do consider—the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense—are precisely those factors that go into determining intent under *Washington* v. *Davis*, 426 U. S. 229 (1976). See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266–267 (1977). Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent.

We have no occasion to elaborate upon what constitutes an adequate justification. Under *Green*, we have recognized that an otherwise unconstitutional policy may be justified if it serves "important and legitimate ends," *Dayton*, *supra*, at 538, or if its elimination is not "practicable," *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 250 (1991). As JUSTICE SCALIA points out, see *post*, at 753–754, our standard appears to mirror these formulations rather closely. Nonetheless, I find most encouraging the Court's emphasis on "sound *educational* practices," *ante*, at 729 (emphasis added); see also, *e. g.*, *ante*, at 731 ("sound educational justification"); *ante*, at 736 ("sound educational policy"). From the beginning, we have recognized that desegregation remedies cannot be designed to ensure the elimination of any remnant at any price, but rather must display "a practical flexibility" and "a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955). Quite obviously, one compelling need to be considered is the *educational* need of the present and

future *students* in the Mississippi university system, for whose benefit the remedies will be crafted.

In particular, we do not foreclose the possibility that there exists "sound educational justification" for maintaining historically black colleges *as such.* Despite the shameful history of state-enforced segregation, these institutions have survived and flourished. Indeed, they have expanded as opportunities for blacks to enter historically white institutions have expanded. Between 1954 and 1980, for example, enrollment at historically black colleges increased from 70,000 to 200,000 students, while degrees awarded increased from 13,000 to 32,000. See S. Hill, National Center for Education Statistics, The Traditionally Black Institutions of Higher Education 1860 to 1982, pp. xiv–xv (1985). These accomplishments have not gone unnoticed:

> "The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and, especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans." Carnegie Commission on Higher Education, From Isolation to Mainstream: Problems of the Colleges Founded for Negroes 11 (1971).

I think it undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically black colleges have become "a symbol of the highest attainments of black culture." J. Preer, Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education 2 (1982). Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a

State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional *diversity* is without "sound educational justification," or that it is even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races. The Court at least hints at the importance of this value when it distinguishes *Green* in part on the ground that colleges and universities "are not fungible." *Ante*, at 729. Although I agree that a State is not constitutionally *required* to maintain its historically black institutions as such, see *ante*, at 743, I do not understand our opinion to hold that a State is *forbidden* to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.

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

With some of what the Court says today, I agree. I agree, of course, that the Constitution compels Mississippi to remove all discriminatory barriers to its state-funded universities. *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*. I agree that the Constitution does not compel Mississippi to remedy funding disparities between its historically black institutions (HBI's) and historically white institutions (HWI's). And I agree that Mississippi's American College Testing Program (ACT) requirements need further review. I reject, however, the effectively unsustainable burden the Court imposes on Mississippi, and all States that formerly operated segregated universities, to demonstrate compliance with *Brown I*. That requirement, which resembles what we prescribed for primary and secondary schools in *Green* v. *School Bd. of New Kent County*, 391 U. S. 430

(1968), has no proper application in the context of higher education, provides no genuine guidance to States and lower courts, and is as likely to subvert as to promote the interests of those citizens on whose behalf the present suit was brought.

I

Before evaluating the Court's handiwork, it is no small task simply to comprehend it. The Court sets forth not one, but seemingly two different tests for ascertaining compliance with *Brown I*—though in the last analysis they come to the same. The Court initially announces the following test, in Part III of its opinion: All policies (i) "traceable to [the State's] prior *[de jure]* system" (ii) "that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—" must be eliminated (iii) to the extent "practicabl[e]" and (iv) consistent with "sound educational" practices. *Ante,* at 731. When the Court comes to applying its test, however, in Part IV of the opinion, "influencing student enrollment decisions" is not merely one example of a "segregative effec[t]," but is elevated to an independent and essential requirement of its own. The policies that must be eliminated are those that (i) are legacies of the dual system, (ii) "contribute to the racial identifiability" of the State's universities (the same as (i) and (ii) in Part III), and, in addition, (iii) do so in a way that "*substantially restrict[s] a person's choice of which institution to enter.*" *Ante,* at 733 (emphasis added). See also *ante,* at 734–735, 738–739, 741–743.

What the Court means by "substantially restrict[ing] a person's choice of which institution to enter" is not clear. During the course of the discussion in Part IV the requirement changes from one of strong coercion ("substantially restrict," *ante,* at 733, "interfere," *ante,* at 741), to one of middling pressure ("restrict," *ante,* at 734, "limi[t]," *ante,* at 741), to one of slight inducement ("inherent[ly] self-selec[t]," *ante,* at 735, n. 9, "affect," *ante,* at 739, 742). If words have any

meaning, in this last stage of decrepitude the requirement is so frail that almost anything will overcome it. Even an open-admissions policy would fall short of ensuring that student choice is un*affected* by state action. The Court's results also suggest that the "restricting choice" requirement is toothless. Nothing else would explain how it could be met by Mississippi's mission designations, program duplication, and operation of all eight formerly *de jure* colleges. Only a test aimed at state action that "affects" student choice could implicate policies such as these, which in no way *restrict* the decision where to attend college. (Indeed, program duplication and continuation of the eight schools have quite the opposite effect; they *multiply*, rather than restrict, limit, or impede the available choices.) At the end of the day, then, the Court dilutes this potentially useful concept to the point of such insignificance that it adds nothing to the Court's test except confusion. It will be a fertile source of litigation.

Almost as inscrutable in its operation as the "restricting choice" requirement is the requirement that challenged state practices perpetuate *de facto* segregation. That is "likely" met, the Court says, by Mississippi's mission designations. *Ante*, at 741. Yet surely it is apparent that by designating three colleges of the same prior disposition (HWI's) as the *only* comprehensive schools, Mississippi encouraged integration; and that the suggested alternative of elevating an HBI to comprehensive status (so that blacks could go there instead of to the HWI's) would have been an invitation to continuing segregation. See *Ayers* v. *Allain*, 674 F. Supp. 1523, 1562 (ND Miss. 1987) ("Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities"). It appears, moreover, that even if a particular practice does not, in isolation, rise to the minimal level of fostering segregation, it can be aggregated with other ones, and the *composite* condemned. See *ante*, at 739–740 ("by treating [the] issue [of program duplication] in isolation, the [district] court failed to consider the combined effects of unnecessary program duplication

with other policies, such as differential admissions standards"); *ante*, at 741 ("[W]hen combined with the differential admission practices and unnecessary program duplication, it is likely that the mission designations . . . tend to perpetuate the segregated system"). It is interesting to speculate how university administrators are going to guess which practices a district judge will choose to aggregate; or how district judges are going to guess when disaggregation is lawful.

The Court appears to suggest that a practice that has been aggregated and condemned may be disaggregated and approved so long as it does not *itself* "perpetuat[e] the segregated higher education system," *ante*, at 742—which seems, of course, to negate the whole purpose of aggregating in the first place. The Court says:

> "Elimination of program duplication and revision of admissions criteria may make institutional closure unnecessary. . . . [O]n remand this issue should be carefully explored by inquiring and determining whether retention of all eight institutions itself . . . perpetuates the segregated higher education system, whether maintenance of each of the universities is educationally justifiable, and whether one or more of them can be practicably closed or merged with other existing institutions." *Ibid.*

Perhaps the Court means, however, that even if retention of all eight institutions is found by itself *not* to "perpetuat[e] the segregated higher education system," it must *still* be found that such retention is "educationally justifiable," or that none of the institutions can be "practicably closed or merged." It is unclear.

Besides the ambiguities inherent in the "restricting choice" requirement and the requirement that the challenged state practice or practices perpetuate segregation, I am not sanguine that there will be comprehensible content to the to-be-defined-later (and, make no mistake about it, outcome-

determinative) notions of "sound educational justification" and "impracticable elimination." In short, except for the results that it produces in the present litigation (which are what they are because the Court says so), I have not the slightest idea how to apply the Court's analysis—and I doubt whether anyone else will.

Whether one consults the Court's description of what it purports to be doing, in Part III, *ante*, at 727–732, or what the Court actually does, in Part IV, *ante*, at 732–743, one must conclude that the Court is essentially applying to universities the amorphous standard adopted for primary and secondary schools in *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968). Like that case, today's decision places upon the State the ordinarily unsustainable burden of proving the negative proposition that *it* is not responsible for extant racial disparity in enrollment. See *ante*, at 728. *Green* requires school boards to prove that racially identifiable schools are *not* the consequence of past or present discriminatory state action, *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 26 (1971); today's opinion requires state university administrators to prove that racially identifiable schools are *not* the consequence of any practice or practices (in such impromptu "aggregation" as might strike the fancy of a district judge) held over from the prior *de jure* regime. This will imperil virtually any practice or program plaintiffs decide to challenge—just as *Green* has—so long as racial imbalance remains. And just as under *Green*, so also under today's decision, the only practicable way of disproving that "existing racial identifiability is attributable to the State," *ante*, at 728, *is to eliminate extant segregation, i. e., to assure racial proportionality in the schools.* Failing that, the State's only defense will be to establish an excuse for each challenged practice—either impracticability of elimination, which is also a theoretical excuse under the *Green* regime, see *Board of Ed. of Oklahoma City Public Schools* v. *Dowell*, 498 U. S. 237, 249–250 (1991),

or sound educational value, which (presumably) is not much different from the "important and legitimate ends" excuse available under *Green,* see *Dayton Bd. of Ed.* v. *Brinkman,* 443 U. S. 526, 538 (1979).

II

Application of the standard (or standards) announced today has no justification in precedent, and in fact runs contrary to a case decided six years ago, see *Bazemore* v. *Friday,* 478 U. S. 385 (1986). The Court relies primarily upon citations of *Green* and other primary and secondary school cases. But those decisions left open the question whether *Green* merits application in the distinct context of higher education. Beyond that, the Court relies on *Brown I, Florida ex rel. Hawkins* v. *Board of Control of Fla.,* 350 U. S. 413 (1956) *(per curiam),* and *Gilmore* v. *City of Montgomery,* 417 U. S. 556 (1974). That reliance also is mistaken.

The constitutional evil of the "separate but equal" regime that we confronted in *Brown I* was that blacks were told to go to one set of schools, whites to another. See *Plessy* v. *Ferguson,* 163 U. S. 537 (1896). What made this "even-handed" racial partitioning offensive to equal protection was its implicit stigmatization of minority students: "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I,* 347 U. S., at 494. In the context of higher education, a context in which students decide whether to attend school and if so where, the only unconstitutional derivations of that bygone system are those that limit access on discriminatory bases; for only they have the potential to generate the harm *Brown I* condemned, and only they have the potential to deny students equal access to the best public education a State has to offer. Legacies of the dual system that permit (or even incidentally facilitate) free choice of racially

identifiable schools—while still assuring each individual student the right to attend *whatever* school he wishes—do not have these consequences.

Our decisions immediately following *Brown I* also fail to sustain the Court's approach. They, too, suggest that former *de jure* States have one duty: to eliminate discriminatory obstacles to admission. *Brown* v. *Board of Education*, 349 U. S. 294 (1955) *(Brown II)*, requires States "to achieve a system of determining admission to the public schools on a nonracial basis," *id.*, at 300–301, as do other cases of that era, see, *e. g.*, *Cooper* v. *Aaron*, 358 U. S. 1, 7 (1958); *Goss* v. *Board of Ed. of Knoxville*, 373 U. S. 683, 687 (1963).

Nor do *Hawkins* or *Gilmore* support what the Court has done. *Hawkins* involved a segregated graduate school, to be sure. But our one-paragraph *per curiam* opinion supports nothing more than what I have said: The duty to dismantle means the duty to establish nondiscriminatory admissions criteria. See 350 U. S., at 414 ("He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates"). Establishment of neutral admissions standards, not the eradication of all "policies traceable to the *de jure* system . . . hav[ing] discriminatory effects," *ante*, at 729, is what *Hawkins* is about. Finally, *Gilmore*, quite simply, is inapposite. All that we did there was uphold an order enjoining a city from granting exclusive access to its parks and recreational facilities to segregated private schools and to groups affiliated with such schools. 417 U. S., at 569. Notably, in the one case that does bear proximately on today's decision, *Bazemore*, *supra*, we declined to apply *Gilmore*. See *Bazemore*, *supra*, at 408 (WHITE, J., concurring) ("Our cases requiring parks and the like to be desegregated lend no support for requiring more than what has been done in this case").

If we are looking to precedent to guide us in the context of higher education, we need not go back 38 years to *Brown I*, read between the lines of *Hawkins*, or conjure authority

(Gilmore) that does not exist. In *Bazemore* v. *Friday*, *supra*, we addressed a dispute parallel in all relevant respects to this one. At issue there was state financing of 4–H and Homemaker youth clubs by the North Carolina Agricultural Extension Service, a division of North Carolina State University. In the *Plessy* era, club affiliations had been dictated by race; after 1964, they were governed by neutral criteria. Yet "there were a great many all-white and all-black clubs" at the time suit was filed. 478 U. S., at 407. We nonetheless declined to adopt *Green*'s requirement that "affirmative action [be taken] to integrate" once segregated-by-law/still segregated-in-fact state institutions. 478 U. S., at 408. We confined *Green* to primary and secondary public schools, where "schoolchildren must go to school" and where "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." 478 U. S, at 408. "[T]his case," we said, "presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy. The mere continued existence of single-race clubs does not make out a constitutional violation." *Ibid.*

The Court asserts that we reached the result we did in *Bazemore* "only after satisfying ourselves that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join," *ante*, at 731—implying that we assured ourselves there, as the Court insists we must do here, that none of the State's practices carried over from *de jure* days incidentally played a part in the decision of which club an individual chose to join. We did no such thing. An accurate description of *Bazemore* was set forth in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989): "mere existence of single-race clubs . . . cannot create a duty to integrate," we said *Bazemore* held, "in absence of *evidence of exclusion by race*," 488 U. S., at 503 (emphasis added)—

not "in absence of evidence of state action playing a part in the decision of which club an individual chose to join." The only thing we "satisfied ourselves" about in *Bazemore* was that the club members' choices were "wholly voluntary and unfettered," 478 U. S., at 407—which does not mean the State "play[ed] [no] part in the decision of which club an individual chose to join," however much the Court may mush the concepts together today. It is, on the face of things, entirely unbelievable that the previously established characteristics of the various all-white and all-black 4–H Clubs (where each of them met, for example) did not even play a part in young people's decisions of which club to join.

Bazemore's standard for dismantling a dual system ought to control here: discontinuation of discriminatory practices and adoption of a neutral admissions policy. To use *Green* nomenclature, modern racial imbalance remains a "vestige" of past segregative practices in Mississippi's universities, in that the previously mandated racial identification continues to affect where students choose to enroll—just as it surely affected which clubs students chose to join in *Bazemore*. We tolerated this vestigial effect in *Bazemore*, squarely rejecting the view that the State was obliged to correct "the racial segregation resulting from [its prior] practice[s]." 478 U. S., at 417 (Brennan, J., dissenting in part). And we declined to require the State, as the Court has today, to prove that no holdover practices of the *de jure* system, *e. g.*, program offerings in the different clubs, played a role in the students' decisions of which clubs to join. If that analysis was correct six years ago in *Bazemore*, and I think it was, it must govern here as well. Like the club attendance in *Bazemore* (and unlike the school attendance in *Green*), attending college is voluntary, not a legal obligation, and which institution particular students attend is determined by their own choice, not by "school boards [who] customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." *Baze-*

more, *supra*, at 408. Indeed, *Bazemore* was a more appealing case than these for adhering to the *Green* approach, since the 4–H Clubs served students similar in age to those in *Green*, and had been "organized in the public schools" until the early 1960's. 478 U. S., at 417.

It is my view that the requirement of compelled integration (whether by student assignment, as in *Green* itself, or by elimination of nonintegrated options, as the Court today effectively decrees) does not apply to higher education. Only one aspect of a historically segregated university system need be eliminated: discriminatory admissions standards. The burden is upon the formerly *de jure* system to show that that has been achieved. Once that has been done, however, it is not just unprecedented, but illogical as well, to establish that former *de jure* States continue to deny equal protection of the law to students whose choices among public university offerings are unimpeded by discriminatory barriers. Unless one takes the position that *Brown I* required States not only to provide equal access to their universities but also to correct lingering disparities between them, that is, to remedy institutional noncompliance with the "equal" requirement of *Plessy*, a State is in compliance with *Brown I* once it establishes that it has dismantled all discriminatory barriers to its public universities. Having done that, a State is free to govern its public institutions of higher learning as it will, unless it is convicted of discriminating anew—which requires both discriminatory intent and discriminatory causation. See *Washington* v. *Davis*, 426 U. S. 229 (1976).

That analysis brings me to agree with the judgment that the Court of Appeals must be reversed in part—for the reason (quite different from the Court's) that Mississippi has not borne the burden of demonstrating that intentionally discriminatory admissions standards have been eliminated. It has been established that Mississippi originally adopted ACT assessments as an admissions criterion because that was an effective means of excluding blacks from the HWI's. See

Ayers v. *Allain*, 674 F. Supp., at 1555; *Ayers* v. *Allain*, 914 F. 2d 676, 690 (CA5 1990) (en banc). Given that finding, the District Court should have required Mississippi to prove that its continued use of ACT requirements does not have a racially exclusionary purpose and effect—a not insubstantial task, see *Freeman* v. *Pitts*, 503 U. S. 467, 503 (SCALIA, J., concurring).

III

I must add a few words about the unanticipated consequences of today's decision. Among petitioners' contentions is the claim that the Constitution requires Mississippi to correct funding disparities between its HBI's and HWI's. The Court rejects that, see *ante*, at 743—as I think it should, since it is students and not colleges that are guaranteed equal protection of the laws. See *Sweatt* v. *Painter*, 339 U. S. 629, 635 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938). But to say that the Constitution does not *require* equal funding is not to say that the Constitution *prohibits* it. The citizens of a State may conclude that if certain of their public educational institutions are used predominantly by whites and others predominantly by blacks, it is desirable to fund those institutions more or less equally.

Ironically enough, however, today's decision seems to prevent adoption of such a conscious policy. What the Court says about duplicate programs is as true of equal funding: The requirement "was part and parcel of the prior dual system." *Ante*, at 738. Moreover, equal funding, like program duplication, facilitates continued segregation—enabling students to attend schools where their own race predominates without paying a penalty in the quality of education. Nor could such an equal-funding policy be saved on the basis that it serves what the Court calls a "sound educational justification." The only conceivable *educational* value it furthers is that of fostering schools in which blacks receive their education in a "majority" setting; but to acknowledge that as a "value" would contradict the compulsory-integration philoso-

phy that underlies *Green.* Just as vulnerable, of course, would be all other programs that have the effect of facilitating the continued existence of predominantly black institutions: elevating an HBI to comprehensive status (but see *ante,* at 740–741, where the Court inexplicably suggests that this action may be required); offering a so-called Afrocentric curriculum, as has been done recently on an experimental basis in some secondary and primary schools, see Jarvis, *Brown* and the Afrocentric Curriculum, 101 Yale L. J. 1285, 1287, and n. 12 (1992); preserving eight separate universities, see *ante,* at 741–742, which is perhaps Mississippi's single policy most segregative in effect; or providing funding for HBI's as HBI's, see 20 U. S. C. §§ 1060–1063c, which does just that.

But this predictable impairment of HBI's should come as no surprise: for incidentally facilitating—indeed, even tolerating—the continued existence of HBI's is not what the Court's test is about, and has never been what *Green* is about. See *Green,* 391 U. S., at 442 ("The Board must be required to formulate a new plan and . . . fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school") (footnote omitted). What the Court's test is designed to achieve is the elimination of predominantly black institutions. While that may be good social policy, the present petitioners, I suspect, would not agree; and there is much to be said for the Court of Appeals' perception in *Ayers,* 914 F. 2d, at 687, that "if no [state] authority exists to deny [the student] the right to attend the institution of his choice, he is done a severe disservice by remedies which, in seeking to maximize integration, minimize diversity and vitiate his choices." But whether or not the Court's antagonism to unintegrated schooling is good policy, it is assuredly not good constitutional law. There is nothing unconstitutional about a "black" school in the sense, not of a school that blacks *must* attend and that whites *cannot,* but of a school that, as a consequence of private choice

in residence or in school selection, contains, and has long contained, a large black majority. See *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 641 (1950). (The Court says this, see *ante*, at 743, but does not appear to mean it, see *ante*, at 730, n. 4.) In a perverse way, in fact, the insistence, whether explicit or implicit, that such institutions not be permitted to endure perpetuates the very stigma of black inferiority that *Brown I* sought to destroy. Not only Mississippi, but Congress itself, seems out of step with the drum that the Court beats today, judging by its passage of an Act entitled "Strengthening Historically Black Colleges and Universities," which authorizes the Education Department to provide money grants to historically black colleges. 20 U. S. C. §§ 1060–1063c. The implementing regulations designate Alcorn State University, Jackson State University, and Mississippi Valley State University as eligible recipients. See 34 CFR § 608.2(b) (1991).

* * *

The Court was asked to decide today whether, in the provision of university education, a State satisfies its duty under *Brown I* by removing discriminatory barriers to admissions. That question required us to choose between the standards established in *Green* and *Bazemore*, both of which involved (as, for the most part, this does) free-choice plans that failed to end *de facto* segregation. Once the confusion engendered by the Court's something-for-all, guidance-to-none opinion has been dissipated, compare *ante*, at 744–745 (O'CONNOR, J., concurring), with *ante*, at 747–749 (THOMAS, J., concurring), it will become apparent that, essentially, the Court has adopted *Green*.

I would not predict, however, that today's opinion will succeed in producing the same result as *Green*—viz., compelling the States to compel racial "balance" in their schools—because of several practical imperfections: because the Court deprives district judges of the most efficient (and perhaps

the only effective) *Green* remedy, mandatory student assignment, see *ante*, at 730, n. 4; because some contradictory elements of the opinion (its suggestion, for example, that Mississippi's mission designations foster, rather than deter, segregation) will prevent clarity of application; and because the virtually standardless discretion conferred upon district judges (see Part I, *supra*) will permit them to do pretty much what they please. What I do predict is a number of years of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominantly white ones. Nothing good will come of this judicially ordained turmoil, except the public recognition that any court that would knowingly impose it must hate segregation. We must find some other way of making that point.

Syllabus

TWO PESOS, INC. *v.* TACO CABANA, INC.

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

No. 91–971. Argued April 21, 1992—Decided June 26, 1992

Respondent, the operator of a chain of Mexican restaurants, sued petitioner, a similar chain, for trade dress infringement under § 43(a) of the Trademark Act of 1946 (Lanham Act), which provides that "[a]ny person who . . . use[s] in connection with any goods or services . . . any false description or representation . . . shall be liable to . . . any person . . . damaged by [such] use." The District Court instructed the jury, *inter alia*, that respondent's trade dress was protected if it either was inherently distinctive—*i. e.*, was not merely descriptive—or had acquired a secondary meaning—*i. e.*, had come through use to be uniquely associated with a specific source. The court entered judgment for respondent after the jury found, among other things, that respondent's trade dress is inherently distinctive but has not acquired a secondary meaning. In affirming, the Court of Appeals ruled that the instructions adequately stated the applicable law, held that the evidence supported the jury's findings, and rejected petitioner's argument that a finding of no secondary meaning contradicted a finding of inherent distinctiveness.

Held: Trade that is inherently distinctive is protectable under § 43(a) without a showing that it has acquired secondary meaning, since such trade dress itself is capable of identifying products or services as coming from a specific source. This is the rule generally applicable to trademarks, see, *e. g.*, Restatement (Third) of Unfair Competition § 13, pp. 37–38, and the protection of trademarks and of trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition. There is no textual basis for applying different analysis to the two. Section 43(a) mentions neither and does not contain the concept of secondary meaning, and that concept, where it does appear in the Lanham Act, is a requirement that applies only to merely descriptive marks and not to inherently distinctive ones. Engrafting a secondary meaning requirement onto § 43(a) also would make more difficult the identification of a producer with its product and thereby undermine the Lanham Act's purposes of securing to a mark's owner the goodwill of his business and protecting consumers' ability to distinguish among competing producers. Moreover, it could have anticompetitive effects by creating burdens on the startup of small businesses. Petitioner's suggestion that such businesses be protected by briefly dispensing with the

secondary meaning requirement at the outset of the trade dress' use is rejected, since there is no basis for such requirement in § 43(a). Pp. 767–776.

932 F. 2d 1113, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 776. STEVENS, J., *post*, p. 776, and THOMAS, J., *post*, p. 785, filed opinions concurring in the judgment.

Kimball J. Corson argued the cause and filed the briefs for petitioner.

Richard G. Taranto argued the cause for respondent. With him on the brief were *H. Bartow Farr III* and *James Eliasberg.**

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the trade dress[1] of a restaurant may be protected under § 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, 15 U. S. C. § 1125(a)

**Arthur M. Handler* and *Ronald S. Katz* filed a brief for the Private Label Manufacturers Association as *amicus curiae* urging reversal.

Bruce P. Keller filed a brief for the United States Trademark Association as *amicus curiae.*

[1] The District Court instructed the jury: "'[T]rade dress' is the total image of the business. Taco Cabana's trade dress may include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the decor, the menu, the equipment used to serve food, the servers' uniforms and other features reflecting on the total image of the restaurant." 1 App. 83–84. The Court of Appeals accepted this definition and quoted from *Blue Bell Bio-Medical* v. *Cin-Bad, Inc.*, 864 F. 2d 1253, 1256 (CA5 1989): "The 'trade dress' of a product is essentially its total image and overall appearance." See 932 F. 2d 1113, 1118 (CA5 1991). It "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *John H. Harland Co.* v. *Clarke Checks, Inc.*, 711 F. 2d 966, 980 (CA11 1983). Restatement (Third) of Unfair Competition § 16, Comment *a* (Tent. Draft No. 2, Mar. 23, 1990).

(1982 ed.), based on a finding of inherent distinctiveness, without proof that the trade dress has secondary meaning.

I

Respondent Taco Cabana, Inc., operates a chain of fast-food restaurants in Texas. The restaurants serve Mexican food. The first Taco Cabana restaurant was opened in San Antonio in September 1978, and five more restaurants had been opened in San Antonio by 1985. Taco Cabana describes its Mexican trade dress as

> "a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme." 932 F. 2d 1113, 1117 (CA5 1991).

In December 1985, a Two Pesos, Inc., restaurant was opened in Houston. Two Pesos adopted a motif very similar to the foregoing description of Taco Cabana's trade dress. Two Pesos restaurants expanded rapidly in Houston and other markets, but did not enter San Antonio. In 1986, Taco Cabana entered the Houston and Austin markets and expanded into other Texas cities, including Dallas and El Paso where Two Pesos was also doing business.

In 1987, Taco Cabana sued Two Pesos in the United States District Court for the Southern District of Texas for trade dress infringement under § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a) (1982 ed.),[2] and for theft of trade secrets

[2] Section 43(a) provides: "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to de-

under Texas common law. The case was tried to a jury, which was instructed to return its verdict in the form of answers to five questions propounded by the trial judge. The jury's answers were: Taco Cabana has a trade dress; taken as a whole, the trade dress is nonfunctional; the trade dress is inherently distinctive;[3] the trade dress has not acquired a secondary meaning[4] in the Texas market; and the alleged infringement creates a likelihood of confusion on the part of ordinary customers as to the source or association of the restaurant's goods or services. Because, as the jury was told, Taco Cabana's trade dress was protected if it either was inherently distinctive or had acquired a secondary meaning, judgment was entered awarding damages to Taco Cabana. In the course of calculating damages, the trial court held that Two Pesos had intentionally and deliberately infringed Taco Cabana's trade dress.[5]

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scribe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 60 Stat. 441.

This provision has been superseded by § 132 of the Trademark Law Revision Act of 1988, 102 Stat. 3946, 15 U. S. C. § 1121.

[3] The instructions were that, to be found inherently distinctive, the trade dress must not be descriptive.

[4] Secondary meaning is used generally to indicate that a mark or dress "has come through use to be uniquely associated with a specific source." Restatement (Third) of Unfair Competition § 13, Comment *e* (Tent. Draft No. 2, Mar. 23, 1990). "To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 851, n. 11 (1982).

[5] The Court of Appeals agreed: "The weight of the evidence persuades us, as it did Judge Singleton, that Two Pesos brazenly copied Taco Cabana's successful trade dress, and proceeded to expand in a manner that

The Court of Appeals ruled that the instructions adequately stated the applicable law and that the evidence supported the jury's findings. In particular, the Court of Appeals rejected petitioner's argument that a finding of no secondary meaning contradicted a finding of inherent distinctiveness.

In so holding, the court below followed precedent in the Fifth Circuit. In *Chevron Chemical Co.* v. *Voluntary Purchasing Groups, Inc.*, 659 F. 2d 695, 702 (CA5 1981), the court noted that trademark law requires a demonstration of secondary meaning only when the claimed trademark is not sufficiently distinctive of itself to identify the producer; the court held that the same principles should apply to protection of trade dresses. The Court of Appeals noted that this approach conflicts with decisions of other courts, particularly the holding of the Court of Appeals for the Second Circuit in *Vibrant Sales, Inc.* v. *New Body Boutique, Inc.*, 652 F. 2d 299 (1981), cert. denied, 455 U. S. 909 (1982), that § 43(a) protects unregistered trademarks or designs only where secondary meaning is shown. *Chevron*, *supra*, at 702. We granted certiorari to resolve the conflict among the Courts of Appeals on the question whether trade dress that is inherently distinctive is protectible under § 43(a) without a showing that it has acquired secondary meaning.[6] 502 U. S. 1071 (1992). We find that it is, and we therefore affirm.

II

The Lanham Act[7] was intended to make "actionable the deceptive and misleading use of marks" and "to protect per-

foreclosed several lucrative markets within Taco Cabana's natural zone of expansion." 932 F. 2d, at 1127, n. 20.

[6] We limited our grant of certiorari to the above question on which there is a conflict. We did not grant certiorari on the second question presented by the petition, which challenged the Court of Appeals' acceptance of the jury's finding that Taco Cabana's trade dress was not functional.

[7] The Lanham Act, including the provisions at issue here, has been substantially amended since the present suit was brought. See Trademark Law Revision Act of 1988, 102 Stat. 3946, 15 U. S. C. § 1121.

sons engaged in . . . commerce against unfair competition." § 45, 15 U. S. C. § 1127. Section 43(a) "prohibits a broader range of practices than does § 32," which applies to registered marks, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 858 (1982), but it is common ground that § 43(a) protects qualifying unregistered trademarks and that the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a). See *A. J. Canfield Co.* v. *Honickman*, 808 F. 2d 291, 299, n. 9 (CA3 1986); *Thompson Medical Co.* v. *Pfizer Inc.*, 753 F. 2d 208, 215–216 (CA2 1985).

A trademark is defined in 15 U. S. C. § 1127 as including "any word, name, symbol, or device or any combination thereof" used by any person "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." In order to be registered, a mark must be capable of distinguishing the applicant's goods from those of others. § 1052. Marks are often classified in categories of generally increasing distinctiveness; following the classic formulation set out by Judge Friendly, they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful. See *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 9 (CA2 1976). The Court of Appeals followed this classification and petitioner accepts it. Brief for Petitioner 11–15. The latter three categories of marks, because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are entitled to protection. In contrast, generic marks—those that "refe[r] to the genus of which the particular product is a species," *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985), citing *Abercrombie & Fitch*, *supra*, at 9—are not registrable as trademarks. *Park 'N Fly*, *supra*, at 194.

Marks which are merely descriptive of a product are not inherently distinctive. When used to describe a product, they do not inherently identify a particular source, and hence cannot be protected. However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the Act. Section 2 of the Lanham Act provides that a descriptive mark that otherwise could not be registered under the Act may be registered if it "has become distinctive of the applicant's goods in commerce." §§ 2(e), (f), 15 U. S. C. §§ 1052(e), (f). See *Park 'N Fly*, *supra*, at 194, 196. This acquired distinctiveness is generally called "secondary meaning." See *ibid.; Inwood Laboratories*, *supra*, at 851, n. 11; *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 118 (1938). The concept of secondary meaning has been applied to actions under § 43(a). See, *e. g.*, *University of Georgia Athletic Assn.* v. *Laite*, 756 F. 2d 1535 (CA11 1985); *Thompson Medical Co.* v. *Pfizer Inc.*, *supra.*

The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it *either* (1) is inherently distinctive *or* (2) has acquired distinctiveness through secondary meaning. Restatement (Third) of Unfair Competition § 13, pp. 37–38, and Comment *a* (Tent. Draft No. 2, Mar. 23, 1990). Cf. *Park 'N Fly*, *supra*, at 194. It is also clear that eligibility for protection under § 43(a) depends on nonfunctionality. See, *e. g.*, *Inwood Laboratories*, *supra*, at 863 (WHITE, J., concurring in result); see also, *e. g.*, *Brunswick Corp.* v. *Spinit Reel Co.*, 832 F. 2d 513, 517 (CA10 1987); *First Brands Corp.* v. *Fred Meyers, Inc.*, 809 F. 2d 1378, 1381 (CA9 1987); *Stormy Clime Ltd.* v. *ProGroup, Inc.*, 809 F. 2d 971, 974 (CA2 1987); *Ambrit, Inc.* v. *Kraft, Inc.*, 812 F. 2d 1531, 1535 (CA11 1986); *American Greetings Corp.* v. *Dan-Dee Imports, Inc.*, 807 F. 2d 1136, 1141 (CA3 1986). It is, of course, also undisputed that liability under § 43(a) requires proof of the likelihood of confusion. See, *e. g.*, *Brunswick Corp.*, *supra*, at 516–517; *AmBrit*,

supra, at 1535; *First Brands*, *supra*, at 1381; *Stormy Clime*, *supra*, at 974; *American Greetings*, *supra*, at 1141.

The Court of Appeals determined that the District Court's instructions were consistent with the foregoing principles and that the evidence supported the jury's verdict. Both courts thus ruled that Taco Cabana's trade dress was not descriptive but rather inherently distinctive, and that it was not functional. None of these rulings is before us in this case, and for present purposes we assume, without deciding, that each of them is correct. In going on to affirm the judgment for respondent, the Court of Appeals, following its prior decision in *Chevron*, held that Taco Cabana's inherently distinctive trade dress was entitled to protection despite the lack of proof of secondary meaning. It is this issue that is before us for decision, and we agree with its resolution by the Court of Appeals. There is no persuasive reason to apply to trade dress a general requirement of secondary meaning which is at odds with the principles generally applicable to infringement suits under § 43(a). Petitioner devotes much of its briefing to arguing issues that are not before us, and we address only its arguments relevant to whether proof of secondary meaning is essential to qualify an inherently distinctive trade dress for protection under § 43(a).

Petitioner argues that the jury's finding that the trade dress has not acquired a secondary meaning shows conclusively that the trade dress is not inherently distinctive. Brief for Petitioner 9. The Court of Appeals' disposition of this issue was sound:

> "Two Pesos' argument—that the jury finding of inherent distinctiveness contradicts its finding of no secondary meaning in the Texas market—ignores the law in this circuit. While the necessarily imperfect (and often prohibitively difficult) methods for assessing secondary meaning address the empirical question of current consumer association, the legal recognition of an inherently distinctive trademark or trade dress acknowledges the

owner's legitimate proprietary interest in its unique and valuable informational device, regardless of whether substantial consumer association yet bestows the additional empirical protection of secondary meaning." 932 F. 2d, at 1120, n. 7.

Although petitioner makes the above argument, it appears to concede elsewhere in its brief that it is possible for a trade dress, even a restaurant trade dress, to be inherently distinctive and thus eligible for protection under § 43(a). Brief for Petitioner 10–11, 17–18; Reply Brief for Petitioner 10–14. Recognizing that a general requirement of secondary meaning imposes "an unfair prospect of theft [or] financial loss" on the developer of fanciful or arbitrary trade dress at the outset of its use, petitioner suggests that such trade dress should receive limited protection without proof of secondary meaning. *Id.*, at 10. Petitioner argues that such protection should be only temporary and subject to defeasance when over time the dress has failed to acquire a secondary meaning. This approach is also vulnerable for the reasons given by the Court of Appeals. If temporary protection is available from the earliest use of the trade dress, it must be because it is neither functional nor descriptive, but an inherently distinctive dress that is capable of identifying a particular source of the product. Such a trade dress, or mark, is not subject to copying by concerns that have an equal opportunity to choose their own inherently distinctive trade dress. To terminate protection for failure to gain secondary meaning over some unspecified time could not be based on the failure of the dress to retain its fanciful, arbitrary, or suggestive nature, but on the failure of the user of the dress to be successful enough in the marketplace. This is not a valid basis to find a dress or mark ineligible for protection. The user of such a trade dress should be able to maintain what competitive position it has and continue to seek wider identification among potential customers.

This brings us to the line of decisions by the Court of Appeals for the Second Circuit that would find protection for trade dress unavailable absent proof of secondary meaning, a position that petitioner concedes would have to be modified if the temporary protection that it suggests is to be recognized. Brief for Petitioner 10–14. In *Vibrant Sales, Inc.* v. *New Body Boutique, Inc.*, 652 F. 2d 299 (1981), the plaintiff claimed protection under § 43(a) for a product whose features the defendant had allegedly copied. The Court of Appeals held that unregistered marks did not enjoy the "presumptive source association" enjoyed by registered marks and hence could not qualify for protection under § 43(a) without proof of secondary meaning. *Id.*, at 303, 304. The court's rationale seemingly denied protection for unregistered, but inherently distinctive, marks of all kinds, whether the claimed mark used distinctive words or symbols or distinctive product design. The court thus did not accept the arguments that an unregistered mark was capable of identifying a source and that copying such a mark could be making any kind of a false statement or representation under § 43(a).

This holding is in considerable tension with the provisions of the Lanham Act. If a verbal or symbolic mark or the features of a product design may be registered under § 2, it necessarily is a mark "by which the goods of the applicant may be distinguished from the goods of others," 60 Stat. 428, and must be registered unless otherwise disqualified. Since § 2 requires secondary meaning only as a condition to registering descriptive marks, there are plainly marks that are registrable without showing secondary meaning. These same marks, even if not registered, remain inherently capable of distinguishing the goods of the users of these marks. Furthermore, the copier of such a mark may be seen as falsely claiming that his products may for some reason be thought of as originating from the plaintiff.

Some years after *Vibrant*, the Second Circuit announced in *Thompson Medical Co.* v. *Pfizer Inc.*, 753 F. 2d 208 (1985),

that in deciding whether an unregistered mark is eligible for protection under § 43(a), it would follow the classification of marks set out by Judge Friendly in *Abercrombie & Fitch*, 537 F. 2d, at 9. Hence, if an unregistered mark is deemed merely descriptive, which the verbal mark before the court proved to be, proof of secondary meaning is required; however, "[s]uggestive marks are eligible for protection without any proof of secondary meaning, since the connection between the mark and the source is presumed." 753 F. 2d, at 216. The Second Circuit has nevertheless continued to deny protection for trade dress under § 43(a) absent proof of secondary meaning, despite the fact that § 43(a) provides no basis for distinguishing between trademark and trade dress. See, *e. g.*, *Stormy Clime Ltd.* v. *ProGroup, Inc.*, 809 F. 2d, at 974; *Union Mfg. Co.* v. *Han Baek Trading Co.*, 763 F. 2d 42, 48 (1985); *LeSportsac, Inc.* v. *K mart Corp.*, 754 F. 2d 71, 75 (1985).

The Fifth Circuit was quite right in *Chevron*, and in this case, to follow the *Abercrombie* classifications consistently and to inquire whether trade dress for which protection is claimed under § 43(a) is inherently distinctive. If it is, it is capable of identifying products or services as coming from a specific source and secondary meaning is not required. This is the rule generally applicable to trademarks, and the protection of trademarks and trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition. There is no persuasive reason to apply different analysis to the two. The "proposition that secondary meaning must be shown even if the trade dress is a distinctive, identifying mark, [is] wrong, for the reasons explained by Judge Rubin for the Fifth Circuit in *Chevron*." *Blau Plumbing, Inc.* v. *S. O. S. Fix-It, Inc.*, 781 F. 2d 604, 608 (CA7 1986). The Court of Appeals for the Eleventh Circuit also follows *Chevron*, *Ambrit, Inc.* v. *Kraft, Inc.*, 805 F. 2d 974, 979 (1986), and the Court of Appeals for the Ninth Circuit appears to think that proof of secondary meaning is super-

fluous if a trade dress is inherently distinctive, *Fuddruckers, Inc.* v. *Doc's B. R. Others, Inc.*, 826 F. 2d 837, 843 (1987).

It would be a different matter if there were textual basis in § 43(a) for treating inherently distinctive verbal or symbolic trademarks differently from inherently distinctive trade dress. But there is none. The section does not mention trademarks or trade dress, whether they be called generic, descriptive, suggestive, arbitrary, fanciful, or functional. Nor does the concept of secondary meaning appear in the text of § 43(a). Where secondary meaning does appear in the statute, 15 U. S. C. § 1052 (1982 ed.), it is a requirement that applies only to merely descriptive marks and not to inherently distinctive ones. We see no basis for requiring secondary meaning for inherently distinctive trade dress protection under § 43(a) but not for other distinctive words, symbols, or devices capable of identifying a producer's product.

Engrafting onto § 43(a) a requirement of secondary meaning for inherently distinctive trade dress also would undermine the purposes of the Lanham Act. Protection of trade dress, no less than of trademarks, serves the Act's purpose to "secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers. National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly*, 469 U. S., at 198, citing S. Rep. No. 1333, 79th Cong., 2d Sess., 3–5 (1946) (citations omitted). By making more difficult the identification of a producer with its product, a secondary meaning requirement for a nondescriptive trade dress would hinder improving or maintaining the producer's competitive position.

Suggestions that under the Fifth Circuit's law, the initial user of any shape or design would cut off competition from

products of like design and shape are not persuasive. Only nonfunctional, distinctive trade dress is protected under § 43(a). The Fifth Circuit holds that a design is legally functional, and thus unprotectible, if it is one of a limited number of equally efficient options available to competitors and free competition would be unduly hindered by according the design trademark protection. See *Sicilia Di R. Biebow & Co.* v. *Cox*, 732 F. 2d 417, 426 (1984). This serves to assure that competition will not be stifled by the exhaustion of a limited number of trade dresses.

On the other hand, adding a secondary meaning requirement could have anticompetitive effects, creating particular burdens on the startup of small companies. It would present special difficulties for a business, such as respondent, that seeks to start a new product in a limited area and then expand into new markets. Denying protection for inherently distinctive nonfunctional trade dress until after secondary meaning has been established would allow a competitor, which has not adopted a distinctive trade dress of its own, to appropriate the originator's dress in other markets and to deter the originator from expanding into and competing in these areas.

As noted above, petitioner concedes that protecting an inherently distinctive trade dress from its inception may be critical to new entrants to the market and that withholding protection until secondary meaning has been established would be contrary to the goals of the Lanham Act. Petitioner specifically suggests, however, that the solution is to dispense with the requirement of secondary meaning for a reasonable, but brief, period at the outset of the use of a trade dress. Reply Brief for Petitioner 11–12. If § 43(a) does not require secondary meaning at the outset of a business' adoption of trade dress, there is no basis in the statute to support the suggestion that such a requirement comes into being after some unspecified time.

III

We agree with the Court of Appeals that proof of secondary meaning is not required to prevail on a claim under § 43(a) of the Lanham Act where the trade dress at issue is inherently distinctive, and accordingly the judgment of that court is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I write separately to note my complete agreement with JUSTICE THOMAS's explanation as to how the language of § 43(a) and its common-law derivation are broad enough to embrace inherently distinctive trade dress. Nevertheless, because I find that analysis to be complementary to (and not inconsistent with) the Court's opinion, I concur in the latter.

JUSTICE STEVENS, concurring in the judgment.

As the Court notes in its opinion, the text of § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a) (1982 ed.), "does not mention trademarks or trade dress." *Ante*, at 774. Nevertheless, the Court interprets this section as having created a federal cause of action for infringement of an unregistered trademark or trade dress and concludes that such a mark or dress should receive essentially the same protection as those that are registered. Although I agree with the Court's conclusion, I think it is important to recognize that the meaning of the text has been transformed by the federal courts over the past few decades. I agree with this transformation, even though it marks a departure from the original text, because it is consistent with the purposes of the statute and has recently been endorsed by Congress.

I

It is appropriate to begin with the relevant text of § 43(a).[1] See, *e. g.*, *Moskal* v. *United States*, 498 U. S. 103 (1990); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988); *United States* v. *Turkette*, 452 U. S. 576, 580 (1981). Section 43(a)[2] provides a federal remedy for using either "a false designation of origin" or a "false description or representation" in connection with any goods or services. The full text of the section makes it clear that the word "origin" refers to the geographic location in which the goods originated, and in fact, the phrase "false designation of origin" was understood to be limited to false advertising of geographic origin. For example, the "false designation of origin" language con-

[1] The text that we consider today is § 43(a) of the Lanham Act prior to the 1988 amendments; it provides:

"Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 15 U. S. C. § 1125(a) (1982 ed.).

[2] Section 43(a) replaced and extended the coverage of § 3 of the Trademark Act of 1920, 41 Stat. 534, as amended. Section 3 was destined for oblivion largely because it referred only to false designation of origin, was limited to articles of merchandise, thus excluding services, and required a showing that the use of the false designation of origin occurred "willfully and with intent to deceive." *Ibid.* As a result, "[a]lmost no reported decision can be found in which relief was granted to either a United States or foreign party based on this newly created remedy." Derenberg, Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?, 32 N. Y. U. L. Rev. 1029, 1034 (1957).

tained in the statute makes it unlawful to represent that California oranges came from Florida, or vice versa.[3]

For a number of years after the 1946 enactment of the Lanham Act, a "false description or representation," like "a false designation of origin," was construed narrowly. The phrase encompassed two kinds of wrongs: false advertising[4] and the common-law tort of "passing off."[5] False advertising meant representing that goods or services possessed characteristics that they did not actually have and passing off meant representing one's goods as those of another. Neither "secondary meaning" nor "inherent distinctiveness" had anything to do with false advertising, but proof of secondary meaning was an element of the common-law

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[3] This is clear from the fact that the cause of action created by this section is available only to a person doing business in the locality falsely indicated as that of origin. See n. 1, *supra.*

[4] The deleterious effects of false advertising were described by one commentator as follows: "[A] campaign of false advertising may completely discredit the product of an industry, destroy the confidence of consumers and impair a communal or trade good will. Less tangible but nevertheless real is the injury suffered by the honest dealer who finds it necessary to meet the price competition of inferior goods, glamorously misdescribed by the unscrupulous merchant. The competition of a liar is always dangerous even though the exact injury may not be susceptible of precise proof." Handler, Unfair Competition, 21 Iowa L. Rev. 175, 193 (1936).

[5] The common-law tort of passing off has been described as follows:

"Beginning in about 1803, English and American common law slowly developed an offshoot of the tort of fraud and deceit and called it 'passing off' or 'palming off.' Simply stated, passing off as a tort consists of one passing off his goods as the goods of another. In 1842 Lord Langdale wrote:

"'I think that the principle on which both the courts of law and equity proceed is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man. . . .'

"In 19th century cases, trademark infringement embodied much of the elements of fraud and deceit from which trademark protection developed. That is, the element of fraudulent intent was emphasized over the objective facts of consumer confusion." 1 J. McCarthy, Trademarks and Unfair Competition § 5.2, p. 133 (2d ed. 1984) (McCarthy) (footnotes omitted).

passing-off cause of action. See, *e. g.*, *G. & C. Merriam Co.* v. *Saalfield*, 198 F. 369, 372 (CA6 1912) ("The ultimate offense always is that defendant has passed off his goods as and for those of the complainant").

II

Over time, the Circuits have expanded the categories of "false designation of origin" and "false description or representation." One treatise[6] identified the Court of Appeals for the Sixth Circuit as the first to broaden the meaning of "origin" to include "origin of source or manufacture" in addition to geographic origin.[7] Another early case, described as unique among the Circuit cases because it was so "forward-looking,"[8] interpreted the "false description or representation" language to mean more than mere "palming off." *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 214 F. 2d 649 (CA3 1954). The court explained: "We find nothing in the legislative history of the Lanham Act to justify the view that [§ 43(a)] is merely declarative of existing law. . . . It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts." *Id.*, at 651. Judge Clark, writing a concurrence in 1956, presciently observed: "Indeed, there is indication here and elsewhere that the bar has not yet realized the potential impact of this statutory provision [§ 43(a)]." *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 546 (CA2). Although some have criticized the expansion as unwise,[9] it is now "a firmly

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[6] 2 *id.*, § 27:3, p. 345.

[7] *Federal-Mogul-Bower Bearings, Inc.* v. *Azoff*, 313 F. 2d 405, 408 (CA6 1963).

[8] Derenberg, 32 N. Y. U. L. Rev., at 1047, 1049.

[9] See, *e. g.*, Germain, Unfair Trade Practices Under § 43(a) of the Lanham Act: You've Come a Long Way Baby—Too Far, Maybe?, 64 Trademark Rep. 193, 194 (1974) ("It is submitted that the cases have applied Section

embedded reality."[10] The United States Trade Association Trademark Review Commission noted this transformation with approval: "Section 43(a) is an enigma, but a very popular one. Narrowly drawn and intended to reach false designations or representations as to the geographical origin of products, the section has been widely interpreted to create, in essence, a federal law of unfair competition. . . . It has definitely eliminated a gap in unfair competition law, and its vitality is showing no signs of age."[11]

Today, it is less significant whether the infringement falls under "false designation of origin" or "false description or representation"[12] because in either case § 43(a) may be invoked. The federal courts are in agreement that § 43(a) creates a federal cause of action for trademark and trade dress infringement claims. 1 J. Gilson, Trademark Protection and Practice § 2.13, p. 2–178 (1991). They are also in agreement that the test for liability is likelihood of confusion: "[U]nder the Lanham Act [§ 43(a)], the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks. . . . Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical—is there a 'likelihood of confusion?'" *New West Corp.* v. *NYM Co. of California, Inc.*, 595 F. 2d 1194, 1201 (CA9 1979) (footnote omitted). And the Circuits are in

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43(a) to situations it was not intended to cover and have used it in ways that it was not designed to function").

[10] 2 McCarthy § 27:3, p. 345.

[11] The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 Trademark Rep. 375, 426 (1987).

[12] Indeed, in count one of the complaint, respondent alleged that petitioner "is continuing to affix, apply, or use in connection with its restaurants, goods and services a false designation o[f] origin, or a false description and representation, tending to falsely describe or represent the same," and that petitioner "has falsely designated the origin of its restaurants, goods and services and has falsely described and represented the same . . . ." App. 44–45; see Tr. of Oral Arg. 37.

general agreement,[13] with perhaps the exception of the Second Circuit,[14] that secondary meaning need not be established once there is a finding of inherent distinctiveness in order to establish a trade dress violation under § 43(a).

III

Even though the lower courts' expansion of the categories contained in § 43(a) is unsupported by the text of the Act, I am persuaded that it is consistent with the general purposes of the Act. For example, Congressman Lanham, the bill's sponsor, stated: "The purpose of [the Act] is to protect le-

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[13] See, *e. g.*, *AmBrit, Inc.* v. *Kraft, Inc.*, 805 F. 2d 974 (CA11 1986), cert. denied, 481 U. S. 1041 (1987); *Blau Plumbing, Inc.* v. *S. O. S. Fix-It, Inc.*, 781 F. 2d 604 (CA7 1986); *In re Morton-Norwich Products, Inc.*, 671 F. 2d 1332, 1343 (C. C. P. A. 1982); *Chevron Chemical Co.* v. *Voluntary Purchasing Groups, Inc.*, 659 F. 2d 695 (CA5 1981), cert. denied, 457 U. S. 1126 (1982); see also *Fuddruckers, Inc.* v. *Doc's B. R. Others, Inc.*, 826 F. 2d 837, 843–844 (CA9 1987); *M. Kramer Mfg. Co.* v. *Andrews*, 783 F. 2d 421, 449, n. 26 (CA4 1986).

[14] Consistent with the common-law background of § 43(a), the Second Circuit has said that proof of secondary meaning is required to establish a claim that the defendant has traded on the plaintiff's good will by falsely representing that his goods are those of the plaintiff. See, *e. g.*, *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 F. 299 (1917). To my knowledge, however, the Second Circuit has not explained why "inherent distinctiveness" is not an appropriate substitute for proof of secondary meaning in a trade dress case. Most of the cases in which the Second Circuit has said that secondary meaning is required did not involve findings of inherent distinctiveness. For example, in *Vibrant Sales, Inc.* v. *New Body Boutique, Inc.*, 652 F. 2d 299 (1981), cert. denied, 455 U. S. 909 (1982), the product at issue—a velcro belt—was functional and lacked "any distinctive, unique or non-functional mark or feature." 652 F. 2d, at 305. Similarly, in *Stormy Clime Ltd.* v. *ProGroup, Inc.*, 809 F. 2d 971, 977 (1987), the court described functionality as a continuum, and placed the contested rainjacket closer to the functional end than to the distinctive end. Although the court described the lightweight bag in *LeSportsac, Inc.* v. *K mart Corp.*, 754 F. 2d 71 (1985), as having a distinctive appearance and concluded that the District Court's finding of nonfunctionality was not clearly erroneous, *id.*, at 74, it did not explain why secondary meaning was also required in such a case.

gitimate business and the consumers of the country."[15] 92 Cong. Rec. 7524 (1946). One way of accomplishing these dual goals was by creating uniform legal rights and remedies that were appropriate for a national economy. Although the protection of trademarks had once been "entirely a State matter," the result of such a piecemeal approach was that there were almost "as many different varieties of common law as there are States" so that a person's right to a trademark "in one State may differ widely from the rights which [that person] enjoys in another." H. R. Rep. No. 944, 76th Cong., 1st Sess., 4 (1939). The House Committee on Trademarks and Patents, recognizing that "trade is no longer local, but . . . national," saw the need for "national legislation along national lines [to] secur[e] to the owners of trademarks in interstate commerce definite rights." *Ibid.*[16]

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[15] The Senate Report elaborated on these two goals:

"The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner." S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946).

By protecting trademarks, Congress hoped "to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. This is the end to which this bill is directed." *Id.*, at 4.

[16] Forty years later, the USTA Trademark Review Commission assessed the state of trademark law. The conclusion that it reached serves as a testimonial to the success of the Act in achieving its goal of uniformity: "The federal courts now decide, under federal law, all but a few trademark disputes. State trademark law and state courts are less influential than ever. Today the Lanham Act is the paramount source of trademark law in the United States, as interpreted almost exclusively by the federal courts." Trademark Review Commission, 77 Trademark Rep., at 377.

Congress has revisited this statute from time to time, and has accepted the "judicial legislation" that has created this federal cause of action. Recently, for example, in the Trademark Law Revision Act of 1988, 102 Stat. 3935, Congress codified the judicial interpretation of § 43(a), giving its *imprimatur* to a growing body of case law from the Circuits that had expanded the section beyond its original language.

Although Congress has not specifically addressed the question whether secondary meaning is required under § 43(a), the steps it has taken in this subsequent legislation suggest that secondary meaning is not required if inherent distinctiveness has been established.[17] First, Congress broadened the language of § 43(a) to make explicit that the provision prohibits "any word, term, name, symbol, or device, or any combination thereof" that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U. S. C. § 1125(a). That language makes clear that a confusingly similar trade dress is actionable under § 43(a), without necessary reference to "falsity." Second, Congress approved and confirmed the extensive judicial development under the provision, including its application to trade dress that the federal courts had come to apply.[18] Third, the legis-

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[17] "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309 (1911); see *NLRB* v. *Bell Aerospace Co. of Textron, Inc.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969); *United States* v. *Stafoff*, 260 U. S. 477, 480 (1923) (opinion of Holmes, J.).

[18] As the Senate Report explained, revision of § 43(a) is designed "to codify the interpretation it has been given by the courts. Because Section 43(a) of the Act fills an important gap in federal unfair compe-

lative history of the 1988 amendments reaffirms Congress' goals of protecting both businesses and consumers with the Lanham Act.[19] And fourth, Congress explicitly extended to any violation of § 43(a) the basic Lanham Act remedial provisions whose text previously covered only registered trademarks.[20] The aim of the amendments was to apply the same protections to unregistered marks as were already afforded to registered marks. See S. Rep. No. 100–515, p. 40 (1988). These steps buttress the conclusion that § 43(a) is properly understood to provide protection in accordance with the standards for registration in § 2. These aspects of the 1988 legislation bolster the claim that an inherently distinctive trade dress may be protected under § 43(a) without proof of secondary meaning.

IV

In light of the consensus among the Courts of Appeals that have actually addressed the question, and the steps on the part of Congress to codify that consensus, *stare decisis* concerns persuade me to join the Court's conclusion that secondary meaning is not required to establish a trade dress violation under § 43(a) once inherent distinctiveness

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tition law, the committee expects the courts to continue to interpret the section.

"As written, Section 43(a) appears to deal only with false descriptions or representations and false designations of geographic origin. Since its enactment in 1946, however, it has been widely interpreted as creating, in essence, a federal law of unfair competition. For example, it has been applied to cases involving the infringement of unregistered marks, violations of trade dress and certain nonfunctional configurations of goods and actionable false advertising claims." S. Rep. No. 100–515, p. 40 (1988).

[19] "Trademark protection is important to both consumers and producers. Trademark law protects the public by making consumers confident that they can identify brands they prefer and can purchase those brands without being confused or misled. Trademark laws also protec[t] trademark owners. When the owner of a trademark has spent conside[r]able time and money bringing a product to the marketplace, trademark law protects the producer from pirates and counterfeiters." *Id.*, at 4.

[20] See 15 U. S. C. §§ 1114, 1116–1118.

has been established. Accordingly, I concur in the judgment, but not in the opinion, of the Court.

JUSTICE THOMAS, concurring in the judgment.

Both the Court and JUSTICE STEVENS decide today that the principles that qualify a mark for registration under § 2 of the Lanham Act apply as well to determining whether an unregistered mark is entitled to protection under § 43(a). The Court terms that view "common ground," though it fails to explain why that might be so, and JUSTICE STEVENS decides that the view among the Courts of Appeals is textually insupportable, but worthy nonetheless of adherence. See *ante*, at 768 (opinion of the Court); *ante*, at 781–782 (STEVENS, J., concurring in judgment). I see no need in answering the question presented either to move back and forth among the different sections of the Lanham Act or to adopt what may or may not be a misconstruction of the statute for reasons akin to *stare decisis*. I would rely, instead, on the language of § 43(a).

Section 43(a) made actionable (before being amended) "any false description or representation, including words or other symbols tending falsely to describe or represent," when "use[d] in connection with any goods or services." 15 U. S. C. § 1125(a) (1982 ed.). This language codified, among other things, the related common-law torts of technical trademark infringement and passing off, see *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 861, n. 2 (1982) (WHITE, J., concurring in result); *Chevron Chemical Co.* v. *Voluntary Purchasing Groups, Inc.*, 659 F. 2d 695, 701 (CA5 1981), cert. denied, 457 U. S. 1126 (1982), which were causes of action for false descriptions or representations concerning a good's or service's source of production, see, *e. g.*, *Yale Electric Corp.* v. *Robertson*, 26 F. 2d 972, 973 (CA2 1928); *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 F. 281, 284–286 (CA6 1900).

At common law, words or symbols that were arbitrary, fanciful, or suggestive (called "inherently distinctive" words or symbols, or "trademarks") were presumed to represent the source of a product, and the first user of a trademark could sue to protect it without having to show that the word or symbol represented the product's source in fact. See, *e. g.*, *Heublein* v. *Adams*, 125 F. 782, 784 (CC Mass. 1903). That presumption did not attach to personal or geographic names or to words or symbols that only described a product (called "trade names"), and the user of a personal or geographic name or of a descriptive word or symbol could obtain relief only if he first showed that his trade name did in fact represent not just the product, but a producer (that the good or service had developed "secondary meaning"). See, *e. g.*, *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73, 74–75 (CA2 1910). Trade dress, which consists not of words or symbols, but of a product's packaging (or "image," more broadly), seems at common law to have been thought incapable ever of being inherently distinctive, perhaps on the theory that the number of ways to package a product is finite. Thus, a user of trade dress would always have had to show secondary meaning in order to obtain protection. See, *e. g.*, *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 F. 299, 300–301 (CA2 1917); *Flagg Mfg. Co.* v. *Holway*, 178 Mass. 83, 91, 59 N. E. 667 (1901); *Philadelphia Novelty Mfg. Co.* v. *Rouss*, 40 F. 585, 587 (CC SDNY 1889); see also J. Hopkins, Law of Trademarks, Tradenames and Unfair Competition § 54, pp. 140–141 (3d ed. 1917); W. Browne, Law of Trade-Marks §§ 89*b*, 89*c*, pp. 106–110 (2d ed. 1885); Restatement (Third) of the Law of Unfair Competition § 16, Comment *b* (Tent. Draft No. 2, Mar. 23, 1990) (hereinafter Third Restatement).

Over time, judges have come to conclude that packages or images may be as arbitrary, fanciful, or suggestive as words or symbols, their numbers limited only by the human imagination. See, *e. g.*, *AmBrit, Inc.* v. *Kraft, Inc.*, 812 F. 2d 1531, 1536 (CA11 1986) ("square size, bright coloring, pebbled tex-

ture, polar bear and sunburst images" of the package of the "Klondike" ice cream bar held inherently distinctive), cert. denied, 481 U. S. 1041 (1987); see also Third Restatement §§ 13, 16. A particular trade dress, then, is now considered as fully capable as a particular trademark of serving as a "representation or designation" of source under § 43(a). As a result, the first user of an arbitrary package, like the first user of an arbitrary word, should be entitled to the presumption that his package represents him without having to show that it does so in fact. This rule follows, in my view, from the language of § 43(a), and this rule applies under that section without regard to the rules that apply under the sections of the Lanham Act that deal with registration.

Because the Court reaches the same conclusion for different reasons, I join its judgment.

Syllabus

FRANKLIN, SECRETARY OF COMMERCE, ET AL. *v.* MASSACHUSETTS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 91–1502. Argued April 21, 1992—Decided June 26, 1992

The Constitution requires that the apportionment of Representatives be determined by an "actual Enumeration" of persons "in each State," conducted every 10 years. Art. I, § 2, cl. 3; Amdt. 14, § 2. After the Secretary of Commerce takes the census in a form and content she determines, 13 U. S. C. § 141(a), she reports the tabulation to the President, § 141(b). He, in turn, sends Congress a statement showing the number of persons in each State, based on data from the "decennial census," and he determines the number of Representatives to which each State will be entitled. 2 U. S. C. § 2a(a). For only the second time since 1900, the Census Bureau (Bureau) allocated the Department of Defense's overseas employees to particular States for reapportionment purposes in the 1990 census, using an allocation method that it determined most closely resembled "usual residence," its standard measure of state affiliation. Appellees Massachusetts and two of its registered voters filed an action against, *inter alios*, the President and the Secretary of Commerce, alleging, among other things, that the decision to allocate federal overseas employees is inconsistent with the Administrative Procedure Act (APA) and the Constitution. In particular, they alleged that the allocation of overseas military personnel resulted in the shift of a Representative from Massachusetts to Washington State. The District Court, *inter alia*, held that the Secretary's decision to allocate such employees to the States was arbitrary and capricious under APA standards, directed the Secretary to eliminate them from the apportionment count, and directed the President to recalculate the number of Representatives and submit the new calculation to Congress.

Held: The judgment is reversed.

785 F. Supp. 230, reversed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. There was no "final agency action" reviewable under the APA. Pp. 796–801.

(a) An agency action is "final" when an agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. Here, the action that creates an entitlement

to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress. He is not required to transmit the Secretary's report directly to Congress. Rather, he uses the data from the "decennial census" in making his statement, and, even after he receives the Secretary's report, he is not prohibited from instructing the Secretary to reform the census. The statutory structure here differs from those statutes under which an agency action automatically triggers a course of action regardless of any discretionary action taken by the President. *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, distinguished. Contrary to appellees' argument, the President's action here is not ceremonial or ministerial. Apportionment is not foreordained by the time the Secretary gives the President the report, and the fact that the final action is the President's is important to the integrity of the process. Pp. 796–800.

(b) The President's actions are not reviewable under the APA. He is not specifically included in the APA's purview, and respect for the separation of powers and the President's unique constitutional position makes textual silence insufficient to subject him to its provisions. Pp. 800–801.

2. The Secretary's allocation of overseas federal employees to their home States is consistent with the constitutional language and goal of equal representation. It is compatible with the standard of "usual residence," which was the gloss given the constitutional phrase "in each State" by the first enumeration Act and which has been used by the Bureau ever since to allocate persons to their home States. The phrase may mean more than mere physical presence, and has been used to include some element of allegiance or enduring tie to a place. The first enumeration Act also used "usual place of abode," "usual resident," and "inhabitant" to describe the required tie. And "Inhabitant," in the related context of congressional residence qualifications, Art. I, §2, has been interpreted to include persons occasionally absent for a considerable time on public or private business. "Usual residence" has continued to hold broad connotations up to the present day. The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that overseas employees have retained ties to their home States, actually promotes equality. Pp. 803–806.

O'Connor, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which Rehnquist, C. J., and White, Scalia, and Thomas, JJ., joined, the opinion of the Court with respect to Part IV, in which Rehnquist, C. J., and White, Blackmun, Stevens, Kennedy, Souter, and Thomas, JJ., joined, and an opinion with respect to Part III, in which Rehnquist, C. J., and White

and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, KENNEDY, and SOUTER, JJ., joined, *post*, p. 807. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 823.

Deputy Solicitor General Roberts argued the cause for appellants. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Edwin S. Kneedler*, *Michael Jay Singer*, and *Mark B. Stern*.

Dwight Golann, Assistant Attorney General of Massachusetts, argued the cause for appellees. With him on the briefs were *Scott Harshbarger*, Attorney General, *Steve Berenson*, Assistant Attorney General, and *John P. Driscoll, Jr.*, *Edward P. Leibensperger*, and *Neil P. Motenko*, Special Assistant Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III.

As one season follows another, the decennial census has again generated a number of reapportionment controversies. This decade, as a result of the 1990 census and reapportionment, Massachusetts lost a seat in the House of Representatives. Appellees Massachusetts and two of its registered voters brought this action against the President, the Secretary of Commerce (Secretary), Census Bureau officials, and the Clerk of the House of Representatives, challenging, among other things, the method used for counting federal employees serving overseas. In particular, the appellants' allocation of 922,819 overseas military personnel to the State

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**Robert Abrams*, Attorney General of New York, *Jerry Boone*, Solicitor General, and *Sanford M. Cohen*, Assistant Attorney General, *Daniel E. Lungren*, Attorney General of California, *Thomas D. Barr*, and *Robert S. Rifkind* filed a brief for the State of New York et al. as *amici curiae* urging affirmance.

Kenneth O. Eikenberry, Attorney General of Washington, *James M. Johnson*, Senior Assistant Attorney General, and *J. Lawrence Coniff* filed a brief for the State of Washington as *amicus curiae*.

designated in their personnel files as their "home of record" altered the relative state populations enough to shift a Representative from Massachusetts to Washington. A three-judge panel of the United States District Court for the District of Massachusetts held that the decision to allocate military personnel serving overseas to their "homes of record" was arbitrary and capricious under the standards of the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.* As a remedy, the District Court directed the Secretary to eliminate the overseas federal employees from the apportionment counts, directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress, and directed the Clerk of the House of Representatives to inform the States of the change. The federal officials appealed. We noted probable jurisdiction, stayed the District Court's order, and ordered expedited briefing and argument. 503 U. S. 442 (1992). We now reverse.

I

Article I, § 2, cl. 3, of the Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," which requires, by virtue of § 2 of the Fourteenth Amendment, "counting the whole number of persons in each State." The number of persons in each State is to be calculated by "actual Enumeration," conducted every 10 years, "in such Manner as [Congress] shall by Law direct." U. S. Const., Art. I, § 2, cl. 3.

The delegates to the Constitutional Convention included the periodic census requirement in order to ensure that entrenched interests in Congress did not stall or thwart needed reapportionment. See 1 M. Farrand, Records of the Federal Convention of 1787, pp. 571, 578–588 (rev. ed. 1966). Their effort was only partially successful, as the congressional battles over the method for calculating the reapportionment still caused delays. After just such a 10-year stalemate after the 1920 census, Congress reformed the reapportionment proc-

ess to make it virtually self-executing, so that the number of Representatives per State would be determined by the Secretary of Commerce and the President without any action by Congress. See S. Rep. No. 2, 71st Cong., 1st Sess., 2–3 (1929) ("The need for legislation of this type is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. . . . As a result, great American constituencies have been robbed of their rightful share of representation . . ."); *Department of Commerce* v. *Montana*, 503 U. S. 442, 451–452, and n. 25 (1992).

Under the automatic reapportionment statute, the Secretary of Commerce takes the census "in such form and content as [s]he may determine." 13 U. S. C. § 141(a). The Secretary is permitted to delegate her authority for establishing census procedures to the Bureau of the Census. See §§ 2, 4. "The tabulation of total population by States . . . as required for the apportionment of Representatives in Congress . . . shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." § 141(b). After receiving the Secretary's report, the President "shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . ." 2 U. S. C. § 2a(a). "Each State shall be entitled . . . to the number of Representatives shown" in the President's statement, and the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." § 2a(b).

With the one-time exception in 1900 of counting overseas servicemen at their family home, the Census Bureau did not allocate federal personnel stationed overseas to particular

States for reapportionment purposes until 1970. App. 175, 177. The 1970 census, taken during the Vietnam War, allocated members of the Armed Forces stationed overseas to their "home of record," using Defense Department personnel records. *Id.*, at 179. "Home of record" is the State declared by the person upon entry into military service, and determines where he or she will be moved after military service is complete. *Id.*, at 149. Because the Bureau found that military personnel were likely to designate a "home of record" with low or no income taxes instead of their true home State—even though home of record does not determine state taxation—the Bureau did not allocate overseas employees to particular States in the 1980 census. App. 180.

Initially, the Bureau took the position that overseas federal employees would not be included in the 1990 state enumerations either. There were, however, stirrings in Congress in favor of including overseas federal employees, especially overseas military, in the state population counts. Several bills requiring the Secretary to include overseas military were introduced but not passed in the 100th and 101st Congresses. See H. R. 3814, 100th Cong., 1st Sess. (1987); H. R. 4234, 100th Cong., 2d Sess. (1988); H. R. 3815, 100th Cong., 1st Sess. (1987); H. R. 4720, 100th Cong., 2d Sess. (1988); S. 2103, 100th Cong., 2d Sess. (1988); H. R. 1468, 101st Cong., 1st Sess. (1989); H. R. 2661, 101st Cong., 1st Sess. (1989); H. R. 3016, 101st Cong., 1st Sess. (1989); S. 290, 101st Cong., 1st Sess. (1989). In July 1989, nine months before the census taking was to begin, then-Secretary of Commerce Robert Mosbacher agreed to allocate overseas federal employees to their home States for purposes of congressional apportionment. App. 182. His decision memorandum cites both the growing congressional support for including overseas employees and the Department of Defense's belief that "its employees should not be excluded from apportionment counts because of temporary and involuntary residence overseas." *Id.*, at 120. Another factor explaining the Secre-

tary's shift was that the Department of Defense, the largest federal overseas employer, planned to poll its employees to determine, among other things, which State they considered their permanent home. *Id.*, at 184. In December 1989, however, the Defense Department canceled its plans to conduct the survey due to a lack of funds. *Ibid.* As an alternative, the Defense Department suggested that it could provide data on its employees' last six months of residence in the United States, information that would be more complete and up-to-date than the home of record data already in the personnel files. This possibility also failed to materialize when the Defense Department informed the Census Bureau that it was not able to assemble the information after all. *Ibid.*

In the meantime, two more bills were introduced in Congress, but not passed, which would have required the Census Bureau to apportion members of the overseas military to their home States using the "home of record" data already in their personnel files. See H. R. 4903, 101st Cong., 2d Sess. (1990); S. 2675, 101st Cong., 2d Sess. (1990). In July 1990, six months before the census count was due to be reported to the President, the Census Bureau decided to allocate the Department of Defense's overseas employees to the States based on their "home of record." App. 185. It chose the home of record designation over other data available, including legal residence and last duty station, because home of record most closely resembled the Census Bureau's standard measure of state affiliation—"usual residence." 3 Record 925. Legal residence was thought less accurate because the choice of legal residence may have been affected by state taxation. Indeed, the Congressional Research Service found that in 1990 "the nine States with either no income taxes, or those which tax only interest and dividend income, have approximately 9 percent more of the overseas military personnel claiming the States for tax purposes, than those same States receive using *home of record.*" Congressional

Research Service Report, App. 151, n. 13. For similar reasons, last duty station was rejected because it would provide only a work address, and the employee's last home address might have been in a different State, as with those, for example, who worked in the District of Columbia but lived in Virginia or Maryland. 3 Record 925. Residence at a "last duty station" may also have been of a very short duration and may not have reflected the more enduring tie of usual residence. App. 150. Those military personnel for whom home of record information was not available were allocated based on legal residence or last duty station, in that order. *Id.*, at 186.

The Census Bureau invited 40 other federal agencies with overseas employees to submit counts of their employees as well. Of those, only 30 actually submitted counts, and only 20 agencies included dependents in their enumeration. Four of the agencies could not provide a home State for all of their overseas employees. *Ibid.*

Appellees challenged the decision to allocate federal overseas employees, and the method used to do so, as inconsistent with the APA and with the constitutional requirement that the apportionment of Representatives be determined by an "actual Enumeration" of persons "in each State." U. S. Const., Art. I, § 2, cl. 3; U. S. Const., Amdt. 14, § 2. Appellees focused their attack on the Secretary's decision to use "home of record" data for military personnel. The District Court, finding that it had jurisdiction to address the merits of the claims, was "skeptical" of the merits of appellees' constitutional claims, speculating that "[t]here would appear to be nothing inherently unconstitutional in a properly supported decision to include overseas federal employees in apportionment counts." *Commonwealth* v. *Mosbacher*, 785 F. Supp. 230, 266 (Mass. 1992). The District Court nonetheless held that, on the administrative record before it, the Secretary's decision to allocate the employees and to use home

of record data was arbitrary and capricious under the standards of the APA. *Id.*, at 264–266.

II

Appellees raise claims under both the APA and the Constitution. We address first the statutory basis for our jurisdiction under the APA. See *Blum* v. *Bacon*, 457 U. S. 132, 137 (1982); *Burton* v. *United States*, 196 U. S. 283, 295 (1905).

The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts. The Secretary's report to the President is an unusual candidate for "agency action" within the meaning of the APA, because it is not promulgated to the public in the Federal Register, no official administrative record is generated, and its effect on reapportionment is felt only after the President makes the necessary calculations and reports the result to the Congress. Contrast 2 U. S. C. § 441a(e) (requiring Secretary to publish each year in the Federal Register an estimate of the voting age population). Only after the President reports to Congress do the States have an entitlement to a particular number of Representatives. See § 2a(b) ("Each State shall be entitled . . . to the number of Representatives shown in the [President's] statement").

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U. S. C. § 704. At issue in this case is whether the "final" action that appellees have challenged is that of an "agency" such that the federal courts may exercise their powers of review under the APA. We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards.

To determine when an agency action is final, we have looked to, among other things, whether its impact "is suffi-

ciently direct and immediate" and has a "direct effect on . . . day-to-day business." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152 (1967). An agency action is not final if it is only "the ruling of a subordinate official," or "tentative." *Id.*, at 151. The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. In this case, the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President.

Unlike other statutes that expressly require the President to transmit an agency's report directly to Congress, § 2a does not. Compare, *e. g.*, 20 U. S. C. § 1017(d) ("The President shall transmit each such report [of the National Advisory Council on Continuing Education] to the Congress with his comments and recommendations"); 30 U. S. C. § 1315(c) (similar language); 42 U. S. C. § 3015(f) (similar language); 42 U. S. C. § 6633(b)(2) (similar language). After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." 2 U. S. C. § 2a(a). Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the "decennial census." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. For potential litigants, therefore, the "decennial census" still presents a moving target, even after the Secretary reports to the President. In this case, the Department of Commerce, in its press release issued the day the Secretary submitted the report to the President, was explicit that the data presented to the President was still subject to correction. See United States Department of Commerce News, Bureau of Census, 1990 Census Population for the United States is 249,632,692: Reapportionment Will

Shift 19 Seats in the U. S. House of Representatives 2 (Dec. 26, 1990) ("The population counts set forth herein are subject to possible correction for undercount and overcount. The United States Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991").[1] Moreover, there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him. It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives. Because the Secretary's report to the President carries no direct consequences for the reapportionment, it serves more like a tentative recommendation than a final and binding determination. It is, like "the ruling of a subordinate official," *Abbott Laboratories* v. *Gardner*, *supra*, at 151, not final and therefore not subject to review. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 109 (1948); *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 379 (1940).

The statutory structure in this case differs from that at issue in *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221 (1986), in which we held that the Secretary of Commerce's certification to the President that another country was endangering fisheries was "final agency action." *Id.*, at 231, n. 4. In that case, the Secretary's certification

[1] JUSTICE STEVENS suggests that the "decennial census" is a single count, determined solely by the Secretary, that is used for many purposes other than reapportionment of Representatives. Therefore, he reasons, it cannot be within the control of the President. However, the President may be involved in the policymaking tasks of his Cabinet members, whether or not his involvement is explicitly required by statute. The question here is whether the census count is final before the President acts. It seems clear that it is not. The tabulations used for purposes of state redistricting, which include counts of persons in each state district, are not required by statute to be completed until April 1, months after the President's report to Congress. 13 U. S. C. § 141(c).

to the President under 22 U. S. C. § 1978(a)(1) automatically triggered sanctions by the Secretary of State under 16 U. S. C. § 1821(e)(2)(B), regardless of any discretionary action the President himself decided to take. *Japan Whaling*, *supra*, at 226. Under 13 U. S. C. § 141(a), by contrast, the Secretary's report to the President has no direct effect on reapportionment until the President takes affirmative steps to calculate and transmit the apportionment to Congress.

Appellees claim that because the President exercises no discretion in calculating the numbers of Representatives, his "role in the statutory scheme was intended to have no substantive content," and the final action is the Secretary's, not the President's. Brief for Appellees 86. They cite the Senate Report for the bill that became 2 U. S. C. § 2a, which states that the President is to report "upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5.

The admittedly ministerial nature of the apportionment calculation itself does not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President. To reiterate, § 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in "the decennial census"; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report. Because it is the President's personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge. The President, not the Secretary, takes the final action that affects the States.

Indeed, it is clear that Congress thought it was important to involve a constitutional officer in the apportionment process. Congress originally considered a bill requiring the Secretary to report the apportionment calculation directly

to Congress. See S. Rep. No. 1446, 70th Cong., 2d Sess., 4 (1929). The bill was later amended to require the participation of the President: "Another objection to the previous bill was that the Secretary of Commerce should not be intrusted with the final responsibility for making so important a report to Congress. The new and pending bill recognizes this objection to the extent that the President is substituted for the Secretary of Commerce so that this function may be served by a constitutional officer. This makes for greater permanence, which is one of the major virtues to be desired in such a statute." S. Rep. No. 2, *supra*, at 5. It is hard to imagine a purpose for involving the President if he is to be prevented from exercising his accustomed supervisory powers over his executive officers. Certainly no purpose to alter the President's usual superintendent role is evident from the text of the statute.

As enacted, 2 U. S. C. § 2a provides that the Secretary cannot act alone; she must send her results to the President, who makes the calculations and sends the final apportionment to Congress. That the final act is that of the President is important to the integrity of the process and bolsters our conclusion that his duties are not merely ceremonial or ministerial. Thus, we can only review the APA claims here if the President, not the Secretary of Commerce, is an "agency" within the meaning of the Act.

The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U. S. C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the Presi-

dent to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. Cf. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 748, n. 27 (1982) (Court would require an explicit statement by Congress before assuming Congress had created a damages action against the President). As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, see *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), we hold that they are not reviewable for abuse of discretion under the APA, see *Armstrong* v. *Bush*, 288 U. S. App. D. C. 38, 45, 924 F. 2d 282, 289 (1991). The District Court erred in proceeding to determine the merits of the APA claims.

III

Although the reapportionment determination is not subject to review under the standards of the APA, that does not dispose of appellees' constitutional claims. See *Webster* v. *Doe*, 486 U. S. 592, 603–605 (1988). Constitutional challenges to apportionment are justiciable. See *Department of Commerce* v. *Montana*, 503 U. S. 442 (1992).

We first address standing.[2] To invoke the constitutional power of the federal courts to adjudicate a case or controversy under Article III, appellees here must allege and prove an injury "fairly traceable to the [appellants'] allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

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[2] While appellants asserted below that the courts have no subject-matter jurisdiction over this case because it involves a "political question," we recently rejected a similar argument in *Department of Commerce* v. *Montana*, 503 U. S., at 456–459, and appellants now concede the issue. Brief for Appellants 21.

To determine whether appellees sufficiently allege and prove causation requires separating out appellees' claims: Appellees claim both that the Secretary erred in deciding to allocate overseas employees to various States and that the Secretary erred in using inaccurate data to do so. Appellees have shown that Massachusetts would have had an additional Representative if overseas employees had not been allocated at all. App. 183. They have neither alleged nor shown, however, that Massachusetts would have had an additional Representative if the allocation had been done using some other source of "more accurate" data. Consequently, even if appellees have standing to challenge the Secretary's decision to allocate, they do not have standing to challenge the accuracy of the data used in making that allocation. We need, then, review only the decision to include overseas federal employees in the state population counts, not the Secretary's choice of information sources.

The thornier standing question is whether the injury is redressable by the relief sought. Tracking the statutory progress of the census data from the Census Bureau, through the President, and to the States, the District Court entered an injunction against the Secretary of Commerce, the President, and the Clerk of the House. 785 F. Supp., at 268. While injunctive relief against executive officials like the Secretary of Commerce is within the courts' power, see *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi* v. *Johnson*, 4 Wall. 475, 498–499 (1867), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, *United States* v. *Nixon*, 418 U. S. 683 (1974), but in general "this

court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, *supra*, at 501. At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable.

For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 75, n. 20 (1978); *Allen* v. *Wright*, *supra*, at 752. The Secretary certainly has an interest in defending her policy determinations concerning the census; even though she cannot herself change the reapportionment, she has an interest in litigating its accuracy. And, as the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

IV

On the merits, appellees argue that the Secretary's allocation of overseas federal employees to the States violated the command of Article I, § 2, cl. 3, that the number of Representatives per State be determined by an "actual Enumeration" of "their respective Numbers," that is, a count of the persons "in" each State. Appellees point out that the first census conducted in 1790 required that persons be allocated to their place of "usual residence." Brief for Appellees 77. See Act of Mar. 1, 1790, § 5, 1 Stat. 103. Because the interpretations of the Constitution by the First Congress are per-

suasive, *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986), appellees argue that the Secretary should have allocated the overseas employees to their overseas stations, because those were their usual residences.

The appellants respond, on the other hand, that the allocation of employees temporarily stationed overseas to their home States is fully compatible with the standard of "usual residence" used in the early censuses. We review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation. See *Department of Commerce* v. *Montana*, 503 U. S., at 459.

"Usual residence" was the gloss given the constitutional phrase "in each State" by the first enumeration Act and has been used by the Census Bureau ever since to allocate persons to their home States. App. 173–174. The term can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place. The first enumeration Act itself provided that "every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States." Act of Mar. 1, 1790, § 5, 1 Stat. 103. The Act placed no limit on the duration of the absence, which, considering the modes of transportation available at the time, may have been quite lengthy. For example, during the 36-week enumeration period of the 1790 census, President George Washington spent 16 weeks traveling through the States, 15 weeks at the seat of Government, and only 10 weeks at his home in Mount Vernon. He was, however, counted as a resident of Virginia. T. Clemence, Place of Abode, reproduced in App. 83.

The first enumeration Act uses other words as well to describe the required tie to the State: "usual place of abode," "inhabitant," "usual reside[nt]." Act of Mar. 1, 1790, § 5, 1 Stat. 103. The first draft of Article I, § 2, also used the word "inhabitant," which was omitted by the Committee of Style

in the final provision. 2 Farrand, Records of the Federal Convention of 1787, at 566, 590.[3]

In the related context of congressional residence qualifications, U. S. Const., Art. I, § 2, James Madison interpreted the constitutional term "inhabitant" to include "persons absent occasionally for a considerable time on public or private business." 2 Farrand, Records of the Federal Convention of 1787, at 217. This understanding was applied in 1824, when a question was raised about the residency qualifications of would-be Representative John Forsyth, of Georgia. Mr. Forsyth had been living in Spain during his election, serving as minister plenipotentiary from the United States. His qualification for office was challenged on the ground that he was not "an inhabitant of the State in which he [was] chosen." U. S. Const., Art. I, § 2, cl. 2. The House Committee of Elections disagreed, reporting: "There is nothing in Mr. Forsyth's case which disqualifies him from holding a seat in this House. The capacity in which he acted, excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered as in the same situation as before the acceptance of the appointment." M. Clarke & D. Hall, Cases of Contested Elections in Congress 497–498 (1834). Representative Bailey, supporting the qualification of Mr. Forsyth, pointed out that if "the mere living in a place constituted inhabitancy," it would "exclude sitting members of this House." *Id.*, at 497 (emphasis deleted).

Up to the present day, "usual residence" has continued to hold broad connotations. For example, up until 1950, college

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[3] As submitted to the Committee of Style, the provision read: "[T]he Legislature shall . . . regulate the number of representatives by the number of inhabitants." 2 M. Farrand, Records of the Federal Convention of 1787, p. 566 (rev. ed. 1966). After its return by the Committee, it had a more familiar ring: "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers." *Id.*, at 590.

students were counted as belonging to the State where their parents resided, not to the State where they attended school. App. 219. Even today, high school students away at boarding school are allocated to their parents' home State, not the location of the school. *Id.*, at 220. Members of Congress may choose whether to be counted in the Washington, D. C., area or in their home States. *Id.*, at 218. Those persons who are institutionalized in out-of-state hospitals or jails for short terms are also counted in their home States. *Id.*, at 225.

In this case, the Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress: "Many, if not most, of these military overseas consider themselves to be usual residents of the United States, even though they are temporarily assigned overseas." *Id.*, at 120. The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality. If some persons sharing in Washington's fate had not been properly counted, the votes of all those who reside in Washington State would not have been weighted equally to votes of those who reside in other States. Certainly, appellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal. Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 730–731 (1983) (parties challenging state apportionment legislation bear burden of proving disparate representation). We conclude that appellees' constitutional challenge fails on the merits.

The District Court's judgment is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

In my opinion the census report prepared by the Secretary of Commerce is "final agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.* I am persuaded, however, that the Secretary complied with the Census Act and with the Constitution in the preparation of the 1990 census and that, under the standard of deference appropriate here, the Secretary's actions were not arbitrary or capricious. I therefore agree that the judgment of the District Court must be reversed.

I

During the decade after 1980 the population of Massachusetts increased less rapidly than the population of the entire Nation. In the apportionment following the 1990 census, it received only 10 of the 435 seats in the House of Representatives whereas formerly it had 11.

In the District Court, appellees, who are the Commonwealth of Massachusetts and two of its registered voters, made two separate attacks on the process that reduced the size of Massachusetts' congressional delegation. They challenged the Secretary's conduct of the census, and they challenged the method of apportioning congressional seats based on the census report. The District Court rejected the challenge to the constitutionality of the method of apportionment prescribed in the Apportionment Act of 1941, 55 Stat. 761–762. *Commonwealth* v. *Mosbacher*, 785 F. Supp. 230, 256 (Mass. 1992). That decision was consistent with the analysis subsequently set forth in our opinion in *Department of Commerce* v. *Montana*, 503 U. S. 442 (1992), and is no longer in dispute. Pursuant to the judicial review provisions of the APA, 5 U. S. C. § 706(2), the District Court also examined the decision of the Secretary of Commerce to include overseas federal employees in the census count. The

court concluded that the Secretary's decision was "arbitrary and capricious, and an abuse of discretion." 785 F. Supp., at 267.

In a rather surprising development, this Court reverses because it concludes that the census report is not "final agency action," 5 U. S. C. § 704. The reason the Court gives for this conclusion is that the President—who is not himself a part of the agency that prepared the census and who has no statutory responsibilities under the Census Act—might revise that report in some way when he is performing his responsibilities under an entirely separate statute, the Apportionment Act. The logic of the Court's opinion escapes me, and apparently was not obvious to the Solicitor General, for he advanced no such novel claim in his argument seeking reversal. The Court's conclusion is erroneous for several reasons.

II

Article I, § 2, cl. 3, of the Constitution, as modified by the Fourteenth Amendment, provides that Members of the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ." To ensure that the apportionment remains representative of the current population, the Constitution further requires that a census be taken at least every 10 years.[1]

Beginning in 1790, Congress fulfilled the constitutional command by passing a Census Act every 10 years. Under the early census statutes, marshals would transmit the collected information to the Secretary of State. The census functions of the Secretary of State were transferred to the Secretary of the Interior after that Department was estab-

[1] "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct." U. S. Const., Art. I, § 2, cl. 3.

lished in 1849.[2] A Census Office in the Department of the Interior was established in 1899 and made permanent in 1902.[3] A year later, the Census Office was moved to the newly formed Department of Commerce and Labor.[4]

Following each census, Congress enacted a statute to reapportion the House of Representatives. After the 1920 census, however, Congress failed to pass a reapportionment Act. This congressional deadlock provided the impetus for the 1929 Act that established a self-executing apportionment in the case of congressional inaction. See S. Rep. No. 2, 71st Cong., 1st Sess., 2–4 (1929). The bill produced an automatic reapportionment through the application of a mathematical formula to the census. The automatic connection between the census and the reapportionment was the key innovation of the Act.[5]

In its original version, the bill directed the Secretary of Commerce to apply a mathematical formula to the census figures and to transmit the resulting apportionment calculations to Congress. A later version made the President responsible for performing the mathematical computations and reporting the result. From the legislative history, it is clear that this change in the designated official was intended to have no substantive significance.[6] There is no indication

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[2] See C. Wright, The History and Growth of the United States Census, S. Doc. No. 194, 56th Cong., 1st Sess., 40 (1900).

[3] 32 Stat. 51.

[4] 32 Stat. 826–827.

[5] See 71 Cong. Rec. 1609–1610 (1929) (remarks of Sen. Vandenberg). The automatic reapportionment on the basis of the decennial census was retained when the reapportionment features of the bill were modified somewhat in 1941. Act of Nov. 15, 1941, 55 Stat. 761. See *Department of Commerce* v. *Montana*, 503 U. S. 442, 451–452, and n. 25 (1992).

[6] The sponsor of the bill, Senator Vandenberg, explained the change: "[T]he President of the United States is substituted in the bill as the person who shall make the computation and report instead of the Secretary of Commerce, who was identified in the bill last February simply and solely because it was my own personal notion that if we were to accomplish a permanent end through the passage of permanent legislation it were

whatsoever of an intention to introduce a layer of Executive discretion between the taking of the census and the application of the reapportionment formula. The intention was exactly the contrary: to make the apportionment proceed automatically based on the census.

The statutory scheme creates an interlocking set of responsibilities for the Secretary and the President. The Secretary of Commerce is required to take a "decennial census of population as of the first day of April of [every tenth] year, which date shall be known as the 'decennial census date.'" 13 U. S. C. § 141(a). The Secretary reports the collected information to the President, see § 141(b), who is directed to "transmit to the Congress" a statement showing the population of each State "as ascertained under the seventeenth and each subsequent decennial census . . . ." 2 U. S. C. § 2a(a). The plain language of the statute demonstrates that the President has no substantive role in the computation of the census. The Secretary takes the "decennial census," and the President performs the apportionment calculations and transmits the census figures and apportionment results to Congress.

In the face of this clear statutory mandate, the Court must fall back on an argument based on statutory silence. The Court insists that there is no law *prohibiting* the President from changing the census figures after he receives them from the Secretary. The Court asserts: "Section 2a does not expressly require the President to use the data in the *Secretary's report*, but, rather, the data from the '*decennial census.*'" *Ante*, at 797 (emphasis added). This statement is difficult to comprehend, for it purports to contrast two terms that the statute equates. The "decennial census" is the name the statute gives to the information collected by the

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better to name a constitutional officer rather than a statutory officer. I have quite no pride of opinion at that point and I think it makes quite no difference, because everybody will get the same answer when we undertake to do that problem in arithmetic." 71 Cong. Rec. 1613 (1929).

Secretary and reported to the President. The Court's argument cannot be harmonized with a statutory scheme that directs the Secretary to take the "decennial census" and the President to report to Congress figures "as ascertained under the . . . decennial census." This language cannot support the Court's view that the statute endows the President with discretion to modify the census results reported by the Secretary.

The legislative record, moreover, establishes that the Executive involvement in the process is to be wholly ministerial.[7] The question of the discretion allowed to the President was discussed on the floor of the Senate, and the sponsor of the bill, Senator Vandenberg of Michigan, stated unequivocally that the President exercised no discretion whatsoever: "I believe as a matter of indisputable fact, that function served by the President is as purely and completely a ministerial function as any function on earth could be." 71 Cong. Rec. 1858 (1929).[8] In a colloquy with other legisla-

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[7] The Senate Report, for example, states:

"The objection that this is an improper 'delegation of power' to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President reports upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. No. 2, 71st Cong., 1st Sess., 4–5 (1929).

[8] At another point, Senator Vandenberg explained:

"The bill calls upon the President to report the result of a census to the Congress. We have always depended upon somebody to report the result of a census to us. The bill calls upon the President, when he reports the result of the census, also to report the result of a problem in arithmetic. If the President did not present the answer to that problem in arithmetic, somebody else would have to do the problem in arithmetic, because no matter what method is embraced for purposes of apportionment, there is inevitably needed a formula which, like a chemical formula, may in itself be somewhat inscrutable, and yet which always reaches the same conclusion." 71 Cong. Rec. 1613 (1929). The accuracy of Senator Vandenberg's

tors, Senator Vandenberg made clear that the bill did not allow the President to change the census figures he received:

> "Mr. SWANSON: As I understand, the Senator from Montana says, after reading the bill carefully, that the President is bound and has no discretion under its terms; so that if there should be glaring frauds all over the country he would be compelled to make the apportionment according to the census.
>
> "Mr. WALSH of Montana: I should say so, because as I understand, he is not authorized to disregard any numbers upon any ground.
>
> "Mr. SWANSON: I should like to ask the Senator from Michigan if that is his view? I understand the Senator from Montana to say that if the census returns shall be shown to be reeking with frauds the President will have no power to correct them; that he must follow the census returns as certified, regardless of the fraud that may be involved. Is that the view of the Senator from Michigan?
>
> . . . . .
>
> "Mr. VANDENBERG: My answer is that the Senator from Montana is entirely correct. There is absolutely no discretion in name or nature reposed in the President in connection with the administration of this proposed act." *Id.*, at 1845–1846.[9]

No President—indeed, no member of the Executive Branch—has ever suggested that the statute authorizes the President to modify the census figures when he performs the

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statements is confirmed by the analysis set forth in our opinion in *Department of Commerce* v. *Montana*, 503 U. S., at 448–456.

[9] An opponent of the bill, Senator Black, questioned whether the Act might allow the President more than a ministerial role in the apportionment process. He considered such a possibility a recipe for tyranny. See 71 Cong. Rec. 1612 (1929).

apportionment calculations. Nor did the Solicitor General advance that argument in this litigation.[10] As a matter of practice, the President has consistently and faithfully performed the ministerial duty described by Senator Vandenberg. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.[11]

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[10] While asserting that the President has authority to direct the Secretary's performance of the census, the Solicitor General acknowledged that the statute does not authorize the President to deviate from the Secretary's report:

"MR. ROBERTS: The law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives, but I don't think there is a limit on his exercise of authority to direct the Secretary of Commerce to conduct the census in a particular manner. It would be unlawful, maybe not subject to judicial review, but unlawful just to say, these are the figures, they are right, but I am going to submit a different statement. But he can certainly direct the Secretary in the conduct of the census.

"QUESTION: But would he have to remand it in effect to the Secretary or could he say, well, I have had somebody over at the FBI making some checks for me and they tell me there are really more people in Massachusetts, so I am going to give them extra seats.

"MR. ROBERTS: I think under the law he is supposed to base his calculation on the figures submitted by the Secretary." Tr. of Oral Arg. 12–13.

[11] The Court confuses two duties of the President: (1) the general duty to supervise the actions of the Secretary of Commerce, and (2) the statutory duty to transmit the census report and the apportionment calculations to Congress. This confusion is evident from the Court's statement, "It is hard to imagine a purpose for involving the President if he is to be prevented from exercising his accustomed supervisory powers over his executive officers." *Ante*, at 800. It may be true that the statute does not purport to limit the President's "accustomed supervisory powers" over the Secretary of Commerce. The President would enjoy these "accustomed powers," however, whether or not he was responsible for transmitting the census and apportionment calculations to Congress. These "accustomed powers," therefore, cannot be relevant in deciding whether agency action is final for the purposes of the APA, or else no action of an Executive department would ever be final. The Court's argument then depends on construing the statute to grant discretion to the President that

Because the Census Act directs that the tabulation of the total population by States shall be "reported by the Secretary to the President," the Court suggests that it is "like a tentative recommendation" to the President, *ante*, at 798. This suggestion is misleading because, unlike the typical "tentative recommendation," the census report is a public document. It is released to the public at the same time that it is transmitted to the President.[12] By law, the census report is distributed to federal and state agencies because it provides the basis for the allocation of various benefits and burdens among the States under a variety of federal programs. The Secretary also transmits the census figures directly to the States to assist them in redistricting. See 13 U. S. C. § 141(c).

This wide distribution provides further evidence that the statute does not contemplate the President's changing the Secretary's report. If the President modified the census figures after he received them from the Secretary, the Federal Government and the States would rely on different census results. The Secretary has made clear that the existence of varying "official" population figures is not acceptable.

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he would not otherwise enjoy. Such additional grants of authority were implicated in the cases on which the Court relies. See *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948); *United States* v. *George S. Bush & Co.*, 310 U. S. 371 (1940). The statutory language here will not bear this interpretation. Moreover, whatever purpose the Court wishes to "imagine" for the statute's designating the President as the official responsible for performing the apportionment calculations, the legislative record makes it absolutely clear that the purpose was *not* to give the President any new discretionary authority over the census. See *supra*, at 810–812, and n. 6.

[12] See United States Department of Commerce News, Bureau of Census, 1990 Census Population for the United States is 249,632,692: Reapportionment Will Shift 19 Seats in the U. S. House of Representatives (Dec. 26, 1990); see also N. Y. Times, Dec. 27, 1990, p. A1, col. 3.

In setting forth guidelines for possible adjustment of the census results,[13] the Secretary stated:

> "The resulting counts must be of sufficient quality and level of detail to be usable for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published. . . .
>
> "[T]here can be, for the population at all geographic levels at any one point in time, only one set of official government population figures." 55 Fed. Reg. 9840–9841 (1990).

To ensure uniformity, the Secretary's count must establish the final census figures.[14]

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[13] The Court asserts that the possibility of census adjustments prior to the President's report to Congress supports its interpretation of the statute. See *ante*, at 797–798. On the contrary, the evidence the Court cites undermines its argument. The President's statement accompanying the transmittal of the 1990 census and apportionment figures to Congress explains, "The Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991." H. R. Doc. No. 102–18, p. 1 (1991). The statement underscores that it is the *Secretary*, not the President who determines the final census figures. That the Secretary will "publish" the corrected results also demonstrates that the Court is mistaken in likening the Secretary's report to a "tentative recommendation." *Ante*, at 798.

The possibility that the Secretary may modify the census figures, of course, cannot support the Court's view that the President's intervention deprives the Secretary's action of finality. The possibility of correction would mean, at most, that appellees' challenge was not ripe until the Secretary's eventual announcement that he would not adjust the census. See 56 Fed. Reg. 33582 (1991). Similarly, even if it were the President's report to Congress that signaled the end of a census-adjustment process, that would be relevant only in determining when a challenge is ripe, not whether the Secretary's report is "final agency action."

[14] Even in the Court's view, the Secretary's report of census information to recipients other than the President would certainly constitute "final agency action." The Court's decision thus appears to amount to a pleading requirement. To avoid the bar to APA review that the Court imposes

In light of the statutory language, the legislative history, and the consistent Executive practice, the Court's conclusion that the census report is not "final agency action" is as insupportable as it is surprising.[15]

III

In view of my conclusion that the census report prepared by the Secretary constitutes final agency action, I must consider the Secretary's contention that judicial review is not available because the conduct of the census is "committed to agency discretion by law." 5 U. S. C. § 701(a)(2).

As we have frequently recognized, the "strong presumption that Congress intends judicial review of administrative action," see, *e. g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986), cannot be overcome without " 'clear and convincing evidence' " of a contrary legislative intent, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U. S. 367, 380 (1962)). No such evidence appears here.

The current version of the statute provides that "[t]he Secretary shall . . . take a decennial census of population as of the first day of April . . . in such form and content as [s]he may determine . . . ." 13 U. S. C. § 141(a).[16] The Secretary

today, litigants need only join their apportionment challenges to other census-related claims. Notwithstanding the Court's novel reading of the statute, in view of the Secretary's insistence on unitary census data, relief on any census claim would yield relief on all other claims.

[15] My conclusion that the Secretary's action was reviewable makes it unnecessary for me to consider whether the President is an "agency" within the meaning of the APA.

[16] Moreover, this language appeared only recently in the statute. The Act passed in 1929 stated: "That a census of population . . . shall be taken by the Director of the Census in the year 1930 and every ten years thereafter." 46 Stat. 21. Before the 1976 amendment, the Act provided: "The Secretary shall, in the year 1960 and every ten years thereafter, take a census of population . . . ." 71 Stat. 483. It was not until 1976 that Congress added the language, "in such form and content as [s]he may determine." To the extent that the argument for unreviewability depends on

asserts that the discretion afforded by the statute is at least as broad as that allowed the Director of Central Intelligence in the statute we considered in *Webster* v. *Doe*, 486 U. S. 592 (1988). That assertion cannot withstand scrutiny. The statute at issue in *Doe* provided that "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." 50 U. S. C. § 403(c). In concluding that employment discharge decisions were committed to agency discretion, we emphasized the language of "deem . . . advisable," which we found to provide no meaningful standard of review. We also relied on the overall statutory structure of the National Security Act.

No language equivalent to "deem . . . advisable" exists in the census statute. There is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion. Moreover, it

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this phrase, it requires the conclusion that when Congress amended the statute in 1976, it intended to effect a new, unreviewable commitment to agency discretion. There is no support for this position whatsoever. The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment). See S. Rep. No. 94–1256, pp. 2–3 (1976). The legislative history evidences no intention to expand the scope of the Secretary's discretion.

The Senate Report on the new language in 13 U. S. C. § 141(a) reads in its entirety:

"Subsection (a) of section 141 essentially rewords the existing subsection, adding the term 'decennial census of population' so as to distinguish this census, to be taken in 1980 and every ten years thereafter, from the mid-decade census, which is to be taken in 1985 and every ten years thereafter. New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94–1256, at 4.

Indeed, other portions of the Act limited the Secretary's authority by requiring, if feasible, the use of sampling in the nonapportionment census. 90 Stat. 2464, 13 U. S. C. § 195.

is difficult to imagine two statutory schemes more dissimilar than the National Security Act and the Census Act. Though they both relate to the gathering of information, the similarity ends there. *Doe* raises the possibility that, except for constitutional claims, the Director of Central Intelligence may enjoy unreviewable discretion to discharge employees. This conclusion accords with the principle of judicial deference that pervades the area of national security. See, *e. g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988); *CIA* v. *Sims*, 471 U. S. 159, 180–181 (1985). While the operations of a secret intelligence agency may provide an exception to the norm of reviewability,[17] the taking of the census does not. The open nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government.[18] The reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.

More generally, the Court has limited the exception to judicial review provided by 5 U. S. C. § 701(a)(2) to cases involving national security, such as *Webster* v. *Doe* and *Department of Navy* v. *Egan*, or those seeking review of refusal to pursue enforcement actions, see *Heckler* v. *Chaney*, 470 U. S.

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[17] Indeed, it was asserted in *Webster* v. *Doe*, 486 U. S. 592 (1988), that the statute should be construed to preclude review even of constitutional claims. See *id.*, at 605–606 (O'CONNOR, J., concurring in part and dissenting in part); *id.*, at 621 (SCALIA, J., dissenting) (describing Court's refusal to preclude constitutional review as creating "the world's only secret intelligence agency that must litigate the dismissal of its agents").

[18] See 3 Encyclopedia of the Social Sciences 296 (reprinted in Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Senate Committee on Governmental Affairs, The Decennial Census: An Analysis and Review, 96th Cong., 2d Sess., 461 (Comm. Print 1980)). The tradition of publicity, of course, relates to the tabulated information. The confidentiality of individual responses has long been assured by statute. See 13 U. S. C. §§ 8(b), 9(a); see also *Baldrige* v. *Shapiro*, 455 U. S. 345, 356–358 (1982).

821 (1985); *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444 (1979); *Morris* v. *Gressette*, 432 U. S. 491 (1977). These are areas in which courts have long been hesitant to intrude. The taking of the census is not such an area of traditional deference.[19]

Nor is this an instance in which the statute is so broadly drawn that "'there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The District Court found that the overall statutory scheme and the Census Bureau's consistently followed policy provided "law to apply" in reviewing the Secretary's exercise of discretion. 785 F. Supp., at 262. As the District Court explained, the relationship of the census provision contained in 13 U. S. C. § 141 and the apportionment provision contained in 2 U. S. C. § 2a demonstrates that the Secretary's discretion is constrained by the requirement that she produce a tabulation of the "whole number of persons in each State." 2 U. S. C. § 2a(a).[20] This statutory command also

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[19] The great weight of authority supports the view that the conduct of the census is not "committed to agency discretion by law." See, *e. g.*, *Carey* v. *Klutznick*, 637 F. 2d 834 (CA2 1980); *New York* v. *United States Dept. of Commerce*, 739 F. Supp. 761 (EDNY 1990); *New York* v. *United States Dept. of Commerce*, 713 F. Supp. 48 (EDNY 1989); *Cuomo* v. *Baldrige*, 674 F. Supp. 1089 (SDNY 1987); *Willacoochee* v. *Baldrige*, 556 F. Supp. 551 (SD Ga. 1983); *Carey* v. *Klutznick*, 508 F. Supp. 404 (SDNY 1980); *Philadelphia* v. *Klutznick*, 503 F. Supp. 663 (ED Pa. 1980); *Young* v. *Klutznick*, 497 F. Supp. 1318 (ED Mich. 1980), rev'd on other grounds, 652 F. 2d 617 (CA6 1981), cert. denied *sub nom. Young* v. *Baldrige*, 455 U. S. 939 (1982); *Camden* v. *Plotkin*, 466 F. Supp. 44 (N. J. 1978).

[20] The Census Act provides various other rules, as well, that limit the Secretary's discretion. For example, the statute requires the Secretary to take a decennial census of population "as of the first day of April" in every 10th year. 13 U. S. C. § 141(a). Thus, persons who die in February or March, or who are not born until May or June, are not to be counted. The fact that the statute gives the Secretary broad discretion with respect to the "form and content" of the census surely does not mean that she could lawfully count persons who predeceased the census date or who were

embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment. The "usual residence" policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion. See generally *Heckler* v. *Chaney*, 470 U. S., at 836; *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41–43 (1983); *Padula* v. *Webster*, 822 F. 2d 97, 100, 261 U. S. App. D. C. 365, 368 (1987). The District Court was clearly correct in concluding that the statutory framework and the long-held administrative tradition provide a judicially administrable standard of review.[21]

IV

For the reasons stated in Part IV of the Court's opinion, I agree that the inclusion of overseas employees in state census totals does not violate the Constitution.[22] I turn now to

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born thereafter. Similarly, it would be plain error to count as Massachusetts residents a family that moved from New York to Boston on June 1.

[21] Nothing in the language of the statute or in the overall statutory scheme supports the Secretary's alternative argument that this is an instance in which the relevant "statutes preclude judicial review." 5 U. S. C. § 701(a)(1). In the absence of express statutory language, we have generally reserved that exception for cases in which the existence of an alternative review procedure provided "clear and convincing evidence," *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 671 (1986) (citations and internal quotation marks omitted), of a legislative intent to preclude judicial review. See, *e. g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 530–533 (1988); *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 130–133 (1987); *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 346–348 (1984). No such alternative scheme appears here. The ability of Congress, itself, to resolve apportionment issues by enacting new laws does not provide any evidence of an intent to preclude judicial review.

[22] I believe that appellees' challenge to the use of "home of record" data also merits brief consideration.

The contention that overseas personnel may have little connection with their "home of record" clearly has some force. A person designates a

appellees' contention that the Secretary's decision to include overseas federal employees was arbitrary and capricious and should have been set aside under the APA.

With the exception of the census conducted in 1900, overseas federal employees were not included in state census totals before 1970.[23] In the census conducted in 1970, during the Vietnam War, overseas military personnel were assigned to States for apportionment purposes based on the "home of record" appearing in their personnel files.[24] The Bureau reverted to its previous policy of excluding overseas employees from apportionment totals in the 1980 census. In explaining this decision, one of the reasons cited by Bureau officials was the "unknown reliability" of the data relied on to determine the "home State" of overseas personnel. App. 55. In discussions with the Bureau and in testimony before Congress, officials of the Defense Department agreed that "home of record" data had a high "error rate" and might have little correlation with an employee's true feelings of affiliation. See *id.*, at 124, 183.

In July 1989, then-Secretary Mosbacher decided to include overseas employees in state population figures in the 1990

"home of record" when entering the service and is not permitted to change it thereafter. See App. 147, n. 5. This information may therefore be quite stale, implicating the constitutional requirements of accuracy and decenniality.

The special problems of including overseas personnel in the census, though, necessitate difficult judgments about the best data to use. In view of the discretion available to the Secretary in formulating residence rules, the adoption of the "home of record" principle cannot be said to transgress any constitutional command. Accuracy in this context is clearly a comparative concept, and appellees have not demonstrated that the constitutional requirement of accuracy dictates a different method of determining residence.

Like the District Court, I also conclude that the Secretary's decision did not violate any specific provision of the Census Act. See 785 F. Supp., at 266, n. 31.

[23] See App. 175–177.

[24] See *id.*, at 57.

census.[25] The decision memorandum approved by the Secretary described several reasons for this conclusion, including "growing bipartisan concern of the Congress" and the belief of the Defense Department that its employees should be included in apportionment calculations because they considered themselves to be "usual residents" of the United States. *Id.*, at 120. The prospect of more accurate data than previously available also contributed to the decision. The memorandum stated that the Defense Department's plans to conduct an enumeration of its employees provided a "significant reason" for the decision. *Id.*, at 121; see also *id.*, at 184. In December 1989, however, a lack of funds led the Defense Department to cancel the survey. *Ibid.* The Secretary nevertheless adhered to the decision to include overseas personnel.

In reaching the ultimate decision to allocate overseas federal employees to States, the Secretary had an obligation to "examine the relevant data and articulate a satisfactory explanation for [the] action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U. S., at 43 (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)). The District Court was properly concerned by the scant evidence that the Secretary reconsidered the apportionment policy following the cancellation of the Defense Department survey. If the justification for the decision no longer obtained, the refusal to reconsider would be quite capricious. The District Court was certainly correct in concluding that "[i]nertia cannot supply the necessary rationality" for the Secretary's decision. 785 F. Supp., at 265.

While the question is a close one, two factors in particular lead me to conclude that the decision to include overseas employees ultimately rested on more than inertia. First, the Secretary received assurances from the Defense Department

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[25] *Id.*, at 182.

that, even without the survey, information on overseas personnel would be "supplemented and improved," App. 161, and would thus be more accurate than the data available in the past. Moreover, while the anticipated Defense Department survey played an important role in the Secretary's initial decision, other factors cited in the memorandum continued to support the Secretary's choice to include overseas personnel.

The record could be more robust. However, the basis for the agency's decision need not appear with "ideal clarity," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974), as long as it is reasonably discernible. As the Court explains, see *ante*, Part IV, the Secretary had discretion to include overseas personnel in the census count. Although the hopes for more accurate data were not fully realized, the record discloses that the decision to include overseas personnel continued to be supported by valid considerations. I therefore conclude that the decision of the Secretary was not arbitrary or capricious.[26]

For these reasons, I concur in the Court's judgment, but only in Part IV of its opinion.

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

I agree with the Court that appellees had no cause of action under the judicial-review provisions of the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.*, and I therefore join Parts I and II of its opinion.

Appellees have also challenged the constitutionality of the allocation methods used by the Secretary of Commerce in conducting the census. The Court concludes that they have

[26] The record indicates that the Secretary considered the alternative methods of allocating overseas employees to States and that the choice of "home of record" data was certainly not arbitrary or capricious. See, *e. g.*, App. 162.

standing to assert these claims, but that the claims are meritless.[1] I disagree with the Court's conclusion on the standing question, and therefore do not reach the merits. Our cases have established that there are three elements to the "irreducible constitutional minimum of standing" required by Article III: (1) the plaintiffs must establish that they have suffered "injury in fact"; (2) they must show causation between the challenged action and the injury; and (3) they must establish that it is likely that the injury will be redressed by a decision in their favor. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). Appellees have clearly satisfied the first two requirements, but I think they founder on the third.

The plurality concludes that declaratory relief directed at the Secretary alone would be sufficient to redress appellees' injury. *Ante*, at 803. I do not agree. Ordering the Secretary to recalculate the final census totals will not redress appellees' injury unless the President accepts the new numbers, changes his calculations accordingly, and issues a new reapportionment statement to Congress, and the Clerk of the House then submits new certificates to the States. 13 U. S. C. § 141(b); 2 U. S. C. § 2a. I agree that, in light of the Clerk's purely ministerial role, we can properly assume that insofar as *his* participation is concerned the sequence of events will occur. But as the Court correctly notes, *ante*, at 797–800, the President's role in the reapportionment process is *not* purely ministerial; he is not "required to adhere to the policy decisions reflected in the Secretary's report," *ante*, at 799. I do not think that for purposes of the Article III redressability requirement we are *ever* entitled to assume, no matter how objectively reasonable the assumption may be, that the President (or, for that matter, any official of the Ex-

[1] Although only a plurality of the Court joins that portion of JUSTICE O'CONNOR's opinion which finds standing (Part III), I must conclude that the *Court* finds standing since eight Justices join Part IV of the Court's opinion discussing the merits of appellees' constitutional claims.

ecutive or Legislative Branches), in performing a function that is not wholly ministerial, will follow the advice of a subordinate official. The decision is by Constitution or law conferred upon him, and I think we are precluded from saying that it is, in practical effect, the decision of someone else. Indeed, judicial inquiry into or speculation about the probability of such "practical" subservience—never mind acting upon the outcome of such inquiry or speculation—seems to me disrespectful of a coordinate branch. On such a theory of redressability, suit would lie (assuming injury-in-fact could be shown) against the members of the President's Cabinet, or even the members of his personal staff, for the almost-sure-to-be-followed advice they give him in their respective areas of expertise.

The plurality, however, has a different theory of redressability. In its view, it suffices that the "authoritative interpretation of the census statute and constitutional provision" rendered by the District Court will induce the President to submit a new reapportionment that is consistent with what the District Court judgment orders the Secretary to submit. *Ante*, at 803. It seems to me this bootstrap argument eliminates, rather than resolves, the redressability question. If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will *always* exist. Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power. It is the Court's *judgment*, in other words, its injunction to the Secretary of Commerce, that must provide appellees relief—not its accompanying excursus on the meaning of the Constitution.

Though the Court does not rely upon it, the judgment sought here *did* run against the President of the United States. The District Court's order expressly required, not

only that a new census tabulation be prepared, but also that the President issue a new certification and that the Clerk of the House forward the new apportionment to the 50 Governors. It is a commentary upon the level to which judicial understanding—indeed, even judicial awareness—of the doctrine of separation of powers has fallen, that the District Court entered this order against the President without blinking an eye. I think it clear that no court has authority to direct the President to take an official act.

We have long recognized that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers. Compare *Nixon* v. *Fitzgerald*, 457 U. S. 731, 750 (1982) ("The President's unique status under the Constitution distinguishes him from other executive officials"), with *Harlow* v. *Fitzgerald*, 457 U. S. 800, 811, n. 17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself"). Although we held in *United States* v. *Nixon*, 418 U. S. 683 (1974), that the President is not *absolutely* immune from judicial process, see also *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.) (upholding subpoena directed to President Jefferson), the order upheld there merely required the President to provide information relevant to an ongoing criminal prosecution, which is what any citizen might do; it did not require him to exercise the "executive Power" in a judicially prescribed fashion. We have similarly held that Members of Congress can be subpoenaed as witnesses, see *Gravel* v. *United States*, 408 U. S. 606, 615 (1972), citing *United States* v. *Cooper*, 4 Dall. 341 (CC Pa. 1800) (Chase, J., sitting on Circuit), though there is no doubt that we cannot direct *them* in the performance of their constitutionally prescribed duties, see *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975) (refusing to enjoin the issuance of a congressional subpoena).

I am aware of only one instance in which we were specifically asked to issue an injunction requiring the President to take specified executive acts: to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. As the plurality notes, *ante*, at 802–803, we emphatically disclaimed the authority to do so, stating that "'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1867). See also C. Burdick, The Law of the American Constitution § 50, pp. 126–127 (1922); C. Pyle & R. Pious, The President, Congress, and the Constitution 170 (1984) ("No court has ever issued an injunction against the president himself or held him in contempt of court"). The apparently unbroken historical tradition supports the view, which I think implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested—viz., the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary.[2]

For similar reasons, I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court. Many of the reasons we gave in *Nixon* v. *Fitzgerald*, *supra*, for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions: The President's immunity from such judicial relief is

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[2] In *Mississippi* v. *Johnson*, 4 Wall. 475 (1867), we left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, see *id.*, at 498–499; cf. *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838) (Postmaster General); *Marbury* v. *Madison*, 1 Cranch 137 (1803) (Secretary of State). As discussed earlier, the President's duty here was not that.

"a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.*, at 749; see also *id.*, at 749–757; *id.*, at 760–764 (Burger, C. J., concurring).[3] Permitting declaratory or injunctive relief against the President personally would not only distract him from his constitutional responsibility to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, § 3, but, as more and more disgruntled plaintiffs add his name to their complaints, would produce needless head-on confrontations between district judges and the Chief Executive. (If official-action suits against the President had been contemplated, surely they would have been placed within this Court's original jurisdiction.) It is noteworthy that in the last substantive section of *Nixon* v. *Fitzgerald* where we explain why "[a] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," 457 U. S., at 757, because of "[t]he existence of alternative remedies and deterrents," *id.*, at 758, injunctive or declaratory relief against the President is not mentioned.

None of these conclusions, of course, in any way suggests that Presidential action is *unreviewable.* Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)—just as unlawful legislative ac-

[3] Although the relief granted in *Powell* v. *McCormack*, 395 U. S. 486 (1969), was only declaratory, and although we reserved the question whether *coercive* relief could properly be granted against the congressional officers, we discussed the issue of the form of relief only *after* having concluded that the actions of these officers were not protected by legislative immunity, *id.*, at 517–518. Accordingly, nothing in the case suggests that declaratory relief may be awarded for actions protected by congressional (or Presidential) immunity.

tion can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, *e. g.*, *Powell* v. *McCormack*, 395 U. S. 486, 503–506 (1969); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive. Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties.

In sum, we cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush, and since we have no power to do that, I believe appellees' constitutional claims should be dismissed.[4] Since I agree with the Court's conclusion that appellees' constitutional claims do not provide an alternative ground that would support the judgment below, I concur in its judgment reversing the District Court.

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[4] A contrary conclusion is not required by the fact that in *Department of Commerce* v. *Montana*, 503 U. S. 442 (1992), we reached the merits of a challenge to the President's use of the method of equal proportions in calculating the reapportionment. "'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.'" *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415 U. S. 528, 533, n. 5 (1974)).

Syllabus

LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL.

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

No. 91–339. Argued March 22, 1992—Decided June 26, 1992

Held: The judgment of the Court of Appeals, which held that a ban on distribution of literature in Port Authority airport terminals is invalid under the First Amendment, is affirmed for the reasons expressed in *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, *ante*, p. 672, in the opinions of JUSTICE O'CONNOR, *ante*, at 685, JUSTICE KENNEDY, *ante*, at 693, and JUSTICE SOUTER, *ante*, at 709.

925 F. 2d 576, affirmed in part.

Arthur P. Berg argued the cause for petitioner. With him on the brief were *Philip Maurer*, *Arnold D. Kolikoff*, and *Milton H. Pachter*.

Barry A. Fisher argued the cause for respondents. With him on the briefs were *David Grosz*, *Robert C. Moest*, *David M. Liberman*, *Jay Alan Sekulow*, and *Jeremiah S. Gutman*.*

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*Briefs of *amici curiae* were filed for the Airports Association Council International-North America by *Michael M. Conway;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *John A. Powell*, and *Arthur N. Eisenberg;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon*, *Walter Kamiat*, and *Laurence Gold;* for the American Jewish Congress et al. by *Bradley P. Jacob* and *Edward McGlynn Gaffney, Jr.;* for the American Newspaper Publishers Association et al. by *Robert C. Bernius*, *Alice Neff Lucan*, *Rene P. Milam*, *Richard A. Bernstein*, *Barbara Wartelle Wall*, *John C. Fontaine*, *Cristina L. Mendoza*, *George Freeman*, and *Carol D. Melamed;* for the American Tract Society et al. by *James Matthew Henderson, Sr.*, *Mark N. Troobnick*, *Thomas Patrick Monaghan*, and *Charles E. Rice;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the Free Congress Foundation by *Wendell R. Bird* and *David J. Myers;* for Multimedia Newspaper Co. et al. by *Carl F. Muller* and *Wallace K. Lightsey;* for Project Vote et al. by *Robert Plotkin* and *Elliot M. Minceberg;* and for the National Institute of Municipal Law Of-

PER CURIAM.

For the reasons expressed in the opinions of JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, see *ante*, p. 685 (O'CONNOR, J., concurring in No. 91–155 and concurring in judgment in No. 91–339), *ante*, p. 693 (KENNEDY, J., concurring in judgments), and *ante*, p. 709 (SOUTER, J., concurring in judgment in No. 91–339 and dissenting in No. 91–155), the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority airport terminals is invalid under the First Amendment is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Leafletting presents risks of congestion similar to those posed by solicitation. It presents, in addition, some risks unique to leafletting. And of course, as with solicitation, these risks must be evaluated against a backdrop of the substantial congestion problem facing the Port Authority and with an eye to the cumulative impact that will result if all groups are permitted terminal access. Viewed in this light, I conclude that the distribution ban, no less than the solicitation ban, is reasonable. I therefore dissent from the Court's holding striking the distribution ban.

I will not trouble to repeat in detail all that has been stated in No. 91–155, *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, *ante*, at 683–685, describing the risks and burdens flowing to travelers and the Port Authority from permitting solicitation in airport terminals. Suffice it to say that the risks and burdens posed by leafletting are quite similar to those posed by solicitation. The weary, harried, or hurried traveler may have no less desire and need

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ficers by *Benjamin L. Brown, Analeslie Muncy, Robert J. Alfton, Frank B. Gummey III, Frederick S. Dean, Neal M. Janey, Victor J. Kaleta, Robert J. Mangler, Neal E. McNeill, Robert J. Watson,* and *Iris J. Jones.*

to avoid the delays generated by having literature foisted upon him than he does to avoid delays from a financial solicitation. And while a busy passenger perhaps may succeed in fending off a leafletter with minimal disruption to himself by agreeing simply to take the proffered material, this does not completely ameliorate the dangers of congestion flowing from such leafletting. Others may choose not simply to accept the material but also to stop and engage the leafletter in debate, obstructing those who follow. Moreover, those who accept material may often simply drop it on the floor once out of the leafletter's range, creating an eyesore, a safety hazard, and additional cleanup work for airport staff. See *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 816–817 (1984) (esthetic interests may provide basis for restricting speech); Sloane Supplemental Affidavit ¶ 10, App. 514 (noting increased maintenance problems that result from solicitation and distribution).

In addition, a differential ban that permits leafletting but prohibits solicitation, while giving the impression of permitting the Port Authority at least half of what it seeks, may in fact prove for the Port Authority to be a much more Pyrrhic victory. Under the regime that is today sustained, the Port Authority is obliged to permit leafletting. But monitoring leafletting activity in order to ensure that it is *only* leafletting that occurs, and not also soliciting, may prove little less burdensome than the monitoring that would be required if solicitation were permitted. At a minimum, therefore, I think it remains open whether at some future date the Port Authority may be able to reimpose a complete ban, having developed evidence that enforcement of a differential ban is overly burdensome. Until now it has had no reason or means to do this, since it is only today that such a requirement has been announced.

For the foregoing reasons, and for the reasons stated in the opinion in No. 91–155, *ante,* p. 672, I respectfully dissent.

Syllabus

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

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

No. 91–744. Argued April 22, 1992—Decided June 29, 1992*

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

Held: The judgment in No. 91–902 is affirmed; the judgment in No. 91–744 is affirmed in part and reversed in part, and the case is remanded.

947 F. 2d 682: No. 91–902, affirmed; No. 91–744, affirmed in part, reversed in part, and remanded.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that consideration of the fundamental constitutional question resolved by *Roe* v. *Wade*, 410 U. S. 113, principles of institutional integrity, and the rule of *stare decisis* require that *Roe*'s essential holding be re-

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*Together with No. 91–902, *Casey, Governor of Pennsylvania, et al.* v. *Planned Parenthood of Southeastern Pennsylvania et al.*, also on certiorari to the same court.

tained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. Pp. 844–869.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of *Roe*'s central holding, by the fact that THE CHIEF JUSTICE would overrule *Roe*, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject. Pp. 844–845.

(b) *Roe* determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1, procreation, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, and contraception, *Griswold* v. *Connecticut*, 381 U. S. 479, and have recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453. *Roe*'s central holding properly invoked the reasoning and tradition of these precedents. Pp. 846–853.

(c) Application of the doctrine of *stare decisis* confirms that *Roe*'s essential holding should be reaffirmed. In reexamining that holding, the Court's judgment is informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling. Pp. 854–855.

Syllabus

(d) Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable. P. 855.

(e) The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. Pp. 855–856.

(f) No evolution of legal principle has left *Roe*'s central rule a doctrinal anachronism discounted by society. If *Roe* is placed among the cases exemplified by *Griswold*, *supra*, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, *e. g.*, *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 278. Finally, if *Roe* is classified as *sui generis*, there clearly has been no erosion of its central determination. It was expressly reaffirmed in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 *(Akron I)*, and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747; and, in *Webster* v. *Reproductive Health Services*, 492 U. S. 490, a majority either voted to reaffirm or declined to address the constitutional validity of *Roe*'s central holding. Pp. 857–859.

(g) No change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of *Roe* have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal

life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact. P. 860.

(h) A comparison between *Roe* and two decisional lines of comparable significance—the line identified with *Lochner* v. *New York*, 198 U. S. 45, and the line that began with *Plessy* v. *Ferguson*, 163 U. S. 537—confirms the result reached here. Those lines were overruled—by, respectively, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, and *Brown* v. *Board of Education*, 347 U. S. 483—on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of *Roe*'s central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining *Roe* with any justification beyond a present doctrinal disposition to come out differently from the *Roe* Court. That is an inadequate basis for overruling a prior case. Pp. 861–864.

(i) Overruling *Roe*'s central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. Pp. 864–869.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Part IV that an examination of *Roe* v. *Wade*, 410 U. S. 113, and

subsequent cases, reveals a number of guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, see *id.*, at 162, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

(b) *Roe*'s rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.

(d) Adoption of the undue burden standard does not disturb *Roe*'s holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed. *Id.*, at 164–165. Pp. 869–879.

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts V–A and V–C, concluding that:

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe*, *supra*, at 164. Although the definition could be interpreted in an unconstitutional manner, this Court defers to lower federal court interpretations of state law unless they amount to "plain" error. Pp. 879–880.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry

is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 69. Pp. 887–898.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, joined by JUSTICE STEVENS, concluded in Part V–E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice. Pp. 900–901.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Parts V–B and V–D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent *Akron I*, 462 U. S., at 444, and *Thornburgh*, 476 U. S., at 762, find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right. Moreover, the physician's First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion. The premise behind *Akron I*'s invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, 462 U. S., at 450, is also wrong. Although § 3205's 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid

on the present record and in the context of this facial challenge. Pp. 881–887.

2. Section 3206's one-parent consent requirement and judicial bypass procedure are constitutional. See, *e. g.*, *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 510–519. Pp. 899–900.

JUSTICE BLACKMUN concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional. Pp. 930, 934–936.

THE CHIEF JUSTICE, joined by JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that:

1. Although *Roe* v. *Wade*, 410 U. S. 113, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" *Roe* accorded to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," *id.*, at 154–156, is warranted by the confusing and uncertain state of this Court's post-*Roe* decisional law. A review of post-*Roe* cases demonstrates both that they have expanded upon *Roe* in imposing increasingly greater restrictions on the States, see *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 783 (Burger, C. J., dissenting), and that the Court has become increasingly more divided, none of the last three such decisions having commanded a majority opinion, see *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502; *Hodgson* v. *Minnesota*, 497 U. S. 417; *Webster* v. *Reproductive Health Services*, 492 U. S. 490. This confusion and uncertainty complicated the task of the Court of Appeals, which concluded that the "undue burden" standard adopted by JUSTICE O'CONNOR in *Webster* and *Hodgson* governs the present cases. Pp. 944–951.

2. The *Roe* Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390; *Loving* v. *Virginia*, 388 U. S. 1; and *Griswold* v. *Connecticut*, 381 U. S. 479, and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as *Roe*, *supra*, at 152–153, claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy. And the historical traditions of the American people—as evidenced by the English common

law and by the American abortion statutes in existence both at the time of the Fourteenth Amendment's adoption and *Roe*'s issuance—do not support the view that the right to terminate one's pregnancy is "fundamental." Thus, enactments abridging that right need not be subjected to strict scrutiny. Pp. 951–953.

3. The undue burden standard adopted by the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER has no basis in constitutional law and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. To evaluate abortion regulations under that standard, judges will have to make the subjective, unguided determination whether the regulations place "substantial obstacles" in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code. Pp. 964–966.

4. The correct analysis is that set forth by the plurality opinion in *Webster*, *supra:* A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. P. 966.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of *Roe*'s "fundamental right" approach to this subject, the Court's contrary holding in *Thornburgh* is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24-hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and

in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies. Pp. 966–970.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements. See, *e. g.*, *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476. It is reasonably designed to further the State's important and legitimate interest "in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson*, *supra*, at 444. Pp. 970–971.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential. Public disclosure of other reports made by facilities receiving public funds—those identifying the facilities and any parent, subsidiary, or affiliated organizations, § 3207(b), and those revealing the total number of abortions performed, broken down by trimester, § 3214(f)—are rationally related to the State's legitimate interest in informing taxpayers as to who is benefiting from public funds and what services the funds are supporting; and records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. Pp. 976–977.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. See, *e. g.*, *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 520 (SCALIA, J., concurring). The Pennsylvania statute should be upheld in its entirety under the rational basis test. Pp. 979–981.

O'CONNOR, KENNEDY, and SOUTER, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V–A, V–C, and VI, in which BLACKMUN and STEVENS, JJ., joined, an opinion with respect to Part V–E, in which STEVENS, J., joined, and an opinion with respect to Parts IV, V–B, and V–D. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 911. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, *post*, p. 922. REHNQUIST, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which

WHITE, SCALIA, and THOMAS, JJ., joined, *post*, p. 944. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined, *post*, p. 979.

Kathryn Kolbert argued the cause for petitioners in No. 91–744 and respondents in No. 91–902. With her on the briefs were *Janet Benshoof*, *Lynn M. Paltrow*, *Rachael N. Pine*, *Steven R. Shapiro*, *John A. Powell*, *Linda J. Wharton*, and *Carol E. Tracy.*

Ernest D. Preate, Jr., Attorney General of Pennsylvania, argued the cause for respondents in No. 91–744 and petitioners in No. 91–902. With him on the brief were *John G. Knorr III*, Chief Deputy Attorney General, and *Kate L. Mershimer*, Senior Deputy Attorney General.

Solicitor General Starr argued the cause for the United States as *amicus curiae* in support of respondents in No. 91–744 and petitioners in No. 91–902. With him on the brief were *Assistant Attorney General Gerson*, *Paul J. Larkin, Jr.*, *Thomas G. Hungar*, and *Alfred R. Mollin.*†

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†Briefs of *amici curiae* were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Jerry Boone*, Solicitor General, *Mary Ellen Burns*, Chief Assistant Attorney General, and *Sanford M. Cohen*, *Donna I. Dennis*, *Marjorie Fujiki*, and *Shelley B. Mayer*, Assistant Attorneys General, and *John McKernan*, Governor of Maine, and *Michael E. Carpenter*, Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Warren Price III*, Attorney General of Hawaii, *Roland W. Burris*, Attorney General of Illinois, *Bonnie J. Campbell*, Attorney General of Iowa, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *James E. O'Neil*, Attorney General of Rhode Island, *Dan Morales*, Attorney General of Texas, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *John Payton*, Corporation Counsel of District of Columbia; for the State of Utah by *R. Paul Van Dam*, Attorney General, and *Mary Anne Q. Wood*, Special Assistant Attorney General; for the City of New York et al. by *O. Peter Sherwood*, *Conrad Harper*, *Janice Goodman*, *Leonard J. Koerner*, *Lorna Bade Goodman*, *Gail Rubin*, and *Julie Mertus;* for 178 Organizations by *Pamela S.*

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V–A,

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Karlan and *Sarah Weddington;* for Agudath Israel of America by *David Zwiebel;* for the Alan Guttmacher Institute et al. by *Colleen K. Connell* and *Dorothy B. Zimbrakos;* for the American Academy of Medical Ethics by *Joseph W. Dellapenna;* for the American Association of Prolife Obstetricians and Gynecologists et al. by *William Bentley Ball*, *Philip J. Murren*, and *Maura K. Quinlan;* for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips*, *Ann E. Allen*, *Laurie R. Rockett*, *Joel I. Klein*, *Nadine Taub*, and *Sarah C. Carey;* for the American Psychological Association by *David W. Ogden;* for Texas Black Americans for Life by *Lawrence J. Joyce* and *Craig H. Greenwood;* for Catholics United for Life et al. by *Thomas Patrick Monaghan*, *Jay Alan Sekulow*, *Walter M. Weber*, *Thomas A. Glessner*, *Charles E. Rice*, and *Michael J. Laird;* for the Elliot Institute for Social Sciences Research by *Stephen R. Kaufmann;* for Feminists for Life of America et al. by *Keith A. Fournier*, *John G. Stepanovich*, *Christine Smith Torre*, *Theodore H. Amshoff, Jr.*, and *Mary Dice Grenen;* for Focus on the Family et al. by *Stephen H. Galebach*, *Gregory J. Granitto*, *Stephen W. Reed*, *David L. Llewellyn, Jr.*, *Benjamin W. Bull*, and *Leonard J. Pranschke;* for the Knights of Columbus by *Carl A. Anderson;* for the Life Issues Institute by *James Bopp, Jr.*, and *Richard E. Coleson;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius L. Chambers*, *Ronald L. Ellis*, and *Alice L. Brown;* for the National Legal Foundation by *Robert K. Skolrood;* for National Right to Life, Inc., by Messrs. Bopp and Coleson, *Robert A. Destro*, and *A. Eric Johnston;* for the Pennsylvania Coalition Against Domestic Violence et al. by *Phyllis Gelman;* for the Rutherford Institute et al. by *Thomas W. Strahan*, *John W. Whitehead*, *Mr. Johnston*, *Stephen E. Hurst*, *Joseph Secola*, *Thomas S. Neuberger*, *J. Brian Heller*, *Amy Dougherty*, *Stanley R. Jones*, *David Melton*, *Robert R. Melnick*, *William Bonner*, *W. Charles Bundren*, and *James Knicely;* for the Southern Center for Law & Ethics by *Tony G. Miller;* for the United States Catholic Conference et al. by *Mark E. Chopko*, *Phillip H. Harris*, *Michael K. Whitehead*, and *Forest D. Montgomery;* for University Faculty for Life by *Clarke D. Forsythe* and *Victor G. Rosenblum;* for Certain American State Legislators by *Paul Benjamin Linton;* for 19 Arizona Legislators by *Ronald D. Maines;* for Representative Henry J. Hyde et al. by *Albert P. Blaustein* and *Kevin J. Todd;* for Representative Don Edwards et al. by *Walter Dellinger* and *Lloyd N. Cutler;* and for 250 American Historians by *Sylvia A. Law.*

V–C, and VI, an opinion with respect to Part V–E, in which JUSTICE STEVENS joins, and an opinion with respect to Parts IV, V–B, and V–D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe* v. *Wade*, 410 U. S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for Respondents 104–117; Brief for United States as *Amicus Curiae* 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203–3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra*, at 902. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3-day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F. Supp. 1323 (ED Pa. 1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. 947 F. 2d 682 (1991). We granted certiorari. 502 U. S. 1056 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F. 2d, at 687–698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe* v. *Wade*. Tr. of Oral Arg. 5–6. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post*, at 944, 966. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity,

and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler* v. *Kansas*, 123 U. S. 623, 660–661 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth

Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (concurring opinion). "[T]he guaranties of due process, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" *Poe* v. *Ullman*, 367 U. S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado* v. *California*, 110 U. S. 516, 532 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, *e. g.*, *Duncan* v. *Louisiana*, 391 U. S. 145, 147–148 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See *Adamson* v. *California*, 332 U. S. 46, 68–92 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127–128, n. 6 (1989) (opinion of Scalia, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was ille-

gal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in *Turner* v. *Safley*, 482 U. S. 78, 94–99 (1987); in *Carey* v. *Population Services International*, 431 U. S. 678, 684–686 (1977); in *Griswold* v. *Connecticut*, 381 U. S. 479, 481–482 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, *id.*, at 486–488 (Goldberg, J., joined by Warren, C. J., and Brennan, J., concurring) (expressly relying on due process), *id.*, at 500–502 (Harlan, J., concurring in judgment) (same), *id.*, at 502–507 (WHITE, J., concurring in judgment) (same); in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); and in *Meyer* v. *Nebraska*, 262 U. S. 390, 399–403 (1923).

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amdt. 9. As the second Justice Harlan recognized:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe* v.

> *Ullman*, *supra*, at 543 (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe* v. *Ullman*, but the Court adopted his position four Terms later in *Griswold* v. *Connecticut*, *supra*. In *Griswold*, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). Constitutional protection was extended to the sale and distribution of contraceptives in *Carey* v. *Population Services International*, *supra*. It is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, see *Carey* v. *Population Services International*, *supra; Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Eisenstadt* v. *Baird*, *supra; Loving* v. *Virginia*, *supra; Griswold* v. *Connecticut*, *supra; Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942); *Pierce* v. *Society of Sisters*, *supra; Meyer* v. *Nebraska*, *supra*, as well as bodily integrity, see, *e. g.*, *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990); *Winston* v. *Lee*, 470 U. S. 753 (1985); *Rochin* v. *California*, 342 U. S. 165 (1952).

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code.

> The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Poe* v. *Ullman,* 367 U. S., at 542 (opinion dissenting from dismissal on jurisdictional grounds).

See also *Rochin* v. *California, supra,* at 171–172 (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps

in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Texas* v. *Johnson*, 491 U. S. 397 (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey* v. *Population Services International*, 431 U. S., at 685. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, *supra*, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold* v. *Connecticut*, *Eisenstadt* v. *Baird*, and *Carey* v. *Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support

the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. *Roe* was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting prenatal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in *Roe* itself and in decisions following it.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

III

A

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405–411 (1932) (Brandeis, J., dissenting). See also *Payne* v. *Tennessee*, 501 U. S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e. g.*, *United States* v. *Title Ins. & Trust*

Co., 265 U. S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173–174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e. g.*, *Burnet*, *supra*, at 412 (Brandeis, J., dissenting).

So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

1

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see *Payne* v. *Tennes-*

see, supra, at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe.*

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis.* This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, *e. g.,* R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). See *Roe*, 410 U. S., at 152–153. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 278 (1990); cf., *e. g.*, *Riggins* v. *Nevada*, 504 U. S. 127, 135 (1992); *Washington* v. *Harper*, 494 U. S. 210 (1990); see also, *e. g.*, *Rochin* v. *California*, 342 U. S. 165 (1952); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 24–30 (1905).

Finally, one could classify *Roe* as *sui generis*. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the

concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 *(Akron I)*, and by a majority of five in 1986, see *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see *id.*, at 518 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 529 (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*. See *Webster*, 492 U. S., at 521 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 525–526 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 537, 553 (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.*, at 561–563 (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942); *Griswold*, *supra; Loving* v. *Virginia*, 388 U. S. 1 (1967); and *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." *Poe* v. *Ullman*, 367 U. S., at 543 (Harlan, J., dissenting). As we described in

Carey v. *Population Services International*, *supra*, the liberty which encompasses those decisions

> "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" 431 U. S., at 684–685 (citations omitted).

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. *E. g.*, *Arnold* v. *Board of Education of Escambia County, Ala.*, 880 F. 2d 305, 311 (CA11 1989) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery* v. *County of Burke*, 660 F. 2d 111, 115 (CA4 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647 (relying on *Roe* in finding a right to terminate medical treatment), cert. denied *sub nom. Garger* v. *New Jersey*, 429 U. S. 922 (1976)). In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

4

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I, supra,* at 429, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U. S., at 160, with *Webster*, *supra,* at 515–516 (opinion of REHNQUIST, C. J.); see *Akron I,* 462 U. S., at 457, and n. 5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant;

Roe portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

B

In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with *Lochner* v. *New York*, 198 U. S. 45 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. *Id.*, at 75 (dissenting opinion). The *Lochner* decisions were exemplified by *Adkins* v. *Children's Hospital of District of Columbia*, 261 U. S. 525 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on funda-

mentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co.*, *supra*, at 399. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see *id.*, at 557, 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of

the facts and the rule it was stated to justify were repudiated in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*. As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 427 (1960).

The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U. S., at 494–495. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy*, *supra*, at 552–564 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible

they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, *e. g.*, *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); *Mapp* v. *Ohio*, 367 U. S. 643, 677 (1961) (Harlan, J., dissenting).

C

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis

would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is

obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its

decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955) *(Brown II)* ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results

when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power

to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis.* Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U. S., at 759; *Akron I,* 462 U. S., at 419–420. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, see *infra,* at 882–883, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe.* It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe,* is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe* v. *Wade,* 410 U. S., at 163. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see *supra,* at 860, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." *Roe*, *supra*, at 162. The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Yet it must be remembered that *Roe* v. *Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." *Roe*, *supra*, at 163. That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, *e. g.*, *Akron I*, *supra*, at 427. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. *Roe*, *supra*, at 163–166. Most of our cases since *Roe* have involved the application of rules derived from the trimester framework. See, *e. g.*, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, *supra; Akron I*, *supra*.

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "'[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'" *Webster* v. *Reproductive Health Services*, 492 U. S., at 511 (opinion of

the Court) (quoting *Poelker* v. *Doe*, 432 U. S. 519, 521 (1977)). It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See *Webster* v. *Reproductive Health Services*, 492 U. S., at 518 (opinion of Rehnquist, C. J.); *id.*, at 529 (O'Connor, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they

wish to vote. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983); *Norman* v. *Reed*, 502 U. S. 279 (1992).

The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. See *Hodgson* v. *Minnesota*, 497 U. S. 417, 458–459 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 519–520 (1990) *(Akron II)* (opinion of KENNEDY, J.); *Webster* v. *Reproductive Health Services*, *supra*, at 530 (O'CONNOR, J., concurring in part and concurring in judgment); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 828 (O'CONNOR, J., dissenting); *Simopoulos* v. *Virginia*, 462 U. S. 506, 520 (1983) (O'CONNOR, J., concurring in part and concurring in judgment); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 505 (1983) (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Akron I*, 462 U. S., at 464 (O'CONNOR, J., joined by WHITE and REHNQUIST, JJ., dissenting); *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976) *(Bellotti I)*.

For the most part, the Court's early abortion cases adhered to this view. In *Maher* v. *Roe*, 432 U. S. 464, 473–474 (1977), the Court explained: "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See

also *Doe* v. *Bolton*, 410 U. S. 179, 198 (1973) ("[T]he interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); *Bellotti I*, *supra*, at 147 (State may not "impose undue burdens upon a minor capable of giving an informed consent"); *Harris* v. *McRae*, 448 U. S. 297, 314 (1980) (citing *Maher*, *supra*). Cf. *Carey* v. *Population Services International*, 431 U. S., at 688 ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").

These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion "without interference from the State." *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 61 (1976). All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. It is, as a consequence, not surprising that despite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U. S., at 154–155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U. S., at 453. Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman.

Roe v. *Wade* was express in its recognition of the State's "important and legitimate interest[s] in preserving and pro-

tecting the health of the pregnant woman [and] in protecting the potentiality of human life." 410 U. S., at 162. The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. *Id.*, at 163. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. *Webster*, 492 U. S., at 519 (opinion of REHNQUIST, C. J.); *Akron I*, *supra*, at 461 (O'CONNOR, J., dissenting).

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. See, *e. g.*, *Hodgson* v. *Minnesota*, *supra*, at 459–461 (O'CONNOR, J., concurring in part and concurring in judgment); *Akron II*, *supra*, at 519–520 (opinion of KENNEDY, J.); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, *supra*, at 828–829 (O'CONNOR, J., dissenting); *Akron I*, *supra*, at 461–466 (O'CONNOR, J., dissenting); *Harris* v. *McRae*, *supra*, at 314; *Maher* v. *Roe*, *supra*, at 473; *Beal* v. *Doe*, 432 U. S. 438, 446 (1977); *Bellotti I*, *supra*, at 147. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991) (attempting "to define the doctrine of abuse of the writ with more precision" after acknowledging tension among earlier cases). In our considered judgment, an undue burden is an unconstitutional burden. See *Akron II*, 497 U. S., at 519–520 (opinion of Kennedy, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. See, *e. g.*, *Akron I*, 462 U. S., at 462–463 (O'Connor, J., dissenting). The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See *infra*, at 899–900 (addressing Pennsylvania's parental consent requirement).

Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Even when jurists reason from shared premises, some disagreement is inevitable. Compare *Hodgson*, 497 U. S., at 482–497 (KENNEDY, J., concurring in judgment in part and dissenting in part), with *id.*, at 458–460 (O'CONNOR, J., concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

(a) To protect the central right recognized by *Roe* v. *Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of *Roe* v. *Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe* v. *Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe* v. *Wade*, 410 U. S., at 164–165.

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

V

The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion, but refine the undue burden analysis in accordance with the principles articulated above. We now consider the separate statutory sections at issue.

A

Because it is central to the operation of various other requirements, we begin with the statute's definition of medical emergency. Under the statute, a medical emergency is

> "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." 18 Pa. Cons. Stat. § 3203 (1990).

Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U. S., at 164. See also *Harris* v. *McRae*, 448 U. S., at 316.

The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. 744 F. Supp., at 1378. Yet, as the Court of Appeals observed, 947 F. 2d, at 700–701, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. *Id.*, at 701. It stated: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Ibid.* As we said in *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985): "Normally, . . . we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. *Palmer* v. *Hoffman*, 318 U. S. 109, 118 (1943). This " 'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.' " *Frisby* v. *Schultz*, 487 U. S. 474, 482 (1988) (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

B

We next consider the informed consent requirement. 18 Pa. Cons. Stat. § 3205 (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 67. In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all previability regulations designed to further the State's interest in fetal life.

In *Akron I*, 462 U. S. 416 (1983), we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information "designed to influence the woman's informed choice between abortion or childbirth." *Id.*, at 444. As we later described

the *Akron I* holding in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 762, there were two purported flaws in the Akron ordinance: the information was designed to dissuade the woman from having an abortion and the ordinance imposed "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient . . . ." *Ibid.*

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron I* and *Thornburgh*. Those decisions, along with *Danforth*, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. *E. g.*, *Danforth*, *supra*, at 66–67. It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think

it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U. S., at 762. We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Our prior cases also suggest that the "straitjacket," *Thornburgh*, *supra*, at 762 (quoting *Danforth*, *supra*, at 67, n. 8), of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely

adverse effect on the physical or mental health of the patient." 18 Pa. Cons. Stat. § 3205 (1990). In this respect, the statute does not prevent the physician from exercising his or her medical judgment.

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen* v. *Roe*, 429 U. S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The Pennsylvania statute also requires us to reconsider the holding in *Akron I* that the State may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. 462 U. S., at 448. Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not

an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). Thus, we uphold the provision as a reasonable means to ensure that the woman's consent is informed.

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." 462 U. S., at 450. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be

a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." 744 F. Supp., at 1351. As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome." *Id.*, at 1352.

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," *id.*, at 1378, but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see *id.*, at 1374, the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment," *id.*, at 1378. Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. In light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period

on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe,* however, has not suggested that there is a constitutional right to abortion on demand. See, *e. g., Doe* v. *Bolton,* 410 U. S., at 189. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects. The informed consent requirement is not an undue burden on that right.

C

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on

a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute. These included:

> "273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. . . .
>
> . . . . . .
>
> "279. The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. . . .
>
> . . . . . .
>
> "281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. . . .
>
> "282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion. . . .
>
> "283. The required filing of the spousal consent form would require plaintiff-clinics to change their counseling

procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality of these revelations could not be guaranteed, since the woman's records are not immune from subpoena. . . .

"284. Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . .

"285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous. . . .

"286. Married women, victims of battering, have been killed in Pennsylvania and throughout the United States. . . .

"287. Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. . . .

"288. In a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife. . . .

"289. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. . . . The battering husband may deny parentage and use the pregnancy as an excuse for abuse. . . .

"290. Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her. A battered woman, therefore, is highly unlikely to disclose

the violence against her for fear of retaliation by the abuser. . . .

"291. Even when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. . . .

. . . . . .

"294. A woman in a shelter or a safe house unknown to her husband is not 'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances.

"295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted. . . .

"296. It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief. . . .

"297. The marital rape exception to section 3209 cannot be claimed by women who are victims of coercive sexual behavior other than penetration. The 90-day reporting requirement of the spousal sexual assault statute, 18 Pa. Con. Stat. Ann. § 3218(c), further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident. . . .

"298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of

whether the section applies to them." 744 F. Supp., at 1360–1362 (footnote omitted).

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted their wives during the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "[r]esearchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific Affairs, Violence Against Women 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. *Id.*, at 3–4; Shields & Hanneke, Battered Wives' Reactions to Marital Rape, in The Dark Side of Families: Current Family Violence Research 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. Violence Against Women, *supra*, at 12.

Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. L. Walker, The Bat-

tered Woman Syndrome 27–28 (1984). Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Herbert, Silver, & Ellard, Coping with an Abusive Relationship: I. How and Why do Women Stay?, 53 J. Marriage & the Family 311 (1991). Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Aguirre, Why Do They Return? Abused Wives in Shelters, 30 J. Nat. Assn. of Social Workers 350, 352 (1985). Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8 percent of all homicide victims in the United States are killed by their spouses. Mercy & Saltzman, Fatal Violence Among Spouses in the United States, 1976–85, 79 Am. J. Public Health 595 (1989). Thirty percent of female homicide victims are killed by their male partners. Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess., 3 (1990).

The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence. Ryan & Plutzer, When Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 J. Marriage & the Family 41, 44 (1989).

This information and the District Court's findings reinforce what common sense would suggest. In well-

functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose

a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. See Brief for Respondents 83–86. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Respondents' argument itself gives implicit recognition to this principle, at one of its critical points. Respondents speak of the one percent of women seeking abortions who are married and would choose not to notify their husbands of their plans. By selecting as the controlling class women

who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, § 3209's real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. See, *e. g.*, *Akron II*, 497 U. S., at 510–519; *Bellotti* v. *Baird*, 443 U. S. 622 (1979) *(Bellotti II); Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 74. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Danforth*, *supra*, at 69. With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972); see also *Quilloin* v. *Walcott*, 434 U. S. 246 (1978); *Caban* v. *Mohammed*, 441 U. S. 380 (1979); *Lehr* v. *Robertson*, 463 U. S. 248 (1983). If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living

child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S., at 281. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Danforth, supra,* at 71. This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird,* 405 U. S., at 453 (emphasis in original). The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell* v. *State,* 16 Wall. 130 (1873), three Members of this

Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." *Id.*, at 141 (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a woman's role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. 428 U. S., at 69. The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify—a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that § 3209 is invalid.

D

We next consider the parental consent provision. Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. See, *e. g.*, *Akron II*, 497 U. S., at 510–519; *Hodgson*, 497 U. S., at 461 (O'Connor, J., concurring in part and concurring in judgment in part); *id.*, at 497–501 (Kennedy, J., concurring in judgment in part and dissenting in part); *Akron I*, 462 U. S., at 440; *Bellotti II*, 443 U. S., at 643–644 (plurality opinion). Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

The only argument made by petitioners respecting this provision and to which our prior decisions do not speak is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it for the reasons given above. Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in

the context of the values and moral or religious principles of their family. See *Hodgson*, *supra*, at 448–449 (opinion of STEVENS, J.).

E

Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public.

For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. See 18 Pa. Cons. Stat. §§ 3207, 3214 (1990). In all events, the identity of each woman who has had an abortion remains confidential.

In *Danforth*, 428 U. S., at 80, we held that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here, except that relating to spousal notice, are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients

is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's "reason for failure to provide notice" to her husband. § 3214(a)(12). This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.

VI

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

* * *

The judgment in No. 91–902 is affirmed. The judgment in No. 91–744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability.

It is so ordered.

APPENDIX TO OPINION OF O'CONNOR, KENNEDY, AND SOUTER, JJ.

Selected Provisions of the 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982

18 PA. CONS. STAT. (1990).

"§ 3203. Definitions.

. . . . .

" 'Medical emergency.' That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function."

"§ 3205. Informed consent.

"(a) General rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

"(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

"(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

"(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

"(iii) The medical risks associated with carrying her child to term.

"(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the re-

sponsibility has been delegated by either physician, has informed the pregnant woman that:

"(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

"(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

"(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

"(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

"(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

"(b) Emergency.—Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

"(c) Penalty.—Any physician who violates the provisions of this section is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the

act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. Any physician who performs or induces an abortion without first obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained shall for the first offense be guilty of a summary offense and for each subsequent offense be guilty of a misdemeanor of the third degree. No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

"(d) Limitation on civil liability.—Any physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P. L. 390, No. 111), known as the Health Care Services Malpractice Act."

"§ 3206. Parental consent.

"(a) General rule.—Except in the case of a medical emergency or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C. S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result of incest, where

the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

"(b) Unavailability of parent or guardian.—If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

"(c) Petition to the court for consent.—If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

"(d) Court order.—If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

"(e) Representation in proceedings.—The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has

a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel."

"§ 3207. Abortion facilities.

. . . . .

"(b) Reports.—Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:

"(1) Name and address of the facility.

"(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

"(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this subsection by facilities which receive State-appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State-appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof."

"§ 3208. Printed information.

"(a) General rule.—The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, and shall update on an annual basis, the following easily comprehensible printed materials:

"(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner, including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall provide information on the availability of medical assistance benefits for prenatal care, childbirth and neonatal care, and state that it is unlawful for any individual to coerce a woman to undergo abortion, that any physician who performs an abortion upon a woman without obtaining her informed consent or without according her a private medical consultation may be liable to her for damages in a civil action at law, that the father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion and that the law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

"(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival; provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the woman's stage of pregnancy. The materials shall be objective, non-judgmental and designed

to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

"(b) Format.—The materials shall be printed in a typeface large enough to be clearly legible.

"(c) Free distribution.—The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital."

"§ 3209. Spousal notice.

"(a) Spousal notice required.—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

"(b) Exceptions.—The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

"(1) Her spouse is not the father of the child.

"(2) Her spouse, after diligent effort, could not be located.

"(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

"(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

"(c) Medical emergency.—The requirements of subsection (a) shall not apply in case of a medical emergency.

"(d) Forms.—The department shall cause to be published, forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

"(e) Penalty; civil action.—Any physician who violates the provisions of this section is guilty of 'unprofessional conduct,' and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs."

"§ 3214. Reporting.

"(a) General rule.—For the purpose of promotion of maternal health and life by adding to the sum of medical and

public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

"(1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.

"(2) The county and state in which the woman resides.

"(3) The woman's age.

"(4) The number of prior pregnancies and prior abortions of the woman.

"(5) The gestational age of the unborn child at the time of the abortion.

"(6) The type of procedure performed or prescribed and the date of the abortion.

"(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.

"(8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

"(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

"(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

"(11) The information required to be reported under section 3210(a) (relating to determination of gestational age).

"(12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.

. . . . .

"(f) Report by facility.—Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives State-appropriated funds."

JUSTICE STEVENS, concurring in part and dissenting in part.

The portions of the Court's opinion that I have joined are more important than those with which I disagree. I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement.

I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits.[1] The central holding of *Roe* v. *Wade*, 410 U. S. 113 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 101 (1976) (STEVENS, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). See also *Carey* v. *Population Services International*, 431 U. S. 678, 687, 702 (1977) (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe*'s post-viability analysis. Specifically, I accept the proposition that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U. S., at 163–164; see *ante*, at 879.

I also accept what is implicit in the Court's analysis, namely, a reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother

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[1] It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in *Roe* v. *Wade*, 410 U. S. 113 (1973). Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and JUSTICES BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four—all of whom happen to be on the Court today—have reached the opposite conclusion.

must take precedence over any duty to the unborn. The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." 410 U. S., at 156. After analyzing the usage of "person" in the Constitution, the Court concluded that that word "has application only postnatally." *Id.*, at 157. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.*, at 162. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.*, at 159. From this holding, there was no dissent, see *id.*, at 173; indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."[2] This has been and, by the Court's holding today,

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[2] Professor Dworkin has made this comment on the issue:

"The suggestion that states are free to declare a fetus a person. . . . assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

". . . If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill. . . . Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with

remains a fundamental premise of our constitutional law governing reproductive autonomy.

II

My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*. Contrary to the suggestion of the joint opinion, *ante*, at 876, it is not a "contradiction" to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake.

First, it is clear that, in order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest. See *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 778 (1986) (STEVENS, J., concurring); see generally *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 563–572 (1989) (STEVENS, J., concurring in part and dissenting in part). Moreover, as discussed above, the state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person.

Identifying the State's interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more

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the constitutional rights of pregnant women." Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 U. Chi. L. Rev. 381, 400–401 (1992).

than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population,[3] believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165 (1952); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942). This right is neutral on the question of abortion: The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969). The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. *Whalen* v. *Roe*, 429 U. S. 589,

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[3] The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.

598–600 (1977). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul." *Thornburgh*, 476 U. S., at 781. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may "'"expres[s] a preference for normal childbirth,"'" that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante*, at 872–873. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante*, at 878. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs throughout our decisions concerning reproductive freedom. In general, *Roe*'s requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations re-

quiring written informed consent, see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); limited recordkeeping and reporting, see *ibid.;* and pathology reports, see *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983); as well as various licensing and qualification provisions, see, *e. g., Roe*, 410 U. S., at 150; *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983). Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), or by "requir[ing] the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh*, 476 U. S., at 760; see also *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 442–449 (1983).

In my opinion, the principles established in this long line of cases and the wisdom reflected in Justice Powell's opinion for the Court in *Akron* (and followed by the Court just six years ago in *Thornburgh*) should govern our decision today. Under these principles, Pa. Cons. Stat. §§ 3205(a)(2)(i)–(iii) (1990) of the Pennsylvania statute are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the Commonwealth is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth to influence the

woman's choice in any way. If anything, such requirements *enhance*, rather than skew, the woman's decisionmaking.

III

The 24-hour waiting period required by §§ 3205(a)(1)–(2) of the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the Commonwealth's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the Commonwealth's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24-hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions, see *Hodgson* v. *Minnesota*, 497 U. S. 417, 449 (1990),[4] none of those reasons applies to an

[4] As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), which involved "a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion." *Hodgson*, 497 U. S., at 449, n. 35.

adult woman's decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante*, at 895–898, so we must reject the notion that a woman is less capable of deciding matters of gravity. Cf. *Reed* v. *Reed*, 404 U. S. 71 (1971).

In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.[5]

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[5] The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante*, at 873–874, is misplaced; what matters is not only the effect of a regulation but also the reason for the regulation. As I explained in *Hodgson:*

"In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, *Shapiro* v. *Thompson*, 394 U. S. 618, 631 (1969), or deny prisoners the right to marry, *Turner* v. *Safley*, 482 U. S. 78, 94–99 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Turner* v. *Safley, supra; Loving* v. *Virginia*, 388 U. S. 1, 12 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, *e. g.*, *Maher* v. *Roe*, 432 U. S. 464 (1977); cf. *Webster* v. *Reproductive*

Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

IV

In my opinion, a correct application of the "undue burden" standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.[6]

The 24-hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of

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Health Services, 492 U. S. 490, 508–511 (1989); *id.*, at 523–524 (O'CONNOR, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing 'obstacles—absolute or otherwise—in the pregnant woman's path to an abortion.'" 497 U. S., at 435.

[6] The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied. For that reason, I discount both JUSTICE SCALIA's comments on past descriptions of the standard, see *post*, at 988–990 (opinion concurring in judgment in part and dissenting in part), and the attempt to give it crystal clarity in the joint opinion. The several opinions supporting the judgment in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), are less illuminating than the central holding of the case, which appears to have passed the test of time. The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

the burden that the 24-hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is, in my opinion, "undue" because there is no evidence that such a delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In these cases, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child-support payments. §§ 3205(a)(2)(i)–(iii). The statute requires that this information be given to *all* women seeking abortions, including those for whom such information is clearly useless, such as those who are married, those who have undergone the procedure in the past and are fully aware of the options, and those who are fully convinced that abortion is their only reasonable option. Moreover, the statute requires physicians to inform all of their patients of "[t]he probable gestational age of the unborn child." § 3205(a)(1)(ii). This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester[7] when fetal age has less relevance than when the fetus nears viability. Nor can the informa-

[7] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

tion required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante*, at 872, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in § 3205(a)(1)(ii) and §§ 3205(a)(2)(i)–(iii) do not serve a useful purpose and thus constitute an unnecessary—and therefore undue—burden on the woman's constitutional liberty to decide to terminate her pregnancy.

Accordingly, while I disagree with Parts IV, V–B, and V–D of the joint opinion,[8] I join the remainder of the Court's opinion.

JUSTICE BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, III, V–A, V–C, and VI of the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER, *ante*.

Three years ago, in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. *Id.*, at 557 (BLACKMUN, J., dissenting). See *id.*, at 499 (plurality opinion of REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 532 (SCALIA, J., concurring in part and concurring in judgment). All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. See, *e. g.*, *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 524 (1990) (BLACKMUN, J., dissenting). But now, just when so many expected the darkness to fall, the flame has grown bright.

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[8] Although I agree that a parental-consent requirement (with the appropriate bypass) is constitutional, I do not join Part V–D of the joint opinion because its approval of Pennsylvania's informed parental-consent requirement is based on the reasons given in Part V–B, with which I disagree.

I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

Make no mistake, the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle. In contrast to previous decisions in which JUSTICES O'CONNOR and KENNEDY postponed reconsideration of *Roe* v. *Wade*, 410 U. S. 113 (1973), the authors of the joint opinion today join JUSTICE STEVENS and me in concluding that "the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed." *Ante*, at 846. In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages." *Ante*, at 844.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante*, at 853. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," *ante*, at 847—a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted. See *ante*, at 848–849. Included within this realm of liberty is "'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Ante*, at 851, quoting *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972) (emphasis in original). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are *central* to the

liberty protected by the Fourteenth Amendment." *Ante,* at 851 (emphasis added). Finally, the Court today recognizes that in the case of abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Ante,* at 852.

The Court's reaffirmation of *Roe*'s central holding is also based on the force of *stare decisis.* "[N]o erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." *Ante,* at 860–861. Indeed, the Court acknowledges that *Roe*'s limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it." *Ante,* at 855. In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning—"[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Ante,* at 860. The Court understands that, having "call[ed] the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution," *ante,* at 867, a decision to overrule *Roe* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Ante,* at 865. What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework

for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice.[1] In determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's "*purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ante*, at 878 (emphasis added). The Court reaffirms: "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Ante*, at 894. Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether "in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante*, at 895. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante*, at 877. And in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process. Whatever may have been the practice when the Fourteenth Amendment was adopted, the Court observes, "[w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." *Ante*, at 898.[2]

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[1] As I shall explain, the joint opinion and I disagree on the appropriate standard of review for abortion regulations. I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard.

[2] I also join the Court's decision to uphold the medical emergency provision. As the Court notes, its interpretation is consistent with the essential holding of *Roe* that "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy

Lastly, while I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. See, *e. g.*, *ante*, at 885–886. I am confident that in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante*, at 895.

II

Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest judicial scrutiny. Our precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

A

The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ." *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891). Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental in-

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would constitute a threat to her health." *Ante*, at 880. As is apparent in my analysis below, however, this exception does not render constitutional the provisions which I conclude do not survive strict scrutiny.

trusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. See *ante*, at 847–849. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt*, 405 U. S., at 453. In *Roe* v. *Wade*, this Court correctly applied these principles to a woman's right to choose abortion.

State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See, *e. g.*, *Winston* v. *Lee*, 470 U. S. 753 (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin* v. *California*, 342 U. S. 165 (1952) (invalidating stomach pumping).[3]

Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no less an impact on a woman's life than decisions about contraception or marriage. 410 U. S.,

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[3] As the joint opinion acknowledges, *ante*, at 857, this Court has recognized the vital liberty interest of persons in refusing unwanted medical treatment. *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261 (1990). Just as the Due Process Clause protects the deeply personal decision of the individual to *refuse* medical treatment, it also must protect the deeply personal decision to *obtain* medical treatment, including a woman's decision to terminate a pregnancy.

at 153. Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices." *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977).

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. See, *e. g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724–726 (1982); *Craig* v. *Boren*, 429 U. S. 190, 198–199 (1976).[4] The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our

[4] A growing number of commentators are recognizing this point. See, *e. g.*, L. Tribe, American Constitutional Law § 15–10, pp. 1353–1359 (2d ed. 1988); Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 350–380 (1992); Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 31–44 (1992); cf. Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 788–791 (1989) (similar analysis under the rubric of privacy); MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L. J. 1281, 1308–1324 (1991).

understanding of the family, the individual, or the Constitution." *Ante*, at 897.

B

The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe* v. *Wade*, 410 U. S., at 155.[5]

Roe implemented these principles through a framework that was designed "to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact," *ante*, at 872. *Roe* identified two relevant state interests: "an interest in preserving and protecting the health of the pregnant woman" and an interest in "protecting the potentiality of human life." 410 U. S., at 162. With respect to the State's interest in the health of the mother, "the 'compelling' point . . . is at approximately the end of the first trimester," because it is at that point that the mortality rate in abortion approaches that in childbirth. *Id.*, at 163. With respect to the State's interest in potential life, "the 'compelling' point is at viability," because it is at that point that the

[5] To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives. See, *e. g.*, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 65–67, 79–81 (1976) (upholding requirements of a woman's written consent and recordkeeping). But the Court today reaffirms the essential principle of *Roe* that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Ante*, at 846. Under *Roe*, any more than *de minimis* interference is undue.

fetus "presumably has the capability of meaningful life outside the mother's womb." *Ibid.* In order to fulfill the requirement of narrow tailoring, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 434 (1983).

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe.* Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach. The factual premises of the trimester framework have not been undermined, see *Webster*, 492 U. S., at 553 (BLACKMUN, J., dissenting), and the *Roe* framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

Nonetheless, three criticisms of the trimester framework continue to be uttered. First, the trimester framework is attacked because its key elements do not appear in the text of the Constitution. My response to this attack remains the same as it was in *Webster:*

> "Were this a true concern, we would have to abandon most of our constitutional jurisprudence. [T]he 'critical elements' of countless constitutional doctrines nowhere appear in the Constitution's text . . . . The Constitution makes no mention, for example, of the First Amendment's 'actual malice' standard for proving certain libels, see *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). . . . Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the *Roe* framework, these

> tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government." *Id.*, at 548.

The second criticism is that the framework more closely resembles a regulatory code than a body of constitutional doctrine. Again, my answer remains the same as in *Webster:*

> "[I]f this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence. . . . Are [the distinctions entailed in the trimester framework] any finer, or more 'regulatory,' than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a 'release time' program permitting public-school students to leave school grounds during school hours to receive religious instruction does not violate the Establishment Clause, even though a release-time program permitting religious instruction on school grounds does violate the Clause? Compare *Zorach* v. *Clauson*, 343 U. S. 306 (1952), with *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County*, 333 U. S. 203 (1948). . . . Similarly, in a Sixth Amendment case, the Court held that although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, *Geders* v. *United States*, 425 U. S. 80 (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony. *Perry* v. *Leeke*, 488 U. S. 272 (1989).
>
> "That numerous constitutional doctrines result in narrow differentiations between similar circumstances does

not mean that this Court has abandoned adjudication in favor of regulation." *Id.*, at 549–550.

The final, and more genuine, criticism of the trimester framework is that it fails to find the State's interest in potential human life compelling throughout pregnancy. No Member of this Court—nor for that matter, the Solicitor General, see Tr. of Oral Arg. 42—has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U. S., at 159. Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution. Nor, consistent with our Establishment Clause, can it be a theological or sectarian interest. See *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U. S. 747, 778 (1986) (STEVENS, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See *ante*, at 914–915 (STEVENS, J., concurring in part and dissenting in part).

But while a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," *ante,* at 846, legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women. Again, I stand by the views I expressed in *Webster:*

> "I remain convinced, as six other Members of this Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the

> woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows 'quickening'—the point at which a woman feels movement in her womb—and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy." 492 U. S., at 553–554.[6]

Roe's trimester framework does not ignore the State's interest in prenatal life. Like JUSTICE STEVENS, *ante*, at 916, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," *ante*, at 872, and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante*, at 873. But

> "[s]erious questions arise . . . when a State attempts to persuade the woman to choose childbirth over abortion. *Ante*, at 878. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect

[6] The joint opinion agrees with *Roe*'s conclusion that viability occurs at 23 or 24 weeks at the earliest. Compare *ante*, at 860, with *Roe* v. *Wade*, 410 U. S. 113, 160 (1973).

> the individual's freedom to make such judgments." *Ante,* at 916 (STEVENS, J., concurring in part and dissenting in part) (internal quotation marks omitted).

As the joint opinion recognizes, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante,* at 877.

In sum, *Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's constitutional right with the State's legitimate interests.

C

Application of the strict scrutiny standard results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, *stare decisis* requires that we again strike them down.

This Court has upheld informed- and written-consent requirements only where the State has demonstrated that they genuinely further important health-related state concerns. See *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 65–67 (1976). A State may not, under the guise of securing informed consent, "require the delivery of information 'designed to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh,* 476 U. S., at 760, quoting *Akron,* 462 U. S., at 443–444. Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an "'undesired and uncomfortable straitjacket.'" *Thornburgh,* 476 U. S., at 762, quoting *Danforth,* 428 U. S., at 67, n. 8.

Measured against these principles, some aspects of the Pennsylvania informed-consent scheme are unconstitutional.

While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare Pa. Cons. Stat. §§ 3205(a)(i)–(iii) (1990) with *Akron*, 462 U. S., at 446, n. 37, I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than a counselor. *Id.*, at 448. The District Court found that the physician-only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366–387, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

Sections 3205(a)(2)(i)–(iii) of the Act further requires that the physician or a qualified nonphysician inform the woman that printed materials are available from the Commonwealth that describe the fetus and provide information about medical assistance for childbirth, information about child support from the father, and a list of agencies offering adoption and other services as alternatives to abortion. *Thornburgh* invalidated biased patient-counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in these cases:

> "[T]he listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or

> comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.
>
> "The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this . . . , for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment . . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." 476 U. S., at 762–763 (citation omitted).

"This type of compelled information is the antithesis of informed consent," *id.*, at 764, and goes far beyond merely describing the general subject matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose." *Ibid.*[7]

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[7] While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." *Ante*, at 882. Because the State's information must be "calculated to inform the woman's free choice, not hinder

The 24-hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts. 744 F. Supp. 1323, 1378–1379 (ED Pa. 1990). In *Akron* this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest.[8]

As JUSTICE STEVENS insightfully concludes, the mandatory delay rests either on outmoded or unacceptable assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is

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it," *ante*, at 877, the measures must be designed to ensure that a woman's choice is "mature and informed," *ante*, at 883, not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict "psychological abuse," *ante*, at 893, designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the life of the unborn." *Ante*, at 877.

[8] The Court's decision in *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990), validating a 48-hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24-hour delay is imposed on an *adult* woman. See *id.*, at 449–450, n. 35; *Ohio* v. *Akron Center for Reproductive Health, Inc.*, 497 U. S. 502 (1990). Moreover, the statute in *Hodgson* did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

presumptively wrong. *Ante,* at 918–919. The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this information—of the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic.[9]

Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. 744 F. Supp., at 1382. Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." *Danforth,* 428 U. S., at 74–75 (emphasis added). The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, § 3206 is not narrowly drawn to serve that interest.[10]

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[9] Because this information is so widely known, I am confident that a developed record can be made to show that the 24-hour delay, "in a large fraction of the cases in which [the restriction] is relevant, . . . will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante,* at 895.

[10] The judicial-bypass provision does not cure this violation. *Hodgson* is distinguishable, since these cases involve more than parental involvement or approval—rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face-to-face meeting with

Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under *Danforth*, in which this Court held that record-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. *Id.*, at 79–81. The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the Commonwealth's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. 744 F. Supp., at 1392. The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are uncon-

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the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

stitutional insofar as they require the name of the referring physician and the basis for his or her medical judgment.

In sum, I would affirm the judgment in No. 91–902 and reverse the judgment in No. 91–744 and remand the cases for further proceedings.

III

At long last, THE CHIEF JUSTICE and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Post,* at 944. If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE's opinion.

THE CHIEF JUSTICE's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. *Post,* at 951. This constricted view is reinforced by THE CHIEF JUSTICE's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in *Michael H.* v. *Gerald D.,* 491 U. S. 110 (1989), where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers* v. *Hardwick,* 478 U. S. 186 (1986), where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the "'firing [of] a gun . . . into another person's body.'" *Post,* at 951–952. In THE CHIEF JUSTICE's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called sexual

deviates.[11] Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental—for THE CHIEF JUSTICE, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision. *Post*, at 967–968. In short, THE CHIEF JUSTICE's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does THE CHIEF JUSTICE give any serious consideration to the doctrine of *stare decisis*. For THE CHIEF JUSTICE, the facts that gave rise to *Roe* are surprisingly simple: "women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Post*, at 955. This characterization of the issue thus allows THE CHIEF JUSTICE quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take virtually immediate account of" a decision overruling *Roe*. *Post*, at 956 (internal quotation marks omitted).

THE CHIEF JUSTICE's narrow conception of individual liberty and *stare decisis* leads him to propose the same standard of review proposed by the plurality in *Webster*. "States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 491 (1955); cf. *Stanley* v. *Illinois*, 405 U. S. 645, 651–653 (1972)." *Post*, at 966. THE

[11] Obviously, I do not share THE CHIEF JUSTICE's views of homosexuality as sexual deviance. See *Bowers*, 478 U. S., at 202–203, n. 2.

CHIEF JUSTICE then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must "'show that no set of circumstances exists under which the [provision] would be valid.'" *Post*, at 973, quoting *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S., at 514. In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone.* Finally, in applying his standard to the spousal-notification provision, THE CHIEF JUSTICE contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. *Post*, at 974, n. 2. Yet throughout the explication of his standard, THE CHIEF JUSTICE never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest—a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother*, "could raise very serious questions." Tr. of Oral Arg. 48. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." *Id.*, at 49. If, as THE CHIEF JUSTICE contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a

State's prohibiting the sins of the father from being visited upon his offspring?[12]

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

IV

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

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[12] JUSTICE SCALIA urges the Court to "get out of this area," *post*, at 1002, and leave questions regarding abortion entirely to the States, *post*, at 999–1000. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, JUSTICE SCALIA is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe* v. *Wade*, 410 U. S. 113 (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate *Roe;* this case involves the regulation of abortions rather than their outright prohibition." 947 F. 2d 682, 687 (1991). Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in *Webster* v. *Reproductive Health Services*, *supra*, and *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990), the Court of Appeals concluded that JUSTICE O'CONNOR's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. 947 F. 2d, at 693–697 ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (internal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one

requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe* v. *Wade*, *supra*, in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother.[1] We agree with the Court of Appeals that our decision in *Roe* is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion. But, as the Court of Appeals found, the state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe*, JUSTICES O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

In *Roe*, the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still another important and legitimate interest in protecting

[1] Two years after *Roe*, the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975*, 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to *Roe* v. *Wade*, 9 John Marshall J. Prac. & Proc. 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *Morgentaler* v. *Queen*, 1 S. C. R. 30, 44 D. L. R. 4th 385 (1988).

the potentiality of human life." 410 U. S., at 162 (emphasis omitted). In the companion case of *Doe* v. *Bolton*, 410 U. S. 179 (1973), the Court referred to its conclusion in *Roe* "that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U. S., at 189. But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after *Roe*, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a number of decisions, however, the Court has substantially limited the States in their ability to impose such requirements. With regard to parental *notice* requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. *H. L.* v. *Matheson*, 450 U. S. 398, 407–410 (1981). Recently, however, we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to *two* parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. *Hodgson* v. *Minnesota*, *supra*.

We have treated parental *consent* provisions even more harshly. Three years after *Roe*, we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket provision . . . requiring the consent of a parent." *Planned Parenthood*

of Central Mo. v. *Danforth*, 428 U. S. 52, 74 (1976). In *Bellotti* v. *Baird*, 443 U. S. 622 (1979), the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her best interests. See *id.*, at 643–644 (plurality opinion); *id.*, at 656–657 (WHITE, J., dissenting). In light of *Bellotti*, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti*, see *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 439–442 (1983). We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In *Roe*, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances. Because neither *Roe* nor *Doe* involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. *Roe* v. *Wade*, *supra*, at 165, n. 67. But three years later, in *Danforth*, the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 69–71.

States have also regularly tried to ensure that a woman's decision to have an abortion is an informed and well-considered one. In *Danforth*, we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision]

be made with full knowledge of its nature and consequences." *Id.*, at 67. Since that case, however, we have twice invalidated state statutes designed to impart such knowledge to a woman seeking an abortion. In *Akron*, we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. *Akron* v. *Akron Center for Reproductive Health*, *supra*, at 442–445. More recently, in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), we struck down a more limited Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." *Id.*, at 764. Even when a State has sought only to provide information that, in our view, was consistent with the *Roe* framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. *Akron* v. *Akron Center for Reproductive Health*, 462 U. S., at 448–449. In *Akron* as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. *Id.*, at 449–451.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983), we concluded in *Akron* and *Ashcroft* that a State could not

require that such abortions be performed only in hospitals. See *Akron* v. *Akron Center for Reproductive Health, supra*, at 437–439; *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft, supra*, at 481–482. Despite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, "'present medical knowledge,'" in our view, could not justify such a hospitalization requirement under the trimester framework. *Akron* v. *Akron Center for Reproductive Health, supra*, at 437 (quoting *Roe* v. *Wade, supra*, at 163). And in *Danforth*, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. 428 U. S., at 77.

Although *Roe* allowed state regulation after the point of viability to protect the potential life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti* v. *Franklin*, 439 U. S. 379 (1979), the Court struck down a statute that governed the determination of viability. *Id.*, at 390–397. In the process, we made clear that the trimester framework incorporated only one definition of viability—ours—as we forbade States to decide that a certain objective indicator—"be it weeks of gestation or fetal weight or any other single factor"—should govern the definition of viability. *Id.*, at 389. In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id.*, at 397–401; see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 768–769 (invalidating a similar regulation). In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id.*, at 769–771. Regulations governing the treatment of aborted fetuses have

met a similar fate. In *Akron*, we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 462 U. S., at 451 (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 783 (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id.*, at 814 (WHITE, J., dissenting) ("[T]he majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990); *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990); *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989).

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks* v. *United States*, 430 U. S. 188 (1977), it concluded that in light of *Webster* and *Hodgson*, the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by JUSTICE O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991) (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legis-

lative action is practically impossible" (internal quotation marks omitted)); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546–547, 557 (1985).

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). Three years earlier, in *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934), we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 105; see also *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122 (1989) (plurality opinion) (citing the language from *Snyder*). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint. In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), we held that it included a parent's right to send a child to private school; in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, *Loving* v. *Virginia*, 388 U. S. 1 (1967); a right to procreate, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942); and a right to use contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

In *Roe* v. *Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S., at 152–153. We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier

opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris* v. *McRae*, 448 U. S. 297, 325 (1980). The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, *supra*, at 792 (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H.* v. *Gerald D.*, *supra*, at 124, n. 4 (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe* v. *Wade*, 410 U. S., at 139–140; *id.*, at 176–177, n. 2 (REHNQUIST, J., dissenting). On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our his-

tory supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986):

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.*, at 194.

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." *Webster* v. *Reproductive Health Services*, 492 U. S., at 518 (plurality opinion). The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.

II

The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." *Ante*, at 871. Instead of claiming that *Roe*

was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis.* This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe.* *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante,* at 872–873; see *Roe* v. *Wade*, *supra,* at 162–164. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante,* at 873.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe,* such as *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante,* at 881–884.

In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for

constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depar[t] from a proper understanding" of the Constitution. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S., at 557; see *United States* v. *Scott*, 437 U. S. 82, 101 (1978) ("'[I]n cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function'" (quoting *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, at 406–408 (Brandeis, J., dissenting))); *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944). Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 74–78 (1938).

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante*, at 857–860. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could sur-

vive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante*, at 871–873. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "[c]onsiderations in favor of *stare decisis* are at their acme." *Payne* v. *Tennessee*, 501 U. S., at 828. But, as the joint opinion apparently agrees, *ante*, at 855–856, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe*, and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as "reproductive planning could take virtually immediate account of" this action. *Ante*, at 856.

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante*, at 856. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in

reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante*, at 856.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante*, at 856. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), or that "liberty" under the Due Process Clause protected "freedom of contract," see *Adkins* v. *Children's Hospital of District of Columbia*, 261 U. S. 525 (1923); *Lochner* v. *New York*, 198 U. S. 45 (1905). The "separate but equal" doctrine lasted 58 years after *Plessy*, and *Lochner*'s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (rejecting the "separate but equal" doctrine); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital*, *supra*, in upholding Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect

the "legitimacy" of this Court. *Ante,* at 861–869. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante,* at 865, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolve[s] the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante,* at 866. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. *Ante,* at 866, 867. This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are

in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See *Payne* v. *Tennessee*, *supra*, at 828–830, and n. 1 (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe*. *Ante*, at 861–864 (discussing *Lochner* v. *New York*, *supra*, and *Plessy* v. *Ferguson*, *supra*). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See *West Coast Hotel Co.* v. *Parrish*, *supra; Brown* v. *Board of Education*, *supra*. One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe*. There is no reason to think that either *Plessy* or *Lochner* produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe*, so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the

decision at all costs lest it *seem* to be retreating under fire. Public protests should not alter the normal application of *stare decisis*, lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe*, on the one hand, and *Plessy* and *Lochner*, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel*, which overruled *Adkins* v. *Children's Hospital*, *supra*, and *Lochner*, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition by stubbornly refusing to reexamine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire." *Ante*, at 867.

The joint opinion agrees that the Court's stature would have been seriously damaged if in *Brown* and *West Coast Hotel* it had dug in its heels and refused to apply normal principles of *stare decisis* to the earlier decisions. But the opinion contends that the Court was entitled to overrule *Plessy* and *Lochner* in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, *post hoc* rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional protection of contractual freedom contributed to an economy

that failed to protect the welfare of all. *Ante*, at 861. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simple believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." *Lochner* v. *New York*, 198 U. S., at 53. Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in *Holden* v. *Hardy*, 169 U. S. 366 (1898), and other States followed suit shortly afterwards, see, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412 (1908); *Bunting* v. *Oregon*, 243 U. S. 426 (1917). These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at *any* wage.

When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "[t]he Constitution does not speak of freedom of contract." *West Coast Hotel Co.* v. *Parrish*, 300 U. S., at 391; *Lochner* v. *New York*, *supra*, at 75 (Holmes,

J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown*. In fact, the opinion lauds *Brown* in comparing it to *Roe*. *Ante*, at 867. This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" character. To us, adherence to *Roe* today under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." *Plessy* v. *Ferguson*, 163 U. S., at 562. It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground

alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrender[ing] to political pressure" when it overrules a controversial decision, *ante*, at 867, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court

should make its decisions with a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), have also engendered demonstrations in opposition. The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered. Nearly a century ago, Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," 57 Albany L. J. 166, 169 (1898). This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion—the "undue burden" standard. As indicated above, *Roe* v. *Wade* adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, re-

sult in the sort of "simple limitation," easily applied, which the joint opinion anticipates. *Ante*, at 855. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. *Ante*, at 877. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. *Griswold* v. *Connecticut*, 381 U. S., at 502 (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. *Ante*, at 887. But the authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. *Ante*, at 895. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," JUSTICE STEVENS would hold that they do. *Ante*, at 920–922.

Furthermore, while striking down the spousal *notice* regulation, the joint opinion would uphold a parental *consent* restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. *Ante*, at 895. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and

spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe* v. *Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 491 (1955); cf. *Stanley* v. *Illinois*, 405 U. S. 645, 651–653 (1972). With this rule in mind, we examine each of the challenged provisions.

III

A

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 18 Pa. Cons. Stat. § 3205 (1990). Section 3205(a)(1) requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable ges-

tational age; and (iii) the medical risks involved in carrying her pregnancy to term. Section 3205(a)(2) requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; and (iii) the child's father is liable for child support. The Act also imposes a 24-hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, at 902–904.

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 760. Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." *Id.*, at 798–799 (WHITE, J., dissenting).

We conclude that this provision of the statute is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision.

Section 3205(a)(1) requires a physician to disclose certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." 947 F. 2d, at 703. We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." *Akron* v.

Akron Center for Reproductive Health, Inc., 462 U. S., at 446. An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See *id.*, at 445–446, n. 37 (required disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." 947 F. 2d, at 704.

Section 3205(a)(2) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." *Id.*, at 704–705. And petitioners do not claim that the information required to be disclosed by statute is in any way false or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and noninflammatory." *Id.*, at 705. We conclude that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 830 (O'CONNOR, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might

very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. *id.*, at 801 (WHITE, J., dissenting) ("[T]he ostensible objective of *Roe* v. *Wade* is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in *Thornburgh* this Court struck down informed consent requirements similar to the ones at issue here. See *id.*, at 760–764. It is clear, however, that while the detailed framework of *Roe* led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, . . . or for any other surgical procedure except abortion." *Webster* v. *Reproductive Health Services*, 492 U. S., at 517 (plurality opinion) (citing *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 802 (WHITE, J., dissenting); *id.*, at 783 (Burger, C. J., dissenting)). In light of our rejection of *Roe*'s "fundamental right" approach to this subject, we do not regard *Thornburgh* as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24-hour mandatory waiting period is unconstitutional. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, *supra*, at 449–451. Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting period requirements do not apply in the case of a medical emergency. See 18 Pa. Cons. Stat. §§ 3205(a), (b) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable conse-

quences on fetal life, and the possible effects on her own." 462 U. S., at 474 (O'CONNOR, J., dissenting).

B

In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she must either furnish the consent of one of her parents, or must opt for the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, *or* determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical emergency. 18 Pa. Cons. Stat. § 3206 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, at 904–906.

This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983) (upholding parental consent requirement with a similar judicial bypass option); *Akron* v. *Akron Center for Reproductive Health, Inc.*, *supra*, at 439–440 (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); *Bellotti* v. *Baird*, 443 U. S. 622 (1979).

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may some-

times impair their ability to exercise their rights wisely." *Hodgson* v. *Minnesota*, 497 U. S., at 444 (opinion of STEVENS, J.). A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S., at 520 (opinion of KENNEDY, J.); see also *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 91 (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

C

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. 18 Pa. Cons. Stat. § 3209 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, at 908–909.

We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 67–72. Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.*, at 71. But the provision here involves a much less intrusive requirement of spousal *notification*, not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." *Hodgson* v. *Minnesota*, *supra*, at 496 (KENNEDY, J., concurring in judgment in part and dissenting in part); see *H. L.* v. *Matheson*, 450 U. S., at 411, n. 17. *Danforth* thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. 947 F. 2d, at 712. For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she would suffer bodily injury as a result of the notification. 18 Pa. Cons. Stat. § 3209(b) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). Thus, it is not enough for petition-

ers to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S., at 514. Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." *Ibid.* (internal quotation marks omitted). This they have failed to do.[2]

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[2] The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision. *Ante*, at 887–898. In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. 744 F. Supp. 1323, 1360 (ED Pa. 1990). In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision.

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, *ante*, at 895, and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See 744 F. Supp., at 1360. For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint

The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 69 ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); *id.*, at 93 (WHITE, J., concurring in part and dissenting in part); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S., at 541. The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "[t]he Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed

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opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands (and do not qualify for an exception). *Ante*, at 895. This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

opposition—that may be obviated by discussion prior to the abortion." 947 F. 2d, at 726 (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." 18 Pa. Cons. Stat. § 3209(a) (1990). This Court has previously recognized "the importance of the marital relationship in our society." *Planned Parenthood of Central Mo.* v. *Danforth*, *supra*, at 69. In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. See *Labine* v. *Vincent*, 401 U. S. 532, 538 (1971) ("[T]he power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See *Planned Parenthood of Central Mo.* v. *Danforth*, *supra*, at 103–104 (STEVENS, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counterpro-

ductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 800 (WHITE, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See *Harris* v. *McRae*, 448 U. S., at 325–326 ("It is not the mission of this Court or any other to decide whether the balance of competing interests . . . is wise social policy").

D

The Act also imposes various reporting requirements. Section 3214(a) requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See 18 Pa. Cons. Stat. §§ 3214(a)(1), (5), (10) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, at 909–911. The District Court found that these reports are kept completely confidential. 947 F. 2d, at 716. We further conclude that these reporting requirements rationally further the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion facility to file a report with its name and address, as well as the names

and addresses of any parent, subsidiary, or affiliated organizations. 18 Pa. Cons. Stat. § 3207(b) (1990). Section 3214(f) further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility received state funds within the preceding 12 months. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, at 906, 911. Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. See Pa. Stat. Ann., Tit. 65, §§ 66.1, 66.2 (Purdon 1959 and Supp. 1991–1992). As the Court of Appeals observed, "[w]hen a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." 947 F. 2d, at 718. These reporting requirements rationally further this legitimate state interest.

E

Finally, petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See 18 Pa. Cons. Stat. §§ 3205(a), 3206(a), 3209(c) (1990). The Act defines a "medical emergency" as

> "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial

and irreversible impairment of major bodily function." § 3203.

Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer—preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See 947 F. 2d, at 700–701. Finding that "[t]he Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.*, at 701. It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in *Thornburgh*, one which the Court made reference to with apparent approval. 476 U. S., at 771 ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so").[3] We find that the interpretation

[3] The definition in use at that time provided as follows:

"'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa. Stat. Ann., Tit. 18, § 3203 (Purdon 1983).

of the Court of Appeals in these cases is eminently reasonable, and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

IV

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 532 (1989) (opinion concurring in part and concurring in judgment), and *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 520 (1990) *(Akron II)* (concurring opinion). The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." *Ante*, at 851. The Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," *ibid.*—but the crucial part of that quali-

fication is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—with which entire societies of reasonable people disagree—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.* Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.[1] *Akron II*, *supra*, at 520 (SCALIA, J., concurring).

[1] The Court's suggestion, *ante*, at 847–848, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving* v. *Virginia*, 388 U. S. 1, 9 (1967) ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id.*, at 13 (Stewart, J., concurring in judgment). The enterprise launched in *Roe* v. *Wade*, 410 U. S. 113 (1973), by contrast, sought to *establish*—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text.

There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not

The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," *ante*, at 847 (citing *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127, n. 6 (1989) (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "cur[b] the discretion of federal judges," *ante*, at 847, is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.

Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

"The inescapable fact is that adjudication of substantive due process claims may call upon the Court

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protect childbirth simply because it does not protect abortion. The Court's contention, *ante*, at 859, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

> **in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."** *Ante,* at 849.

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in *Roe* v. *Wade,* 410 U. S. 113 (1973). Today's opinion describes the methodology of *Roe,* quite accurately, as weighing against the woman's interest the State's "'important and legitimate interest in protecting the potentiality of human life.'" *Ante,* at 871 (quoting *Roe, supra,* at 162). But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, *e. g., Roe, supra,* at 162; *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 61 (1976); *Colautti* v. *Franklin,* 439 U. S. 379, 386 (1979); *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U. S. 416, 428 (1983) *(Akron I); Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft,* 462 U. S. 476, 482 (1983). The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.* Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

The authors of the joint opinion, of course, do not squarely contend that *Roe* v. *Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis. Ante,* at 853, 861, 871. But in their exhaustive discussion of all the factors that go into the determi-

nation of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception," *ante*, at 865, the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong—even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," *ante*, at 849; it involves a "most intimate and personal choic[e]," *ante*, at 851; it is "central to personal dignity and autonomy," *ibid.;* it "originate[s] within the zone of conscience and belief," *ante*, at 852; it is "too intimate and personal" for state interference, *ibid.;* it reflects "intimate views" of a "deep, personal character," *ante*, at 853; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," *ante*, at 857; and it concerns a particularly " 'important decisio[n],' " *ante*, at 859 (citation omitted).[2] But it is

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[2] JUSTICE BLACKMUN's parade of adjectives is similarly empty: Abortion is among " 'the most intimate and personal choices,' " *ante*, at 923; it is a matter "central to personal dignity and autonomy," *ibid.;* and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny," *ante*, at 927. JUSTICE STEVENS is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and the

obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see *Bowers* v. *Hardwick*, 478 U. S. 186 (1986)) has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:

> "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott* v. *Sandford*, 19 How. 393, 621 (1857) (dissenting opinion).

"Liberty finds no refuge in a jurisprudence of doubt." *Ante,* at 844.

One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe* v. *Wade*, rather than the revised version fabricated today by the au-

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most personal nature," *ante,* at 915; it involves a "'difficult choice having serious and personal consequences of major importance to [a woman's] future,'" *ante,* at 916; the authority to make this "traumatic and yet empowering decisio[n]" is "an element of basic human dignity," *ibid.;* and it is "nothing less than a matter of conscience," *ibid.*

thors of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion—which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by JUSTICE O'CONNOR in her dissent in *Akron I*, 462 U. S. 416 (1983). See *ante*, at 876.[3] Because the three Justices now wish to "set forth a standard of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." *Ibid.* I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarifica-

[3] The joint opinion is clearly wrong in asserting, *ante*, at 874, that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in JUSTICE BLACKMUN's opinion for the Court in *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976) *(Bellotti I)*, was not by way of setting forth the *standard* of unconstitutionality, as JUSTICE O'CONNOR's later opinions did, but by way of expressing the *conclusion* of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several nonmajority opinions, see, *e. g.*, *Bellotti* v. *Baird*, 443 U. S. 622, 647 (1979) *(Bellotti II)*; *Carey* v. *Population Services International*, 431 U. S. 678, 705 (1977) (opinion concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420, n. 1 (1983) *(Akron I)*. The joint opinion's reliance on *Maher* v. *Roe*, 432 U. S. 464, 473 (1977), and *Harris* v. *McRae*, 448 U. S. 297, 314 (1980), is entirely misplaced, since those cases did not involve regulation of abortion, but mere refusal to fund it. In any event, JUSTICE O'CONNOR's earlier formulations have apparently now proved unsatisfactory to the three Justices, who—in the name of *stare decisis* no less—today find it necessary to devise an entirely new version of "undue burden" analysis. See *ante*, at 877–879.

tion make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ante*, at 877; see also *ante*, at 877–879. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante*, at 877.[4] This latter statement cannot

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[4] The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. *Ante*, at 877. This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, *e. g.*, *Akron I*, *supra*, at 463 (O'CONNOR, J., dissenting) ("The 'undue burden' . . . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard"); see also *Hodgson* v. *Minnesota*, 497 U. S. 417, 458–460 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 828 (1986) (O'CONNOR, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), which adopted the rational-basis test, could join an opinion expressly adopting the undue burden test. See *id.*, at 520 (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous citation of the plurality opinion in *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 506 (1990) *(Akron II)* (opinion of KENNEDY, J.), as applying the undue burden test. See *ante*, at 876 (using this citation to support the proposition that "two of us"—*i. e.*, two of the authors of the joint opinion—have previously applied this test). In fact, *Akron II* does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, *or otherwise unconstitutional*, burden." 497 U. S., at 519 (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under *any* standard, including

possibly mean what it says. *Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As THE CHIEF JUSTICE points out, *Roe*'s strict-scrutiny standard "at least had a recognized basis in constitutional law at the time *Roe* was decided," *ante*, at 964, while "[t]he same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *ibid.* The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." *Ante*, at 873. It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. *Ante*, at 874. I agree, indeed I have

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the undue burden test, amounts to adopting the undue burden test as the *exclusive* standard. The Court's citation of *Hodgson* as reflecting JUSTICE KENNEDY's and JUSTICE O'CONNOR's "shared premises," *ante*, at 878, is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case. I joined JUSTICE KENNEDY's opinions in both *Hodgson* and *Akron II;* I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 389–390 (1992); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–882 (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*." *Ante*, at 873.

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n. 3, *supra*, is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in JUSTICE O'CONNOR's earlier opinions. *Ante*, at 876–877. Those opinions stated that a statute imposes an "undue burden" if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision," *Akron I*, 462 U. S., at 464 (dissenting opinion) (emphasis added); see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 828 (1986) (dissent-

ing opinion). Those strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is "undue" if it merely imposes a "substantial" obstacle to abortion decisions. See, *e. g.*, *ante*, at 895, 901. JUSTICE O'CONNOR has also abandoned (again without explanation) the view she expressed in *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983) (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relate[s] to the preservation and protection of maternal health," *id.*, at 505 (citation and internal quotation marks omitted). In today's version, even health measures will be upheld only "*if they do not constitute an undue burden*," *ante*, at 878 (emphasis added). Gone too is JUSTICE O'CONNOR's statement that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy," *Akron I*, *supra*, at 461 (dissenting opinion) (emphasis added); see also *Ashcroft*, *supra*, at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Thornburgh*, *supra*, at 828 (O'CONNOR, J., dissenting); instead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest, *ante*, at 876, 878. (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe*. See *Akron I*, 462 U. S., at 420, n. 1.) And "viability" is no longer the "arbitrary" dividing line previously decried by JUSTICE O'CONNOR in *Akron I*, *id.*, at 461; the Court now announces that "the attainment of viability may continue to serve as the critical fact," *ante*, at 860.[5] It is difficult to

[5] Of course JUSTICE O'CONNOR was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness"

maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

Because the portion of the joint opinion adopting and describing the undue burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases. Thus, the joint opinion would uphold the 24-hour waiting period contained in the Pennsylvania statute's informed consent provision, 18 Pa. Cons. Stat. § 3205 (1990), because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk," *ante,* at 885. The three Justices therefore conclude that "on the record before us, . . . we are not convinced that the 24-hour waiting period constitutes an undue burden." *Ante,* at 887. The requirement that a doctor provide the information pertinent to informed consent would also be upheld because "there is no evidence on this record that [this requirement] would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Ante,* at 884. Similarly, the joint opinion would uphold the reporting requirements of the Act, §§ 3207, 3214, because "there is no . . . showing on the record before us" that these requirements constitute a "substantial obstacle"

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be thought to override the interests of the mother. *Ante,* at 870. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

to abortion decisions. *Ante*, at 901. But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle." *Ibid.* Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length, *ante*, at 888–891.

I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice.[6] But what is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, *e. g.*, *ante*, at 880, 884–885, 887, 893–894, 895, 901. We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been

[6] The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante*, at 891–893. Because this additional factfinding pertains to matters that surely are "subject to reasonable dispute," Fed. Rule Evid. 201(b), the joint opinion must be operating on the premise that these are "legislative" rather than "adjudicative" facts, see Rule 201(a). But if a court can find an undue burden simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue"—subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevent[s] a significant number of women from obtaining an abortion," *ante*, at 893; whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ante*, at 894; and whether the regulation often "deters" women from seeking abortions, *ante*, at 897. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As JUSTICE BLACKMUN recognizes (with evident hope), *ante*, at 926, the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a pref-

erence for childbirth over abortion," *ante*, at 883. Reason finds no refuge in this jurisprudence of confusion.

> **"While we appreciate the weight of the arguments . . . that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."** *Ante*, at 853.

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to *Marbury* v. *Madison*, 1 Cranch 137 (1803), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven 'unworkable,'" *ante*, at 855. I suppose the

Court is entitled to call a "central holding" whatever it wants to call a "central holding"—which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*. I thought I might note, however, that the following portions of *Roe* have not been saved:

• Under *Roe*, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice. *Thornburgh*, 476 U. S., at 759–765; *Akron I*, 462 U. S., at 442–445. Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional. *Ante*, at 881–885.

• Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. *Akron I*, *supra*, at 446–449. Under the "undue burden" regime (as applied today, at least) it is not. *Ante*, at 884–885.

• Under *Roe*, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. *Akron I*, *supra*, at 449–451. Under the "undue burden" regime (as applied today, at least) it is not. *Ante*, at 885–887.

• Under *Roe*, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. *Thornburgh*, *supra*, at 765–768. Under the "undue burden" regime (as applied today, at least) it generally is not. *Ante*, at 900–901.

> **"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . , its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a**

national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante,* at 866–867.

The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe* v. *Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe,* moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?"—not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court

in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.

> **"[T]o overrule under fire . . . would subvert the Court's legitimacy . . . .**
>
> **". . . To all those who will be . . . tested by following, the Court implicitly undertakes to remain steadfast . . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete. . . .**
>
> **"[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."** *Ante*, at 867–868.

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.

> "The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . ." The Federalist No. 78, pp. 393–394 (G. Wills ed. 1982).

Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no

shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior Courts," *ante*, at 866), with the more democratic views of a more humble man:

> "[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," *ante*, at 868, of "remain[ing] steadfast," *ibid.*, and adhering to "principle," *ante*, *passim*. Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion's "undue burden" standard)—and that principle is inconsistent with *Roe*. See 410 U. S., at 154–156.[7] To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. See n. 4, *supra;* see *supra*, at 988–990. It is beyond me how the Court expects these accommodations to be accepted "as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." *Ante*, at 865–866. The only principle the Court "adheres"

[7] JUSTICE BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constan[t]" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non-*de-minimis*" abortion regulations, *ante*, at 926, but that could only be true if a "substantial obstacle," *ante*, at 877 (joint opinion), were the same thing as a non-*de-minimis* obstacle—which it plainly is not.

to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*—and a wrong one at that.

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*. In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott* v. *Sandford*, 19 How. 393 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner* v. *New York* and *Roe* v. *Wade*." D. Currie, The Constitution in the Supreme Court 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Con-

stitution has an evolving meaning, see *ante,* at 848; that the Ninth Amendment's reference to "othe[r]" rights is not a disclaimer, but a charter for action, *ibid.;* and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe,* to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little they intimidate us.

Of course, as THE CHIEF JUSTICE points out, we have been subjected to what the Court calls "'political pressure'" by *both* sides of this issue. *Ante,* at 963. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.

In truth, I am as distressed as the Court is—and expressed my distress several years ago, see *Webster,* 492 U. S., at 535—about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into ac-

count their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," *ante,* at 849, which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court—not just those mentioned in the text or established in the traditions of our society. *Ante,* at 847–849. Why even the Ninth Amendment—which says only that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through "reasoned judgment." *Ante,* at 848–849.

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments;* if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, *Lee* v. *Weisman,* 505 U. S. 577 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value

judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it. *Ante*, at 943.

* * *

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, at 867.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There

seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

Syllabus

LUCAS *v.* SOUTH CAROLINA COASTAL COUNCIL

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 91–453. Argued March 2, 1992—Decided June 29, 1992

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S. 255, 261. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding $1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler* v. *Kansas*, 123 U. S. 623, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's preamendment deprivation. Lucas has properly alleged injury in fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe. Pp. 1010–1014.

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2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case. Pp. 1014–1032.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical—and economic— equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation. Pp. 1014–1019.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated. Pp. 1020–1026.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. *Scranton* v. *Wheeler*, 179 U. S. 141, 163. Pp. 1027–1031.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances. P. 1031.

304 S. C. 376, 404 S. E. 2d 895, reversed and remanded.

Syllabus

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 1032. BLACKMUN, J., *post*, p. 1036, and STEVENS, J., *post*, p. 1061, filed dissenting opinions. SOUTER, J., filed a separate statement, *post*, p. 1076.

A. Camden Lewis argued the cause for petitioner. With him on the briefs were *Gerald M. Finkel* and *David J. Bederman.*

C. C. Harness III argued the cause for respondent. With him on the brief were *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth P. Woodington*, Senior Assistant Attorney General, and *Richard J. Lazarus.**

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Acting Assistant Attorney General Hartman*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Clegg*, *Acting Deputy Assistant Attorney General Cohen*, *Edwin S. Kneedler*, *Peter R. Steenland*, *James E. Brookshire*, *John A. Bryson*, and *Martin W. Matzen;* for United States Senator Steve Symms et al. by *Peter D. Dickson*, *Howard E. Shapiro*, and *D. Eric Hultman;* for the American Farm Bureau Federation et al. by *James D. Holzhauer*, *Clifford M. Sloan*, *Timothy S. Bishop*, *John J. Rademacher*, and *Richard L. Krause;* for the American Mining Congress et al. by *George W. Miller*, *Walter A. Smith, Jr.*, *Stuart A. Sanderson*, *William E. Hynan*, and *Robert A. Kirshner;* for the Chamber of Commerce of the United States of America by *Stephen A. Bokat*, *Robin S. Conrad*, *Herbert L. Fenster*, and *Tami Lyn Azorsky;* for Defenders of Property Rights et al. by *Nancy G. Marzulla;* for the Fire Island Association, Inc., by *Bernard S. Meyer;* for the Institute for Justice by *Richard A. Epstein*, *William H. Mellor III*, *Clint Bolick*, and *Jonathan W. Emord;* for the Long Beach Island Oceanfront Homeowners Association et al. by *Theodore J. Carlson;* for the Mountain States Legal Foundation et al. by *William Perry Pendley;* for the National Association of Home Builders et al. by *Michael M. Berger* and *William H. Ethier;* for the Nemours Foundation, Inc., by *John J. Mullenholz;* for the Northern Virginia Chapter of the National Association of Industrial and Office Parks et al. by *John Holland Foote* and *John F. Cahill;* for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Edward J. Connor, Jr.*, and *R. S. Radford;* and for the South Carolina Policy Council Education Foundation et al. by *G. Stephen Parker.*

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Daniel E. Lungren*, Attorney General, *Roderick E. Walston*,

JUSTICE SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County,

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South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S. C. Code Ann. § 48–39–250 *et seq.* (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48–39–290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U. S. Const., Amdt. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U. S. C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code Ann. § 48–39–10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes,

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§ 48–39–10(J)) to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48–39–130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. S. C. Code Ann. § 48–39–280(A)(2) (Supp. 1988).[1] In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act

[1] This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which are directly influenced by the inlet and its associated shoals," S. C. Code Ann. § 48–39–270(7) (Supp. 1988)) that is "not stabilized by jetties, terminal groins, or other structures," § 48–39–280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established along "the crest of an ideal primary oceanfront sand dune." § 48–39–280(A)(1).

construction of occupable improvements[2] was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48–39–290(A). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the

[2] The Act did allow the construction of certain nonhabitable improvements, *e. g.*, "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48–39–290(A)(1) and (2).

Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." 304 S. C. 376, 379, 404 S. E. 2d 895, 896 (1991). Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina Legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. *Id.*, at 383, 404 S. E. 2d, at 898. The court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," *id.*, at 383, 404 S. E. 2d, at 899 (citing, *inter alia*, *Mugler* v. *Kansas*, 123 U. S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property—*i. e.*, uses of property akin to "public nuisances"—without having to pay compensation. But they would not have characterized the Beachfront Management Act's "*primary* purpose [as] the prevention of a nuisance." 304 S. C., at 395, 404 S. E. 2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S. E. 2d, at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 U. S. 966 (1991).

II

As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to

authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See S. C. Code Ann. § 48–39–290(D)(1) (Supp. 1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 351 (1986). See also *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 190 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council. See Brief for Respondent 9, n. 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Cf., *e. g.*, *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 631–632 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's *past* deprivation, *i. e.*, for his having been denied construction rights during the period before the 1990 amendment. See generally *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987) (holding that

temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period.

In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury in fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.[3] That there is a discre-

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[3] JUSTICE BLACKMUN insists that this aspect of Lucas's claim is "not justiciable," *post*, at 1042, because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), to "submi[t] a plan for development of [his] property" to the proper state authorities, *id.*, at 187. See *post*, at 1043. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as JUSTICE BLACKMUN apparently believes. See *post*, at 1042, and n. 5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's takings claim, it is appropriate for us

tionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See *Esposito* v. *South Carolina Coastal Council*, 939 F. 2d 165, 168 (CA4 1991), cert. denied, *post*, p. 1219.[4] We leave for decision on remand, of course, the questions left unaddressed by the South

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to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury in fact in his complaint. See App. to Pet. for Cert. 154 (complaint); *id.*, at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 312–313 (1987). JUSTICE BLACKMUN finds it "baffling," *post*, at 1043, n. 5, that we grant standing here, whereas "just a few days ago, in *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, *post*, at 1036, is "eager to decide" it, *post*, at 1045, and is unwilling to "be denied," *post*, at 1042. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury in fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.

[4] In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed:

"The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." *Esposito* v. *South Carolina Coastal Council*, 939 F. 2d 165, 168 (1991).

Carolina Supreme Court as a consequence of its categorical disposition.[5]

III

A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642 (1879). See also *Gibson* v. *United States*, 166 U. S. 269, 275–276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U. S., at 414–415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

[5] JUSTICE BLACKMUN states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. *Post*, at 1045, n. 7. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case *after* the Act had been amended, and *after* it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435–440, even though the facilities occupied at most only 1½ cubic feet of the landlords' property, see *id.*, at 438, n. 16. See also *United States* v. *Causby*, 328 U. S. 256, 265, and n. 10 (1946) (physical invasions of airspace); cf. *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U. S., at 260; see also *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 834 (1987); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452

U. S. 264, 295–296 (1981).[6] As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins*, *supra*, at 260 (citations omitted) (emphasis added).[7]

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[6] We will not attempt to respond to all of JUSTICE BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge" and not for the point that "*denial* of such use is sufficient to establish a takings claim regardless of any other consideration." *Post*, at 1050, n. 11. The cases say, repeatedly and unmistakably, that "'[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."*'" *Keystone*, 480 U. S., at 495 (quoting *Hodel*, 452 U. S., at 295–296 (quoting *Agins*, 447 U. S., at 260)) (emphasis added).

JUSTICE BLACKMUN describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." *Post*, at 1045, 1046. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule with exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, *e. g.*, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). JUSTICE BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

[7] Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S., at 652 (dissenting opinion). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438

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analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co.* v. *New York City*, 42 N. Y. 2d 324, 333–334, 366 N. E. 2d 1271, 1276–1277 (1977), aff'd, 438 U. S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 497–502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515–520 (REHNQUIST, C. J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566–569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i. e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

U. S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, *e. g.*, *Annicelli* v. *South Kingstown*, 463 A. 2d 133, 140–141 (R. I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co.* v. *Parsippany-Troy Hills Township*, 40 N. J. 539, 552–553, 193 A. 2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co.*, *supra*, at 652 (dissenting opinion). The many statutes on the books, both state and federal, that

provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, *e. g.,* 16 U. S. C. § 410ff–1(a) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)"); § 460aa–2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921–3923 (authorizing acquisition of wetlands); N. C. Gen. Stat. § 113A–38 (1990) (authorizing acquisition of, *inter alia*, " 'scenic easements' " within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11–15–101 to 11–15–108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[8]

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[8] JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post,* at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn*

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.[9] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his

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Central Transportation Co. v. *New York City*, 438 U. S. 104, 124 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." *Post*, at 1065, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, *e. g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436 (1982) (interest in excluding strangers from one's land).

[9] This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45–50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985).

land might occasion. 304 S. C., at 384, 404 S. E. 2d, at 899. By neglecting to dispute the findings enumerated in the Act[10] or otherwise to challenge the legislature's purposes,

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[10] The legislature's express findings include the following:

"The General Assembly finds that:

"(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) . . . [D]evelopment unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/

petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382–383, 404 S. E. 2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler* v. *Kansas*, 123 U. S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915) (law barring operation of brick mill in residential area); *Miller* v. *Schoene*, 276 U. S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government

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dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

. . . . .

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S. C. Code Ann. § 48–39–250 (Supp. 1991).

may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, *e. g.*, *Penn Central Transportation Co.*, 438 U. S., at 125 (where State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also *Nollan* v. *California Coastal Comm'n*, 483 U. S., at 834–835 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

> "[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no 'blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual.' Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U. S., at 133–134, n. 30.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that

"land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." *Nollan*, *supra*, at 834 (quoting *Agins* v. *Tiburon*, 447 U. S., at 260); see also *Penn Central Transportation Co.*, *supra*, at 127; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387–388 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[11] Compare, *e. g.*, *Claridge* v. *New Hampshire*

[11] In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," 304 S. C. 376, 385, 404 S. E. 2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S. C. Code Ann. § 48–39–250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48–39–250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," § 48–39–250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, at 1040. He says "[n]othing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild

Wetlands Board, 125 N. H. 745, 752, 485 A. 2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, *e. g.*, *Bartlett* v. *Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A. 2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts § 822, Comment *g*, p. 112 (1979) ("Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and the Police Power, 74 Yale L. J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.[12]

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if their structures are not "destroyed beyond repair," S. C. Code Ann. § 48–39–290(B) (Supp. 1988)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code Ann. § 48–39–290(D)(1) (Supp. 1991).

[12] In JUSTICE BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses,

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U. S., at 513–514 (REHNQUIST, C. J., dissenting).[13]

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the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, at 1039, 1040–1041, 1047–1051. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

[13] *E. g.*, *Mugler* v. *Kansas*, 123 U. S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman* v. *Little Rock*, 237 U. S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962) (prohibition on excavation; other uses permitted).

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[14] This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even ren-

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[14] Drawing on our First Amendment jurisprudence, see, *e. g.*, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–879 (1990), JUSTICE STEVENS would "loo[k] to the *generality* of a regulation of property" to determine whether compensation is owing. *Post*, at 1072. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire State." *Post*, at 1074. There may be some validity to the principle JUSTICE STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon* v. *Smith*, *supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U. S., at 655–656. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. JUSTICE STEVENS's approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

der his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus* v. *Allard*, 444 U. S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[15]

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S., at 426—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land-

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[15] After accusing us of "launch[ing] a missile to kill a mouse," *post*, at 1036, JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897)—which, as JUSTICE BLACKMUN acknowledges, occasionally included *outright physical appropriation* of land without compensation, see *post*, at 1056—were out of accord with *any* plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, at 1057–1058, and n. 23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

owner's title. Compare *Scranton* v. *Wheeler,* 179 U. S. 141, 163 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna* v. *United States,* 444 U. S., at 178–180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i. e.,* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[16]

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible

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[16] The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch* v. *Boston,* 101 U. S. 16, 18–19 (1880); see *United States* v. *Pacific R. Co.,* 120 U. S. 227, 238–239 (1887).

under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239–1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972); see, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1011–1012 (1984); *Hughes* v. *Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[17]

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property,

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[17] Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U. S., at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid.*

posed by the claimant's proposed activities, see, *e. g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e. g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e. g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.*, § 827, Comment *g.* So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin* v. *Benson*, 222 U. S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas.* As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can

the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[18]

* * *

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

JUSTICE KENNEDY, concurring in the judgment.

The case comes to the Court in an unusual posture, as all my colleagues observe. *Ante*, at 1010–1011; *post*, at 1041 (BLACKMUN, J., dissenting); *post*, at 1061–1062 (STEVENS, J., dissenting); *post*, at 1076–1077 (statement of SOUTER, J.). After the suit was initiated but before it reached us, South Carolina amended its Beachfront Management Act to authorize the issuance of special permits at variance with the Act's general limitations. See S. C. Code Ann. § 48–39–290(D)(1) (Supp. 1991). Petitioner has not applied for a special permit but may still do so. The availability of this alternative, if it can be invoked, may dispose of petitioner's claim of a permanent taking. As I read the Court's opinion, it does not decide the permanent taking claim, but neither does it foreclose the Supreme Court of South Carolina from considering the claim or requiring petitioner to pursue an administrative alternative not previously available.

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo

[18] JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention"/"benefit conferral" dichotomy, see *post*, at 1054–1055. There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

what has occurred in the past. The Beachfront Management Act was enacted in 1988. S. C. Code Ann. § 48–39–250 *et seq.* (Supp. 1990). It may have deprived petitioner of the use of his land in an interim period. § 48–39–290(A). If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles,* 482 U. S. 304, 318 (1987).

The issues presented in the case are ready for our decision. The Supreme Court of South Carolina decided the case on constitutional grounds, and its rulings are now before us. There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it. The State cannot complain of the manner in which the issues arose. Any uncertainty in this regard is attributable to the State, as a consequence of its amendment to the Beachfront Management Act. If the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law.

Although we establish a framework for remand, moreover, we do not decide the ultimate question whether a temporary taking has occurred in this case. The facts necessary to the determination have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements will be part of that analysis.

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App. to Pet. for Cert. 37. The finding appears to presume that the property has no significant mar-

ket value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction. *Post*, at 1043–1045 (BLACKMUN, J., dissenting); *post*, at 1065, n. 3 (STEVENS, J., dissenting); *post*, at 1076 (statement of SOUTER, J.). While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978); see also *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935). The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. *Mugler* v. *Kansas*, 123 U. S. 623, 669 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. *E. g.*, *Katz* v.

United States, 389 U. S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt* v. *Hempstead*, 369 U. S. 590, 593 (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S. C. 376, 383, 404 S. E. 2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means, as well as the ends, of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual

lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922).

With these observations, I concur in the judgment of the Court.

JUSTICE BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as JUSTICE KENNEDY demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Takings Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept

the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

I

A

In 1972 Congress passed the Coastal Zone Management Act. 16 U. S. C. § 1451 *et seq.* The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline erosion and coastal hazards. In the 1980 amendments to the Act, Congress directed States to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas."[1] 16 U. S. C. § 1456b(a)(2) (1988 ed., Supp. II).

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the South Carolina Coastal Council (Council), and the construction of any habitable structure was prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and

[1] The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club et al. as *Amici Curiae* 2–5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately $6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Calif. L. Rev. 205, 212–213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management i, 6–10 (Mar. 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. S. C. Code Ann. § 48–39–250 *et seq.* (Supp. 1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available.[2] S. C. Code Ann. § 48–39–280 (Supp. 1991).

B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.[3] The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr. 84. Between 1957 and 1963, petitioner's property was under water. *Id.*, at 79, 81–82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. *Ibid.* In 1973 the first line of stable vegetation was about halfway through the property. *Id.*, at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for

[2] The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is 40 times the annual erosion rate. S. C. Code Ann. § 48–39–280 (Supp. 1991).

[3] The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $96,660, sold in 1984 for $187,500, then in 1985 for $260,000, and, finally, to Lucas in 1986 for $475,000. He estimated its worth in 1991 at $650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the lots and built on them. Tr. 44–46.

sandbagging to protect property in the Wild Dune development. *Id.*, at 99. Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. *Id.*, at 102.

C

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." S. C. Code Ann. §48–39–250(1)(a) (Supp. 1990). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." §48–39–250(4); see also §48–39–250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to en-

force it." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491–492 (1987) (internal quotation marks omitted); see also *id.*, at 488–489, and n. 18. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See, *e. g.*, *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592–593 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Gorieb* v. *Fox*, 274 U. S. 603, 608 (1927); *Mugler* v. *Kansas*, 123 U. S. 623 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr. 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 S. C. 376, 383, 404 S. E. 2d 895, 898 (1991), and "to prevent serious injury to the community." *Id.*, at 387, 404 S. E. 2d, at 901. The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme." *Id.*, at 383, 404 S. E. 2d, at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion. Because that legislative determination cannot be disregarded in the absence of such evidence, see, *e. g.*, *Euclid*, 272 U. S., at 388; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–258 (1931) (Brandeis, J.), and because its determination

of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction, see *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 633 (1981); *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 190, 191 (1985). See also *MacDonald, Sommer & Frates*, 477 U. S., at 348 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See *ante*, at 1011–1012. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted.

The Court, however, will not be denied: It determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable.[4]

From the very beginning of this litigation, respondent has argued that the courts

> "lac[k] jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line." Tr. 10 (answer, as amended).

Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or erosion rate applied to his property in formal administrative, followed by judicial, proceedings. S. C. Code Ann. § 48–39–280(E) (Supp. 1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr. 20, 25, 36. If he was correct, the Council's

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[4] The Court's reliance, *ante,* at 1013, on *Esposito* v. *South Carolina Coastal Council,* 939 F. 2d 165, 168 (CA4 1991), cert. denied, *post,* p. 1219, in support of its decision to consider Lucas' temporary takings claim ripe is misplaced. In *Esposito* the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an as-applied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question.

final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property.

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 126 (1985). See also *Williamson County*, 473 U. S., at 188 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).[5]

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new takings jurisprudence based on the trial court's finding that the property

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[5] Even more baffling, given its decision, just a few days ago, in *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App. to Pet. for Cert. 153–156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr. 28–29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." 504 U. S., at 564. The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "'damages for the temporary taking of his property' from the date of the 1988 Act's passage to 'such time as this matter is finally resolved,'" *ante*, at 1013, n. 3, quoting the complaint, and failed to demonstrate any immediate concrete plans to build or sell.

had lost all economic value.[6] This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, *e. g.*, *Turnpike Realty Co.* v. *Dedham*, 362 Mass. 221, 284 N. E. 2d 891 (1972); *Turner* v. *County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972), cert. denied, 409 U. S. 1108 (1973); *Hall* v. *Board of Environmental Protection*, 528 A. 2d 453 (Me. 1987). Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr. 54–55. The appraiser's value was based on the fact that the "highest and best use of these lots . . . [is] luxury single family detached dwellings." *Id.*, at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see *Goldblatt*, 369 U. S., at 592, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions

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[6] Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

was "total." Record 128 (findings of fact). I agree with the Court, *ante*, at 1020, n. 9, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]," *ante*, at 1017.

Clearly, the Court was eager to decide this case.[7] But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "[T]he existence of facts supporting the legislative judgment is to be presumed." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." *Berman* v. *Par-*

[7] The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary takings claim. The Court chastises respondent for arguing that Lucas' temporary takings claim is premature because it failed "so much as [to] commen[t]" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period." *Ante*, at 1012. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary takings claim in the state courts.

ker, 348 U. S. 26, 32 (1954). See also *Sweet* v. *Rechel*, 159 U. S. 380, 392 (1895); *Euclid*, 272 U. S., at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young*, 282 U. S., at 258. In the absence of such proof, "the presumption of constitutionality must prevail." *Id.*, at 257. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See *Keystone Bituminous Coal*, 480 U. S., at 485. See also *Goldblatt*, 369 U. S., at 594 (citing "the usual presumption of constitutionality" that applies to statutes attacked as takings).

Rather than invoking these traditional rules, the Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasize[s]" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. *Ante*, at 1031. In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could.

IV

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they

prohibit is a background common-law nuisance or property principle. See *ante*, at 1028–1031.

A

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced," *ante*, at 1015, if all economic value has been lost. If one fact about the Court's takings jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." *Agins*, 447 U. S., at 261. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 131 (1978).

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." *Mugler* v. *Kansas*, 123

U. S., at 668–669. On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the "establishments will become of no value as property." *Id.*, at 664; see also *id.*, at 668.

Mugler was only the beginning in a long line of cases.[8] In *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888), the Court upheld legislation prohibiting the manufacture of oleomargarine, despite the owner's allegation that "if prevented from continuing it, the value of his property employed therein would be entirely lost and he be deprived of the means of livelihood." *Id.*, at 682. In *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915), the Court upheld an ordinance prohibiting a brickyard, although the owner had made excavations on the land that prevented it from being utilized for any purpose but a brickyard. *Id.*, at 405. In *Miller* v. *Schoene*, 276 U. S. 272 (1928), the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. The "preferment of [the public interest] over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.*, at 280. Again, in *Omnia Commercial Co.* v. *United States*, 261 U. S. 502 (1923), the Court stated that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." *Id.*, at 508.

More recently, in *Goldblatt*, the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety. 369

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[8] Prior to *Mugler*, the Court had held that owners whose real property is wholly destroyed to prevent the spread of a fire are not entitled to compensation. *Bowditch* v. *Boston*, 101 U. S. 16, 18–19 (1880). And the Court recognized in the *License Cases*, 5 How. 504, 589 (1847) (opinion of McLean, J.), that "[t]he acknowledged police power of a State extends often to the destruction of property."

U. S., at 596. "Although a comparison of values before and after is relevant," the Court stated, "it is by no means conclusive."[9] *Id.*, at 594. In 1978, the Court declared that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed . . . recognized real property interests." *Penn Central Transp. Co.*, 438 U. S., at 125. In *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), the owner alleged that a floodplain ordinance had deprived it of "all use" of the property. *Id.*, at 312. The Court remanded the case for consideration whether, even if the ordinance denied the owner all use, it could be justified as a safety measure.[10] *Id.*, at 313. And in *Keystone Bituminous Coal*, the Court summarized over 100 years of precedent: "[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests."[11] 480 U. S., at 489, n. 18.

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[9] That same year, an appeal came to the Court asking "[w]hether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation." Juris. Statement, O. T. 1962, No. 307, p. 5. The Court dismissed the appeal for lack of a substantial federal question. *Consolidated Rock Products Co.* v. *Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342, appeal dism'd, 371 U. S. 36 (1962).

[10] On remand, the California court found no taking in part because the zoning regulation "involves this highest of public interests—the prevention of death and injury." *First Lutheran Church* v. *Los Angeles*, 210 Cal. App. 3d 1353, 1370, 258 Cal. Rptr. 893, 904 (1989), cert. denied, 493 U. S. 1056 (1990).

[11] The Court's suggestion that *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest." *Id.*, at 260–262. The other cases cited by the Court, *ante*, at 1015, repeat the *Agins* sentence, but in no way suggest that the public interest is irrelevant

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," *ante*, at 1022, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use.[12] Instead, the cases depended on whether the

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if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 295–297 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a takings claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in *Agins*, *Hodel*, *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987), for its new categorical rule. *Ante*, at 1015–1016. I prefer to rely on the directly contrary holdings in cases such as *Mugler* v. *Kansas*, 123 U. S. 623 (1887), and *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915), not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U. S., at 260–262; *Keystone Bituminous Coal*, 480 U. S., at 489, n. 18, 491–492.

[12] *Miller* v. *Schoene*, 276 U. S. 272 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." *Id.*, at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially salable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: The Court

government interest was sufficient to prohibit the activity, given the significant private cost.[13]

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal*, 480 U. S., at 491, n. 20. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss.[14] See *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 418 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

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spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.*, at 280.

[13] The Court seeks to disavow the holdings and reasoning of *Mugler* and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest takings cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See *Keystone Bituminous Coal*, 480 U. S., at 491, n. 20.

[14] "Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." *First Lutheran Church*, 210 Cal. App. 3d, at 1366, 258 Cal. Rptr., at 901–902.

B

Ultimately even the Court cannot embrace the full implications of its *per se* rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."[15] *Ante*, at 1031.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.[16] The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to deter-

[15] Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, The Boundaries of Nuisance, 65 L. Q. Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 999–1000 (1966); J. Stephen, A General View of the Criminal Law of England 105–107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

[16] Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler* v. *Kansas*, 123 U. S., at 654; *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Miller*, 276 U. S., at 272; *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U. S., at 410 (citation omitted).

mine what measures would be appropriate for the protection of public health and safety. See 123 U. S., at 661. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U. S., at 280. See also *Goldblatt*, 369 U. S., at 593; *Hadacheck*, 239 U. S., at 411. Instead the Court has relied in the past, as the South Carolina court has done here, on legislative judgments of what constitutes a harm.[17]

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Ante*, at 1024. Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," *ante*, at 1025, the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation, *ante*, at 1026. The Court, however, fails to explain how its proposed common-law alternative escapes the same trap.

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[17] The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in *Mugler* and the South Carolina Supreme Court did in the instant case, would nullify *Pennsylvania Coal*. See *ante*, at 1022–1023. Justice Holmes, the author of *Pennsylvania Coal*, joined *Miller* v. *Schoene*, 276 U. S. 272 (1928), six years later. In *Miller*, the Court adopted the exact approach of the South Carolina court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that *Pennsylvania Coal* was inconsistent with *Mugler*, *Hadacheck*, *Miller*, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. *Keystone Bituminous Coal*, 480 U. S., at 490.

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction," *ante*, at 1017, n. 7, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . ."[18] Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1614 (1988).

The Court's decision in *Keystone Bituminous Coal* illustrates this principle perfectly. In *Keystone*, the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 U. S., at 501. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. *Ibid.* The dissent, however, characterized the support estate as a distinct property interest that was wholly destroyed. *Id.*, at 519. The Court could agree on no "value-free basis" to resolve this dispute.

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nui-

[18] See also Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192–1193 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36, 60 (1964).

sance law is simply a determination whether a particular use causes harm. See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966) ("*Nuisance* is a French word which means nothing more than harm"). There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free."[19] Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, *ante*, at 1031, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

C

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the " 'long recognized' " "understandings of our citizens." *Ante*, at 1027. These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." *Ante*, at 1028. It is not clear from the Court's

[19] "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts 616 (5th ed. 1984) (footnotes omitted). It is an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, Environmental Law §2.4, p. 48 (1986) (footnotes omitted). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." *Milwaukee* v. *Illinois*, 451 U. S. 304, 317 (1981).

opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.

> "The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation 'extends to the public benefit . . . for this is for the public, and every one hath benefit by it.'" F. Bosselman, D. Callies, & J. Banta, The Taking Issue 80–81 (1973), quoting *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12–13 (1606) (hereinafter Bosselman).

See also Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 697, n. 9 (1985).[20]

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners.[21] See M. Horwitz, The Transformation of American Law, 1780–1860, pp. 63–64 (1977) (hereinafter Horwitz); Treanor, 94 Yale L. J., at 695. As one court declared in 1802, citizens "were bound

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[20] See generally Sax, 74 Yale L. J., at 56–59. "The evidence certainly seems to indicate that the mere fact that government activity destroyed existing economic advantages and power did not disturb [the English theorists who formulated the compensation notion] at all." *Id.*, at 56. Professor Sax contends that even Blackstone, "remembered champion of the language of private property," did not believe that the Compensation Clause was meant to preserve economic value. *Id.*, at 58–59.

[21] In 1796, the attorney general of South Carolina responded to property holders' demand for compensation when the State took their land to build a road by arguing that "there is not one instance on record, and certainly none within the memory of the oldest man now living, of any demand being made for compensation for the soil or freehold of the lands." *Lindsay* v. *Commissioners*, 2 S. C. L. 38, 49 (1796).

to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." *M'Clenachan* v. *Curwin*, 3 Yeates 362, 373 (Pa. 1802). There was an obvious movement toward establishing the just compensation principle during the 19th century, but "there continued to be a strong current in American legal thought that regarded compensation simply as a 'bounty given . . . by the State' out of 'kindness' and not out of justice." Horwitz 65, quoting *Commonwealth* v. *Fisher*, 1 Pen. & W. 462, 465 (Pa. 1830). See also *State* v. *Dawson*, 3 Hill 100, 103 (S. C. 1836).[22]

Although, prior to the adoption of the Bill of Rights, America was replete with land-use regulations describing which activities were considered noxious and forbidden, see Bender, The Takings Clause: Principles or Politics?, 34 Buffalo L. Rev. 735, 751 (1985); L. Friedman, A History of American Law 66–68 (1973), the Fifth Amendment's Takings Clause originally did not extend to regulations of property, whatever the effect.[23] See *ante*, at 1014. Most state courts agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century . . . jurists held that

[22] Only the Constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania Constitution, its sole requirement was that property not be taken without the consent of the legislature. See Grant, The "Higher Law" Background of the Law of Eminent Domain, in 2 Selected Essays on Constitutional Law 912, 915–916 (1938). By 1868, five of the original States still had no just compensation clauses in their Constitutions. *Ibid.*

[23] James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 711 (1985). Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale L. J., at 58, the "few authorities that are available" indicate that the Clause was "designed to prevent arbitrary government action," not to protect economic value. *Id.*, at 58–60.

the constitution protected possession only, and not value." Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See *ibid.; Callender* v. *Marsh*, 1 Pick. 418, 430 (Mass. 1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public.[24] In the *Coates* cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." *Coates* v. *City of New York*, 7 Cow. 585, 592 (N. Y. 1827). See also *Brick Presbyterian Church* v. *City of New York*, 5 Cow. 538 (N. Y. 1826); *Commonwealth* v. *Alger*, 7 Cush. 53, 59, 104 (Mass. 1851); *St. Louis Gunning Advertisement Co.* v. *St. Louis*, 235 Mo. 99, 146, 137 S. W. 929, 942 (1911), appeal dism'd, 231 U. S. 761 (1913). More recent cases reach the same result. See *Consolidated Rock Products Co.* v. *Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342, appeal dism'd, 371 U. S. 36 (1962); *Nassr* v.

[24] For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." *Coates* v. *City of New York*, 7 Cow. 585, 605 (N. Y. 1827). See also *Brick Presbyterian Church* v. *City of New York*, 5 Cow. 538, 542 (N. Y. 1826); *Commonwealth* v. *Tewksbury*, 11 Metc. 55 (Mass. 1846); *State* v. *Paul*, 5 R. I. 185 (1858).

Commonwealth, 394 Mass. 767, 477 N. E. 2d 987 (1985); *Eno* v. *Burlington*, 125 Vt. 8, 209 A. 2d 499 (1965); *Turner* v. *County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." *Lindsay* v. *Commissioners*, 2 S. C. L. 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale L. J., at 695 (footnotes omitted). This rule was followed by some States into the 1800's. See Horwitz 63–65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See *id.*, at 32. Thus, for example, the owner could build nothing on his land that would alter the natural flow of water. See *id.*, at 44; see also, *e. g.*, *Merritt* v. *Parker*, 1 Coxe 460, 463 (N. J. 1795). Some more recent state courts still follow this reasoning. See, *e. g.*, *Just* v. *Marinette County*, 56 Wis. 2d 7, 201 N. W. 2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Takings Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common-law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public."

Tewksbury, 11 Metc., at 57.[25] Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." *Alger*, 7 Cush., at 104; see also *State* v. *Paul*, 5 R. I. 185, 193 (1858); *Commonwealth* v. *Parks*, 155 Mass. 531, 532, 30 N. E. 174 (1892) (Holmes, J.) ("[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new takings doctrine. Instead, the Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Takings Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.[26]

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[25] More recent state-court decisions agree. See, *e. g.*, *Lane* v. *Mt. Vernon*, 38 N. Y. 2d 344, 348–349, 342 N. E. 2d 571, 573 (1976); *Commonwealth* v. *Baker*, 160 Pa. Super. 640, 641–642, 53 A. 2d 829, 830 (1947).

[26] The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." *Ante*, at 1028, and n. 15. Nor apparently are we to find this compact in the early federal takings cases, which clearly permitted prohibition of harmful uses despite the alleged loss of all value,

V

The Court makes sweeping and, in my view, misguided and unsupported changes in our takings doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

JUSTICE STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

I

As the Court notes, *ante*, at 1010–1011, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 351 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is

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whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See *supra*, at 1047–1048, 1052–1053, and n. 16. I cannot imagine where the Court finds its "historical compact," if not in history.

the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.[1] Thus, on the present record it is entirely possible that petitioner has suffered no injury in fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.*, at 346. The second of those rules applies directly to this case.

> "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39; [citing five additional cases]. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States*, 196 U. S. 283, 295." *Id.*, at 346–347.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at

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[1] In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

1013. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, at 1026, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation, *ante*, at 1027–1029. The test the Court announces is that the regulation must "do no more than duplicate the result that could have been achieved" under a State's nuisance law. *Ante*, at 1029. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

The Categorical Rule

As the Court recognizes, *ante*, at 1015, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.*, at 416. What he had "already . . . said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminu-

tion [of value.] So the question depends upon the particular facts." *Id.*, at 413.

Nor does the Court's new categorical rule find support in decisions following *Mahon.* Although in dicta we have sometimes recited that a law "effects a taking if [it] . . . denies an owner economically viable use of his land," *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980), our *rulings* have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, *e. g., First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 313 (1987); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 596 (1962); *United States* v. *Caltex*, 344 U. S. 149, 155 (1952); *Miller* v. *Schoene*, 276 U. S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U. S. 394, 405 (1915); *Mugler* v. *Kansas*, 123 U. S. 623, 657 (1887); cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1011 (1984); *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986). In short, as we stated in *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 490 (1987), "'Although a comparison of values before and after' a regulatory action 'is relevant, . . . it is by no means conclusive.'"

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S. C. Acts 634, § 3; see also *Esposito* v. *South Carolina Coastal Council*, 939 F. 2d 165, 167 (CA4 1991).[2] Thus, if the homes adjacent to Lucas'

[2] This aspect of the Act was amended in 1990. See S. C. Code Ann. § 48–39–290(B) (Supp. 1990).

lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in *Mugler*, the brickyard in *Hadacheck*, and the gravel pit in *Goldblatt* all could be put to "other uses" and that, therefore, those cases did not involve total regulatory takings.[3] *Ante*, at 1026, n. 13.

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that

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[3] Of course, the same could easily be said in this case: Lucas may put his land to "other uses"—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "*economically* beneficial or productive use," *ante*, at 1015 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

allows only single-family homes would render the investor's property interest "valueless."[4] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." *Ante*, at 1017. This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." *Ante*, at 1018. This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not

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[4] This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. See *ante*, at 1016–1017, n. 7.

greatly hinder important governmental functions—but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some form of public service." *Ibid.* As discussed more fully below, see Part III, *infra,* I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: A regulation may single out a property owner without depriving him of all of his property, see, *e. g.*, *Nollan* v. *California Coastal Comm'n,* 483 U. S. 825, 837 (1987); *J. E. D. Associates, Inc.* v. *Atkinson,* 121 N. H. 581, 432 A. 2d 12 (1981); and it may deprive him of all of his property without singling him out, see, *e. g.*, *Mugler* v. *Kansas,* 123 U. S. 623 (1887); *Hadacheck* v. *Sebastian,* 239 U. S. 394 (1915). What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U. S. Reports. No sooner does the Court state that "total regulatory takings must be compensated," *ante,* at 1026, than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." *Ante*, at 1029–1030. The Court thus rejects the basic holding in *Mugler* v. *Kansas*, 123 U. S. 623 (1887). There we held that a statewide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. We squarely rejected the rule the Court adopts today:

> "It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a State's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U. S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional

power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn* v. *Illinois*, 94 U. S. 113, 134 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

> "If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 93 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, *e. g.*, *Andrus* v. *Allard*, 444 U. S. 51 (1979); the importance of wetlands, see, *e. g.*, 16 U. S. C. § 3801 *et seq.;* and the vulnerability of coastal

lands, see, *e. g.*, 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow government "'the largest legislative discretion'" to deal with "'the special exigencies of the moment,'" *Mugler*, 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.[5]

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.[6]

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[5] Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. of Law & Econ. 125 (1992).

[6] As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 1030, n. 17. They may "invalidat[e the] excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.*, at 319–321. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquir[y]." *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt* v. *Hempstead*, 369 U. S., at 594). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests," *Agins*, 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: The categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first and, in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "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." *Armstrong*, 364 U. S., at 49. Accordingly, one of the central concerns of our takings jurisprudence is "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co.* v. *United*

States, 148 U. S. 312, 325 (1893). We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property.[7]

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. *Nollan*, 483 U. S., at 835, n. 4; see also *Pennell* v. *San Jose*, 485 U. S. 1, 23 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act (at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler

[7] This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction." See The Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 879–880 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *United States* v. *Lee*, 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment). . . . In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.' *Id.*, at 171. In *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette* v. *United States*, 401 U. S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See *Keystone*, 480 U. S., at 486. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid* v. *Amber Realty Co.*, 272 U. S. 365 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U. S., at 132, and n. 28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."[8] Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. See, *e. g.*, *A. A. Profiles, Inc.* v. *Ft. Lauderdale*, 850 F. 2d 1483, 1488 (CA11 1988); *Wheeler* v. *Pleasant Grove*, 664 F. 2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy* v. *Westlake*, 357 So. 2d 1299, 1304 (La. App. 1978); see also *Burrows* v. *Keene*, 121 N. H. 590, 596, 432 A. 2d 15, 21 (1981); *Herman Glick Realty Co.* v. *St. Louis County*, 545 S. W. 2d 320, 324–325 (Mo. App. 1976); *Huttig* v. *Richmond Heights*,

[8] See Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1352–1354 (1991).

372 S. W. 2d 833, 842–843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth* v. *Alger*, 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S. C. Code Ann. § 48–39–10 (Supp. 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the federal Coastal Zone Management Act of 1972. Pub. L. 92–583, 86 Stat. 1280, codified as amended at 16 U. S. C. § 1451 *et seq.* Pursuant to the federal Act, every coastal State has implemented coastline regulations.[9] Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S. C. Acts 634, § 3,[10] and what is equally significant, from repairing erosion control devices, such as seawalls, see S. C. Code Ann. § 48–39–290(B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S. C. Acts 634, § 3, p. 5140.[11] In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped

[9] See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Calif. L. Rev. 205, 216–217, nn. 46–47 (1991) (collecting statutes).

[10] This provision was amended in 1990. See S. C. Code Ann. § 48–39–290(B) (Supp. 1990).

[11] This provision was amended in 1990; authority for renourishment was shifted to local governments. See S. C. Code Ann. § 48–39–350(A) (Supp. 1990).

land alike.[12] This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protec[t] life and property." S. C. Code Ann. § 48–39–260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $6 billion in property damage in South Carolina alone.[13]

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South

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[12] In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), and more closely resembles the general zoning scheme in *Euclid* v. *Amber Realty Co.*, 272 U. S. 365 (1926), than the specific landmark designation in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978).

[13] Zalkin, 79 Calif. L. Rev., at 212–213.

Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, see, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–502 (1987); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central Transportation Corp.* v. *New York City*, 438 U. S. 104, 130–131 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45–50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, at 1016–1017, n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recog-

nize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); *id.*, § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, § 89 (private nuisances usually remedied by damages, injunction, or abatement); see also, *e. g.*, *Mugler* v. *Kansas*, 123 U. S. 623, 668–669 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck* v. *Sebastian*,

239 U. S. 394, 412 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, *e. g., Welsh* v. *Wisconsin*, 466 U. S. 740, 755 (1984) (Burger, C. J.); *United States* v. *Shannon*, 342 U. S. 288, 294 (1952) (Frankfurter, J.).

Syllabus

ESPINOSA *v.* FLORIDA

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

No. 91–7390. Decided June 29, 1992

During the penalty phase of a capital murder trial in Florida, a jury is asked to recommend whether a defendant should be sentenced to death or life imprisonment in a verdict that does not include specific findings of aggravating and mitigating circumstances. The court itself must then weigh the aggravating and mitigating circumstances to determine what the sentence will be, and it must issue a written statement of the circumstances found and weighed if the sentence is death. In petitioner Espinosa's case, the jury was instructed, *inter alia*, that it could find as an aggravating factor that the murder was "especially wicked, evil, atrocious or cruel." It recommended that the trial court impose death, and finding four aggravating and two mitigating factors, the court did so. On appeal, the State Supreme Court affirmed, rejecting Espinosa's argument that the instruction in question was vague and left the jury with insufficient guidance when to find the existence of the aggravating factor.

Held: If a weighing State requires a trial court to pay deference to a jury's sentencing recommendation in determining the appropriate sentence, the jury's consideration of an invalid aggravating circumstance unconstitutionally infects the court's sentencing determination. Instructions more specific and elaborate than the one given in the instant case have been found unconstitutionally vague, and the weighing of an invalid aggravating circumstance violates the Eighth Amendment. The State incorrectly argues that there was no need to instruct the jury with the specificity required by this Court's cases because Florida juries are not the sentencers. While a trial court in Florida is not bound by a jury's recommendation, it is required to give "great weight" to it. It must be presumed that the jury in this case weighed the invalid instruction in making its recommendation and that the trial court followed state law and gave deference to that recommendation. Thus, the trial court indirectly weighed the invalid aggravating factor itself, creating the same potential for arbitrariness as the direct weighing of such a factor.

Certiorari granted; 589 So. 2d 887, reversed and remanded.

PER CURIAM.

Under Florida law, after a defendant is found guilty of a capital felony, a separate sentencing proceeding is conducted to determine whether the sentence should be life imprisonment or death. Fla. Stat. § 921.141(1) (1991). At the close of a hearing at which the prosecution and the defense may present evidence and argument in favor of and against the death penalty, *ibid.*, the trial judge charges the jurors to consider "[w]hether sufficient aggravating circumstances exist," "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances," and "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2). The verdict does not include specific findings of aggravating and mitigating circumstances, but states only the jury's sentencing recommendation. "Notwithstanding the recommendation of a majority of the jury," the trial court itself must then "weig[h] the aggravating and mitigating circumstances" to determine finally whether the sentence will be life or death. § 921.141(3). If the trial court fixes punishment at death, the court must issue a written statement of the circumstances found and weighed. *Ibid.*

A Florida jury found petitioner Henry Jose Espinosa guilty of first-degree murder. At the close of the evidence in the penalty hearing, the trial court instructed the jury on aggravating factors. One of the instructions informed the jury that it was entitled to find as an aggravating factor that the murder of which it had found Espinosa guilty was "especially wicked, evil, atrocious or cruel." See § 921.141(h). The jury recommended that the trial court impose death, and the court, finding four aggravating and two mitigating factors, did so. On appeal to the Supreme Court of Florida, petitioner argued that the "wicked, evil, atrocious or cruel" instruction was vague and therefore left the jury with insufficient guidance when to find the existence of the aggravating factor. The court rejected this argument and affirmed, say-

ing: "We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of *Smalley* v. *State*, 546 So. 2d 720 (Fla. 1989)." 589 So. 2d 887, 894 (1991).

Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. See *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992); *Stringer* v. *Black*, 503 U. S. 222, 232 (1992); *Parker* v. *Dugger*, 498 U. S. 308, 319–321 (1991); *Clemons* v. *Mississippi*, 494 U. S. 738, 752 (1990). Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. See *Stringer*, *supra*, at 235. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See *Shell* v. *Mississippi*, 498 U. S. 1 (1990); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

The State here does not argue that the "especially wicked, evil, atrocious or cruel" instruction given in this case was any less vague than the instructions we found lacking in *Shell*, *Cartwright*, or *Godfrey*. Instead, echoing the State Supreme Court's reasoning in *Smalley* v. *State*, 546 So. 2d, at 722, the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes. This is true, the State argues, because the trial court is not bound by the jury's sentencing recommendation; rather, the court must independently determine which aggravating and mitigating circumstances exist, and, after weighing the circumstances, enter a sentence "[n]otwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3).

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), or death, see *Smith* v. *State*, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U. S. 971 (1988); *Grossman* v. *State*, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U. S. 1071 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills* v. *Maryland*, 486 U. S. 367, 376–377 (1988), just as we must further presume that the trial court followed Florida law, cf. *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. *Baldwin* v. *Alabama*, 472 U. S. 372, 382 (1985), and the result, therefore, was error.

We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. See *id.*, at 389; *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984). Today's decision in no way signals a retreat from that position. We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Florida is reversed. We remand for proceedings not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE and JUSTICE WHITE dissent and would grant certiorari and set the case down for oral argument.

JUSTICE SCALIA, dissenting.

For the reasons given in my opinion in *Sochor* v. *Florida*, 504 U. S. 527, 553 (1992), I dissent from the Court's summary reversal of Espinosa's death sentence. Since the Florida courts found several constitutionally sound aggravating factors in this case, Espinosa's death sentence unquestionably comports with the "narrowing" requirement of *Furman* v. *Georgia*, 408 U. S. 238 (1972). Compliance with that requirement is the only special capital sentencing procedure that the Eighth Amendment demands. See *Walton* v. *Arizona*, 497 U. S. 639, 669–673 (1990) (SCALIA, J., concurring in part and concurring in judgment). I would deny the petition.

Per Curiam

BENTEN ET AL. *v.* KESSLER, COMMISSIONER, FOOD AND DRUG ADMINISTRATION, ET AL.

ON APPLICATION TO VACATE STAY

No. A–40. Decided July 17, 1992

Respondent federal officials confiscated applicant Benten's supply of RU–486, a drug not approved by the Food and Drug Administration (FDA), at airport customs as she tried to import a single dosage in order to induce a nonsurgical abortion. The District Court entered a preliminary injunction compelling the drug's immediate return to Benten, which the Court of Appeals stayed pending an appeal.

Held: The application to vacate the stay is denied. Applicants have failed to demonstrate a substantial likelihood of success on the merits of their claim that Benten is entitled to the drug's return on the ground that the administrative document instructing officials to seize the drug was promulgated without notice-and-comment procedures assertedly required by both the Administrative Procedure Act and FDA regulations. The Court expresses no opinion on the merits of the claim that holding the drug would constitute an undue burden upon Benten's constitutionally protected abortion rights, since that claim was addressed neither by the courts below nor by applicants' filings in this Court.

Application denied.

PER CURIAM.

Petitioner Leona Benten wants to use RU–486, a drug not approved by the Food and Drug Administration (FDA), in order to induce a nonsurgical abortion. She tried to import a single dosage of the drug for that purpose, but respondent federal officials confiscated her supply at airport customs. Petitioners filed suit in the District Court for the Eastern District of New York in order to compel the immediate return of the drug to Benten. The District Court entered a preliminary injunction granting this remedy. Respondents appealed, and the Court of Appeals for the Second Circuit stayed the injunction pending the appeal. Petitioners have filed an application to vacate the Court of Appeals' stay. We deny the application.

Petitioners contend that Benten is entitled to the return of her RU–486 because an administrative document instructing enforcement officials to seize that drug was promulgated without notice-and-comment procedures assertedly required under both the Administrative Procedure Act and FDA regulations. We conclude that petitioners have failed to demonstrate a substantial likelihood of success on the merits of these claims. JUSTICE STEVENS contends that the Government's holding the drug would constitute an undue burden upon Benten's constitutionally protected abortion rights. See *post* this page and 1086. We express no view on the merits of this assertion. The claim under which JUSTICE STEVENS would grant relief was addressed neither by the District Court nor by the Court of Appeals nor by petitioners' filings in this Court. Accordingly, we conclude that it is not properly before us.

Petitioners' application to vacate the Court of Appeals' July 15, 1992, stay pending respondents' appeal, presented to JUSTICE THOMAS and by him referred to the Court, is denied.

It is so ordered.

JUSTICE BLACKMUN dissents and would grant the application to vacate the stay.

JUSTICE STEVENS, dissenting.

Whether an undue burden has been imposed on the exercise of a constitutional right depends on the relative significance of the burden, on the one hand, and the governmental interest at stake, on the other.

In this case, applicant Benten's constitutionally protected interest in liberty has two components—her decision to terminate the pregnancy and her decision concerning the method of doing so. The Government does not assert any interest in, or right to, burden the former decision. The Government does, however, assert an interest in the latter

by protecting Benten from taking medication under the supervision of her doctor instead of undergoing an invasive surgical procedure. In view of the Government's "personal use exception" policy, expressed in the Federal Drug Administration's February 1, 1989, revision of its Regulatory Procedures Manual,* the only legitimate governmental interest that is now relevant is the interest in avoiding any "significant health risk" associated with the use of this medication when prescribed by a competent physician. There is no evidence in this record that Benten faces any such risk; indeed, on the specific facts of this case, the Government's purported interest actually supports her position. In all events, I am persuaded that the relevant legitimate federal interest is not sufficient to justify the burdensome consequence of this seizure.

Accordingly, I would grant the application.

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*The Regulatory Procedures Manual provides in pertinent part as follows:

"In deciding whether to exercise discretion to allow personal shipments of drugs or devices, FDA personnel should consider a more permissive policy in the following situations:

"when the intended use is appropriately identified, such use is not for treatment of a serious condition, and the product is not known to represent a significant health risk." Ch. 9–71–30(C).

Reporter's Note

The next page is purposely numbered 1201. The numbers between 1086 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 20 THROUGH
SEPTEMBER 30, 1992

JUNE 20, 1992

Miscellaneous Order

No. A–954. REYNOLDS *v.* INTERNATIONAL AMATEUR ATHLETIC FEDERATION ET AL. Motion of Athletics Congress of the U. S. A., Inc., to vacate the stay entered by JUSTICE STEVENS [*post*, p. 1301] denied.

JUNE 22, 1992

Vacated and Remanded on Appeal

No. 91–962. HARRIS *v.* CITY OF BIRMINGHAM ET AL. Appeal from D. C. N. D. Ala. Judgment vacated and case remanded with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 772 F. Supp. 1207.

Certiorari Granted—Vacated and Remanded

No. 91–505. WEST *v.* NORTHWEST AIRLINES, INC. C. A. 9th Cir. Upon consideration of petition for rehearing, the order entered June 8, 1992 [504 U. S. 972], denying the petition for writ of certiorari is vacated. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992). Reported below: 923 F. 2d 657.

No. 91–670. UNITED STATES *v.* VERDUGO-URQUIDEZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Alvarez-Machain*, 504 U. S. 655 (1992). Reported below: 939 F. 2d 1341.

No. 91–1269. U. S. METROLINE SERVICES, INC. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621 (1992). JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 947 F. 2d 1486.

No. 91–1527. OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM *v.* SICHERMAN, TRUSTEE. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patterson* v. *Shumate*, 504 U. S. 753 (1992). Reported below: 946 F. 2d 895.

Miscellaneous Orders

No. D–1112. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1113. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1141. IN RE DISBARMENT OF ELLIS. It is ordered that Robert M. Ellis, of Wilmette, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Motion of Massachusetts Municipal Wholesale Electric Co. for leave to participate as *amicus curiae* in this case granted. JUSTICE SOUTER took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 504 U. S. 983.]

No. 91–535. BURDICK *v.* TAKUSHI, DIRECTOR OF ELECTIONS OF HAWAII, ET AL., 504 U. S. 428. Motion of respondents for taxation of respondents' costs in printing joint appendix granted.

No. 91–7358. BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION. C. A. 7th Cir. [Certiorari granted, 504 U. S. 972.] Motion for appointment of counsel granted, and it is ordered that Allen E. Shoenberger, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 91–7873. FEX *v.* MICHIGAN. Sup. Ct. Mich. [Certiorari granted, 504 U. S. 908.] Motion for appointment of counsel granted, and it is ordered that John B. Payne, Jr., Esq., of Dearborn, Mich., be appointed to serve as counsel for petitioner in this case.

No. 91–8092. DOERR *v.* DOERR. Ct. App. Cal., 4th App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* de-

nied. Petitioner is allowed until July 13, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 91–8173. MARTIN *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 13, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari.

Certiorari Granted

No. 91–1353. CONROY *v.* ANISKOFF ET AL. Sup. Jud. Ct. Me. Certiorari granted. Reported below: 599 A. 2d 426.

No. 91–1657. LEATHERMAN ET AL. *v.* TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 954 F. 2d 1054.

No. 91–1826. BARR, ATTORNEY GENERAL, ET AL. *v.* CATHOLIC SOCIAL SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 956 F. 2d 914.

No. 91–610. LOCAL 144 NURSING HOME PENSION FUND ET AL. *v.* DEMISAY ET AL. C. A. 2d Cir. Motions of National Coordinating Committee for Multiemployer Plans and Central States et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 935 F. 2d 528.

No. 91–1600. HAZEN PAPER CO. ET AL. *v.* BIGGINS. C. A. 1st Cir. Motion of National Association of Manufacturers et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 953 F. 2d 1405.

No. 91–7804. BUFFERD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Motion of petitioner for leave to proceed *in*

forma pauperis granted. Certiorari granted. Reported below: 952 F. 2d 675.

Certiorari Denied

No. 91–689. CITIBANK, N. A. *v.* WELLS FARGO ASIA LTD. C. A. 2d Cir. Certiorari denied. Reported below: 936 F. 2d 723.

No. 91–884. FARM CREDIT SERVICES *v.* MORTER, DBA SWINENGINEERING, INC. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 2d 354.

No. 91–1122. MOSTOLLER, TRUSTEE *v.* MESSING. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 905.

No. 91–1133. SILETS *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 7th Cir. Certiorari denied. Reported below: 945 F. 2d 227.

No. 91–1412. GLADWELL, TRUSTEE *v.* HARLINE. C. A. 10th Cir. Certiorari denied. Reported below: 950 F. 2d 669.

No. 91–1416. MACDONALD, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER OF NEVADA *v.* ASSOCIATED BUILDERS & CONTRACTORS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 270.

No. 91–1418. ABROMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1241.

No. 91–1549. NEW YORK STATE DEPARTMENT OF HEALTH *v.* ANDRULONIS, INDIVIDUALLY AND AS CONSERVATOR OF THE PROPERTY OF ANDRULONIS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 652.

No. 91–1569. HILL ET AL. *v.* TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT) ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 399.

No. 91–1577. TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* MARTIN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 1050.

No. 91–1589. SWAMP ET AL. *v.* KENNEDY, EXECUTIVE DIRECTOR, WISCONSIN STATE BOARD OF ELECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 383.

No. 91–1592. H. G. A. Cinema Trust, Kanter, Trustee *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1357.

No. 91–1674. Star Market Co. *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 801.

No. 91–1690. Brennan *v.* Abbott Laboratories et al. C. A. Fed. Cir. Certiorari denied. Reported below: 952 F. 2d 1346.

No. 91–1692. K & S Partnership et al. *v.* Continental Bank, N. A. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 971.

No. 91–1703. Hall *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 778, 415 S. E. 2d 158.

No. 91–1704. Overseas Motors, Inc. *v.* Mitkovski et al. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 644.

No. 91–1706. Smith et al. *v.* Hammon et al. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 84, 946 F. 2d 1564.

No. 91–1719. Charbonnet et al. *v.* Lee, Sheriff of Jefferson Parish, et al. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 638.

No. 91–1723. Clines *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 578.

No. 91–1727. Bezanson, Trustee for Medomak Canning Co., Inc. *v.* Metropolitan Insurance & Annuity Co. C. A. 1st Cir. Certiorari denied. Reported below: 952 F. 2d 1.

No. 91–1730. Perfetti *v.* First National Bank of Chicago. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 449.

No. 91–1735. Scheerer *v.* Rose State College et al. C. A. 10th Cir. Certiorari denied. Reported below: 950 F. 2d 661.

No. 91–1737. Shiseido Cosmetics (America) Ltd. *v.* Franchise Tax Board of California. Ct. App. Cal., 3d App. Dist.

Certiorari denied. Reported below: 235 Cal. App. 3d 478, 286 Cal. Rptr. 690.

No. 91–1739. GROUND ET AL. *v.* BARLOW. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 2d 1132.

No. 91–1745. ELKS NATIONAL FOUNDATION ET AL. *v.* WEBER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 1480.

No. 91–1749. TARABISHI *v.* MCALESTER REGIONAL HOSPITAL, AKA MCALESTER REGIONAL HEALTH CENTER AUTHORITY PUBLIC TRUST STATUS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1558.

No. 91–1750. ALABAMA *v.* MATTHEWS. Sup. Ct. Ala. Certiorari denied. Reported below: 601 So. 2d 52.

No. 91–1751. KARST *v.* WOODS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–1752. WOOD *v.* FREEDMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 947 F. 2d 948.

No. 91–1755. MURDOCK ET UX., FOR THEMSELVES AND AS PARENTS AND NEXT FRIENDS OF MURDOCK *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 907.

No. 91–1758. PEREZ *v.* BMG MUSIC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 318.

No. 91–1762. REGIONAL CONSTRUCTION CO. ET AL. *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES ET AL. Ct. App. D. C. Certiorari denied. Reported below: 600 A. 2d 1077.

No. 91–1763. OTTAWAY NEWSPAPERS, INC., DBA ASHLAND PUBLISHING CO., ET AL. *v.* OSBORNE ET AL. Ct. App. Ky. Certiorari denied.

No. 91–1765. AUSTIN *v.* BERRYMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 223.

No. 91–1767. DEANDINO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 958 F. 2d 146.

No. 91–1775. GORDON *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 91–1788. BRUNO *v.* CITY OF CROWN POINT, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 355.

No. 91–1789. PECORA, SENATOR, 44TH PENNSYLVANIA SENATORIAL DISTRICT *v.* PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 335, 609 A. 2d 132.

No. 91–1790. PARKHILL ET AL. *v.* ADUDDELL. Sup. Ct. Tex. Certiorari denied. Reported below: 821 S. W. 2d 158.

No. 91–1796. COOK *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1172.

No. 91–1834. BUNGE EDIBLE OIL CORP. *v.* CANADIAN PACIFIC (BERMUDA) LTD. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 786.

No. 91–1886. FREAS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 562, 606 A. 2d 372.

No. 91–7529. CURTIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–7537. CHRISTOPHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 536.

No. 91–7693. PELTIER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 249 Kan. 415, 819 P. 2d 628.

No. 91–7708. CEASAR *v.* HAMILTON, ON BEHALF OF CEASAR, A MINOR. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 218 Ill. App. 3d 268, 578 N. E. 2d 221.

No. 91–7777. SLEZAK *v.* CANNON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 396.

No. 91–7818. MCGEE *v.* SCREW CONVEYOR CORPORATION OF WINONA, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 399.

No. 91–7887. TILLMAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 220 Conn. 487, 600 A. 2d 738.

No. 91–8037. YOUNG *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8083. HURD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 91–8086. TROXELL *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–8091. WILLIAMS *v.* FAUVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1395.

No. 91–8095. MCCREADIE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 223 Ill. App. 3d 316, 584 N. E. 2d 839.

No. 91–8097. SAUNDERS *v.* NEAL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8099. PALMER *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 234.

No. 91–8102. WILLIAMS *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 945 F. 2d 926.

No. 91–8103. WILLIAMS *v.* BURTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1572.

No. 91–8110. CROWHORN *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 235.

No. 91–8115. MITCHELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 926, 583 N. E. 2d 78.

No. 91–8116. MARTIN *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 820 S. W. 2d 605.

No. 91–8117. WHITAKER *v.* PASCARELLA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–8124. WOODSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 220 Ill. App. 3d 865, 581 N. E. 2d 320.

No. 91–8126. WICKHAM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 593 So. 2d 191.

No. 91–8128. AUSTIN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 91–8130. FANTI *v.* MITCHELL, ACTING SECRETARY OF THE COMMONWEALTH, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 91–8137. DANDRIDGE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 217 Ill. App. 3d 1111, 626 N. E. 2d 792.

No. 91–8140. ZABRANI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 580 So. 2d 782.

No. 91–8141. ALWINE *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 91–8142. MCGEE *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 724.

No. 91–8143. COTTON *v.* PUCKETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8144. DEMPSEY *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 959 F. 2d 230.

No. 91–8146. SMITH *v.* KAISER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1260.

No. 91–8152. PRINCE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 91–8153. MCINERNEY *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 721.

No. 91–8154. PRAYSO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 270.

No. 91–8160. KULKA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 91–8171. TRENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 949 F. 2d 998.

No. 91–8184. STANLEY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 752.

No. 91–8187. GLASS *v.* GRIJALVA, DEPUTY WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–8192. WEIMER ET AL. *v.* LIEBNER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 336.

No. 91–8239. SWENSKY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1171.

No. 91–8270. WATTS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 593 So. 2d 198.

No. 91–8271. SLOAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–8273. SZYMANSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 725.

No. 91–8287. BARROZO ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–8291. SALIM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–8300. SHARP *v.* UNITED STATES; and
No. 91–8301. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1312.

No. 91–8305. VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–8306. SELLARS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–8313. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 351.

No. 91–8314. EWING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 957 F. 2d 115.

No. 91–8316. KEAGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 928 F. 2d 407.

No. 91–8318. ERDMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 387.

No. 91–8342. ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 378.

No. 91–8347. SPARROW *v.* INTERNAL REVENUE SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 259, 949 F. 2d 434.

No. 91–8352. TAJEDDINI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 945 F. 2d 458.

No. 91–8354. AKINKOUTU, AKA BABALOLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–8355. CHAN CHUN-YIN, AKA AH WAI *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 222, 958 F. 2d 440.

No. 91–8357. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 91–8362. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 1035.

No. 91–8363. MAYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 858.

No. 91–8364. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 14.

No. 91–8370. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–8371. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 48.

No. 91–8373. ROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 91–8377. GERALDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1160.

No. 91–8383. OLVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 788.

No. 91–8392. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 722.

No. 91–8394. SMITH *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 961 F. 2d 211.

No. 91–8396. BORROMEO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 245.

No. 91–8399. CLINCY *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 234.

No. 91–8402. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–8403. EMANUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–4. INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 12, AFL–CIO *v.* WILSON ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 915 F. 2d 535.

No. 91–1641. FEDERAL BUREAU OF INVESTIGATION ET AL. *v.* WIENER. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 943 F. 2d 972.

No. 91–356. MEAD CORP. *v.* TILLEY ET AL. C. A. 4th Cir. Motion of American Academy of Actuaries et al. for leave to file supplemental brief as *amici curiae* denied. Certiorari denied. Reported below: 927 F. 2d 756.

No. 91–545. BURLINGTON NORTHERN RAILROAD CO. *v.* BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION ET AL. C. A. 9th Cir. Motions of Reservation Telephone Cooperative and Association of American Railroads for leave to file briefs as *amici curiae* granted. Motion of California et al. for leave to file supplemental brief as *amici curiae* denied. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 924 F. 2d 899.

No. 91–680. FAIRWAY SPRING CO., INC., ET AL. *v.* SOVRAN BANK/MARYLAND; and

No. 91–681. CHEMUNG CANAL TRUST CO., AS TRUSTEE OF THE FAIRWAY SPRING CO., INC., RESTATED PENSION PLAN *v.* SOVRAN BANK/MARYLAND. C. A. 2d Cir. Certiorari denied.

JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. Reported below: 939 F. 2d 12.

No. 91–707. LENNES, COMMISSIONER, DEPARTMENT OF LABOR AND INDUSTRY OF MINNESOTA, ET AL. *v.* BOISE CASCADE CORP. ET AL. C. A. 8th Cir. Motion of Mechanical Contractors Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 939 F. 2d 632.

No. 91–1586. SUPER VALU STORES, INC. *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE. Sup. Ct. Iowa. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 479 N. W. 2d 255.

No. 91–1607. KAISER STEEL RESOURCES, INC., FKA KAISER STEEL CORP. *v.* PEARL BREWING CO. ET AL. C. A. 10th Cir. Motion of Credit Managers Association of California for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 952 F. 2d 1230.

No. 91–1732. MICHIGAN *v.* SAMMONS; and MICHIGAN *v.* STONE. Ct. App. Mich. Motions of respondents Martin Howard Sammons and Alan Michael Stone for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 191 Mich. App. 351, 478 N. W. 2d 901 (first case).

No. 91–1754. ILLINOIS *v.* FREEMAN. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 220 Ill. App. 3d 825, 581 N. E. 2d 293.

No. 91–1780. COLORADO *v.* GASKINS. Ct. App. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 91–1792. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 955 F. 2d 614.

No. 91–8131. JONES *v.* GUNTER, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Motion of petitioner to defer consideration of petition for certiorari denied. Certiorari denied. Reported below: 953 F. 2d 1391.

Rehearing Denied

No. 91–734. NORTHWEST AIRLINES, INC. *v.* WEST, 504 U. S. 968;
No. 91–7225. RUGGLES *v.* CITY OF RIVERSIDE, 503 U. S. 947;
No. 91–7232. HOFMANN *v.* PRESSMAN TOY CORP. ET AL., 503 U. S. 963;
No. 91–7472. IN RE BALLARD, 504 U. S. 907;
No. 91–7495. ROMERO *v.* CALDWELL ET AL., 503 U. S. 993;
No. 91–7496. MABERY *v.* RODRIGUEZ ET AL., 503 U. S. 993;
No. 91–7523. GILL *v.* VIRGINIA, 503 U. S. 1008;
No. 91–7541. GRAY *v.* SILVA ET AL., 503 U. S. 1008;
No. 91–7561. SCOTT *v.* VETERANS ADMINISTRATION ET AL., 504 U. S. 918;
No. 91–7851. COFIELD *v.* OFFICE OF PERSONNEL MANAGEMENT, 504 U. S. 959;
No. 91–7893. STOIANOFF *v.* FRANCIS ET AL., 504 U. S. 959;
No. 91–7924. TAYLOR *v.* DUCKWORTH, WARDEN, ET AL., 504 U. S. 960;
No. 91–7926. IN RE THOMAS, 504 U. S. 954;
No. 91–7941. HENTHORN *v.* UNITED STATES, 504 U. S. 928; and
No. 91–7970. KELLEY *v.* UNITED STATES, 504 U. S. 929. Petitions for rehearing denied.

No. 91–6917. LANE *v.* PARRIS ET AL., LANE *v.* STARR, JUDGE, and LANE *v.* TUNNELL ET AL., 502 U. S. 1116; and
No. 91–7371. CRAWFORD *v.* DISTRICT OF COLUMBIA BOARD OF PAROLE, 503 U. S. 990. Motions of petitioners for leave to file petitions for rehearing denied.

JUNE 23, 1992

Dismissal Under Rule 46

No. 91–8500. BLACKSHIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

JUNE 29, 1992

Affirmed on Appeal

No. 91–1270. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* TERRAZAS ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 789 F. Supp. 828.

Appeal Dismissed

No. 91–1571. MASSACHUSETTS ET AL. *v.* FRANKLIN, SECRETARY OF COMMERCE, ET AL. Cross-appeal from D. C. Mass. dismissed. Reported below: 785 F. Supp. 230.

Certiorari Granted—Reversed and Remanded. (See No. 91–7390, *ante,* p. 1079.)

Certiorari Granted—Vacated and Remanded

No. 90–1473. KOTLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF KOTLER *v.* AMERICAN TOBACCO CO. ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cipollone* v. *Liggett Group, Inc.*, *ante,* p. 504. Reported below: 926 F. 2d 1217.

No. 90–1837. PAPAS ET UX. *v.* ZOECON CORP. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cipollone* v. *Liggett Group, Inc.*, *ante,* p. 504. Reported below: 926 F. 2d 1019.

No. 91–310. JONES ET AL. *v.* CLEAR CREEK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lee* v. *Weisman, ante,* p. 577. Reported below: 930 F. 2d 416.

No. 91–1646. ANTARES AIRCRAFT L. P. *v.* FEDERAL REPUBLIC OF NIGERIA ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607 (1992). Reported below: 948 F. 2d 90.

No. 91–5450. HITCHCOCK *v.* FLORIDA. Sup. Ct. Fla. Petition for rehearing granted, and order entered October 15, 1991 [502 U. S. 912], denying petition for writ of certiorari vacated. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Espinosa* v. *Florida, ante,* p. 1079. JUSTICE THOMAS took no part in the consideration or decision of this case. Reported below: 578 So. 2d 685.

No. 91–6076. BELTRAN-LOPEZ *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Espinosa* v. *Florida*, *ante*, p. 1079. Reported below: 583 So. 2d 1030.

No. 91–6887. AGUIRRE *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Doggett* v. *United States*, *ante*, p. 647. Reported below: 935 F. 2d 276.

No. 91–7170. HENRY *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Espinosa* v. *Florida*, *ante*, p. 1079, and *Sochor* v. *Florida*, 504 U. S. 527 (1992). Reported below: 586 So. 2d 1033.

No. 91–7273. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Espinosa* v. *Florida*, *ante*, p. 1079. Reported below: 586 So. 2d 1038.

No. 91–7634. GASKIN *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Espinosa* v. *Florida*, *ante*, p. 1079. Reported below: 591 So. 2d 917.

Miscellaneous Orders

No. ——. TOZZI *v.* JOLIET JUNIOR COLLEGE ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–915. RAWLINS *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1100. IN RE DISBARMENT OF CUNNINGHAM. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1110. IN RE DISBARMENT OF HANSEN. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1116. IN RE DISBARMENT OF MULDROW. Disbarment entered. [For earlier order herein, see 503 U. S. 1002.]

No. D–1142. IN RE DISBARMENT OF SHAUGHNESSY. It is ordered that Robert William Shaughnessy, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1143. IN RE DISBARMENT OF BYRD. It is ordered that Mitchell King Byrd, of Rock Hill, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 91–1546. SLAGLE *v.* TERRAZAS ET AL. Appeal from D. C. W. D. Tex. Motion of appellant for establishment of deadline for submission of the views of the United States denied.

No. 91–8233. IN RE KALTENBACH. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 20, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of mandamus.

No. 91–8412. PROWS *v.* WILLIAMS, WARDEN, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until July 20, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 91–8494. IN RE BURNETT; and
No. 91–8508. IN RE COCHRAN. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 91–1526. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 943 F. 2d 825.

No. 91–790. CSX TRANSPORTATION, INC. *v.* EASTERWOOD; and
No. 91–1206. EASTERWOOD *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. Motion of Association of American Railroads for

leave to file a brief as *amicus curiae* in No. 91–790 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 933 F. 2d 1548.

No. 91–1958. HELLING ET AL. *v.* MCKINNEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 959 F. 2d 853.

No. 91–5397. NEGONSOTT *v.* SAMUELS, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 933 F. 2d 818.

Certiorari Denied

No. 90–1362. WILSON *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 1282.

No. 90–1448. ROBERTS *v.* MADIGAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 1047.

No. 90–1573. VILLAGE OF CRESTWOOD, ILLINOIS, ET AL. *v.* DOE. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 1476.

No. 90–8443. REDD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 300, 404 S. E. 2d 264.

No. 91–141. CITY OF ROLLING MEADOWS ET AL. *v.* KUHN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 927 F. 2d 1401.

No. 91–284. BARGER *v.* PETROLEUM HELICOPTERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 828.

No. 91–286. BISHOP *v.* DELCHAMPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 926 F. 2d 1066.

No. 91–468. CHABAD-LUBAVITCH OF VERMONT ET AL. *v.* CITY OF BURLINGTON, VERMONT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 936 F. 2d 109.

No. 91–477. MORONGO UNIFIED SCHOOL DISTRICT ET AL. *v.* SANDS ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 53 Cal. 3d 863, 809 P. 2d 809.

No. 91–614. NORTHWEST FINANCIAL, INC. *v.* CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 229 Cal. App. 3d 198, 280 Cal. Rptr. 24.

No. 91–685. LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID CO. *v.* FELDMAN. Sup. Ct. N. J. Certiorari denied. Reported below: 125 N. J. 117, 592 A. 2d 1176.

No. 91–796. CAMMACK ET AL. *v.* WAIHEE, GOVERNOR OF HAWAII, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 2d 765.

No. 91–941. ESPOSITO ET AL. *v.* SOUTH CAROLINA COASTAL COUNCIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 939 F. 2d 165.

No. 91–1076. LONG BEACH EQUITIES, INC. *v.* COUNTY OF VENTURA, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 231 Cal. App. 3d 1016, 282 Cal. Rptr. 877.

No. 91–1176. CONSTANGY *v.* NORTH CAROLINA CIVIL LIBERTIES UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 1145.

No. 91–1211. EVANS *v.* CITY OF EVANSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 941 F. 2d 473.

No. 91–1462. MURRAY ET AL. *v.* CITY OF AUSTIN, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 147.

No. 91–1511. ROBERTS, DBA ROBERTS MOTOR CO. *v.* FERRARI S. P. A. ESERCIZIO FABRICHE AUTOMOBILI E CORSE. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 1235.

No. 91–1531. CZARNECKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 953 F. 2d 633.

No. 91–1551. AYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1162.

No. 91–1582. ELLWEST STEREO THEATRES OF MEMPHIS, INC., DBA EXECUTIVE SOUTH, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 404.

No. 91–1603. SAVE BARTON CREEK ASSN., INC., ET AL. *v.* FEDERAL HIGHWAY ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1129.

No. 91–1619. VULPIS ET AL. *v.* UNITED STATES; and
No. 91–1620. PACCIONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 949 F. 2d 1183.

No. 91–1617. HULS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 866.

No. 91–1636. RENFROE *v.* UNITED STATES; and
No. 91–7625. DANIELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–1644. VIRE, INDIVIDUALLY AND AS MOTHER AND PERSONAL REPRESENTATIVE OF THE ESTATE OF VIRE, ET AL. *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 733.

No. 91–1663. ELLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 951 F. 2d 580.

No. 91–1665. CANNON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 949 F. 2d 345.

No. 91–1688. LUCAS *v.* SCHNEIDER NATIONAL CARRIERS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 644.

No. 91–1715. SEA-LAND SERVICE, INC. *v.* FANOLI ET UX. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 557, 606 A. 2d 369.

No. 91–1741. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 4th 654, 822 P. 2d 875.

No. 91–1746. QUINTERO-CRUZ ET AL. *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 588 So. 2d 116.

No. 91–1747. WESTERN FARM CREDIT BANK *v.* FOBIAN ET AL.; and

No. 91–1969. FOBIAN ET AL. *v.* WESTERN FARM CREDIT BANK. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1149.

No. 91–1771. MILLER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 91–1773. FLECK ET AL. *v.* MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 608 A. 2d 729.

No. 91–1774. LILLIS ET AL. *v.* GOLINO. C. A. 2d Cir. Certiorari denied. Reported below: 950 F. 2d 864.

No. 91–1777. AMWEST SURETY INSURANCE CO. *v.* UNITED FIDELITY & TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 722.

No. 91–1779. EDDINE *v.* EDDINE. Sup. Ct. Va. Certiorari denied.

No. 91–1786. MASSACHUSETTS *v.* TANSO. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 411 Mass. 640, 583 N. E. 2d 1247.

No. 91–1791. MANES *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 1424.

No. 91–1802. SORRELL ET AL. *v.* DAYTON WOMEN'S HEALTH CENTER, INC., ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 68 Ohio App. 3d 579, 589 N. E. 2d 121.

No. 91–1806. ALLIED MUTUAL INSURANCE CO. *v.* NORTHERN INSURANCE COMPANY OF NEW YORK. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 1353.

No. 91–1809. TUNIS BROTHERS CO., INC., ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 715.

No. 91–1812. COMMONWEALTH LAND TITLE INSURANCE CO. ET AL. *v.* BURNS, AS EXECUTRIX OF THE ESTATE OF ECHOLS, DECEASED, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 957 F. 2d 90.

No. 91–1814. COMER ET AL. *v.* KENTUCKY TRANSPORTATION CABINET DEPARTMENT OF HIGHWAYS. Ct. App. Ky. Certiorari denied. Reported below: 824 S. W. 2d 881.

No. 91–1815. WESTBOROUGH MALL, INC., ET AL. *v.* CITY OF CAPE GIRARDEAU, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 345.

No. 91–1816. ILLINOIS *v.* BREEDING. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 219 Ill. App. 3d 590, 579 N. E. 2d 1128.

No. 91–1818. BIGGINS *v.* HAZEN PAPER CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 953 F. 2d 1405.

No. 91–1823. JONES *v.* ODOM, SHERIFF OF WHITE COUNTY, ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 91–1824. POINTER *v.* CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 82.

No. 91–1827. BLANKMANN ET AL. *v.* SARGENT. Ct. App. Ga. Certiorari denied. Reported below: 202 Ga. App. 156, 413 S. E. 2d 495.

No. 91–1832. TITTJUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 948 F. 2d 1292.

No. 91–1838. ROCK *v.* PREATE, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 959 F. 2d 1237.

No. 91–1896. AVIATION ASSOCIATES, INC. *v.* AIRLINE PILOTS ASSN., INTERNATIONAL. C. A. 1st Cir. Certiorari denied. Reported below: 955 F. 2d 90.

No. 91–1903. CRESSWELL ET AL. *v.* SULLIVAN & CROMWELL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 91–1905. CARVER ET AL. *v.* WESTINGHOUSE HANFORD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1083.

No. 91–1914. SHORE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 946.

No. 91–1917. EDGMON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1206.

No. 91–1948. URABAZO *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 955.

No. 91–1956. LEQUIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1554.

No. 91–6344. BULLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 940 F. 2d 653.

No. 91–6373. MING HOI WONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 940 F. 2d 648.

No. 91–6712. JONES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 144 Ill. 2d 242, 579 N. E. 2d 829.

No. 91–6785. WELLS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 941 F. 2d 253.

No. 91–6822. DEEB *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 815 S. W. 2d 692.

No. 91–7351. TORO *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 2d 1065.

No. 91–7572. MCDANIEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 887.

No. 91–7727. BEDOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 935 F. 2d 1277.

No. 91–7783. VADEN *v.* LUJAN, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 910.

No. 91–7854. MCGOUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 949 F. 2d 396.

No. 91–7881. MCNEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 1067.

No. 91–7901. VONTSTEEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 1086.

No. 91–7946. NICOLAUS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 3d 551, 817 P. 2d 893.

No. 91–8007. LEONARD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 79, 824 P. 2d 287.

No. 91–8009. DAVIS *v.* STRUBBE ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–8049. JOHNSON *v.* QUINLAN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–8094. POTTS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 716, 410 S. E. 2d 89.

No. 91–8111. KENNEDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 599 So. 2d 991.

No. 91–8147. WHITE *v.* TEMPLE UNIVERSITY. C. A. 3d Cir. Certiorari denied.

No. 91–8161. JOHNSON *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 91–8162. JEFFREY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 220 Conn. 698, 601 A. 2d 993.

No. 91–8164. REESE *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 364.

No. 91–8168. KOLICHMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 218 Ill. App. 3d 132, 578 N. E. 2d 569.

No. 91–8172. MOSKALUK *v.* LOUISIANA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 91–8174. LONG *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 823 S. W. 2d 259.

No. 91–8175. BENIRSCHKE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 577 N. E. 2d 576.

No. 91–8183. CRAWFORD *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 291, 953 F. 2d 687.

No. 91–8185. GAYDOS *v.* GAYDOS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1392.

No. 91–8186. LANGDALE *v.* INTERNATIONAL MONETARY MARKET. C. A. D. C. Cir. Certiorari denied. Reported below: 288 U. S. App. D. C. 258, 925 F. 2d 489.

No. 91–8189. EDWARDS *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–8191. DANA *v.* DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 958 F. 2d 237.

No. 91–8193. SMITH *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA). C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–8216. JOHNSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 308 Ark. 7, 823 S. W. 2d 800.

No. 91–8217. HALL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 201 Ga. App. 328, 411 S. E. 2d 274.

No. 91–8220. TOY *v.* BOROUGH OF BERLIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 937.

No. 91–8222. JOHNSON *v.* PAYLESS DRUG STORES NORTHWEST, INC., DBA WONDER WORLD, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 950 F. 2d 586.

No. 91–8223. KISKILA ET VIR *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–8225. BUCHMANN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 91–8227. BAKER *v.* MILLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 2d 658.

No. 91–8231. FAIN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 91–8232. HARRIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 91–8236. KUDRAKO *v.* ALLSTATE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1392.

No. 91–8241. BERRY *v.* HARKEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 404.

No. 91–8245. HUNT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 330 N. C. 501, 411 S. E. 2d 806.

No. 91–8249. KINSLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 91–8259. MARK *v.* GAMBRIELL PROPERTIES. Ct. App. Wash. Certiorari denied. Reported below: 61 Wash. App. 1057.

No. 91–8260. PROPES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 587 N. E. 2d 1291.

No. 91–8261. MUHAMMAD *v.* MOXON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 400.

No. 91–8280. JOHNS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 599.

No. 91–8284. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–8293. SWANSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 175.

No. 91–8310. LONDON *v.* KAVANAGH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–8324. ZZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 91–8339. HENTHORN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91–8343. DALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

No. 91–8365. MILLS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 357, 582 N. E. 2d 972.

No. 91–8372. ARNETTE *v.* CHIEF OF POLICE, TOWN OF MCCOLL, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 367.

No. 91–8379. SHARP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1312.

No. 91–8382. NGBENDU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 2.

No. 91–8388. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8390. CLARKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–8398. STEFFENS *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 734.

No. 91–8406. COCHRAN *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8408. YEPES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–8409. CRESPO *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 91–8410. RAMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 91–8416. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 242.

No. 91–8419. ALLEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 603 A. 2d 1219.

No. 91–8421. BUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 367.

No. 91–8436. REDD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 441.

No. 91–8437. REID, AKA BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8439. MEJIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

No. 91–8442. DIGIACOMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91–8444. BYROM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8446. BROOKS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 957 F. 2d 1138.

No. 91–8447. DEGRAFFIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 91–8449. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 91–8450. HICKS *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 91–8452. WHALEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 91–8453. CASTRILLON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–8454. COX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 867.

No. 91–8457. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 369.

No. 91–8461. SLAUGHTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 276.

No. 91–8463. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 91–8465. JUSINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 91–8475. GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 91–8478. BAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 439.

No. 91–8480. MARSHBURN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 956 F. 2d 1163.

No. 91–8483. PACIONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1348.

No. 91–8490. COOPER *v.* SAUSER, SUPERINTENDENT, SPRING CREEK CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 274.

No. 91–299. CITY OF ZION ET AL. *v.* HARRIS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE THOMAS would grant certiorari. Reported below: 927 F. 2d 1401.

No. 91–1370. KING *v.* RIDLEY, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 292 U. S. App. D. C. 362, 950 F. 2d 771.

No. 91–8022. HUDSON *v.* WASHINGTON, IN HIS PERSONAL AND OFFICIAL CAPACITY AS COMMISSIONER OF THE COMMISSION ON MENTAL HEALTH SERVICES FOR ST. ELIZABETH'S HOSPITAL. C. A. D. C. Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 292 U. S. App. D. C. 85, 946 F. 2d 1565.

No. 91–1467. BORG, WARDEN *v.* MIKES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 947 F. 2d 353.

No. 91–1522. HABERSTROH, DISTRICT ATTORNEY OF BLAIR COUNTY, PENNSYLVANIA, ET AL. *v.* BURKETT. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 951 F. 2d 1431.

No. 91–1772. MUHAMMAD *v.* PRATT. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 91–1518. PARKER ET AL. *v.* KING, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. 11th Cir. Certiorari

denied. JUSTICE WHITE would grant certiorari. Reported below: 935 F. 2d 1174.

No. 91–1742. RICHMAN BROS. RECORDS, INC. *v.* US SPRINT COMMUNICATIONS CO. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 953 F. 2d 1431.

No. 91–1548. FRANKLIN, SECRETARY OF COMMERCE, ET AL. *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 91–1626. STEVEDORING SERVICES OF AMERICA, INC. *v.* EGGERT ET UX. C. A. 9th Cir. Motion of National Association of Stevedores, Shipbuilders Council of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 953 F. 2d 552.

No. 91–1757. BUNCH *v.* THOMPSON, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Certiorari denied. Reported below: 949 F. 2d 1354.

No. 91–1778. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, CLC, ET AL.; and

No. 91–1787. KOPP ET AL. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, CLC, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 955 F. 2d 1312.

No. 91–1813. COHN *v.* BOND ET AL. C. A. 4th Cir. Motion of American Chiropractic Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 953 F. 2d 154.

No. 91–1821. ANDERSEN *v.* ATLANTIC MARINE CONSTRUCTORS ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 956 F. 2d 1159.

Rehearing Granted. (See No. 91–5450, *supra*, at 1215.)

Rehearing Denied

No. 91–1151. ADKINS ET AL. *v.* GENERAL MOTORS CORP. ET AL., 504 U. S. 908;

No. 91–1274. WRIGHT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF UNION NATIONAL BANK OF CHICAGO, 504 U. S. 909;

No. 91–1371. CANINO *v.* UNITED STATES, 504 U. S. 910;

No. 91–1474. FARRINGTON *v.* BUREAU OF NATIONAL AFFAIRS, INC., ET AL., 504 U. S. 912;

No. 91–1514. ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE ET AL. *v.* STATE ADMINISTRATIVE BOARD OF ELECTION LAWS ET AL., 504 U. S. 938;

No. 91–1552. COLLINS *v.* UNIFIED COURT SYSTEM OF NEW YORK ET AL., 504 U. S. 914;

No. 91–1557. YADAV ET UX. *v.* CHARLES SCHWAB & CO., INC., 504 U. S. 914;

No. 91–1574. PERKINS *v.* WESTERN SURETY CO., 504 U. S. 915;

No. 91–1670. POPE *v.* MCI TELECOMMUNICATIONS CORP., 504 U. S. 916;

No. 91–6358. WHITE *v.* LOUISIANA, 504 U. S. 916;

No. 91–7700. HANSEN *v.* MISSISSIPPI, 504 U. S. 921;

No. 91–7738. WALTON *v.* AMERICAN STEEL CONTAINER ET AL., 504 U. S. 922;

No. 91–7768. DIAZ *v.* INDIANA, 504 U. S. 923;

No. 91–7796. HOFFMAN *v.* FREILICH ET AL., 504 U. S. 924;

No. 91–7820. LUCAS *v.* ESTELLE, WARDEN, ET AL. (two cases), 504 U. S. 925;

No. 91–7895. CHURCH *v.* HUFFMAN, WARDEN, ET AL., 504 U. S. 927;

No. 91–7896. MUMIT, AKA BRYANT *v.* UNITED STATES PAROLE COMMISSION ET AL., 504 U. S. 927;

No. 91–7899. CHAPPELL *v.* UNITED STATES (two cases), 504 U. S. 927;

No. 91–7959. BLEECKER *v.* MURPHY, 504 U. S. 929; and

No. 91–8054. THAKKAR *v.* DEBEVOISE, 504 U. S. 961. Petitions for rehearing denied.

JULY 7, 1992

Dismissal Under Rule 46

No. 91–1645. WOOD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. [Certiorari granted, 504 U. S. 972.] Writ of certiorari dismissed under this Court's Rule 46.

JULY 13, 1992

Miscellaneous Order

No. A–28 (92–5088). HOLLAND *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

JULY 16, 1992

Miscellaneous Order

No. A–32 (O. T. 1992). WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that the judgment of the United States District Court for the Northern District of Florida, filed July 2, 1992, in case Nos. 92–40015–WS, 92–40131–WS, and 92–40220–WS, is stayed pending the timely filing of a statement as to jurisdiction. Should such a statement be timely filed, this order is to remain in effect pending this Court's action on the appeal. In the event the judgment is affirmed, or the appeal is dismissed, this order is to terminate automatically. Should jurisdiction be noted or postponed, or should the judgment be summarily vacated or reversed, this order is to remain in effect pending the sending down of the judgment of this Court.

JULY 17, 1992

Miscellaneous Order. (See also No. A–40, *ante,* p. 1084.)

No. A–51 (O. T. 1992). WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that the judgment of the United States District Court for the Northern District of Florida, dated July 16, 1992, in case Nos. 92–40015–WS, 92–40131–WS, and 92–40220–WS, is stayed pending the timely filing of a statement as to jurisdiction. Should such a statement

be timely filed, this order is to remain in effect pending this Court's action on the appeal. In the event the judgment is affirmed, or the appeal is dismissed, this order is to terminate automatically. Should jurisdiction be noted or postponed, or should the judgment be summarily vacated or reversed, this order is to remain in effect pending the sending down of the judgment of this Court. JUSTICE WHITE took no part in the consideration or decision of this application.

JULY 20, 1992

Certiorari Denied

No. 92–5194 (A–55). KENNEDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 602 So. 2d 1285.

Rehearing Denied

No. 91–8111. KENNEDY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1224. Petition for rehearing denied.

JULY 22, 1992

Dismissal Under Rule 46

No. 91–908. CROMWELL ET AL. *v.* EQUICOR-EQUITABLE HCA CORP. ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 944 F. 2d 1272.

Certiorari Denied

No. 92–5248 (A–59). LANE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 28, 1992

Certiorari Denied

No. 92–5239 (A–64). ANDREWS *v.* UTAH. Sup. Ct. Utah. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS

would grant the application for stay of execution. Reported below: 843 P. 2d 1027.

JULY 29, 1992

Miscellaneous Order

No. A–49 (92–5182). KELLY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JULY 30, 1992

Certiorari Denied

No. 92–5321 (A–81). ANDREWS *v.* CARVER, WARDEN. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

AUGUST 1, 1992

Miscellaneous Order

No. A–82 (O. T. 1992). MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, granted, and it is ordered that the judgment of the United States Court of Appeals for the Second Circuit, case No. 92–6144, filed July 29, 1992, and the subsequent July 29, 1992, order of the United States District Court for the Eastern District of New York, case No. 92 CV 1258, are stayed pending the filing of a petition for writ of certiorari on or before August 24, 1992. Should the petition be filed on or before that date, this order is to remain in effect pending this Court's action on the petition. If the petition for writ of certiorari is denied, this order is to terminate automatically. In the event the petition is granted, this order is to remain in effect pending the sending down of the judgment of this Court. Should the Solicitor General so file a petition for writ of certiorari, respondents' response is to be filed on or before September 8, 1992.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

An applicant for a stay pending the disposition of a petition for certiorari faces a heavy burden. The applicant must demonstrate (1) a likelihood of irreparable harm if the judgment below is not stayed; (2) a reasonable probability that certiorari will be granted; (3) a significant possibility that the judgment below will be reversed; and (4) that the balance of the equities tilts clearly in its favor. I do not think the Government has met the latter two conditions.

Eight federal judges have now considered the territorial reach of 8 U. S. C. §1253(h). Four have concluded that the statute does not apply in international waters, and four have concluded that it does. Given the thorough and careful reasoning of the majority and concurring opinions below, I do not see how the Court can conclude at this stage that the Government's likelihood of success on the merits is any better than even. That is not fatal to the Government's application, for if each party's chance of succeeding is equal, a strong showing on the equities can still carry the day for the Government. But no such showing has been made. While the Government has offered a vague invocation of harm to foreign policy, immigration policy, and the federal treasury, the plaintiffs in this case face the real and immediate prospect of persecution, terror, and possibly even death at the hands of those to whom they are being forcibly returned. So determined the District Court, to whose findings we should defer where the balance of equities is highly factual in nature. *Block* v. *North Side Lumber Co.*, 473 U. S. 1307 (1985) (REHNQUIST, Circuit Justice).

I would deny the application for a stay.

AUGUST 4, 1992

Dismissal Under Rule 46

No. 91–1700. CHECKETT, TRUSTEE IN BANKRUPTCY *v.* VICKERS ET UX. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 954 F. 2d 1426.

Certiorari Denied

No. 92–5208 (A–67). JOHNSON *v.* COLLINS, 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 BLACKMUN and JUSTICE STEVENS would grant the application for stay. Reported below: 964 F. 2d 1527.

AUGUST 5, 1992

Miscellaneous Orders

No. A–82 (O. T. 1992). MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* HAITIAN CENTERS COUNCIL, INC., ET AL. Motion of respondents to treat the application for stay as a petition for writ of certiorari, grant the petition, and set an expedited briefing schedule denied.

No. A–98 (O. T. 1992). HOPKINS, WARDEN *v.* OTEY. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the District of Nebraska, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS would grant the application.

AUGUST 12, 1992

Miscellaneous Order

No. 91–1160. ARAVE, WARDEN *v.* CREECH. C. A. 9th Cir. The order entered June 15, 1992 [504 U. S. 984], is amended to read as follows: Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition.

AUGUST 18, 1992

Miscellaneous Orders

No. A–11 (92–24). IN RE BELL. Sup. Ct. Ill. Application for stay of enforcement of judgment, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–1117. IN RE DISBARMENT OF HUGHES. Disbarment entered. [For earlier order herein, see 504 U. S. 903.]

No. D–1118. IN RE DISBARMENT OF PLAIA. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1120. IN RE DISBARMENT OF SEGERS. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1122. IN RE DISBARMENT OF BALES. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1123. IN RE DISBARMENT OF HOUCK. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1124. IN RE DISBARMENT OF GLUBIN. Disbarment entered. [For earlier order herein, see 504 U. S. 904.]

No. D–1125. IN RE DISBARMENT OF SCHULZ. Disbarment entered. [For earlier order herein, see 504 U. S. 905.]

No. D–1127. IN RE DISBARMENT OF WHITNALL. Disbarment entered. [For earlier order herein, see 504 U. S. 938.]

No. D–1128. IN RE DISBARMENT OF RODRIGUEZ. Disbarment entered. [For earlier order herein, see 504 U. S. 939.]

No. D–1129. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 504 U. S. 953.]

No. D–1136. IN RE DISBARMENT OF PARKER. Disbarment entered. [For earlier order herein, see 504 U. S. 970.]

No. D–1137. IN RE DISBARMENT OF CAHN. Disbarment entered. [For earlier order herein, see 504 U. S. 970.]

No. D–1140. IN RE DISBARMENT OF FITZPATRICK. Disbarment entered. [For earlier order herein, see 504 U. S. 981.] JUSTICE SOUTER took no part in the consideration or decision of this order.

No. D–1144. IN RE DISBARMENT OF DRISCOLL. It is ordered that Robert Justin Driscoll, of Denver, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1145. IN RE DISBARMENT OF VAN RYE. It is ordered that Kenneth Van Rye, of Elmwood Park, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1146. IN RE DISBARMENT OF HERZIG. It is ordered that Philip Richard Herzig, of Salina, Kan., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1147. IN RE DISBARMENT OF LEBEN. It is ordered that Jeffrey Michael Leben, of Yorktown Heights, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1148. IN RE DISBARMENT OF TREVASKIS. It is ordered that John P. Trevaskis, Jr., of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1149. IN RE DISBARMENT OF GREENWALD. It is ordered that Michael I. Greenwald, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 90–6315. PEREZ *v.* LOUISIANA, 504 U. S. 962;
No. 91–1035. BUSSEY *v.* UNITED STATES, 504 U. S. 908;
No. 91–1402. BROIDA *v.* SMITH ET AL., 503 U. S. 1005;
No. 91–1563. AIU INSURANCE CO. ET AL. *v.* SUPERINTENDENT, MAINE BUREAU OF INSURANCE, 504 U. S. 986;
No. 91–1597. PENNSYLVANIA *v.* CHAMBERS, 504 U. S. 946;
No. 91–1655. GARDNER ET AL. *v.* RYAN, SECRETARY OF STATE OF ILLINOIS, ET AL., 504 U. S. 973;
No. 91–1683. POLYAK *v.* HULEN ET AL., 504 U. S. 957;
No. 91–1687. BLANKINSHIP ET AL. *v.* CINCO ENTERPRISES, INC., 504 U. S. 974;
No. 91–1761. PRAVDA *v.* UNITED STATES ET AL., 504 U. S. 974;
No. 91–6658. KINDER *v.* UNITED STATES, 504 U. S. 946;
No. 91–6828. NETELKOS *v.* UNITED STATES, 503 U. S. 908;
No. 91–7229. LABOUNTY *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, 504 U. S. 917;
No. 91–7461. CROSBY *v.* WALDNER, 503 U. S. 1007;
No. 91–7808. ISENBERG *v.* UNITED STATES, 504 U. S. 943;
No. 91–7838. DICKS *v.* UNITED STATES, 504 U. S. 925;
No. 91–7891. SMITH *v.* OKLAHOMA, 504 U. S. 959;
No. 91–7894. STOIANOFF *v.* WACHTLER, 504 U. S. 975;
No. 91–7916. ROTT *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL., 504 U. S. 959;

No. 91–7977. BODINE *v.* DEPARTMENT OF TRANSPORTATION, 504 U. S. 929;

No. 91–7983. EAST *v.* WEST ONE BANK, N. A., PERSONAL REPRESENTATIVE OF THE ESTATE OF LOGAN, 504 U. S. 976;

No. 91–8032. MIDGYETTE *v.* GRAYSON, WARDEN, 504 U. S. 977;

No. 91–8085. CASTILLO-MORALES ET AL. *v.* INTERNAL REVENUE SERVICE ET AL., 504 U. S. 961;

No. 91–8165. TOSTE *v.* UNITED STATES POSTAL SERVICE, 504 U. S. 989; and

No. 91–8201. FARKAS ET AL. *v.* ELLIS, 504 U. S. 989. Petitions for rehearing denied.

No. 90–1599. UNITED STATES *v.* FELIX, 503 U. S. 378. Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

No. 91–913. PATTERSON, TRUSTEE *v.* SHUMATE, 504 U. S. 753. Motion of petitioner to dispense with printing requirement for petition for rehearing granted. Petition for rehearing denied.

No. 91–1447. BINGHAM *v.* INLAND DIVISION OF GENERAL MOTORS, 504 U. S. 965. Petition for rehearing denied. JUSTICE BLACKMUN would call for a response to the petition for rehearing.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Marshall (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period of December 2 through 4, 1992, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

AUGUST 25, 1992

Miscellaneous Order

No. A–112 (92–265). IN RE VASQUEZ, WARDEN, ET AL. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

AUGUST 27, 1992

Miscellaneous Order

No. A–108 (92–253). ILLINOIS DEPARTMENT OF CORRECTIONS *v.* FLOWERS. C. A. 7th Cir. Application for stay, addressed to

THE CHIEF JUSTICE and referred to the Court, granted, and it is ordered that the mandate of the United States Court of Appeals for the Seventh Circuit, case Nos. 91–2330 and 91–2415, is recalled and stayed pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application for stay.

SEPTEMBER 2, 1992

Miscellaneous Order

No. 90–985. BRAY ET AL. *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL. C. A. 4th Cir. [Certiorari granted, 498 U. S. 1119.] Motion of respondents for leave to file a brief on reargument granted with respect to arguments addressing the potential significance of *Planned Parenthood of Southeastern Pa.* v. *Casey*, *ante*, p. 833, and the availability of injunctive relief for violations of 42 U. S. C. § 1985(3), but denied with respect to arguments addressing the hindrance clause of 42 U. S. C. § 1985(3). Petitioners may file a supplemental brief on reargument on or before September 17, 1992, responding to respondents' arguments regarding *Planned Parenthood* and the availability of injunctive relief. JUSTICE O'CONNOR would grant the motion in its entirety.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In a statutory construction case that is important enough to merit reargument, the Court should err on the side of allowing full discussion of the entire statute at issue. Without having examined the supplemental brief attached to respondents' motion, and noting the absence of any objection from petitioners, I would therefore allow it to be filed as a matter of course. Because I intend to read the entire supplemental brief in preparation for the reargument—despite the Court's peculiar order—I would welcome comment by petitioners on all issues discussed therein.

SEPTEMBER 4, 1992

Miscellaneous Orders

No. D–1150. IN RE DISBARMENT OF DEUTSCH. It is ordered that Ronald E. Deutsch, of Santa Fe, N. M., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1151. IN RE DISBARMENT OF MOORE. It is ordered that Harvin Cooper Moore III, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1152. IN RE DISBARMENT OF BACH. It is ordered that Larry Burton Bach, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1153. IN RE DISBARMENT OF KIRKMAN. It is ordered that Robert L. Kirkman, of Portland, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1154. IN RE DISBARMENT OF LADNER. It is ordered that Oscar Buren Ladner, of Gulfport, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1155. IN RE DISBARMENT OF UNPINGCO. It is ordered that Segundo Unpingco, of San Jose, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1156. IN RE DISBARMENT OF ROBERTSON. It is ordered that Juan Paul Robertson, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1157. IN RE DISBARMENT OF HORN. It is ordered that Edward Horn, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1158. IN RE DISBARMENT OF SPECINER. It is ordered that Jules V. Speciner, of Great Neck, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1159. IN RE DISBARMENT OF BRODO. It is ordered that Thomas George Brodo, of Wayne, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1160. IN RE DISBARMENT OF WEIL. It is ordered that Joseph Hilliard Weil, of North Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1161. IN RE DISBARMENT OF JONES. It is ordered that Curtis Larenzo Jones, Jr., of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1162. IN RE DISBARMENT OF SALMEN. It is ordered that T. Jay Salmen, of St. Paul, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1163. IN RE DISBARMENT OF KNOLL. It is ordered that David R. Knoll, of Buffalo, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1164. IN RE DISBARMENT OF FRASCINELLA. It is ordered that Phillip Frascinella, of Santa Monica, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1165. IN RE DISBARMENT OF WATSON. It is ordered that John D. Watson, of Denver, Colo., be suspended from the

practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 91–781. UNITED STATES *v.* A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, ET AL. C. A. 3d Cir. [Certiorari granted, 503 U. S. 905.] Motion of Federal Home Loan Mortgage Corporation for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 91–1030. WITHROW *v.* WILLIAMS. C. A. 6th Cir. [Certiorari granted, 503 U. S. 983.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1393. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* FRETWELL. C. A. 8th Cir. [Certiorari granted, 504 U. S. 908.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1420. GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* EMISON ET AL. D. C. Minn. [Probable jurisdiction noted, 503 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–7873. FEX *v.* MICHIGAN. Sup. Ct. Mich. [Certiorari granted, 504 U. S. 908.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–1513. UNITED STATES DEPARTMENT OF THE TREASURY ET AL. *v.* FABE, SUPERINTENDENT OF INSURANCE OF OHIO. C. A. 6th Cir. [Certiorari granted, 504 U. S. 907.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 91–1538. SMITH *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 504 U. S. 984.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 91–1657. LEATHERMAN ET AL. *v.* TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT ET AL. C. A.

5th Cir. [Certiorari granted, *ante,* p. 1203.] Motion of petitioners to permit Richard Gladden to present oral argument *pro hac vice* granted.

Rehearing Denied

No. 90–8370. MEDINA *v.* CALIFORNIA, *ante,* p. 437;

No. 90–8443. REDD *v.* GEORGIA, *ante,* p. 1218;

No. 91–141. CITY OF ROLLING MEADOWS ET AL. *v.* KUHN ET AL., *ante,* p. 1218;

No. 91–299. CITY OF ZION ET AL. *v.* HARRIS ET AL., *ante,* p. 1229;

No. 91–971. TWO PESOS, INC. *v.* TACO CABANA, INC., *ante,* p. 763;

No. 91–1752. WOOD *v.* FREEDMAN ET AL., *ante,* p. 1206;

No. 91–1757. BUNCH *v.* THOMPSON, WARDEN, *ante,* p. 1230;

No. 91–1809. TUNIS BROTHERS CO., INC., ET AL. *v.* FORD MOTOR CO. ET AL., *ante,* p. 1221;

No. 91–1914. SHORE *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 1222;

No. 91–5450. HITCHCOCK *v.* FLORIDA, *ante,* p. 1215;

No. 91–6076. BELTRAN-LOPEZ *v.* FLORIDA, *ante,* p. 1215;

No. 91–6382. SAWYER *v.* WHITLEY, WARDEN, *ante,* p. 333;

No. 91–7170. HENRY *v.* FLORIDA, *ante,* p. 1216;

No. 91–7273. DAVIS *v.* FLORIDA, *ante,* p. 1216;

No. 91–7598. HILL, AKA ROBINSON *v.* UNITED STATES, 504 U. S. 975;

No. 91–7634. GASKIN *v.* FLORIDA, *ante,* p. 1216;

No. 91–7818. MCGEE *v.* SCREW CONVEYOR CORPORATION OF WINONA, MISSISSIPPI, *ante,* p. 1207;

No. 91–7939. TURNER *v.* OKLAHOMA, 504 U. S. 960;

No. 91–8024. URDENIS *v.* THERMAL INDUSTRIES, INC., 504 U. S. 987;

No. 91–8029. LYLE ET VIR *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 504 U. S. 988;

No. 91–8037. YOUNG *v.* UNITED STATES ET AL., *ante,* p. 1208;

No. 91–8070. SCOTT *v.* DIME SAVINGS BANK OF NEW YORK, 504 U. S. 988;

No. 91–8091. WILLIAMS *v.* FAUVER ET AL., *ante,* p. 1208;

No. 91–8144. DEMPSEY *v.* MASSACHUSETTS, *ante,* p. 1209;

No. 91–8164. REESE *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, *ante,* p. 1224;

No. 91–8185. GAYDOS *v.* GAYDOS ET AL., *ante,* p. 1225;

No. 91–8223. KISKILA ET VIR *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, ET AL., *ante,* p. 1225;

No. 91–8227. BAKER *v.* MILLER ET AL., *ante,* p. 1225;

No. 91–8236. KUDRAKO *v.* ALLSTATE INSURANCE CO., *ante,* p. 1226;

No. 91–8372. ARNETTE *v.* CHIEF OF POLICE, TOWN OF MCCOLL, SOUTH CAROLINA, ET AL., *ante,* p. 1227;

No. 91–8396. BORROMEO *v.* UNITED STATES, *ante,* p. 1212;

No. 91–8398. STEFFENS *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS, *ante,* p. 1227; and

No. 91–8465. JUSINO *v.* UNITED STATES, *ante,* p. 1228. Petitions for rehearing denied.

No. 91–1709. IN RE MILLS, 504 U. S. 971. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 91–5550. FAIN *v.* IDAHO, 504 U. S. 987. Petition for rehearing denied. JUSTICE BLACKMUN would call for a response to the petition for rehearing.

No. 91–7390. ESPINOSA *v.* FLORIDA, *ante,* p. 1079. Petition for rehearing of petitioner denied. Petition for rehearing of respondent denied.

SEPTEMBER 8, 1992

Miscellaneous Order

No. A–191 (O. T. 1992). FOX *v.* CHILES, GOVERNOR OF FLORIDA, ET AL. Application for emergency relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

SEPTEMBER 15, 1992

Certiorari Denied

No. 92–5843 (A–209). JONES *v.* MURRAY, 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. Reported below: 976 F. 2d 169.

No. 92–5855 (A–215). JONES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Application for

stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 19, 1992

Miscellaneous Order

No. A–189 (O. T. 1992). PRICE *v.* NORTH CAROLINA. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

SEPTEMBER 21, 1992

Certiorari Denied

No. 92–5914 (A–232). DEMOUCHETTE *v.* COLLINS, 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 BLACKMUN and JUSTICE STEVENS would grant the application for stay. Reported below: 972 F. 2d 651.

SEPTEMBER 22, 1992

Miscellaneous Order

No. A–201 (O. T. 1992). SLAGLE *v.* TERRAZAS ET AL. D. C. W. D. Tex. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 92–5939 (A–241). DEMOUCHETTE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 23, 1992

Dismissal Under Rule 46

No. 92–5499. MARINE *v.* DELAWARE. Sup. Ct. Del. Certiorari dismissed under this Court's Rule 46. Reported below: 607 A. 2d 1185.

SEPTEMBER 28, 1992

Dismissal Under Rule 46

No. 92–139. VALLEY FARMS ET AL. *v.* SHAWMUT BANK, N. A. Sup. Ct. Conn. Certiorari dismissed under this Court's Rule 46. Reported below: 222 Conn. 361, 610 A. 2d 652.

SEPTEMBER 29, 1992

Dismissal Under Rule 46

No. 92–289. IN RE LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. Petition for writ of mandamus dismissed under this Court's Rule 46.

Miscellaneous Order

No. A–223 (92–5846). HARRIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 30, 1992

Miscellaneous Order

No. A–242 (O. T. 1992). LOPEZ *v.* HALE COUNTY, TEXAS, ET AL. D. C. N. D. Tex. Application for injunction and stay pending appeal, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1247 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE
IN CHAMBERS

REYNOLDS *v.* INTERNATIONAL AMATEUR ATHLETIC FEDERATION ET AL.

ON APPLICATION FOR STAY

No. A–954. Decided June 20, 1992

The request of applicant Reynolds is granted to stay a Court of Appeals' order staying a preliminary injunction which barred The Athletic Congress of the U. S. A., Inc., and the International Amateur Athletic Federation from impeding or interfering with Reynolds' ability to compete in the 1992 United States Olympic Trials. The District Court's opinion on the issue whether Reynolds has established a probability of success on the merits is persuasive. With respect to whether the availability of a damages remedy precludes a finding of irreparable harm, a decent respect for the incomparable importance of winning an Olympic gold medal demonstrates that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete.

JUSTICE STEVENS, Circuit Justice.

On June 19, 1992, the United States District Court for the Southern District of Ohio entered a preliminary injunction barring The Athletic Congress of the U. S. A., Inc., and the International Amateur Athletic Federation (IAAF) from impeding or interfering with Harry L. Reynolds, Jr.'s, ability to compete in the 1992 United States Olympic Trials. Later that day, the United States Court of Appeals for the Sixth Circuit issued an order staying the preliminary injunction. Mr. Reynolds has applied to me in my capacity as a Circuit Justice for a stay of the order of the Court of Appeals.

In my opinion, the IAAF's threatened harm to third parties cannot dictate the proper disposition of applicant's claim. The dispositive questions for me are, first, whether applicant

has established a probability of success on the merits, and second, whether the availability of a damages remedy precludes a finding of irreparable harm. With respect to the first, I find the District Court's opinion persuasive. With respect to the second, a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete.

Of course, I recognize that this ruling may not establish applicant's right to compete in the Olympics at Barcelona, but that opportunity will presumably be foreclosed if he is not allowed to participate in the Olympic Trials. On the other hand, the harm, if any, to the IAAF can be fully cured by a fair and objective determination of the merits of the controversy. Indeed, applicant may fail to qualify, thus mooting the entire matter; if he does qualify, his eligibility can be reviewed before the final event in Barcelona.

The IAAF's threat to enforce its eligibility decision—no matter how arbitrary or erroneous it may be—by punishing innocent third parties cannot be permitted to influence a fair and impartial adjudication of the merits of applicant's claims.

The application for a stay is granted.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1989, 1990 AND 1991

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1989	**1990**	**1991**	**1989**	**1990**	**1991**	**1989**	**1990**	**1991**	**1989**	**1990**	**1991**
Number of cases on dockets	14	14	12	2,416	2,351	2,451	3,316	3,951	4,307	5,746	6,516	6,770
Number disposed of during term	2	3	1	2,051	1,986	2,072	2,879	3,423	3,755	4,932	5,412	5,828
Number remaining on dockets	12	11	11	365	365	379	437	528	552	814	904	942

	TERMS		
	1989	**1990**	**1991**
Cases argued during term	146	125	127
Number disposed of by full opinions	143	121	120
Number disposed of by per curiam opinions	3	4	3
Number set for reargument	0	0	4
Cases granted review this term	123	141	120
Cases reviewed and decided without oral argument	79	109	75
Total cases to be available for argument at outset of following term	57	70	66

JUNE 28, 1992

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BAN ON SOLICITATION. See **Constitutional Law,** VIII, 2.

BEACHFRONT PROPERTY MANAGEMENT. See **Constitutional Law,** V.

BIAS-MOTIVATED CRIME STATUTES. See **Constitutional Law,** VIII, 4.

BUSINESS TAXES. See **Constitutional Law,** III; **Taxes.**

CALIFORNIA. See **Constitutional Law,** IV; VI, 1.

CAPITAL MURDER. See **Constitutional Law,** II; **Habeas Corpus,** 1.

CIGARETTES. See **Constitutional Law,** XII.

CLEAN WATER ACT. See **Attorney's Fees.**

CLEAR AND CONVINCING EVIDENCE STANDARD. See **Habeas Corpus,** 1.

CLERGY-LED PRAYERS. See **Constitutional Law,** VII.

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COMPETENCE TO STAND TRIAL. See **Constitutional Law,** IV.

CONDEMNATION. See **Constitutional Law,** V.

CONGRESSIONAL REAPPORTIONMENT. See **Constitutional Law,** I.

CONSTITUTIONAL LAW.

I. Apportionment.

Allocation of overseas federal employees—Equal representation.—Allocating overseas federal employees to their home States when apportioning congressional representatives among States is consistent with constitutional language and goal of equal representation. Franklin v. Massachusetts, p. 788.

II. Cruel and Unusual Punishment.

Death penalty—Weighing State—Consideration of invalid aggravating factor.—If a weighing State requires a trial court to pay deference to a jury's sentencing recommendation in determining appropriate sentence, jury's consideration of an invalid aggravating circumstance unconstitutionally infects court's sentencing determination. Espinosa v. Florida, p. 1079.

III. Discrimination Against Foreign Commerce.

Iowa business tax—Dividends from foreign subsidiaries.—Iowa's business tax on corporations—which allows a deduction for dividends received from domestic, but not foreign, subsidiaries—facially discriminates against foreign commerce in violation of Foreign Commerce Clause. Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Finance, p. 71.

IV. Due Process.

Competence to stand trial—Burden of proof.—Due Process Clause permits a State to require that a defendant claiming incompetence to stand trial—here, for first-degree murder—bear burden of proving such incompetence by a preponderance of evidence; a presumption of competence also does not violate Clause. Medina v. California, p. 437.

V. Eminent Domain.

Loss of economic value—Beachfront property.—Where South Carolina's Beachfront Management Act in effect barred petitioner from erecting permanent structures on two residential lots, State Supreme Court erred

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in applying "harmful or noxious uses" principle to determine whether Act's dramatic effect on property's economic value accomplished a taking of private property under Fifth and Fourteenth Amendments. Lucas v. South Carolina Coastal Council, p. 1003.

VI. Equal Protection of the Laws.

1. *California property tax assessment.*—Acquisition-value assessment scheme used to value real property under Article XIIIA of California Constitution, which was added by Proposition 13, does not violate Equal Protection Clause. Nordlinger v. Hahn, p. 1.

2. *Jury selection—Discriminatory use of peremptory challenges by criminal defendant.*—Constitution prohibits a criminal defendant from engaging in purposeful discrimination on racial grounds in exercising peremptory challenges. Georgia v. McCollum, p. 42.

3. *Segregation in public higher education—Standard to determine compliance—Justification for policies.*—In determining whether Mississippi has brought itself into compliance with Equal Protection Clause in desegregating its higher education system, correct legal standard is whether State has perpetuated policies and practices traceable to its prior *de jure* dual system that continue to have segregative effects and whether such policies are without sound educational justification and can be practicably eliminated; using that standard, Mississippi must justify several policies that may be race neutral on their face but substantially restrict a person's choice of which institution to enter and contribute to racial identifiability of eight public universities. United States v. Fordice, p. 717.

VII. Establishment of Religion.

Establishment of religion—Public school prayer—Graduation ceremonies.—Inclusion of clergy to offer prayers as part of an official public school graduation ceremony is forbidden by Establishment Clause. Lee v. Weisman, p. 577.

VIII. Freedom of Speech.

1. Airport terminal—Ban on literature distribution.—Court of Appeals' decision that a ban on distribution of literature in respondent Port Authority's airport terminals is invalid under First Amendment is affirmed. Lee v. International Soc. For Krishna Consciousness, Inc., p. 830.

2. *Airport terminal—Ban on solicitation.*—Since an airport terminal operated by a public authority is a nonpublic forum, a ban on solicitation need only satisfy a reasonableness standard; such a ban imposed by respondent Port Authority was reasonable, and thus its application to peti-

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tioner religious corporation did not deprive petitioner's members of their First Amendment rights. International Soc. For Krishna Consciousness, Inc. v. Lee, p. 672.

3. *Assembly and parade ordinance—Government official's discretion.*—County's assembly and parade ordinance—which permits a government administrator to vary fee for assembling or parading to reflect estimated cost of maintaining public order—is invalid because it unconstitutionally ties fee amount to speech's content and lacks adequate procedural safeguards. Forsyth County v. Nationalist Movement, p. 123.

4. *Cross burning—Prosecution under city's Bias-Motivated Crime Ordinance.*—City ordinance—which prohibits display of a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others" on basis of, *inter alia*, race and under which petitioner was charged for allegedly burning a cross on a black family's lawn—is facially invalid under First Amendment. R. A. V. v. St. Paul, p. 377.

IX. Right to Abortion.

Pennsylvania Abortion Control Act of 1982.—Court of Appeals' decision striking down Act's husband notification provision but otherwise upholding Act is affirmed in part and reversed in part. Planned Parenthood of Southeastern Pa. v. Casey, p. 833.

X. Right to Speedy Trial.

Federal drug charges—Lag between indictment and arrest.—A delay of 8½ years between petitioner's indictment and arrest on federal drug charges violated his Sixth Amendment right to a speedy trial. Doggett v. United States, p. 647.

XI. States' Powers.

Low-Level Radioactive Waste Policy Amendments Act of 1985—Incentives to States.—While Congress has substantial power to encourage States to provide for radioactive waste disposal, Constitution does not give Congress ability to compel States to do so; thus, Act's monetary incentives and access incentives provisions are consistent with Constitution's allocation of power between Federal and State Governments, but take-title provision is not. New York v. United States, p. 144.

XII. Supremacy Clause.

Federal Cigarette Labeling and Advertising Act of 1965—Pre-emption of state common-law claims.—Act did not pre-empt state-law damages action against cigarette manufacturer for death of petitioner's mother, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. Cipollone v. Liggett Group, Inc., p. 504.

CONTINGENT-FEE AGREEMENTS. See **Attorney's Fees.**

CORPORATE TAXES. See **Constitutional Law,** III; **Taxes.**

CRIMINAL LAW. See **Constitutional Law,** II; IV; VI, 2; VIII, 4; X; **Federal Rules of Evidence; Habeas Corpus.**

CROSS BURNING. See **Constitutional Law,** VIII, 4.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** II.

DEATH PENALTY. See **Constitutional Law,** II; **Habeas Corpus,** 1.

***DE JURE* SEGREGATION.** See **Constitutional Law,** VI, 3.

DELAY IN TRIAL. See **Constitutional Law,** X.

DESEGREGATION. See **Constitutional Law,** VI, 3.

DISCRIMINATION AGAINST FOREIGN COMMERCE. See **Constitutional Law,** III.

DISCRIMINATION IN JURY SELECTION. See **Constitutional Law,** VI, 2.

DISCRIMINATION IN PUBLIC HIGHER EDUCATION. See **Constitutional Law,** VI, 3.

DISCRIMINATION ON BASIS OF RACE. See **Constitutional Law,** VI, 2, 3.

DISPOSAL OF RADIOACTIVE WASTE. See **Constitutional Law,** XI.

DRUGS. See **Constitutional Law,** X.

DUE PROCESS. See **Constitutional Law,** IV; **Habeas Corpus,** 2.

ECONOMIC VALUE OF LAND. See **Constitutional Law,** V.

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EIGHTH AMENDMENT. See **Constitutional Law,** II.

EMINENT DOMAIN. See **Constitutional Law,** V.

EMPLOYER AND EMPLOYEES. See **Longshore and Harbor Workers' Compensation Act.**

ENHANCEMENT OF ATTORNEY'S FEES. See **Attorney's Fees.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** VI.

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ESTABLISHMENT CLAUSE. See **Constitutional Law,** VII.

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FEDERAL CIGARETTE LABELING AND ADVERTISING ACT OF 1965. See **Constitutional Law,** XII.

FEDERAL COURTS. See **Jurisdiction.**

FEDERAL EMPLOYEES. See **Constitutional Law,** I.

FEDERAL RULES OF EVIDENCE.

Exception to hearsay rule—Admission of grand jury testimony.—Rule 804(b)(1)'s requirement that an unavailable witness' testimony from a prior hearing may not be introduced without a showing that party against whom it is now offered had a "similar motive to develop the testimony by direct, cross, or redirect examination" does not evaporate when Government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial. United States v. Salerno, p. 317.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** XI; XII; **Occupational Safety and Health Act of 1970; Taxes.**

FEE-SHIFTING STATUTES. See **Attorney's Fees.**

FIFTH AMENDMENT. See **Constitutional Law,** V.

FIRST AMENDMENT. See **Constitutional Law,** VII; VIII.

FIRST-DEGREE MURDER. See **Constitutional Law,** IV.

FLORIDA. See **Constitutional Law,** II.

FOREIGN COMMERCE CLAUSE. See **Constitutional Law,** III.

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GEORGIA. See **Constitutional Law,** VI, 2.

GRADUATION CEREMONIES. See **Constitutional Law,** VII.

GRAND JURY TESTIMONY. See **Federal Rules of Evidence.**

HABEAS CORPUS.

1. *Successive, abusive, or defaulted claim—Actual innocence—Clear and convincing evidence.*—A petitioner bringing a successive, abusive, or defaulted federal habeas claim can show that he is "actually innocent" of

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death penalty so that a court may reach his claim's merits only if he shows by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him eligible for death penalty under applicable state law; here, petitioner failed to show actual innocence. Sawyer v. Whitley, p. 333.

2. *Sufficiency of evidence to support conviction.*—Court of Appeals' decision, on federal habeas, that evidence against respondent was insufficient, as a matter of due process, to support his state-court conviction for grand larceny, is reversed. Wright v. West, p. 277.

"HARMFUL OR NOXIOUS USES" PRINCIPLE. See **Constitutional Law,** V.

HAZARDOUS WASTE DISPOSAL. See **Occupational Safety and Health Act of 1970.**

HEALTH AND SAFETY STANDARDS. See **Occupational Safety and Health Act of 1970.**

HEARSAY. See **Federal Rules of Evidence.**

HIGHER EDUCATION SEGREGATION. See **Constitutional Law,** VI, 3.

ILLINOIS. See **Occupational Safety and Health Act of 1970.**

INCOME TAXES. See **Taxes.**

INCOMPETENCE TO STAND TRIAL. See **Constitutional Law,** IV.

INFRINGEMENT ON TRADE DRESS. See **Trademark Act of 1946.**

INJUNCTIONS. See **Stays,** 2.

INTEGRATION. See **Constitutional Law,** VI, 3.

IOWA. See **Constitutional Law,** III.

JURISDICTION.

Federal courts—Removal from state court—"Sue or be sued" clause.—Because "sue or be sued" clause in Red Cross' federal charter confers original federal jurisdiction over all cases to which Red Cross is a party, it was authorized to remove from state to federal court a tort action it was defending. American Nat. Red Cross v. S. G., p. 247.

JURY SELECTION. See **Constitutional Law,** VI, 2.

JUST COMPENSATION CLAUSE. See **Constitutional Law,** V.

LAND VALUE. See **Constitutional Law,** V.

LANHAM ACT. See **Trademark Act of 1946.**

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LODESTAR. See **Attorney's Fees.**

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Forfeiture provision—Application when employer not currently subject to payments under Act.—Act's forfeiture provision—which provides that if workers settle third-party claims for injuries without their employer's written approval, all future benefits are forfeited—applies to a worker whose employer is neither paying compensation to worker nor yet subject to an order to pay under Act at time worker settles third-party claim. Estate of Cowart v. Nicklos Drilling Co., p. 469.

LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985. See **Constitutional Law,** XI.

MASSACHUSETTS. See **Constitutional Law,** I.

MISSISSIPPI. See **Constitutional Law,** VI, 3.

MURDER. See **Constitutional Law,** II; IV; **Habeas Corpus,** 1.

NINTH AMENDMENT. See **Constitutional Law,** IX.

NONPUBLIC FORUMS. See **Constitutional Law,** VIII, 2.

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970.

Pre-emption of state law—Hazardous waste disposal—Worker training.—A state-law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within meaning of Act regardless of whether it has another, nonoccupational purpose; Illinois licensing acts are pre-empted by Act to extent that they establish occupational safety and health standards for training those who work with hazardous wastes. Gade v. National Solid Wastes Management Assn., p. 88.

OLYMPIC GAMES. See **Stays,** 2.

OVERSEAS FEDERAL EMPLOYEES. See **Constitutional Law,** I.

PARADE ORDINANCES. See **Constitutional Law,** VIII, 3.

PENNSYLVANIA ABORTION CONTROL ACT OF 1982. See **Constitutional Law,** IX.

PEREMPTORY CHALLENGES. See **Constitutional Law,** VI, 2.

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PRE-EMPTION OF STATE LAW. See **Constitutional Law,** XII; **Occupational Safety and Health Act of 1970.**

PREPONDERANCE OF EVIDENCE STANDARD. See **Constitutional Law,** IV.

PROPERTY RIGHTS. See **Constitutional Law,** V.

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PUBLIC HIGHER EDUCATION SEGREGATION. See **Constitutional Law,** VI, 3.

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RADIOACTIVE WASTE DISPOSAL. See **Constitutional Law,** XI.

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RESTAURANT TRADE DRESS. See **Trademark Act of 1946.**

RIGHT TO ABORTION. See **Constitutional Law,** IX; **Stays,** 1.

RIGHT TO PRIVACY. See **Constitutional Law,** IX; **Stays,** 1.

RIGHT TO SPEEDY TRIAL. See **Constitutional Law,** X.

RU–486. See **Stays,** 1.

SAFETY AND HEALTH STANDARDS. See **Occupational Safety and Health Act of 1970.**

SCHOOL PRAYER. See **Constitutional Law,** VII.

SCHOOL SEGREGATION. See **Constitutional Law,** VI, 3.

SENTENCING. See **Constitutional Law,** II.

"SIMILAR MOTIVE" REQUIREMENT FOR ADMISSION OF HEARSAY. See **Federal Rules of Evidence.**

SIXTH AMENDMENT. See **Constitutional Law,** X.

SOLICITATION BAN. See **Constitutional Law,** VIII, 2.

SOLID WASTE DISPOSAL ACT. See **Attorney's Fees.**

SOUTH CAROLINA. See **Constitutional Law,** V.

SPEEDY TRIALS. See **Constitutional Law,** X.

STANDARDS OF PROOF. See **Constitutional Law,** IV; **Habeas Corpus,** 1.

STATE-LAW DAMAGES ACTIONS. See **Constitutional Law,** XII.

STATES' POWERS. See **Constitutional Law,** XI.

STATE TAXES. See **Constitutional Law,** III; VI, 1; **Taxes.**

STAYS.

1. *Confiscation of RU–486.*—Application to vacate stay of a District Court order compelling federal officials to return Benten's supply of RU–486—an abortion-inducing drug—to her is denied. Benten v. Kessler, p. 1084.

2. *Participation in Olympic trials.*—Applicant is granted a stay of a Court of Appeals' order staying a preliminary injunction that barred respondents from impeding or interfering with his ability to compete in 1992 United States Olympic Trials. Reynolds v. International Amateur Athletic Federation (STEVENS, J., in chambers), p. 1301.

"SUE OR BE SUED" CLAUSES. See **Jurisdiction.**

SUPREMACY CLAUSE. See **Constitutional Law,** XII.

SUPREME COURT.

Term statistics, p. 1303.

TAKING OF PROPERTY FOR PUBLIC USE. See **Constitutional Law,** V.

TAXES. See also **Constitutional Law,** III; VI, 1.

Immunity from state corporate income taxes.—Wisconsin activities of a Chicago-based chewing gum manufacturer—which consisted of selling through a sales force consisting of a regional manager and various "field" managers—fell outside protection of 15 U. S. C. § 381(a), which prohibits a State from taxing income of a corporation whose only business activities within State consist of soliciting orders for tangible goods, provided that orders are sent outside State for approval and goods are delivered from outside State. Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., p. 214.

TENTH AMENDMENT. See **Constitutional Law,** XI.

THIRD-PARTY CLAIMS. See **Longshore and Harbor Workers' Compensation Act.**

TORTS. See **Jurisdiction.**

TRADEMARK ACT OF 1946.

Trade dress infringement—Restaurants.—A restaurant's trade dress may be protected under Act, also known as Lanham Act, based on a finding of inherent distinctiveness, without proof that trade dress has secondary meaning. Two Pesos, Inc. v. Taco Cabana, Inc., p. 763.

UNIVERSITY SEGREGATION. See **Constitutional Law,** VI, 3.

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